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# The Idea of Europe in Football

Floris de Witte and Jan Zgliniski\*

**Abstract:** The article explores the Europeanisation of football, focusing on two dimensions of this process: its affective and regulatory dimension. Developments such as the creation of pan-European club competitions and growing cross-border movement of players mean that ‘Europe’ plays an ever more important role in football on an affective level. The same is true on a regulatory level, where EU law and policy have come to impact various aspects of football, ranging from transfer rules, to club financing, to the sale of broadcasting rights. We argue that only by examining the interaction between these two dimensions can we truly understand what is ‘European’ about football. The article shows that there continues to be strong support in football for the cultural elements of the European Sport Model, including a commitment to local identity, sporting merit and solidarity. By contrast, its governance aspects are increasingly coming under pressure, as the recent European Super League saga illustrates. Our findings suggest that the EU can – and should – do more to improve regulatory standards in football and push for a greater representation of fans and other stakeholders that have currently no, or limited, voice in the football pyramid.

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## 1. INTRODUCTION

When in April 2021 twelve football clubs announced that they would form their own league – the European Super League (ESL) – in which they could compete regardless of their performances in national football competitions, the world of football shook. It didn't shake for long: within 48 hours, under a barrage of pressure from political actors, football federations and fans, the majority of clubs backed out, making the ESL in its current form unachievable. Those 48 hours were, however, informative for EU scholars. On the one hand, both proponents and detractors of the ESL were quick to highlight that their position was legally sound, with explicit references to European free movement and competition rules, demonstrating that EU law is heavily implicated in the format and future of elite football in Europe. On the other hand, many of the parties involved in the discussion made assertions about what defines 'European' football, revealing a cultural dimension to sports in Europe that is not often voiced or understood within the legal context. In this contribution, we aim to unpack what emerges where these two sides meet. After a brief introduction to the ESL project and its demise (section 2), we will explore two dimensions to the interaction between the EU and football: the affective and regulatory dimension. Only by examining the relationship and connections between them can we truly understand what is 'European' about football.

Football and Europe have, in fact, a long history. A well-entrenched process of Europeanisation of football has been highlighted in the literature, focusing primarily on the creation of pan-European club competitions and increased cross-border mobility of players. If these developments were originally seen as a threat to established culture and tradition in football, today they are not. Competing 'in Europe' is seen as the pinnacle of footballing success, associated with almost romantic notions of sporting heritage, conquest and exoticism, while virtually every club in Europe has star players, managers and fan idols of other, often European, nationalities. The Europeanisation of football can be understood as an example of the ability of EU law to 'localise' and 'encode' Europe. This process, wherein local claims of identity and heritage become intermixed with European elements, serves to stabilise change and mediate between claims wherein 'the past' plays an important affective and symbolic role. Crucially, its legitimacy depends on the gradual nature of the transformation and on participation by those most affected by it (section 3).

The *Bosman* ruling is probably the best-known example of the way in which EU law constrains the autonomy of football in Europe. Ever since, the European football federation UEFA has worked in cooperation with the EU to regulate football in ways that are compliant with European law, albeit often seeking exceptions of the demands of the internal market to accommodate the special nature of the sport. In what has become a vast body of case law and policy measures, both the Court of Justice of the European Union (CJEU) and the Commission have – implicitly or explicitly – infused certain substantive values into the world of football (or, at times, failed to do so), which reveal the way in which the Union conceives of the sport. Some of these, such as the social function of football, its merit-based structure and its integrity, are firmly anchored in EU law, whereas others, such as rules concerning governance, have a more ambiguous standing (section 4).

The assertion that there is a ‘European’ model of sport, typically understood in opposition to the American model, is one that is widely held. The EU institutions, politicians of all sides and the sporting federations themselves have been keen to emphasise its importance. But to what extent does it still capture what is happening in the world of football? And how, in legal terms, can it be protected and enforced? In this article, we will argue that a difference must be drawn between the model’s cultural and governance aspects. The former – as notably manifested in the recognition of the sport’s local embeddedness and the protection of sporting merit and solidarity – continue to be prominent features of both the affective and regulatory dimension of football. They are strongly anchored in a feedback loop between the claims made by football stakeholders and actions taken by regulators. That positive dynamic is no longer present when it comes to governance aspects. The traditional pyramid structure in which football is organised has been challenged by a number of actors. The ensuing tension created by the mismatch between the affective experience of football and its legal regulation was central to the ESL saga. It also, however, creates space for a renegotiation of the different actors that *should* be represented in football governance, and the legal regulation that can aid in this process of transformation (section 5). It remains to be seen whether the EU legislature and CJEU can contribute to that process by committing to these concepts to a greater extent.

## 2. FOOTBALL IN EUROPE AND THE EUROPEAN SUPER LEAGUE

The organisation of football in Europe has remained remarkably stable over the last 70 years. It is based on a pyramid-shaped structure in which we find, going from bottom to top, local grassroots football and clubs; semi-professional to elite-level football organised by national football associations and leagues; UEFA as the European continental federation and, finally, FIFA as the global football federation. There is a hierarchical relationship between the different tiers, in particular in relation to setting the rules of the game, the calendar and institutional structures but, in principle, each level has the monopoly to organise and commercially exploit football matches within their scope of competence. The Italian national football competitions, for example, are run by the Italian football federation, just as the European Champions League falls within the jurisdiction of UEFA and the World Cup in that of FIFA.

