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# The New NBA-FIBA League: Reconciling North American Basketball with EU Law

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**Introduction**

On March 27th, the NBA announced a plan to establish a new European basketball league. This league, which would be organised alongside FIBA, the global basketball regulator, would pose the latest challenge to the basketball landscape in Europe. It would also bring to the fore many of the legal and regulatory debates which have underlaid European sport since the landmark judgments handed down by the Court of Justice in December 2023.

This post will evaluate the extent to which the NBA's proposal is compatible with EU law. It will advance two main arguments. First, it will suggest that whereas EU law does not preclude the establishment of a new NBA-FIBA league, it may limit the extent to which key aspects of the American sport model can be 'imported' in Europe. Second, it will add that that this arises from a central tension underlying the 'European' and 'North American' sport models – namely, their respective understandings of 'sporting merit', and what tools sport governing bodies (SGBs) have at their disposal in order to advance this notion.

**The structure of European basketball**

Global basketball is governed by the International Basketball Federation (FIBA), which sets out the rules of the game, organises international competitions, and governs the transfer of players. The global basketball governance structure is a pyramidal one, in which FIBA is followed by five regional organisations (Africa, Americas, Asia, Europe, and Oceania) which are themselves comprised of national basketball associations.

However, this basic pyramid structure does not fully explain how global basketball is organised. In parallel to the FIBA pyramid, there exist two main private leagues which bring together their respective region's best clubs: the NBA, which is comprised of 30 North American teams, and the Euroleague, which brings together 18 European clubs. This means that in Europe, FIBA-organised competitions (FIBA Champions League, FIBA Europe Cup) co-exist alongside the privately-owned Euroleague. It is this complex landscape that the proposed NBA-FIBA league would join.

## The NBA-FIBA proposal

Although the exact nature of the NBA-FIBA proposal is unclear, some details were advanced by NBA commissioner Adam Silver. The new league would be a semi-closed one; it would be made up of 16 clubs, of which 12 would be permanent members and four would be temporary, allowing the best-ranked teams in national leagues or in FIBA's Champions League to access the following season's NBA-FIBA league.

The new league would be comprised of both existing clubs and new franchises. This would allow the NBA to expand to European markets which have been less exposed to basketball, such as London, with reports suggesting that such franchises could be sold for around 500 million US dollars.

Many of the NBA's financial regulations would be incorporated, including a salary cap and a joint financial ownership structure, with the NBA-FIBA league owning 50% of the equity of new franchises and owners owning the remaining 50%. According to commissioner Silver, the new league could see its first matches in 2026. Although these details may change in the weeks and months ahead, this basic outline suffices to allow us to discuss the proposal's compatibility with EU law.

## The establishment of the NBA-FIBA league would not breach Articles 101 or 102 TFEU

The NBA's proposed entry into the European basketball scene raises several questions from the point of view of Union law, which feed into the broader discussion on how the latter – including EU competition law – interacts with sport governance. The first question is perhaps the most obvious: to what extent would the *establishment* of the proposed NBA-FIBA league be compatible with EU competition law?

Ever since the 1970s, the Court of Justice has made it clear that sport is not exempt from the EU treaties. This notion was first developed in relation to the free movement provisions (*Walrave and Koch*), most famously through the *Bosman* case, and was subsequently applied to Articles 101 and 102 TFEU (*Meca-Medina*), with the Court of Justice repeatedly holding that sport-related disputes are not exempted from these provisions.

In *European Super League Company* ('ESLC'), which concerned the proposal for a breakaway league organised by twelve European football clubs, the Court of Justice set out the criteria under which European clubs could establish themselves independently from their sport's main governing body – for example, by organising a breakaway league. As is well known, the Court of Justice held that the Treaties do not preclude, in themselves, rules by sport governing bodies (SGBs) regarding the prior approval of, and participation in, breakaway competitions. This follows from the 'considerable social and cultural importance' of sport in the EU and from the former's 'specific characteristics' (*ESLC*, paras 143-144). However, this does not give SGBs unfettered discretion in withholding the approval of new competitions. Instead, such decisions must follow rules which are 'transparent, objective, precise and non-discriminatory' – in other words, they cannot be taken solely to prevent new entrants into the market for sport competitions.

