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Superleague: who sets the rules of the game?

By Hans Vedder

I'll be honest: I don't like football. I think it is overcommercialised, involves way too much money and an excessive amount of public resources and the competition on the pitch has precious little to do with athletes trying to outcompete another (I've always liked rowing better). With that out of the way, we can now move on to discuss the recent opinion by Advocate General Rantos in [Superleague](#).

The facts leading to *Superleague* are clear and widely known. A number of high-ranking football clubs sought to create their own league, the Superleague. This would allow these founding clubs to organize an extra football competition involving them and a limited number of other clubs. The Superleague initiative met with broad opposition ranging from fans, politicians, other football clubs and, notably, UEFA and FIFA. This resulted in the failure of the project that, however, did not stop the Madrid Commercial Court from making a very interesting [preliminary reference](#) to the Court.

This reference resulted from a challenge to the UEFA and FIFA rules by ESL, the company behind the Superleague, on the basis of EU competition law and the free movement provisions. These UEFA and FIFA rules essentially provided these associations with a right of prior approval on the participation in another competition by any of the clubs affiliated to any of the national organisations that are part of FIFA and UEFA. This provides UEFA and FIFA with the power to block clubs from partaking in other football competitions like

Superleague. The Advocate-General characterizes the rules as non-competition and exclusivity clauses backed by a sanctioning mechanism (para. 64). That this may be at odds with the EU's competition regime as well as the free movement provisions will not come as a surprise to the aficionados of EU law.

A case steeped in history

The Advocate-General starts his opinion with the ominous opening words from the opinion in [Bosman](#). Ominous words that set the scene for this opinion and – more importantly – the foundational nature of the problem at stake in this case: who sets the rules of the game? It is obvious that the rules are initially set by the sports associations. Whether they concern [transfers](#), the prevention of [doping](#), [selection procedures](#) or [mandatory arbitration of decisions](#), national and international sporting associations set the rules. In doing so, these associations may have various motives and objectives that may or may not coincide with those of all the clubs and athletes. This in turn raises the question whether and to what extent such self-organisation by these associations or sports governing bodies is subject to review.

Bosman (or perhaps even [Walrave & Koch](#)) and the many cases that followed clearly show that the rules are set by the associations, but subject to review on the basis of EU law. The scope and intensity of this review has been the subject of considerable discussion and Rantos' opinion cannot avoid devoting a few words to the so-called 'sporting exception' that was developed in the case law for purely sporting rules that are unconnected to any economic activity (paras. 172, 173). The bottom line of that exception is that it is strictly limited and provides no universal bright line to limit the review of the self-regulation by sports governing bodies.

It does provide a general framework within which the specificity of sports can be taken into account. This specific nature of sports has everything to do with the fact that a sporting competition, contrary to economic competition, must not result in a single athlete or team remaining in the market. The Champions League would be (even) less fun to watch if the sporting success of – say – Real Madrid would result in even more (sponsorship, broadcasting rights and ticket sales) income for that team, allowing it to buy even more

talented players and thus even further reducing the chances of success for the other teams. Sporting competitions, in a nutshell, cannot afford to allow the seasonal monopoly on holding the winner's cup to turn into hegemony. The short explanation of the mechanism at stake here shows that sports and economics are fundamentally intertwined. Add to that the considerable social impact of sports competitions and the importance of sports for well-being, and we have all the ingredients for a high-profile case.

The specific nature of sports and the European Sports Model

The specific nature of sports can be gleaned from the fact that no less than 21 governments chose to present an oral argument (after 16 states participated in the written procedure). As far as I could tell, no other competition case has attracted a similar level of governmental attention. This level of attention can also be seen in the introduction of [Article 165 TFEU](#) by the Treaty of Lisbon. Seemingly innocuous, this provision appears to play a key role in Rantos' opinion.

It does so as the 'constitutional' foundation for the European Sports Model (ESM of model; para. 30). This model consists of a pyramid structure that has a broad basis in amateur sports and professional sports at the very tip. Furthermore, the model rests on open competitions in which anyone can compete based on athletic merit and a competitive balance is maintained. Finally, the model envisages financial solidarity which transfers income from the pyramid's tip to the clubs at the basis. ESL may as well stop reading here, as its business model is a challenge to the very first element of the ESM: the pyramid structure and its necessary corollary 'the one-place-principle' according to which there can be only one institution to organize the competitions for each jurisdiction (para. 31). Surely the competition and free movement provisions in the TFEU cannot challenge a constitutionally enshrined ESM?

The ESM in competition law

Rantos continues his opinion with an analysis of the competition law that applies to institutions, like the sports governing bodies, that possess regulatory powers and are engaged in an economic activity. Such situations, as cases like [MOTOE](#) (and outside the sports context, [GB-Inno-BM](#)) show, can easily lead to the exercise of the regulatory power

in the economic interests of the institution. This, according to Rantos, means that the 'main obligation of a sports federation in UEFA's position is to ensure that third parties are not unduly denied access to the market to the point that competition on that market is thereby distorted' (para. 48, 130). 'Unduly' being the magic word here. To cut a long story short: someone, like ESL, trying to challenge the ESM is *duly* denied access to the market by a sporting association. Only competitions that comply with the ESM are worthy of market access protected by competition law.

Under the heading of the effects-analysis and ancillary restraints as part of Article 101 and the objective justification in the 102-framework, the Opinion finds the UEFA and FIFA rules both legitimate and proportionate. The legitimacy follows from the observation that 'it cannot be disputed that most of the objectives invoked by UEFA and FIFA stem from the 'European Sports Model''(para. 93). The proportionality and inherence of the restriction of competition are allowed more words. In this regard the Advocate-General distinguishes between the impact of the rules on clubs and players. As the latter were not involved in the creation of the Superleague, imposing sanctions on the players seems disproportionate (para. 121).