Within domestic competitions in Europe, three principles are key. First, the different levels of the domestic game are connected to each other through the logic of promotion and relegation, meaning that the teams performing worst in a given league will have to compete one tier lower in the subsequent year, and the other way around. Second, a level of financial redistribution is built into the competition both between clubs participating in the same competition and between the higher and lower tiers of the football pyramid; this is to prevent stratification and enhance competition. Third, the teams that finish in the top positions of the domestic league qualify for European football, in which the best teams of each of the associated national leagues compete against each other. The number of places available for European football varies from one national league to another, depending on

the performances of the clubs from those leagues in European competitions in the previous years. European football itself, is, once again, hierarchically organised, with the UEFA Champions League being the top tier for which only the best teams qualify, followed by the Europa League and the Conference League. These tournaments, organised by UEFA, are highly lucrative for the participating clubs and UEFA alike, with the revenue for the Champions League topping €3 billion, of which just short of €2 billion is shared between the participating clubs.

The establishment of the ESL in April 2021 upset this logic in a number of ways. Its most immediate target of the ESL was UEFA's monopoly on the organisation of matches between clubs from different European federations. The objective of the Super League was to create a stand-alone competition, organised and commercially exploited by the clubs themselves, in which twenty clubs would compete. This competition would run alongside national competitions, which the ESL clubs would continue to be part of. Their participation in the Super League meant that they would withdraw from the Champions League and other matches organised by UEFA. The ESL would operate as a semi-closed shop: the participation of fifteen clubs (including the founders, known as the 'dirty dozen') would be guaranteed, in so far as they could not 'relegate', while the remaining five spots could be earned by other clubs through their performances in national leagues.<sup>1</sup> The twelve clubs involved – Manchester United Liverpool, Chelsea, Arsenal and Tottenham Hotspur; Real Madrid, Barcelona and Atletico Madrid; Juventus, AC Milan and Inter Milan – include some of the most celebrated and successful clubs in Europe but are, under no possible reading, the best twelve clubs in Europe, either currently or historically. For example, the two finalists of the Champions League of the preceding year were not part of the ESL (Bayern Munich and Paris Saint-Germain); nor were clubs such as Ajax Amsterdam, Benfica or Porto, which have won the Champions League or its previous incarnation eight times between them, something that some clubs included in the ESL such as Manchester City, Arsenal and Tottenham have not managed to do even once.

The goal of the ESL founders is not particularly difficult to discern, even if they tried to market it as a win for all football fans: it was about money. Partially this comes from a dissatisfaction with the revenues generated by the Champions League and distributed by UEFA; partially from the need to cover their immense debt generated by poor management and the COVID-crisis; and partially from the desire to hedge against relegation out of the elite level of European football and the concomitant loss of revenue. The ESL had been underwritten by JP Morgan for a period of 23 years, and the money involved was eye-watering, even compared to the current, already high standards: all participating clubs would receive a signing-on bonus of €233 million each, *double* the amount currently reserved for the winner of the Champions League.

In hindsight, it seems incredibly short-sighted of the twelve clubs involved to think they would 'get away with it' (although, as we will see, in purely legal terms, their position is not as weak). The founders of the ESL attempted to buy the consent of other stakeholders in football in various ways, for example by pledging solidarity payments to the football pyramid to the tune of €10 billion, reaffirming their commitment to continue

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<sup>1</sup> See information on the ESL's website, available at [https://thesuperleague.com/#who\\_we\\_are](https://thesuperleague.com/#who_we_are).

to compete in national leagues, and promising year-round elite football for consumers (something not necessarily guaranteed in the current format of the Champions League, in which a number of smaller clubs compete from less strong federations). However, the effect of the creation of a Super League on national leagues and European competitions would clearly have been devastating. On the national level, it would irreversibly affect the competitive balance, with ESL clubs each earning hundreds of millions more on a yearly basis than their domestic competitors, and, in addition, lower the income from the sale of domestic broadcasting rights. On the European level, it would deprive competitions from some of their most successful teams, and affect the public interest as well as revenue generation.

The reaction of the world of football was furious. Within two days, under pressure from all sides, nine of the twelve clubs had withdrawn from the ESL, while – as things stand today – Real Madrid, Barcelona and Juventus have remained involved. The criticism of the founding clubs came from different sources. On the more formal end of the spectrum, there was the threat of UEFA and national federations to exclude ESL clubs and their players from participation in competitions organised under their auspices.<sup>2</sup> On the more emotional end of the scale, the anger of fans (and many players) focused on their lack of representation, the hollowing out of national competitions, the break with the principle of sporting merit (in ditching relegation-promotion and qualification rules), and, more generally, on decisions being taken on the basis of profit rather than the interests of the fans.<sup>3</sup> After the majority of clubs had backed off, both UEFA and national federations quickly attempted to ensure that the possibility of a future ESL-type competition was limited. As such, new rules in the Italian football association lay down that any club participating in competitions not sanctioned by UEFA will automatically be excluded from the Italian league,<sup>4</sup> while the English Premier League threatens new attempts to do so with a financial penalty of £25 million and a 30-point deduction.<sup>5</sup> Despite ongoing attempts by Real Madrid, Barcelona and Juventus to keep the ESL project alive, it is clear that it will not proceed in its current guise, even if their ongoing legal challenges can be perceived as laying the groundwork for the next attempt.<sup>6</sup>

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<sup>2</sup> Statement by UEFA, the English Football Association, the Premier League, the Royal Spanish Football Federation (RFEF), LaLiga, the Italian Football Federation (FIGC) and Lega Serie A, available at <https://www.uefa.com/insideuefa/news/0268-12121411400e-7897186e699a-1000--statement-by-uefa-the-english-football-association-the-premier-/>.