Although this passage was crucial to the factual context underlying the dispute in *ESLC*, it is not as relevant to the NBA-FIBA context. This is the case because the NBA-FIBA proposal does not

concern a breakaway competition; instead, it proposes the establishment of a new league co-organized (and thus endorsed) by the relevant SGB. Therefore, the *establishment* of the new NBA-FIFA league would not, in itself, give rise to concerns from the point of view of Articles 101 and 102 TFEU.

**'Sporting merit' and Article 165 TFEU**

Notwithstanding the above, the NBA-FIBA proposal could face greater difficulties in ensuring that more detailed aspects of its league complied with Union law. To understand why this is the case, we must focus on Article 165 TFEU, which sets out, among others, the Union's competence in the field of sport.

Article 165 TFEU, which was introduced by the Lisbon Treaty, mandates that the Union 'contribute to the promotion of European sporting issues, while taking account of the specific nature of sport'. It also requires that the Union 'develop[] the European dimension in sport […] by promoting fairness and openness in sporting competitions.'

Contrary to what SGBs have claimed for decades, the Court of Justice has repeatedly held (for example, in *ESLC*, para 101, and *Royal Antwerp*, para 69) that Article 165 TFEU does not exempt sport from the EU's *acquis*. However, this provision does serve a twofold role. First, it plays an interpretative role, allowing the 'specific nature of sport' to be taken into account when legislating on sport-related matters. Second, it enables the Court to take into account sport's 'specific' characteristics when *applying* the EU treaties – for example, when derogating from the free movement provisions or when justifying by effect violations of Articles 101 or 102 TFEU.

As set out above, at the heart of Article 165 TFEU lies the mandate to promote 'fairness and openness' in European sport, an obligation which has often been understood as requiring that the Union promote 'sporting merit' as the cornerstone of the so-called 'European sport model'. Although 'sporting merit' does not feature in the EU treaties, it has gradually acquired a central role in EU sport law, both through soft law instruments (such as the 2007 White Paper on Sport) and through the Court's case law. It is precisely here that the NBA-FIBA proposal could struggle to comply with Union law.

As this author has previously argued, there are two possible understandings of how sporting merit, and hence 'opennes and fairness,' can be encouraged. The first, 'static' approach to sporting merit is a short-term one; one which focuses 'on rewarding the most immediate manifestation of sporting merit: for example, by rewarding the winner of the most recent game or competition at hand.' This approach is described as 'static' because of its short-term, formalistic focus. In other words, because it focuses on encouraging equality of *opportunity*, rather than equality of *outcome*, among participants in a given sport competition. A second possible approach to sporting merit is a *dynamic* one – one which focuses on ensuring a level playing field by ensuring that there is true competition on the merits *over time*. This can be understood as one embracing substantive fairness, rather than mere formal fairness; in other words, at ensuring that as many clubs as possible are given the possibility to perform well, even if this requires an internal redistribution of resources (such as players or money) within the league itself.

These different understandings of sporting merit are not only of theoretical interest; they also have important consequences when applying EU law to proposals such as the NBA-FIBA one. Whereas

the European sport model has traditionally embraced a static understanding of sporting merit – as reflected by its pyramid structure and its emphasis on promotion and relegations as the ultimate manifestations of sporting fairness –, the 'big four' American leagues (the NBA, the National Football League, the Major League Baseball, and the National Hockey League) have adopted a radically different business model, with a greater emphasis on growing *the league as a whole*, rather than individual clubs. This collective focus is best illustrated by their 'closed' structure, with clubs not being promoted or relegated; by their long-term agreements between franchises on matters such as intellectual property rights; and by their focus on generating collective revenue, which has been facilitated by the suspension of traditional US antitrust and labour laws in relation to sports.

