The rise and fall of the European Super League: a case for better governance in sport

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THE RISE AND FALL OF THE EUROPEAN SUPER LEAGUE: A CASE FOR BETTER GOVERNANCE IN SPORT

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1. Introduction

Ukraine's formal request for accession to the EU, the various sanction packages on Russia as well as the increasing energy concerns as a result of the ongoing war, the continued attention for appropriate COVID-19 measures, the UK's intention to unilaterally change the Northern Ireland Protocol (an integral part of the EU-UK withdrawal agreement) by national legislation … these are but some of the issues that figure prominently on the EU's political agenda. Besides these major developments, which can all directly or indirectly, actually or potentially, impact on the course of the European integration process, it is "business as usual" at the European institutions. On 11–12 July 2022, for example, the Court of Justice of the European Union held a two day hearing on the case of the European Super League, in the framework of a preliminary ruling procedure concerning mainly the interpretation of Articles 101 and 102 TFEU.[1] The case concerns Europe's football governing body UEFA's refusal to authorize the creation of a new pan-European football competition and the threat of sanctions being imposed on clubs and players involved in this European Super League. The hearing is the latest development in a captivating story about an ambitious (or is it infamous?) project that suddenly broke in April of last year, immediately dominated press coverage on a global scale for two–three days, only to provoke so much public outcry and negative or even hostile reactions that it seemed to die a sudden death … except for the fact that it did not, really, and is still fighting for its life in court. A record number of more than twenty EU and EEA Member States intervened in the proceedings. The European Court's (Grand Chamber) ruling is expected in the first half of next year. The judgment is highly anticipated, as it could seriously impact the governance structure of European football, and sports more

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1. Case C-333/21, *European Super League Company* v. *UEFA & FIFA* (pending).

globally. This could very well become EU law's most important interference with sports since the Court of Justice's legendary *Bosman* judgment of 1995.[2] Interestingly, the A.G.'s opinion in the *European Super League* case is scheduled to be delivered on 15 December 2022, the anniversary of *Bosman.*

2. The dispute and its background

To start, let's briefly recall the facts and circumstances of the dispute. On 18 April 2021, a press release was issued, in which twelve of Europe's leading football clubs announced the establishment of a new football competition, the European Super League, which would be governed by its founding clubs.[3] The idea was to create a new European competition between twenty top clubs, comprising fifteen founders and five annual qualifiers. The competition format provided for two groups of ten clubs each, playing home and away fixtures within the group each year. Following the group stage, eight clubs would qualify for a knockout tournament playing home and away until the single-match Super League championship final.

Both the content and the timing of the announcement were peculiar and immediately sparked controversy.[4] First, why was the announcement made at this premature stage, if only twelve clubs had committed themselves to play in the new competition, whereas explicit reference was made to fifteen founding clubs? The press release merely stated that it was "anticipated that a further three clubs will join ahead of the inaugural season, which is intended to commence as soon as practicable". Wouldn't it have been more logical then to wait with breaking the news until the founding group was complete? Or was it so crucial to anticipate the upcoming news of UEFA's planned further reform of the Champions League, UEFA's leading European football club competition?

Secondly, the composition of the group evidently generated a lot of attention: the inclusion of the likes of AC Milan, Atletico de Madrid, Chelsea, Barcelona, Internazionale, Juventus, Liverpool, Manchester City, Manchester United and Real Madrid into a European Super League seemed self-evident. These clubs undisputedly all belong to Europe's finest. That is, with all due respect, much less the case for Tottenham Hotspur and, to a

2. Case C-4125/93, *Bosman*, EU:C:1995:463.
3. The Super League – Press Release.
4. The European Super League Explained – The New York Times (nytimes.com); European Super League: Uefa and Premier League condemn 12 major clubs signing up to breakaway plans – BBC Sport.

certain extent, also Arsenal. Why have these clubs been included in this elite group? Equally, the non-inclusion of Bayern Munich, PSG or Borussia Dortmund is hard to explain on sporting grounds alone. One also could not fail to notice the fact that the twelve founding clubs all come from merely three European countries, Italy, Spain and the UK, leaving out teams from the EU's largest Member States, Germany and France, not to mention clubs from other traditionally important footballing nations such as the Netherlands or Portugal. A pan-European competition with most teams coming from three countries only? Really?