<sup>3</sup> See for an overview of fans' reactions: <https://www.theguardian.com/football/2021/apr/20/european-super-league-blatantly-cold-cynical-fans-europe>.

<sup>4</sup> See <https://theathletic.com/news/serie-a-ban-super-league/gQJaniWHQrlQ>.

<sup>5</sup> See <https://www.theguardian.com/football/2021/jun/09/six-english-esl-breakaway-clubs-agree-to-pay-20m-to-grassroots-causes>.

<sup>6</sup> Case C-333/21 *European Superleague Company*. See also the proceedings before the Juzgado de lo Mercantil No 17 de Madrid, Order 20 April 2021; Order 17 May 2021.

### 3. THE EXPERIENCE OF EUROPE IN FOOTBALL

This section describes the process of ‘Europeanisation’ of football, that is, the way in which the world of football has internalised the different ways in which Europe manifests itself.<sup>7</sup> It focuses on the experience of actors in the world of football, and primarily on the fans. This more sociological approach to the way in which European integration and EU law proceed is getting traction in legal studies as a way to understand the resistance to, and instantiations of, the process of integration as implicit in rather than in isolation from EU law. The two most important ways in which the Europeanisation of football has occurred is through the creation of trans-national club competitions and by the increase in player mobility across borders. While both developments were initially regarded with scepticism by fans, today they have become internalised and are largely seen as positive and constitutive parts of the game. Conceptually, the process of Europeanisation can best be approached by taking account of both its spatial and temporal properties. This is particularly so given that references to ‘the past’ and ‘the local’ are often used as bulwarks against proposed changes in the structure of football in Europe. A number of insights follow from the use of this conceptual lens, suggesting that the legitimacy of the process of Europeanisation depends, in its substance, on very specific interactions between the local and the European, and, as a process, on the participation of a wide variety of actors.

#### A) THE EUROPEANISATION OF FOOTBALL

The process of Europeanisation of football, wherein ‘European’ elements have been introduced and internalised in the national structure of football, has been traced by an extensive literature, usually highlighting three dimensions.<sup>8</sup> A first is the explosion in consumption of media and football matches across Europe. While we type this, we could watch the match between Suduva and Zalgiris Vilnius in the Lithuanian league with a few clicks on our computers. In particular, the biggest leagues, such as the English Premier League, the Spanish *Primera Division*, the Italian *Serie A* and the German *Bundesliga*, are watched by millions of people across Europe and, indeed, the world. The final stages of the Champions League annually rank as the highest-watched televised events in every single Member State.<sup>9</sup> This means that fans, in particular those from the younger generations, no longer need to live ‘locally’ in order to follow and support a club and be engaged in fandom. As has become clear from research, fandom increasingly also manifests itself through online forums, through YouTube channels, through fan groups of, say, FC Barcelona, coming together every week in Brussels to watch matches in local

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<sup>7</sup> We will focus primarily on the developments related to the EU, as it has been the primary regulator in this field and its Member States constitute the most important footballing nations in Europe (with the exception of the UK, which has recently left the EU).

<sup>8</sup> R. Weber, ‘Banal Europeanism? Europeanisation of football and the enhabitation of a Europeanised football fandom’ (2021) 24 *Sport in Society* 1839; A. Niemann, B. Garcia, W. Grant (eds.), ‘The Transformation of European Football: Towards the Europeanisation of the National Game’ (Manchester University Press 2011). See, more generally, the ongoing research project EUFoot: <https://eufoot.github.io/>.

<sup>9</sup> A. Niemann & A. Brand, ‘The UEFA Champions League: A Political Myth?’ (2020) 21 *Soccer & Society* 329.

bars, and so on.<sup>10</sup> In a way, Europeanisation disconnects football fandom from the physical *locality* of where the football club is based, even if research suggests that even ‘remote’ fans have strong affective ties to the *local* context of a club, cultivated through narratives of collective identity and the mystique associated with occasional visits to the stadium.<sup>11</sup>

The same dynamics are also visible in the second aspect of Europeanisation: the creation of trans-European club competitions. Originally conceived in 1955, today three such competitions exist: the UEFA Champions League, Europa League and Conference League. The best-placed teams from national competitions qualify for these leagues, wherein teams compete (alongside playing in national leagues) with teams across Europe. Just to give a sense of what this means, in the 2021-22 season that included, in the group stages, matches such as Sporting Lisbon – Ajax Amsterdam, Legia Warszawa – Napoli, and FC København – PAOK Saloniki. The creation of such European competitions exposes fans to even more ‘Europe’: whether in travelling to other countries to support their teams, in seeing other European teams against which their favourite teams play, or in following these high-profile competitions on TV and in the media.<sup>12</sup> These matches in European club competitions are rich in symbolism as well, ranging from anthems to flags and specific sponsorship deals.<sup>13</sup> Even if only a country’s best teams qualify for European football, fans from other teams do not understand European football as a competition limited to the clubs competing in them, but as a competition for clubs *representing their countries*, which also implicates fans of non-competing clubs.<sup>14</sup> In the meantime, being successful ‘in Europe’, as a club, has become more prestigious (as well as lucrative and difficult) than being successful ‘at home’.<sup>15</sup> Europe, then, in the mind of the football fan, has come to signify elements of exoticism, conquest and prestige, adding an additional layer of competition and fandom to the one on the national level.

