Kluwer Competition Law Blog

# When Sporting Regulators Don't Play Ball: Rejecting the Sporting Exception in EU Competition Law

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**Introduction**

One of the biggest controversies in European football right now is the fight between UEFA, Europe's continental football association, and the European Super League (ESL), a proposed breakaway league composed of some of the biggest clubs and commercial names in the sport; a case arising out of the dispute recently reached the European Court of Justice (ECJ) and a decision is expected in the coming months. The conflict mirrors the recent schism in the world of golf between the incumbent PGA Tour and the Saudi Arabia-backed breakaway LIV Golf tour (though their recent merger has drawn antitrust scrutiny of its own) and is just one of a number of controversies UEFA and FIFA, the global football regulator headquartered in Switzerland, have faced in recent years.

This conflict recently came to a head when the ESL, a consortium of twelve of the biggest commercial names in European club football, announced their collective creation of a new league in April 2021, which was clearly designed to rival UEFA's Champions League tournament, long considered the pinnacle of the sport in Europe as far as club competitions go. Though the project quickly collapsed due to a combination of player, state, and fan pressure, UEFA itself took swift and strict action to oppose the project as well, announcing it would sanction both players and clubs that participated in the ESL from competing in any other UEFA-sponsored competition. Despite the pushback from the vast majority of stakeholders in European football, three clubs have held out hope of reviving the ESL and sued UEFA and FIFA for allegedly anti-competitive behaviour.

This post will discuss how European competition and sporting law developed to reach this point. I will first trace the history of European competition and sporting law, through both the Treaties and ECJ case law, and their eventual inevitable collision. I will then analyze the instant case of *ESL v. UEFA* more closely and argue against the application of the "*sporting exception*", which is the theoretical carveout for sporting regulators and organizers from normal European Union law, in the context of competition law. Finally, I will conclude by addressing the policy implications of such an outcome.

**EU Competition and Sports Law Background**

*Differing Foundations of EU Competition & Sports Law*

As governed by Articles 101 and 102 TFEU, individual sports clubs are considered undertakings themselves, and sports associations, such as national football associations (FAs) and international associations, such as UEFA and FIFA, may be considered both undertakings and associations of undertakings within the context of the competition articles.

Sport, however, was not explicitly mentioned in the EU treaties until 2009, when the Lisbon Treaty added what is now Article 165 TFEU, which states, in relevant part: "*The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function*".

Thus, up until this point, sports policy in the EU was driven primarily by case law. As for Article 165 TFEU's mandate for EU action in the sporting arena, "*the Court of Justice [of the European Union] has been doing that for a very long time. That's no more than a codification of the Court's approach in the interpretation and application of EU free movement law and competition law to sport*" (see Stephen Weatherill). Without significant enabling legislation for Article 165 at the EU level, ECJ case law continues to be the main arena in which disputes over whether and how other elements of EU law are played out in sport.

Walrave and Koch was one of the first ECJ decisions pertaining to a sporting matter, which was a dispute between two pacemakers for a cycling team who alleged they were subjected to nationality discrimination by the defendant cycling association. The ECJ stated that the prohibition of discrimination on the basis of nationality contained within the Treaties "*does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services*" (para 17). In this, the ECJ held that insofar as sport constitutes "*economic activity*", such as employment, sport can be held subject to the Treaties (para 4). However, the ECJ in *Walrave* also opened the door to what has since been argued is the "*sporting exception*" when it stated that rules of "*purely sporting interest and as such [have] nothing to do with economic activity*" (para 8) are not subject to at least the prohibition of discrimination on the basis of nationality (see generally Richard Parrish & Samuli Miettinen and R. C. R. Siekmann). The ECJ gave the specific, but arguably not exhaustive, example of national sports teams (para 8).