Thirdly, the devil was clearly in the detail: the announcement subtly read that "going forward, the founding clubs look forward to holding discussions with UEFA and FIFA to work together in partnership to deliver the best outcomes for the new league and for football as a whole", conveniently bypassing the fact that, according to the UEFA Statutes, its prior approval was necessary for the creation of this new competition. The clubs clearly positioned themselves as equal discussion partners with football's governing bodies about fundamental issues such as the future format of European competitions, openly challenging UEFA's power as the sole governing body of football in Europe. They backed this up with the claim that the Super League would provide "significantly greater economic growth and support for European football", *inter alia,* via a long-term commitment to solidarity payments which would be "substantially higher than those generated by the current European competitions". They even dared to put a figure to this assertation, expecting it to be in excess of EUR 10 billion during the course of the initial commitment period of the clubs. The founding clubs were expected to receive an amount of EUR 3.5 billion only to support their infrastructure investment plans and to offset the impact of the COVID-19 pandemic.

Last, but certainly not least, the announcement is revealing in what it says, but also extremely important in what it does not explicitly say. The European Super League is a breakaway league, governed by its founding clubs, not UEFA. Its matches will be played mid-week. These will of course coincide with UEFA's European cup competitions, especially the Champions League. Clubs participating in the European Super League will no longer compete in the Champions League. Here comes the genie out of the bottle: the European Super League is a direct challenge to the UEFA Champions League, not only UEFA's sporting crown jewel, but also, and this is not to be lost out of sight, its main source of considerable revenue. Moreover, at the same time the founding clubs clearly expressed their firm intention to continue to play in their domestic leagues.

To say that the press release caused mayhem in football circles in an understatement.[5] That UEFA, confronted with this double frontal challenge, against both its regulatory role and its commercial interests, strongly opposed the creation of the European Super League, did not come as a surprise. However, UEFA received support from the three national football associations directly involved by the proposal, the English, the Spanish and the Italian. They issued a joint statement in which they vowed to "remain united in our efforts to stop this cynical project that is founded on the self-interest of a few clubs. […] Football is based on open competitions and sporting merit; it cannot be any other way". They also made it crystal clear that clubs participating in such a breakaway league would be banned from playing in any other competition at domestic, European or world level; and that players could be denied the opportunity to represent their national teams. Also other national football federations, as well as the European Club Association, were similarly opposed to the proposal. Moreover, further down the football pyramid, the formation of the European Super League led to negative outcry and a wave of condemnation from other clubs, players, coaches, officials and fans. Even politics became involved, with several political leaders and governments objecting to the European Super League and voicing support for the position of UEFA. Ultimately, also FIFA, football's world governing body, discarded the idea of the European Super League, with FIFA president Infantino formulating it as follows: "If some elect to go their own way, then they must live with the consequences of their choice. Concretely this means, either you are in, or you are out. You cannot be half in and half out".[6]

Evidently, the founding clubs of the European Super League were taken aback by the widespread, almost universal, rejection of their plans. In the evening of 20 April, the six English clubs threw in the towel and publicly withdrew from the project. The next day, Atletico de Madrid, Internazionale and AC Milan followed suit. Barely three days after the ESL project had been announced, it had collapsed. It was a total fiasco. Only three of the founding clubs – Barcelona, Juventus, and Real Madrid – remained committed to the project, intent on seeing it through, albeit in a modified version. The first (mediatic) battle had been won by football governing bodies, but the war was not over. The ensuing battlefield was always going to be a legal one. The European Super League company swiftly initiated legal proceedings against UEFA and FIFA, in substance claiming that the opposition of the governing bodies against the new competition amounted to