A third process of Europeanisation of football, more directly related to its legal regulation, is the increase in mobility of football players. Until the 1995 *Bosman* ruling of

<sup>10</sup> P. Milward, ‘The Global Football League: Transnational Networks, Social Movements and Sport in the New Media Age’ (Palgrave 2011).

<sup>11</sup> J. Woods & J. Ludvigsen, ‘The Changing Faces of Fandom? Exploring emerging ‘online’ and ‘offline’ fandom spaces in the English Premier League’ (2021) 24 *Sport in Society* (forthcoming); R. Petersen-Wagner, ‘Between Old and New Traditions: Transnational Solidarities and the Love for Liverpool FC’, in: S. Lawrence & G. Crawford (eds), ‘Digital Football Cultures’ (Routledge, 2019).

<sup>12</sup> The final stages of the ECL have been called ‘fireplace moments’, wherein fans across Europe – regardless of the club they support – watch the match: A. Niemann & A. Brand, ‘The UEFA Champions League: A Political Myth?’ (2020) 21 *Soccer & Society* 329. See also UEFA proposal to pull the semi-finals and final of the Champions League together in a ‘Super Bowl Week’ type of event:

<https://www.nytimes.com/2021/05/27/sports/soccer/champions-league-final-uefa.html>

<sup>13</sup> J. Fox & C. Miller-Idriss, ‘Everyday Nationhood’ (2008) 8 *Ethnicities* 536; R. Weber, ‘Banal Europeanism? Europeanisation of football and the enhabitation of a Europeanised football fandom’ (2021) 24 *Sport in Society* 1846; A. King, ‘The New Symbols of European Football’ (2004) 39 *International Review for the Sociology of Sports* 323.

<sup>14</sup> A. Brand, A. Niemann & G. Spitaler, ‘The Two-Track Europeanization of Football: EU-level pressures, transnational dynamics and their repercussions within different national contexts’ (2013) 5 *International Journal of Sport Policy and Politics* 105.

<sup>15</sup> European football has been termed the ‘gold standard’ (R. Weber, ‘Banal Europeanism? Europeanisation of football and the enhabitation of a Europeanised football fandom’ (2021) 24 *Sport in Society* 1839), and a ‘myth’ (A. Niemann & A. Brand, ‘The UEFA Champions League: A Political Myth?’ (2020) 21 *Soccer & Society* 329). For fan perception see, for example, P. Millward, ‘We’ve all got the bug for Euro-Aways’. What Fans Say about European Football Club Competitions’ (2006) 41 *International Review for the Sociology of Sports* 379.



the CJEU (which will be discussed in greater detail below),<sup>16</sup> UEFA restricted the number of non-national players within a team and imposed transfer fee requirements even for out-of-contract players.<sup>17</sup> The Court's decision to overturn these rules dramatically sped up the mobility of football players throughout the EU, so much so that a few years after the ruling many teams were composed mainly of European non-nationals. In 1999, Chelsea, a team based in London, started a match without a single English player (instead relying on Dutch, Spanish, French, Romanians, Italian and Norwegian players).<sup>18</sup> At the start of the 2020-21 season, of the 220 players starting in the first match rounds in the Premier League, 76 were English (a proportion of 35%). In Italy, this proportion was 37% (82 Italians out of 220). At the European Championship held in 2021, only 37% of players selected represented clubs from their domestic leagues.<sup>19</sup> This reality, that the majority of players in any given team tend to be non-nationals, has evidently had an impact on the fans' frame of reference and identification with things European. As research suggests, the changes in the composition of clubs in terms of nationality have had little or no effect on the fans' identification with the players.<sup>20</sup> What appears to matter is the quality and loyalty of the player, not their nationality. As such, central figures in fans' identification with a club, such as the manager, captain and top goal scorers have increasingly carried a nationality different from the team for which they play. More than that, an element of 'cognitive migration' has emerged, wherein the mere possibility of a club signing players from other nationalities or other leagues makes fans take notice of such transnational elements.<sup>21</sup> This way of encountering 'the other' has done much to infuse local identity and culture with a European flavour.

The three-fold Europeanisation of football can best be understood as a process of change and rescaling. It bears emphasising that this change is not always frictionless. Many of the developments discussed above, such as the creation of European club competitions and the *Bosman* ruling, have initially been heavily contested by fans and criticised as breaking with established tradition and endangering the very nature of football.<sup>22</sup> The process of Europeanisation, moreover, has contributed to a number of *substantive* changes to football, such as changes in the composition of the fan base, with both class and nationality components becoming visible;<sup>23</sup> a significant increase in commercialisation of

<sup>16</sup> Case C-415/93, *Bosman* ECLI:EU:C:1995:463.

<sup>17</sup> There is nevertheless a rich history of player migration before 1996 – see P. Lanfranchi & M. Taylor, 'Moving with the Ball: The Migration of Professional Footballers' (Berg 2001).

<sup>18</sup> Southampton v Chelsea 1-2 on 26<sup>th</sup> December 1999.

<sup>19</sup> 222 out of 598 (authors' research).

<sup>20</sup> D. Ranc, 'Foreign Players and Football Supporters: the Old Firm, Arsenal, Paris-Saint Germain' (Manchester University Press 2012), 88. See for the numbers B. Frick, 'Globalization and Factor Mobility: The Impact of the 'Bosman ruling' on Player Migration in Professional Soccer' (2009) 10 *Journal of Sports Economics* 88.