Shortly after it decided *Walrave*, the ECJ was presented with a similar question in *Donà v. Mantero*. The Court effectively reiterated its previous reasoning, citing *Walrave*, but again holding that "*rules [which] exclude foreign players from participation in certain matches for reasons which are not of an economic nature (…) and are thus of sporting interest only*" may be permissible under the Treaties (paras 17-19). A narrow reading of these cases together would suggest a limited exception, in practice, only for national sports teams. However, the ECJ would not more conclusively shut the door on a broader reading until 1995.

In *Bosman*, the Court addressed a dispute arising out of a system of mandatory transfer fees and nationality quotas in club football teams. The Court held that both of these rules ran afoul of the EU free movement provisions, finding that collective employer-to-employer agreements that had *effects* on employees were impermissible under the Treaties (para 138). Importantly, the Court also moved away from the "*purely sporting*" exception outlined previously and towards a justification analysis, whereby such offending rules could be justified "*if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest*" (para 104).

Notably, however, *Bosman*, as well as *Walrave* and *Donà* before it, deal exclusively with the free movement and nationality discrimination provisions of the Treaties. It would be some time before the Court extended its interpretation of European competition law to the sporting context, even explicitly declining to do so in *Bosman* (para 138).

*The Intersection of EU Competition and Sports Law*

Articles 101 and 102 TFEU and sports law eventually reached their inevitable collision in 2006, when the ECJ decided *Meca-Medina*.

*Meca-Medina* was the first case the ECJ decided based on what are now Articles 101 and 102 TFEU in the sporting context. The case involved a complaint by two swimmers protesting an anti-doping rule adopted by swimming's governing body, which they were found to have violated. Here, the Court definitively held that "*the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down*" (para 27). While the Court went on to eventually dismiss the swimmers' specific claims and effectively uphold the anti-doping limits set by the swimming organizers (paras 40-56), the decision has been characterized as "eliminat[ing]" the sporting exception in the context of EU economic law.

*MOTOE* was another seminal case in the ECJ's jurisprudence applying EU competition law to sports regulators, this time ruling on the powers of a sports governing body to authorize third-party competitions. The dispute involved MOTOE, a Greek motorcycling nonprofit, which sought authorization from the Greek state to organize motorcycling competitions, but this authorization was denied on the basis of a Greek statute that required the consent of the International Motorcycling Federation before granting such a license, which was not given in this case.

The Court found that the relevant market for the analysis of the International Motorcycling Federation (in this case, a regional affiliate in Greece, but functionally an agent of the international federation) was the market for the "*organisation of motorcycling events plus their commercial exploitation by means of sponsorship, advertising and insurance contracts*". In its ruling, the Court held that what is now Article 102 TFEU precludes such a national statute that confers on an undertaking, like the sport's governing body here, "*the power to give consent to applications for authorisation to organise [sport] events, without that power being made subject to restrictions, obligations, and review*" (para 48). While the case dealt with specifically *state-conferred* power under the Treaties, covered by what is now Article 106 TFEU, the Court's reasoning as far as the gatekeeping powers that can or ought to be held by sports regulators is illuminating. It has been suggested that the conflict of interest sports governing bodies that are also organizers of events face "*lies at the heart of the Court's disapproval*" in *MOTOE*.

**The ESL Case – Controversy and Proposed Resolution**

*ESL v. UEFA* involves a dispute primarily between UEFA, the governing body for the sport of football in Europe and the confederation of the national football associations of 55 European countries, and a coalition of some of the largest individual commercial clubs in Europe; the main clubs continuing to drive the litigation are Barcelona and Real Madrid of Spain and Juventus of

Italy. The ESL clubs sought to form a "breakaway" competition that would most directly compete with UEFA's Champions League tournament, which is comprised primarily of the top finishers in each national league—an increasingly consistent group, but not necessarily the same group that would be afforded relegation-free status from the ESL based on the varied success and performance of those founding clubs in recent years.