5. The fall and fall of football's Super League – POLITICO.

6. FIFA President Gianni Infantino warns Super League clubs that they must "live with the consequences" – CNN.

a violation of European law, in particular, the competition law rules. Already on 20 April, the Commercial Court No. 17 in Madrid, seized of the dispute, issued an interim order, obliging UEFA and FIFA to refrain from taking any measure which could prevent, hinder or render in any other way more difficult the organization of the competition and to prevent them from issuing disciplinary actions against the participating clubs and players, until a final decision would be rendered in this case.[7] Clearly unimpressed by the court's order, UEFA imposed a financial payment on the clubs participating in the ESL on 7 May and started further disciplinary proceedings against Barcelona, Juventus and Real Madrid on 25 May for their continued involvement in the ESL project. It would take further intervention from the Spanish Commercial Court and a notification of the Spanish order by the Swiss Federal Department of Justice and Police on 7 June to ensure that the three persevering clubs would be admitted to the 2021–2022 season of the UEFA Champions League. Only on 27 September, and after receiving an ultimatum from the Spanish Commercial Court, would UEFA and FIFA agree to abandon disciplinary proceedings against the three clubs and refrain from collecting the extra financial contributions from the other nine teams. In the meantime, on 11 May, the Commercial Court had already come to the conclusion that the resolution of the dispute required an interpretation of Articles 101 and 102 TFEU; therefore, it had stayed the proceedings and referred a number of questions to the Court of Justice of the European Union for a preliminary ruling.[8]

3. The essence of the problem

What is really the crux of the matter? UEFA is the governing body of football in Europe. Its objectives are to deal with all questions relating to European football, to control the development of every type of football in Europe and to organize and conduct international football competitions and tournaments at European level. The national football associations in Europe, as well as the leagues and the clubs are bound by its statutes and regulations. UEFA has assumed this leading role already for decades. As such, its position at the top of the football pyramid in Europe is also not directly

7. Juzgado de lo Mercantil No. 17 de Madrid, No. 14/2021, 20 April 2021, available at: 184303c283180aada81369542eb7fb64.pdf (epimg.net).

8. Case C-333/21: Request for a preliminary ruling from the Juzgado de lo Mercantil n.° 17 de Madrid (Spain) lodged on 27 May 2021 – *European Super League Company, S.L.* v. *Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA) (europa.eu)*.

challenged. Football in Europe needs a regulator. What is contested is the way UEFA performs this role. And that has to do with the fact that over the years, this role has considerably developed: was this initially (almost) exclusively a regulatory one – taking responsibility for the organization and the conduct of international competitions and tournaments in Europe, setting the calendar, ensuring respect for the rules of the game, etc. – this has drastically evolved in the meantime, due to the rapid professionalization and commercialization of football. Football has become an extremely lucrative business. UEFA plays an active role in this. Nowadays, UEFA is a highly profitable private organization, with huge commercial interests. According to the FIFA Statutes, FIFA and UEFA are, for example, the original owner of all broadcasting, multimedia rights, marketing and promotional rights emanating from competitions and other events coming under their respective jurisdiction, without any restrictions as to content, time, place and law.[9] Inevitably, the combination of these regulatory and commercial roles creates frictions. That is because these roles cannot always clearly be completely dissociated from each other. Regulatory choices often have commercial repercussions. The current dispute clearly exposes this point. According to its statutes, UEFA has the sole jurisdiction to organize or abolish international competitions in Europe in which Member Associations and/or their clubs participate.[10] For club teams, these currently are the UEFA Champions League, the UEFA Europa League and, since the 2021–2022 season, also the UEFA Europa Conference League. For international matches, competitions or tournaments which are not organized by UEFA, but are played on UEFA's territory, UEFA's prior approval is required.[11] It is plain, therefore, that to satisfy the requirements of the applicable regulatory framework in football, the European Super League needed prior formal approval from UEFA.

The possible creation of a European Super League clearly gives UEFA headaches. If it were to give the green light to the formation of the ESL, this decision would expose UEFA to the criticism of jeopardizing the realization of some of its main aims, such as ensuring that sporting values always prevail over commercial interests, or redistributing revenue generated by football in accordance with the principle of solidarity, and to support reinvestment in favour of all levels and areas of football, especially the grassroots of the game. For it is not inconceivable that the sporting value of the UEFA Champions League would decrease and, correspondingly, its commercial interest would wane, if several or most of Europe's top clubs

9. Art. 67 FIFA Statutes.
10. Art. 49 UEFA Statutes.
11. Art. 49(3) UEFA Statutes.

would no longer take part in it, but rather play in its direct competitor, the Super League.

Conversely, a refusal from UEFA to authorize the ESL and to impose sanctions on clubs and players involved in the project can be explained by a legitimate desire to protect the longstanding European model of sport, which is characterized by open competition and is based on merit, with a system of promotion and relegation; but at the same time, would inevitably also attract the criticism that this refusal has been motivated by the protectionist desire to shield its flagship competition from unwarranted competition, both from a sporting and a commercial perspective. And it would be hard to rebut the truthfulness of this allegation. The main issue is now what the Court of Justice thinks this case is now what EU law thinks about whether the contested rules and practices from the football governing bodies are compatible with the Treaty competition rules.