<sup>21</sup> T. Velema, 'A Game of Snakes and Ladders: Player Migration Trajectories in the Global Football Labor Market' (2018) 53 *International Review for the Sociology of Sports* 706; R. Weber, 'Banal Europeanism? Europeanisation of football and the enhabitation of a Europeanised football fandom' (2021) 24 *Sport in Society* 1839; and on cognitive migration S. Koikkalainen & D. Kyle, 'Imagining Mobility: The Prospective Cognition Question In Migration Research' (2015) 42 *Journal of Ethnic and Migration Studies* 759.

<sup>22</sup> This anxiety was already anticipated in research focusing on fans of Liverpool FC. See P. Millward, 'We've all got the bug for Euro-Aways'. What Fans Say about European Football Club Competitions' (2006) 41 *International Review for the Sociology of Sports* 386.

<sup>23</sup> L. Davis, 'Football Fandom and Authenticity: a critical discussion of historical and contemporary perspectives' (2015) 16 *Soccer & Society* 422.

both domestic and European football;<sup>24</sup> and a decrease in the number of teams that are sufficiently successful to be able to compete in European competitions on a regular basis.<sup>25</sup> It is difficult, however, in analysing these developments, to disentangle the causal effect of Europeanisation from other exogenous pressures on the world of football, such as globalisation, technological innovations and the commodification of sport in general. The pushback against the latest and most aggressive form of Europeanisation, the European Super League, is illustrative in this context. The main rhetorical elements here concentrated on, on the one hand, the fans' spiritual ownership of the club ('the club belongs to the fans', 'owners are but temporary custodians of our heritage') and, on the other hand, references to football tradition, authenticity and the centrality of competition in the rejection of a semi-closed league. However, few fans, if any, took issue with the fact that this was a *European* Super League. Somehow, the reference to 'Europe' has become dramatically less contentious in football, even at times where contestation of the EU as such has reached a high mark.

It is worth exploring, then, how this process of adaptation and Europeanisation has taken place. But how can we conceptually make sense of it? In this section, we propose two starting points to understand the changes which the Europeanisation of football has brought. The first is in focusing on the *spatial* changes: how local or national identities have dealt with the increase in *European* elements in football. The second lies in focusing on *temporal* dynamics, and in particular on the way in which claims of 'the past' are employed to negotiate changes in football due to Europeanisation.

## B) LOCAL, NATIONAL AND EUROPEAN DYNAMICS

If we analyse the Europeanisation of football from a spatial perspective, we can understand it as a process of change wherein local symbols of affect and identity are imbued with a European element. The work of scholars such as Kathleen McNamara, who have focused on how everyday, often subconscious, interactions of citizens with 'Europe' affect their understanding of themselves, their life-world and their relationship with the EU, is an interesting starting point.<sup>26</sup> This work emphasises a number of technologies through which this process occurs, which include 'localisation' and 'encoding', and which lead to rescaling of citizens' frames of reference and their imagined communities of belonging.<sup>27</sup> Localisation takes place by imbuing national (or local) symbols and practices with a European context, so that Europe becomes deeply enmeshed with these powerful emblems of local authority. A football club's character, deeply rooted in a local context full of history and folklore, deeply wedded to a specific geographical space, becomes, as such, imbued with European elements when their striker is Austrian, their captain Greek and their manager Portuguese. This process of localisation, in other words, focuses on

<sup>24</sup> A. King, 'The New Symbols of European Football' (2004) 39 *International Review for the Sociology of Sports* 323; A. Niemann & A. Brand, 'The UEFA Champions League: A Political Myth?' (2020) 21 *Soccer & Society* 336.

<sup>25</sup> T. Peeters: Broadcasting Rights and Competitive Balance in European Soccer (2009) Working Paper 9/2009, University of Antwerp Faculty of Business and Economics.

<sup>26</sup> K. McNamara, 'The Politics of Everyday Europe' (OUP 2015); M. Billig, 'Banal Nationalism' (Sage 1995).

<sup>27</sup> R. Weber, A. Brand, A. Niemann & F. Koch, 'Non-Elite Conceptions of Europe: Europe as a Frame of Reference in English Football Fan Discussions' (2020) 16 *Journal of Contemporary European Research* 301.

*contextualising* rather than *challenging* pre-existing identities, symbols, points of reference and practices. It makes the ‘Europeanness’ of daily life almost invisible: we relate to these powerful symbols of authority without appreciating the nuanced changes to their context. This type of ‘enhabitation’ or ‘acting out’ of Europe solidifies its authority.<sup>28</sup>

The process of ‘encoding’, on the other hand, suggests that non-elite perceptions of Europe are generated as a side-product of how citizens live in and view the world. This form of Europeanisation suggests that as our interactions with ‘things European’ – whether a holiday abroad, a meeting with a Polish person in a supermarket in Madrid or, indeed, the signing of a new Hungarian midfielder by your local football team in Copenhagen – become more important once we embed them in the way we narrate our lives; from the most banal narrations and memories and jokes to the most formative of experiences.<sup>29</sup> In this way, European aspects of daily life become more central to people’s self-identification, their way of looking at the world and making sense of it, which becomes particularly powerful when these become part of *shared* narratives within specific sub-cultures or demographics<sup>30</sup> – something common in football, whether centering on a famous European away match, a useless but charismatic Dutch midfielder or the glorious stint of an Italian manager in the 1980s.