UEFA and its member associations responded by threatening sanctions on any club that would participate in the proposed Super League, banning those clubs from participating in other "*domestic, European or world*" competitions and floating the potential exclusion of the clubs' players from representing their national teams in European or global competitions, like the Euros (organized by UEFA) and the World Cup (organized by FIFA). There may be some ostensibly legitimate motivations behind UEFA's threatened sanctions, such as sporting considerations regarding consistency of technology and rule application or player safety reasons deriving from management of the match calendar. However, the federations-as-competition-organizers have often been the culprits driving increases in fixture congestion and player overload while the clubs have previously called for greater rest periods, and a total ban on clubs and their employee-players seems disproportionate to a problem that cross-competition dialogue and coordination could theoretically solve as well.

While there are cases, like *Meca-Medina*, where such legitimate sporting interests and their proportionate protections may be upheld, here it is simply impossible to unravel UEFA's vested interest in maintaining the economic appeal and commercial viability of its flagship club football competition as a unique offering from the wildly disproportionate sanction regime it announced when a competitor attempted to enter the market.

Simply applying the legal analysis provided under Articles 101 and 102 TFEU show that UEFA and its member associations clearly engaged in an unlawful restriction of competition.

*Article 101 TFEU and Meca-Medina*

Viewing the affiliation of national member associations under UEFA as an "*agreement between undertakings*," it is clear that such united action consists of an inexcusable agreement under the Treaties.

First, it is well established that the national associations themselves constitute undertakings through their economic activity. There was also a clear agreement between these undertakings in the form of a joint statement threatening sanctions on ESL clubs and players and action imposing fines on some of the clubs. Second, the object of this agreement was clearly to distort, as in quash, competition, such as the alternative offering of a Super League tournament that could compete for participating clubs, ticket-buying fans, and media broadcasting rights. UEFA president Aleksander Ceferin publicly stated that the message intended behind the sanctions was to make the breakaway clubs "*realise their mistake and suffer the appropriate consequences*". As has been established, simply having such an exclusionist aim is sufficient under the "*object*" arm of the provision, but the further result of the ESL effectively collapsing, at least in part because of the threat of sanctions, could potentially reach the "*effect*" arm as well. [1]

Thirdly, it is argued here that there is no legitimate justification for such action under the *Meca-Medina* test. [2] It is commonly accepted that *Meca-Medina* stands for the proposition that a

potentially anticompetitive rule under the Treaties may be justified if it pursues "*a legitimate objective, [is] inherent to these objectives, [and is] necessary and proportionate*". It has been argued that sport in Europe is typified by a pyramidal organizational structure, the maintenance of which may constitute such a legitimate objective. However, while it has been repeatedly argued that such a European model of sport must be protected, there are no similar rules that apply to clubs or athletes that compete in other competitions around the world that are not similarly marked by such a pyramidal structure. For example, there is no ban on players who have previously competed in Major League Soccer in the United States, which is not based on a pyramidal promotion and relegation system, from joining European football clubs and participating in competition at the Member State, European, and global levels. In a preliminary opinion issued by Advocate General Rantos in the *ESL* case, it is argued that Article 165 TFEU gives constitutional credence to this pyramidal European model of sport (para 30) and that the discipline levied by the sport's governing bodies can only be effective so long as the sport's "*clubs and players (…) [give] their voluntary agreement to be subject to its rules*" (para 84). In response to the former, it is far from clear that the "*carefully and narrowly*" crafted provisions of Article 165 TFEU call for an effective overriding of the more clearly articulated competition provisions of Articles 101 and 102 TFEU. As for the latter, AG Rantos' opinion engages in circular reasoning that both belies the inherent problematic nature of the conflict of interest in question, while also contradicting ECJ precedent on the issue. It is the very fact that clubs and players realistically could not create a new "*independent competition*" (para 74) that was economically feasible without still falling under the sporting auspices of FIFA and UEFA, the governing bodies of the *sport itself*, that begets an illegal anticompetitive move due to the simultaneous economic and sporting monopoly the incumbent governing bodies hold as competition organizers.