4. The law

A complicating factor is that European law is inconclusive on this issue. The Treaty rules do not provide a straightforward answer to the dispute. The only Treaty provision that explicitly deals with sport is Article 165 TFEU, but this provision is more of a programmatic nature, legitimizing the Union's (limited) competence to carry out actions "to support, coordinate or supplement the actions of the Member States" in the domain of sport.[12]

Attention must therefore turn to the case law of the Court of Justice of the European Union. This has been the case since the seminal judgment in *Walrave*, in which the Court firmly established that sport comes within the scope of EU law in so far as it constitutes an economic activity within the meaning of the Treaty.[13] This case law does provide interesting insights, which can contribute to putting the various pieces of this complex jigsaw together. Most prominently, in *Bosman*, the Court invalidated the FIFA transfer rule which prevented out-of-contract professional football players to freely move to another club in another Member State, without transfer payments being due, for its incompatibility with the right to free movement enshrined in Article 45 TFEU. In his famous opinion to the case, A.G. Lenz had concluded that the contested rules also fell foul of Article 101 TFEU.[14] At the time, however, having already established a violation of Article 45 TFEU, the Court did not deem it necessary to rule on the interpretation of

12. Art. 6 TFEU.
13. Case 36/74, *Walrave & Koch* v. *UCI*, EU:C:1974:140, para 4.
14. A.G. Lenz Opinion in Case C-415/93, *Bosman,* EU:C:1995:293.

the competition rules.[15] Ultimately, that was of little importance. The most important take-away of *Bosman* was the fact that sporting associations are firmly subject to observance of the relevant Treaty rules, their claim to complete self-regulatory autonomy lay in shatters.

In the early post-*Bosman* case law, sports-related disputes were invariably addressed by the Court under the Treaty free movement rules.[16] In *Meca-Medina*, however, the Court affirmed for the first time that nothing prevents the Treaty competition rules from also being applicable to sporting rules, practices and activities, such as the contested anti-doping rules of the International Olympic Committee.[17] The Court further specified that the compatibility of these rules with the Treaty competition rules cannot be assessed in the abstract. "Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 101(1) TFEU".[18] For the purposes of application of Article 101 TFEU to a particular case, "account first of all must be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects, and more specifically of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent on the pursuit of those objectives and are proportionate to them".[19] *In casu*, the Court held that the IOC's anti-doping rules pursued the legitimate objective of fairness in sporting competitions, including "the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sports",[20] and did not establish that the procedural aspects ("the conditions for establishing the dividing line between circumstances which amount to doping and those which do not") or the severity of the penalties imposed, went beyond what is necessary to ensure the proper conduct of competitive sport.

Besides these two seminal cases, two other cases have clear precedent value in this respect. The first is *MOTOE*, generally referred to as the "Greek motorcycling case".[21] MOTOE is a non-profit-making association governed by private law whose object is the organization of motorcycling competitions in Greece. Its members include various regional motorcycling

15. *Bosman*, para 138.
16. Joined Cases C-51/96 and C-191/97, *Deliège*, EU:C:2000:199; Case C-176/96, *Lehtonen*, EU:C:2000:201.
17. Case C-519/04 P, *Meca-Medina & Majcen* v. *European Commission*, EU:C:2006:492.
18. *Meca-Medina*, para 42.
19. *Meca-Medina* para 42; see also Case C-309/99, *Wouters*, EU:C:2002:98.
20. *Meca-Medina* para 43.
21. Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v. *Elliniko Dimosi*, EU:C:2008:376.