What these processes of localisation and encoding do is to change the way in which citizens think, by subtly altering their frames of reference and imagined communities of belonging from ones that are predominantly national (or, in football, more often than not, local) to include European elements. The idea, in short, is that everyday interactions with ‘things European’, on the one hand, create a type of social legitimacy or authority for the EU and, on the other hand, offer a framework for understanding the process of rescaling and the subjects’ role in it. For the purposes of this paper, we are most interested in the latter, even if research suggests that the former also takes place in football: the exposure to ‘things European’ does enhance a diffuse, or banal, sense of European identity.<sup>31</sup> How can we trace the process of Europeanisation in football, then? How is it possible that, despite the initial grumblings of fans, both the European club competitions and the high player mobility within the EU are largely seen as positive developments? How do the processes of localisation and encoding stabilise processes of change and rescaling in football?

Approached from the spatial perspective, one insight stands out in the literature on the effect of *Bosman* and the establishment of European club competitions. The relative success of both can be explained by the fact that both are celebrations of and not challenges to the deeply rooted *local* character of football. This comes through in three ways. The first is in the way in which Europe has become part of a club’s and their fans’ identity. This takes place by encoding success (or even mere hope of participation) in

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<sup>28</sup> R. Weber, ‘Banal Europeanism? Europeanisation of football and the enhabitation of a Europeanised football fandom’ (2021) 24 *Sport in Society* 2; M. Billig, ‘Banal Nationalism’ (Sage 1995) 42.

<sup>29</sup> R. Weber, A. Brand, A. Niemann & F. Koch, ‘Non-Elite Conceptions of Europe: Europe as a Frame of Reference in English Football Fan Discussions’ (2020) 16 *Journal of Contemporary European Research* 301-2.

<sup>30</sup> An obvious example is the Erasmus programme or Interrail project, wherein specific rituals, customs and narrations are shared between students regardless of the differences in the location and year of the exchange.

<sup>31</sup> R. Weber, ‘Banal Europeanism? Europeanisation of football and the enhabitation of a Europeanised football fandom’ (2021) 24 *Sport in Society* 1841.

European club competitions in heritage stories,<sup>32</sup> by the exoticism connected with fans' travel to European matches across the continent<sup>33</sup> and by the diverse nationalities of players who have become fans' favourites or have played a crucial role in the club's recent history and successes.<sup>34</sup> All these processes imbue the identity of a club – often rooted in a local, regional or national context – with European elements without threatening the former.<sup>35</sup> They serve as a way to renegotiate identities in the context of Europeanisation, and how the 'other' relates to what is 'self' or 'local'.<sup>36</sup> More than that, 'Europe' comes with a type of reflexive quality, wherein the 'local' is projected *outwards* to the rest of Europe (for example through successes in European football of a club in Catalunya)<sup>37</sup> while simultaneously *internalised* by the positioning of certain clubs as *more* European or cosmopolitan than their rivals.<sup>38</sup> Europe, then, in different ways and to different degrees, has increasingly become a reference point for the self-understanding of clubs and their fans – not as a counterpoint against which to project their local identity or character but as *part of* that identity and character.<sup>39</sup>

A second insight from the literature focuses on the way in which 'Europe' is secondary to the local or national level not just conceptually but also in terms of sporting merit. This is so because qualification for participation in European football competition depends on a club's performance domestically. The latter is, in a way, the gatekeeper for the former, which also explains why clubs are often seen as 'representing' a national league when they play European football, and, in fact do 'represent' the domestic league in so far as their performances in European football affect the number of clubs accessing the European competitions per league.<sup>40</sup> As the research suggests, playing 'in Europe' thereby becomes an objective, an achievement, a dream for many clubs and their fans. It feeds the narratives of exoticism and conquest that chime well, of course, with the competitive

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<sup>32</sup> A. King, 'Football Fandom and post-national identity in the New Europe' (2000) 51 *British Journal of Sociology* 419; P. Millward, 'We've all got the bug for Euro-Aways'. What Fans Say about European Football Club Competitions' (2006) 41 *International Review for the Sociology of Sports* 375.

<sup>33</sup> With an emphasis on notions of conquest, exoticism and romance; see P. Millward, 'We've all got the bug for Euro-Aways'. What Fans Say about European Football Club Competitions' (2006) 41 *International Review for the Sociology of Sports* 375; A. King, 'Football Fandom and post-national identity in the New Europe' (2000) 51 *British Journal of Sociology* 424-5.

<sup>34</sup> D. Ranc, 'Foreign Players and Football Supporters: the Old Firm, Arsenal, Paris-Saint Germain' (Manchester University Press 2012), 129.

<sup>35</sup> See on this dynamics, wherein 'the local' and 'the European' enforce each other, A. King, 'Football Fandom and post-national identity in the New Europe' (2000) 51 *British Journal of Sociology* 419; R. Weber, 'Becoming European Through Football? The Case of Sturm Graz', in: F. Greiner, P. Pichler, J. Vermeiren & A. Ziegerhofer (eds.), 'Reconsidering Europeanization: Ideas and Practices of (Dis-) Integrating Europe since the 18<sup>th</sup> Century' (De Gruyter 2022).

<sup>36</sup> R. Weber, A. Brand, F. Koch, A. Niemann, 'Cosmopolitans and communitarians: A typology of football fans between national and European influences' (2021) 56 *International Review for the Sociology of Sport* 7.

<sup>37</sup> A. King, 'Football Fandom and post-national identity in the New Europe' (2000) 51 *British Journal of Sociology* 419; A. Niemann & A. Brand, 'The UEFA Champions League: A Political Myth?' (2020) 21 *Soccer & Society* 332.