Further, in a direct comparison to the *Meca-Medina* case, which ruled on this principle in favour of the sporting regulators, a clear distinction between the facts can be drawn. In *Meca-Medina*, the ECJ held that "*even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings (…), they do not (…) necessarily constitute a restriction of competition incompatible with the common market, within the meaning of [Article 101 TFEU], since they are justified by a legitimate objective*" (para 45). The legitimate objective for the anti-doping rules there was found to be "*the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport*" (para 43). Here, however, the true objective of UEFA's and its member associations' actions in sanctioning the breakaway clubs is likely to be driven more by UEFA's economic interest in maintaining its exclusive holding of organization and broadcasting rights for European football competitions, such as the Champions League, and the prestige and revenues the member associations receive via their representative clubs in those cups.

The European General Court held, in a case now being appealed to the ECJ as well, that a similar move by the International Skating Union in sanctioning athletes participating in breakaway competitions was unlawful under the Treaties, as they were "*disproportionate*" and "*hinder[ed] the development of alternative and innovative speed skating competitions*". [3] While the outcome of this appeal remains to be seen, it is not unreasonable to contrast the objectives pursued in the various allegedly anti-competitive rules at issue in *Meca-Medina* and the ESL and ISU cases, respectively.

*Article 102 TFEU and MOTOE*

Under Article 102 TFEU's test, it again appears clear that if UEFA were viewed as an individual undertaking, it could reasonably be found to have abused its dominant position through its unilateral actions. First, as has been established by case law, sports governing bodies constitute undertakings themselves through their participation in economic activity (*Walrave*).

Next, in defining the relevant market as the market for European football, or even European club football more specifically, it appears fairly clear that UEFA holds a dominant position. UEFA is the sole organizer of the Champions League, the most prestigious European club football competition primarily reserved for the top performers in national leagues, as well as the secondary Europa League competition, generally open to the teams that finish just below the Champions League participants, and even the recently-launched Europa *Conference* League, aimed at providing European competition for teams finishing even below the Europa League participants.

Third, it also appears clear that UEFA engaged in an abuse of that dominance by moving to hinder the ESL, an ostensible competitor, from getting off the ground. This could reasonably be considered an impermissible exclusionary abuse. And fourth, the impact on the internal market is clear given the economic activity of clubs incorporated throughout the Member States.

In sum, these provisions on their own suggest that the position UEFA took in moving to quash the ESL constituted an inexcusable abuse under Article 102 TFEU. Further, when comparing the most relevant case law at hand, *MOTOE* appears to offer a clear precedent for the ECJ's treatment of such monopolistic governing bodies. Even though the dispute in *MOTOE* involved a Member State statute affirmatively granting such monopolistic privilege to the regional affiliate of the international governing body, the conflict of interest that has been described as one of the driving principles of the ECJ's decision, in that case, is still at play in *ESL v. UEFA* (see Weatherill). While the Court in *MOTOE* did not foreclose the possibility of any gatekeeping function of sports regulators, one can see a link between the reasoning in *MOTOE* and *Meca-Medina* whereby the wielding of this gatekeeping function should be limited to such "*legitimate interests*" articulated in *Meca-Medina*, such as the health and integrity of the athletes.

A "pyramidal structure" should not reach this point, as sports and athletes are seen to be sufficiently protected by non-pyramidal schemes the world over. UEFA is clearly motivated by its interests as the sport's governing body in the region, but also by its economic interests in protecting the revenue it receives from the organization and broadcast of its own tournaments that the ESL would compete against.

## Conclusion

Policy motivations support such a finding. Sports, and football in particular, have grown significantly in popularity and impact over the past century, and along with them the influence and economic might of the governing bodies has similarly increased. As a result of the decreasingly amateur nature of the sport, the motivation behind maintaining a rigid pyramidal structure may be seen as simultaneously decreasingly driven by sports governance interests and increasingly driven by the governing bodies' economic interests. European football has thus widely moved beyond a local market for the sport itself, and increasingly into the wider entertainment market, competing with other leagues, sports, and various forms of entertainment for our time.