clubs. Under Article 49 of the Greek Road Traffic Code, competitions involving motorcycles on public or private roads or spaces are allowed to take place only after authorization has been granted. The authorization is given by the Minister for Public Order, following the consent of ELPA, the Automobile and Touring Club of Greece, which officially represents the International Motorcycling Federation. The case revolved around the refusal to grant MOTOE authorization to organize motorcycling competitions. MOTOE claimed that this refusal amounted to an abuse of its dominant position by ELPA. The Court agreed. It held that a system of undistorted competition can only be guaranteed if equality of opportunity is secured between the various economic operators. To entrust a legal person, such as ELPA, which itself organizes and commercially exploits motorcycling events, by entering into sponsorship, advertising and insurance contracts, the task of giving its consent to applications for authorization to organize such events, without that power being made subject to restrictions, obligations and review, "is tantamount *de facto* to conferring upon it the power to designate the persons authorised to organise those events and to set the conditions in which those events are organised, thereby placing that entity at an obvious advantage over its competitors".[22] The power granted to ELPA could therefore lead it to deny other operators access to the relevant market and to distort competition by favouring events which it organizes or those in whose organization it participates. This situation of unequal conditions of competition amounts to a violation of Articles 102 and 106 TFEU.

The second is the *ISU* case, centring around a complaint with the European Commission from two professional speed skaters from the Netherlands, alleging that the 2014 eligibility rules from the International Skating Union were incompatible with Articles 101 and 102 TFEU, *inter alia,* for preventing them to take part in a speed skating event that the Korean company Icederby International planned to organize outside the auspices of the ISU.[23] The event was to involve a new format of races that would take place on a special ice track on which long-track and short-track speed skaters would compete together. In its December 2017 decision, the Commission sided with the speed skaters, stating that the ISU eligibility rules have the object of restricting competition within the meaning of Article 101(1) TFEU, considering, in essence, that those rules restricted the possibilities for professional speed skaters to take part freely in international events organized by third parties and, therefore, deprived potential organizers of competing events of the services of the athletes which are

22. *MOTOE*, para 51.
23. Case T-93/18, *ISU* v. *European Commission*, EU:T:2020:610.

necessary in order to organize those events. Three years later, in December 2020, the General Court upheld the European Commission's decision on appeal on all key aspects.

In the view of the Commission and the General Court, the crux of the matter is that a situation in which an undertaking such as the ISU, which is both an operator in and the regulator of the relevant market of speed skating competitions, is capable of giving rise to a conflict of interests.[24] On the one hand, as the sole international skating federation, the ISU has the regulatory power to lay down the rules of the discipline and to determine the conditions in which skaters may participate in the speed skating and figure skating activities and events that fall within its competence. The ISU eligibility rules provide for a comprehensive pre-authorization system according to which skaters may participate only in events authorized by the ISU. Skaters participating in an event not authorized are exposed to a penalty of a lifetime ban from any competition organized by the ISU. On the other hand, the ISU also has clear commercial interests, in that it organizes the most important speed skating events. Speed skating provides only limited income opportunities for the great majority of professional skaters. Skaters simply cannot miss the opportunity to take part in important ISU events. In those circumstances, the General Court stated that the ISU must ensure, when examining applications for authorization from third party event organizers, that those parties are not unduly deprived of market access to the point that competition on that market is distorted. It is precisely on this point that the ISU rules fall short. According to the General Court, the authorization criteria are not clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring the organizers of events enjoy effective access to the relevant market. The ISU has broad discretion to refuse to authorize events proposed by third parties, including for reasons not explicitly provided for, which could lead to the adoption of refusal decisions on grounds which are not legitimate.[25] Furthermore, the General Court also held that the severity of the penalties provided for in the eligibility rules constitutes "a particularly relevant factor in analysing their content. That severity may dissuade athletes from participating in events not authorised, even where there are no legitimate objectives that can justify such a refusal, and, consequently, is likely to prevent market access to potential competitors who are deprived of the participation of athletes that is necessary in order to organise their sporting event". It concluded that the restrictions arising from

24. *ISU*, paras. 74–75.
25. *ISU*, paras. 88–89.

the ISU eligibility rules were manifestly disproportionate with regard to the objective of the protection of the integrity of skating.[26]

The *ISU* case is currently still on appeal before the Court of Justice. Interestingly, the hearing took place at the same time as the hearing on the European Super League.