<sup>38</sup> D. Ranc, 'Foreign Players and Football Supporters: the Old Firm, Arsenal, Paris-Saint Germain' (Manchester University Press 2012).

<sup>39</sup> R. Weber, A. Brand, A. Niemann & F. Koch, 'Non-Elite Conceptions of Europe: Europe as a Frame of Reference in English Football Fan Discussions' (2020) 16 *Journal of Contemporary European Research* 308-12.

<sup>40</sup> R. Weber, A. Brand, A. Niemann & F. Koch, 'Non-Elite Conceptions of Europe: Europe as a Frame of Reference in English Football Fan Discussions' (2020) 16 *Journal of Contemporary European Research* 293.

nature of sports more generally.<sup>41</sup> It is also, at the same time, a commitment to take seriously the diversity of Europe regardless of the levels of performance of national leagues. The fact that the Andorran champion gets a place in the preliminary stages of the Champions League makes little sporting sense and can be explained only by a deeply seated sensitivity that what matters on the local level and to local fans must be fed into the European football competitions and not removed from it. But as the research suggests, this comes with a dark side. There is a degree of stratification visible in European football, wherein participation and success in European club competitions has become normal for some clubs and elusive for many others. For fans of these latter clubs, European football (and, by implication, ‘Europe’) is increasingly seen as something that is unconnected to their own experience of football, as something that excludes and even undermines the tradition of national or local football competitions by generating additional revenue for the top teams, which further entrenches their hold on domestic success and participation in European football.<sup>42</sup> Interestingly, these tensions in the competition between the successful and rich clubs and the smaller and less affluent clubs are a staple of football on the *national* level, too. It is telling that almost all national leagues have significant redistribution mechanisms that are meant to ensure that success cannot be bought and that smaller clubs retain the possibility, or at least the illusion, that successes, such as qualification for European football, remain possible with sound technical and personnel choices.<sup>43</sup> In football, it seems, merit presupposes competition, which in turn presupposes financial redistribution. The same seems to apply on the European level, in so far as the possibility of qualification for European football of a wide diversity of clubs remains a presupposition for a positive identification of *all* fans with ‘Europe’.<sup>44</sup> Again, here, the dynamic is quite striking: Europe is a positive association for fans where it is a celebration of (success on) the local or national level, not a threat to it.

From this perspective, it appears that the Europeanisation of football is a process for the renegotiation of spatial identities in a way that *enhances* the idea and importance of *place* (and of ‘the local’) in the experience of football. The greater geographical distance between the fan and his or her favourite club, the greater diversity of the nationality of the players and the greater distribution of the locations of matches is overcome by ensuring that the growing European context is firmly rooted in local identities and national competitive structures. The legitimacy of the process of Europeanisation, then, appears to depend on keeping many elements of football stable while feeding change through the choices made by the clubs (in signing specific players or, conversely, privileging local players), the performances on the field of the individual players and the clubs’ performances in the

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<sup>41</sup> P. Millward, ‘We’ve all got the bug for Euro-Aways’. What Fans Say about European Football Club Competitions’ (2006) 41 *International Review for the Sociology of Sports* 386.

<sup>42</sup> A. Brand, A. Niemann & G. Spitaler, ‘The Two-Track Europeanization of Football: EU-level pressures, transnational dynamics and their repercussions within different national contexts’ (2013) 5 *International Journal of Sport Policy and Politics* 105; R. Weber, A. Brand, A. Niemann & F. Koch, ‘Non-Elite Conceptions of Europe: Europe as a Frame of Reference in English Football Fan Discussions’ (2020) 16 *Journal of Contemporary European Research* 313.

<sup>43</sup> See for overview of the different financial redistribution systems T. Peeters: *Broadcasting Rights and Competitive Balance in European Soccer* (2009) Working Paper 9/2009, University of Antwerp Faculty of Business and Economics.

<sup>44</sup> A. Niemann & A. Brand, ‘The UEFA Champions League: A Political Myth?’ (2020) 21 *Soccer & Society* 336-7.

domestic league. In other words, the productive internalisation of the process of Europeanisation depends on it remaining an additional layer to, and not a substitution of, the local and national context within which football has historically grown.

### C) EUROPEANISATION AND THE PAST

The pushback against the ESL brought into sharp focus the extent to which the affective dimension of football is also tied up with *temporal* elements, highlighting the perpetual and spiritual ownership of the club in the hands of the fans (a claim that outlasts changes in ownership, periods of failure or success, and even generations of fans) as well as often referencing footballing tradition and authenticity rooted in the past. The preliminary findings of the Dowden Report, for example, highlight how “owners as temporary custodians of a community asset come and go but fans are forever” and that “protections of key club heritage items of great cultural and emotional value to fans is not sufficient”.<sup>45</sup> Legal geography and heritage studies can help understand how ‘the past’ is employed to structure the present or resist particular visions for the future, but also how change can be pursued in a fashion that is considered more or less legitimate.<sup>46</sup> They help explain how temporal elements are constitutive in the renegotiation of identities, in the sense that the emphasis on practices, customs and symbols from ‘the past’ are often used to imbue the present and future with particular values.<sup>47</sup> As such, references by fans, football executives or the media to a certain form of footballing tradition or a club’s particular ‘authentic’ past are not claims *about* the past, but about the present and future of football and its clubs.<sup>48</sup> They are technologies used to assemble and reassemble influence, power, control and autonomy of the different actors involved in football.