It has been argued that sports with divided competitions or governing bodies are generally less

popular and have often failed. However, governing bodies like UEFA and FIFA are also criticized, among other reasons, for their lack of stakeholder representation at key decision-making levels, such as their dearth of avenues for meaningful fan and player input. Allowing for breakaway leagues under competition law would, ostensibly, provide more choice to these stakeholders, resulting in a better product at the end of the day under the theory of free market competition.

If consumers—the fans—do not want one of those choices, they can act accordingly on the market, as they did in mobilizing to protest the ESL clubs in England, or in the legislature, which together constitute their only present avenues for participation and influence on decision-making in sport. European competition law, through the ECJ's decision in this case, should not be seen as foreclosing these methods of participation and market choice for consumers (fans), workers (the athletes), and market participants (the clubs). In the United States, for example, all but one of the major sports leagues are subject to normal competition, or antitrust, laws, and there is ongoing debate as to the extent to which this principle should be expanded or constrained among the remaining leagues, though it is clear that such general application of antitrust law to sport does not inevitably lead to the partite organization of individual sports as might be feared in European football should the ECJ hand down such a decision.

The point of this post is thus not to endorse the breakaway of rival football competitions or leagues as the optimal or even a marginally beneficial solution to the problems arising out of the monopolistic control of sports regulating bodies as sole competition organizers. On the one hand, it has been demonstrated that UEFA has achieved a form of "*regulatory capture*" over the European Union, whereby the EU has effectively outsourced its regulatory powers in the realm of football to UEFA and defers its self-regulation on many important matters. On the other hand, it is clear from the popular reaction to the ESL's announcement that a rival competition is not desirable by the market, at least in the format that has been proposed. Commentators have long called for increased EU regulation of sport which, while not without complications, would provide a clearer path forward on a wide range of present and future conflicts. Clearer and potentially more stringent guidance and regulation by the EU could serve the dual function of: i) preserving the *status quo* pyramidal system favoured by fans, evidenced by their market preferences as voiced through the protests to the ESL, while; ii) imposing greater oversight and good governance requirements with meaningful avenues for fan and other stakeholder participation through the political process, all of which are currently absent from the current regime due to the unregulated monopolistic control of the governing bodies. There is already some momentum for such government oversight in the UK, though it remains to be seen whether such an ambitious proposal can and will be taken up at the European level.

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[1] A lower European court has already found another FIFA economic regulation ran afoul of competition law under a similar "*object*" analysis, though related cases arising from challenges to the same regulation have since been appealed and referred to the ECJ for clarification on the scope of competition law as applied to sport, as has been discussed recently on this blog.

[2] In a potentially relevant dispute also discussed recently on this blog, the Court of Arbitration for Sport (CAS) issued an award in *PROFAA v. FIFA* holding that similar "*objectives*" in question in the same FIFA regulation at issue in the German court decisions referenced above were

sufficiently legitimate to avoid further competition scrutiny. Such overlapping objectives with the ESL case include player safety and "solidarity" among clubs (para. 284 *PROFAA v. FIFA* and para. 93 of AG Rantos' opinion in *ESL v. UEFA*). It will be noted here that the ECJ has previously held that the competition provisions of the treaties are of a "*fundamental*" nature (see *Eco Swiss*) and as such necessitate the setting aside of arbitral awards, such as those issued by CAS, when they infringe competition law (see Weatherill). However, even assuming *arguendo* that these objectives were legitimately pursued in *PROFAA v. FIFA*, there is enough of a factual distinction to be made between the cases and the parties involved, as has been discussed here, such as the considerable room for debate as to whether FIFA and UEFA or the clubs themselves may be seen as the strongest proponents of player welfare, as was put forward by the governing bodies in *ESL v. UEFA* as well.

[3] The ECJ heard the arguments in the *ISU* case right before *ESL v. UEFA*, and decisions on both are expected in 2023.

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