5. The outcome?

The case law from the Court of Justice may perhaps not provide a ready-made solution to the questions referred by the Madrid Commercial Court relating to the ESL, but it is nevertheless very instructive. In essence, the *ESL* case does not differ very much from *MOTOE* and *ISU*. Also in this case, there potentially is a clear conflict of interests between the regulatory role and the commercial interests of UEFA. Equality of opportunities must be guaranteed between economic operators. Ultimately, the outcome will hinge upon the Court's assessment of the particular circumstances of the case. The circumstances are special. There is a lot at stake: we are talking about football, arguably the world's most popular and commercialized sport. The attempt by the "Traitorous Twelve" to set-up a breakaway league amounts to nothing else than a direct challenge to the Champions League, UEFA's prime European football club competition, and a direct assault to the long-standing structure of football governance in Europe. By the same token, it also cannot be said that this clash comes completely unexpected: sooner or later, this toxic mix of virtually unlimited regulatory power and astonishingly lucrative commercial revenue and interests in the hands of football governing bodies such as FIFA and UEFA, was bound to give rise to contestation and legal scrutiny.

It is uncertain whether the Court will base its judgment upon Article 101 or rather Article 102 TFEU.[27] In similar circumstances, the General Court found a violation of Article 101 TFEU in *ISU*, whereas the Court adjudicated the *MOTOE* case on the basis of Article 102 TFEU. Arguably, this should not matter very much. There should be a comparability of outcome. In both situations, it has to be determined whether the refusal to grant authorization to start with the European Super League amounts to an impermissible restriction of competition.

There is no doubt that the UEFA Statutes constitute a decision by an association of undertakings. The relevant market is that of international

26. *ISU*, paras. 90–95.

27. Ibanez Colomo, "Competition Law and Sports Governance: Disentangling a Complex Relationship" (2022) 45 *World Competition* (forthcoming).

football club competitions within Europe. Within this relevant market, UEFA and FIFA have a collective dominant position.[28] Also, this cannot reasonably be disputed. These football associations, and they alone, decide which international football competitions can be organized in Europe. At the moment, UEFA even has a monopoly over the organization and exploitation of European club football competitions. This means UEFA and FIFA bear the special responsibility not to abuse this position. They are entitled to protect it, but not to abuse it. Evidently, the requirement of authorization for the formation of the European Super League has the effect of restricting competition. This new mid-week European football club competition has the clear potential to compete with UEFA's other three European football club competitions, especially the Champions League.

Turning to the issue of justification, UEFA and FIFA can put forward a series of arguments that can possibly be qualified as legitimate objectives in the general interest that may justify certain measures which have anti-competitive effects, such as, in particular, the integrity of sports ("there can only be one European football club champion"), the protection of the pyramid structure of governance in sport in Europe, or the maintenance of a certain financial equilibrium and solidarity between clubs. The most forceful argument may turn out to be the need to protect the traditional European model of sports, characterized by an open competition with promotion and relegation and qualification based on merit.[29] The competition format created by the ESL clearly challenges this: the Super League is a closed league, wherein the founding clubs are guaranteed of a starting place and other clubs can join on invitation only. There is no system of promotion and relegation. This model is based on the North-American sports leagues, such as the National Basketball Association or the National Hockey League. In the European model of sport, the primary focus is on sporting merit. In the US, economic incentives seem more prevalent.

If one or more of these objectives were recognized as legitimate by the Court, and this may very well be the case, everything will boil down to the test of proportionality.[30] Are the contested measures, i.e. the need to obtain a prior authorization to set up a breakaway league and the sanctions foreseen in the case of non-compliance, suitable, necessary and proportionate to achieve the aims pursued? Answering this question is by no means a

28. Case C-171/05 P, *Piau* v. *European Commission*, EU:C:2006:149.

29. Sloane, "The European Model of Sport", in Andreff and Szymanski (eds), *Handbook on the Economics of Sport* (Edward Elgar, 2006).

30. Vermeersch, "De impact van de ISU-zaak. Het Europees mededingingsrecht als kader en scheidsrechter in het conflict rond de European Super League?" (2021) *Voetbal- en Sportjuridische zaken* 1–7.

straightforward exercise, and will require a delicate balancing act from the Court, especially in light of the various – also economic – interests at stake. A lot will depend as well on the level of scrutiny the Court is willing to exercise, bearing in mind the limited competence of the EU in the domain of sport. In *Bosman*, the Court first recognized the need to encourage the recruitment and training of young players, and the maintenance of a balance between clubs by preserving a certain degree of equality and uncertainty as to results, as legitimate aims,[31] before finally dismissing the contested transfer rules, reasoning that these objectives could "be achieved at least as efficiently by other means which do not impede freedom of movement for workers".[32] In other cases, the Court was more reluctant to intervene, and left the issue to be decided by the national judge.