**The devil is in the detail, or where the NBA-FIBA league could face trouble**

In light of the above, although it has been suggested above that there would be nothing inherently unlawful in the *establishment* of a new NBA-FIBA league, the project's lawfulness from the point of view of EU law would depend on how closely the proposed league embraced the North American sport model, both in relation to the league's basic structure and in relation to its underlying financial arrangements.

To begin with, the league's structure could give rise to problems if breached the 'fairness and openness' mandate enshrined in Article 165 TFEU, for example by embracing a fully 'closed' structure such as the NBA's. Although such an approach would unequivocally breach EU law, a 'semi-closed' system such as that proposed by the NBA and FIFA would not necessarily be unlawful provided that it remained sufficiently open to non-permanent clubs. At the time of writing, it seems likely that the NBA-FIBA proposal, which would reserve for slots for teams which qualified through a merit-based system, would comply with this requirement.

Beyond the league's basic structure, however, the NBA-FIBA proposal could also raise several other problems from the point of view of EU competition law. Once again, these difficulties arise because of the different understandings of 'sporting merit' embraced by the European and North American sport models.

Contrary to the US, the EU does not exempt sport from its antitrust and labour laws. Instead, the Court of Justice increasingly views sport clubs as 'ordinary' businesses from the point of view of EU competition and free movement law, thereby limiting the extent to which they can operate without breaching the Treaties. In practice, this 'narrow' understanding of sport's 'specific characteristics' means that any economic agreements between participating clubs must keep a careful eye on the outer limits set by the Treaties. The joint exploitation of broadcasting rights provides a good example of this difficult balancing act. As the *ESLC* judgment demonstrates, the Court of Justice is open to the use of efficiency-based arguments to justify the collective exploitation of broadcasting rights. After all, there is a clear economic case to be made for the joint sale of all of a given tournament's televised games. However, the Court has shown itself equally alert to the potential risk of these arguments being abused to restrict the scope of the competition or free movement provisions, thereby breaching the TFEU's core economic provisions.

Similarly, the extent to which clubs cooperate with one another when organizing the tournament's

regulatory and legal aspects would raise serious questions from the point of view of Article 101 TFEU. Such difficulties could arise, for example, in the establishment of salary caps; in negotiations between the league and athletes; or in the design of financial redistribution mechanism based on 'financial solidarity', all of which would be carefully scrutinized by the Court of Justice. In designing its competition, the NBA and FIBA would therefore have to tread very carefully when 'importing' the American sport model into a European legal system which has developed its own rules in the name of its 'European sport model'.

**Conclusion**

At the time of writing, it is unclear how the NBA's entry into the European basketball market will play out. Notwithstanding this uncertainty, the possibility that such a move could take place, and the significant economic implications this would have, requires us to understand whether – and if so, to what extent – such a proposal would comply with Union law.

This post has suggested that, while the mere establishment of an NBA-FIBA league would not be unlawful, any such proposal could face legal difficulties further down the line. These difficulties stem from the central tension underlying the European and American sport model – namely, how each system conceptualises 'sporting merit', and how these divergent understandings impact upon the design and structure of sport tournaments. As has been outlined above, these distinct philosophies have important practical implications when when setting out the detailed regulatory and financial arrangements at the heart of any such league. Whereas US law affords SGBs a more generous toolbox when promoting dynamic competition within their leagues – for example, by designing specific exemptions from the application of antitrust and labour law –, the Court of Justice has embraced an increasingly narrow toolbox – one which grants SGBs 'conditional autonomy' but which otherwise views them as ordinary businesses, thereby subjecting them to the traditional case law on the competition and the free movement provisions.

Therefore, although EU law will not prevent the NBA from entering European basketball, it will require it to tread carefully, understanding the respective differences between the European and American sport models; the *sui generis* nature of the EU's legal system; and how the TFEU's competition and free movement provisions shape the governance of European sport.

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