The reasoning in relation to the proportionality of the UEFA and FIFA rules *vis a vis* the clubs is more elaborate and builds on the explanation of the specific nature of sports set out above. A competing competition alongside those organized by UEFA and FIFA would have a negative impact on the latter as national competitions would no longer be the only determinant for participation in high-level European competitions (para. 102) as the founding clubs would have a guaranteed place in the Superleague. This in turn could allow these clubs to obtain additional income which would increase the disparities between the clubs (para. 102, 103). Interestingly, nearly all member states argued that the participation of clubs from only three countries was insufficient to make it 'European' (para. 104). Finally, the Advocate General treads carefully where the solidarity and economic aspects are involved (para. 104, 105).

The sacrosanct ESM

As much as I dislike it, I guess lots of people like football, or rather the way it is currently organized (which is largely why I dislike it). The opinion (and the nearly unanimous interventions by the member states) is essentially about protecting this status quo and does so on the basis of the ESM.

Now it could be me, but I do have considerable difficulty in following the Advocate-General when it comes to the “constitutional’ recognition’ of this model. Article 165 TFEU builds upon Article 6 TFEU that provides the EU the ability to support, coordinate or supplement the actions of the member states in the field of sports. This is no EU competence as such so I fail to see how this can be construed into a basis for the creation of a European model that becomes the one defining model for the continent. Moving beyond such institutional niceties, I further fail to see how ‘taking into account the specific nature of sport, its structures based on voluntary activity and its social and educational function’ invariably leads to something as specific as the ESM with its pyramid structure and the one-place-principle that are at the root of this dispute.

Moving even further beyond that, there are good reasons for doubting whether the pyramid structure actually exists, other than in accumulation of very considerable funds at the tip of the pyramid. From what I could gather, 4% of the gross revenues of the European competitions are awarded to non-participating clubs in the [22/23 season](#). That doesn’t strike me as a particularly overwhelming degree of solidarity in supporting the broad basis of the pyramid. Furthermore, the literature and Commission appear increasingly skeptical as regards the very assumption that solidarity even is beneficial in the first place ([Budzinski \(2011\)](#), p. 19). There are, as far as I’m concerned, some reasons to question the unassailability of the ESM.

The L- and P-words

When reading the opinion, I repeatedly found myself pondering a myriad of questions. It is a very timely and topical document, not so much for its outcome or actual text, but rather for the reflection that it inspires. Two of these, interconnected, reflections concern liberalization and platforms, but since these are not mentioned in the opinion, I shall refer to them as the L-word and the P-word.

Let's start with the P-word. It is obvious that UEFA and FIFA provide a multi-sided platform that connects clubs, players, sponsors, audiences and broadcasters in a way that results in very significant positive network externalities. UEFA and FIFA are most likely dominant platforms. Connecting this insight to some of Rantos' observations leads to interesting findings. One of them popped up when reading the need for FIFA and UEFA's rules to be applied in a non-discriminatory manner (paras. 72, 73, 134). In light of the judgment in [Google Shopping](#), this raises the question whether FIFA and UEFA actions aren't self-preferencing on steroids? The General Court's judgment turns largely on how Google's simultaneous demotion of other shopping services and promotion of its own services is hard to reconcile with Google's vocation as a universal search engine (paras. 176 – 179) and thus amounts to discrimination (para. 237 – 244). The difference between the platform provided by UEFA and FIFA on the one hand and that offered by Google is of course that the former doesn't have any open and universal vocation. UEFA and FIFA want to be the single pinnacle of that pyramid, which puts them in the closed category that the General Court distinguishes in para. 177 of *Google Shopping*.

That is the category to which the [Bronner](#) standard applies. Again, most of us are familiar with the high threshold laid down in that judgment and this allows the Advocate-General to make short shrift of ESL's case. He simply states that there is 'no legal obstacle' to keep the clubs in ESL from creating their own competition outside UEFA's and FIFA's ecosystem (para. 175, 140). True as that may be, it fails to acknowledge that there are obvious *economic obstacles* to this. I'm no sports economist, but I would think it a fair assumption that opting out of UEFA and FIFA altogether is a very risky if not economically impossible option. I've come across sums of around € 100 million for winning the champions league and € 15 million for entering the group phase. But that is just the clubs: the rules also mean that players opting out of FIFA and UEFA do so categorically. This makes it impossible for the players in a Superleague to take part in any UEFA and FIFA-organised competition. This will, needless to say, greatly impact their value and thus willingness to provide their services to a club that wishes to join the Superleague (para. 83).

This brings us to the L-word. Reading about the Superleague trying to secure 'dual membership' (para 76, 106 and 143) I also came across a characterization of these actions

as 'free riding'. The fact that the first such reference is in paragraph 106 cannot be a coincidence as free riding, cherry picking or cream skimming have featured prominently in the case law pertaining to Article 106 TFEU. This provision is all about liberalization and that is essentially what connects [Paul Corbeau](#) to the ESL. Both tried for dual membership and potentially took a free ride on the incumbent system. Looking through the lens of Article 106(2) TFEU, the Court found that the incumbent system could be protected insofar as this was required to ensure the service of general economic interest. We all know how this triggered the liberalisation of the postal services and telecommunications sector, as it became increasingly clear that a monopoly wasn't needed to ensure that everyone gets their post on time irrespective of where they live. I'm honestly wondering whether we need a monopoly on the organisation of high-level sports matches to enable amateurs and semi-pros to play their game and millions of fans to enjoy that game. But I guess someone likes football, or rather the way it is currently organised.