It is thus hard to predict what the Court will do in this instance. Be that as it may, a couple of observations can already be made in this regard. First, both in *ISU* and in *MOTOE*, the General Court and the Court of Justice stipulated that an authorization requirement does not *per se* have to be problematic, provided that is foreseen in an open, transparent, objective and non-discriminatory procedure for assessing a request for authorization. At the time the announcement of the launch of the ESL was made, the UEFA Statutes did not provide for such a procedure. This is impermissible. UEFA is aware of this. In the meantime, steps have been taken to accommodate for this. A ruling from the Court on this point would therefore not settle the issue yet: the ESL would still need approval from UEFA under the terms of the new procedure.[33] Arguably, the Gordian knot lies in this procedure, though: can an authorization procedure be conceived that enables UEFA to credibly continue carrying out its regulatory role, when some of the regulatory decisions it takes are inextricably linked with its own financial interests? In legal terms: UEFA has a monopoly over the organization of European football club competitions; what to do to avoid the conclusion that it is induced or led to abuse this domination position when issuing decisions impacting on its commercial interests? This entails that an authorization procedure, if it remains in place, will have to comply with high standards of impartiality and objectivity.

Secondly, with regard to the disciplinary action undertaken or planned against players and clubs involved in the creation of the ESL, it must be pointed out that the Court of Justice has previously held that the repressive nature of rules and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition, since

31. *Bosman*, para 106.
32. *Bosman*, para 110.
33. It would, of course, open the door for damages claims.

they can result in the unwarranted exclusion of athletes or clubs from sporting events.[34] Bans on players to participate for their national team in the World Cup or the European Championship, and bans on clubs to participate in their national leagues, are very severe penalties which appear manifestly disproportionate to the objective pursued. The ESL is a proposed international club competition, and thus has as such nothing to do with national leagues or international competitions between national teams.

6. Final thoughts

It is fair to say that the sporting world and the EU institutions have come a long way since the initial legal skirmishes several decades ago. Despite the initial vehement claim of the sporting associations that they operated autonomously and were immune from outside legal intervention, and the fact that the Court of Justice's most well-known interference in sports in *Bosman* became buried under a torrent of criticism, relations have gradually normalized since then. It is interesting that the Court is now asked, more than twenty-five years later, to adjudicate again on an important issue that could determine the governance structure of sports for years to come.

It has been argued that this case might lead to a reconsideration of the current role of the EU in sports, possibly awarding the EU a greater role in sports than hitherto has been the case.[35] This is certainly a possibility. It might practically be more feasible and efficient though to first consider a change within the governance structure in sports. This was not the first attempt to set up a breakaway league in football, and it probably won't be the last, barring a very decisive judgment from the Court on the matter.[36] In this regard, three aspects seem quintessential. First, if UEFA wants to hold onto its position at the apex of the European football pyramid, it has to become more open and transparent. Its regulatory role must be more clearly separated from its commercial activities. Secondly, federations, clubs and players must receive more say in the decision-making processes. Thirdly, there should be a more equitable redistribution of financial revenue; more money should also go to the grassroots of sports. The sporting equilibrium is completely lost; the Champions League has become the playground of only a handful of always the same clubs. If proof is really needed that the UEFA

34. *Meca Medina*, para 47; *ISU* para 91.

35. Weatherill, EU Law Analysis: Never let a good fiasco go to waste: why and how the governance of European football should be reformed after the demise of the "SuperLeague", 21 April 2021.

36. Pijetlovic, *EU Sports Law and Breakaway Leagues in Football* (Springer, 2015).

Statutes need revisiting, one need merely look at Article 21 concerning the composition of the executive committee: besides the President, it shall consist of sixteen other members (including at least one female) …

To conclude, the show put on by UEFA, FIFA, the clubs and all those involved in the European Super League was not a pretty sight. The spectacle on the pitch is far more enjoyable to watch. All parties have, in the meantime, luckily retreated, even if only a little, from their trenches: the ESL founding clubs have understood, regardless of the legal outcome, that for a pan-European competition to succeed, more openness is needed, and have now seemingly embraced the idea of several super leagues, arguably involving promotion and relegation, key features of the European model of sport. By the same token, UEFA has once again made some changes to the Champions League, essentially accommodating the wishes of the big countries for more teams and more matches. So, what are they fighting about, again?