Critical heritage studies have, in recent years, come to emphasise the ongoing professionalisation of the management of sites of heritage – be it town centres, food production, or sporting heritage – and its ensuing commodification.<sup>49</sup> What is of interest, here, is that this process has led to the marginalisation from decision-making processes of actors who, on a daily basis, would engage with sites of heritage as a mundane rather than commodified experience.<sup>50</sup> The ensuing tension between how different groups seek to appropriate heritage is perhaps most visible where such heritage is tangible: think of the struggle of cities to manage the ‘liveability’ of town centres for residents faced with an onslaught of tourism (a process that, incidentally, EU law is central to as well).<sup>51</sup> But the

<sup>45</sup> See Interim Findings of Independent Fan Led Review of Football Governance, at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1004891/TC\\_letter\\_to\\_Oliver\\_Dowden\\_Accessible\\_Format.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004891/TC_letter_to_Oliver_Dowden_Accessible_Format.pdf).

<sup>46</sup> See for an introduction to this debate B. Graham, G. Ashworth & J. Tunbridge, ‘A Geography of Heritage: Power, Culture & Economy’ (Routledge 2000).

<sup>47</sup> R. Harrison, ‘Heritage: Critical Approaches’ (Routledge 2013).

<sup>48</sup> L. Smith, ‘Uses of Heritage’ (Routledge 2006).

<sup>49</sup> S. MacDonald, ‘Heritage and Identity in Europe Today’ (Routledge 2013), in particular Chapter 5 on ‘Selling the past: commodification, authenticity and heritage’.

<sup>50</sup> R. Harrison, ‘Heritage: Critical Approaches’ (Routledge 2013), 229. Note the language in the ESL project itself, distinguishing between ‘legacy fans’ and ‘prospective fans’ in emerging markets.

<sup>51</sup> Case C-400/08, *Commission v Spain* ECLI:EU:C:2011:172; or Joined Cases C-360/15 and C-31/16, *Appingedam* ECLI:EU:C:2018:44. See, more generally, F. De Witte, ‘Here Be Dragons: Legal Geography and EU Law’ (2022) 1 *European Law Open* (forthcoming).

same tension clearly arises where the heritage is largely intangible, such as in football: how can claims of ‘ordinary’ fans about a club’s past be understood against the backdrop of the increased professionalisation and commercialisation of that club’s management? Authors such as Rodney Harrison and Laurajane Smith suggest that processes of rescaling are inevitably fraught from the subject’s perspective, as it leads to a degree of instability about the almost primordial elements in one’s identity, both metaphorically and practically. The most legitimate method for a meaningful renegotiation of space and time, in their view, requires us to be sensitive to the relational commitments that underlie a particular heritage site.

This might sound more complicated than it is. In their view, and in simple terms, heritage is something that different actors approach differently because they have different interests and relationships to it: sometimes this relationship is primarily practical, cultural, social or economic; sometimes they engage with it in a professional capacity, as a passive consumer or an active defender. The management board of Manchester United has different interests from many of its fans (which, internally, are of course also divided, partially due to age, geographical location or temperament),<sup>52</sup> from local inhabitants and from the footballing authorities. In consequence, each employs different symbols, events or practices from its past to secure their vision of the future of football and of the club. What heritage studies suggests is that we need to look beyond this antagonistic perspective and instead create “dialogical models of heritage decision-making in hybrid forums, which break down the conventional barriers between experts, politicians, bureaucrats and interested laypersons or stakeholders”.<sup>53</sup> Such forums, the thinking goes, break the hold of professionals over the renegotiation of change – it brings, in a way, heritage back to life as something that is actively recreated by actors rather than carefully managed by experts.<sup>54</sup>

What this suggests is that the *drivers* of processes of rescaling such as the Europeanisation of football matter. Two immediate differences between the more successful examples of Europeanisation and the less successful ESL project are clear. First, in opposition to the ESL – whose drivers, the owners of the 12 clubs involved, were highly visible and quickly isolated – the creation of European club competitions or the *Bosman* ruling cannot easily be attributed to specific persons. This is an example of the process of ‘deracination’, in which change is presented in abstract and technical terms, rather than anchored in more emotionally loaded registers.<sup>55</sup> In simple terms, a ruling by the CJEU on the basis of the free movement of workers is approached differently than a secretive decision of twelve owners to start their own league. At the same time, this does not mean that such a ruling is necessarily unrepresentative. In fact, a ruling by the CJEU is arguably better able to give voice to and internalise the competing interests of fans, players, clubs, federations and associations than the football authorities themselves. Likewise, some of the first responses to the ESL, such as the mooted creation of an independent regulator for football, are not necessarily more representative and less problematic – it simply shifts

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<sup>52</sup> B. Garcia & R. Llopis-Goig, ‘Club-Militants, Institutionalists, Critics, Moderns and Globalists: A Quantitative Governance-Based Typology of Football Supporters’ (2020) 55 *International Review of the Sociology of Sports* 1116.

<sup>53</sup> R. Harrison, ‘Heritage: Critical Approaches’ (Routledge 2013), 226.

<sup>54</sup> L. Smith, ‘Uses of Heritage’ (Routledge 2006).

<sup>55</sup> K. McNamara, ‘The Politics of Everyday Europe’ (OUP 2015), 16.

power to yet another layer of ‘experts’ to the detriment of a genuinely representative and participatory model of heritage management.

Second, the changes brought about by the creation of European club competitions and the enhanced player mobility after *Bosman* still left a large degree of autonomy for the clubs to negotiate the changes *internally*, in a process that more or less explicitly involved management, fan representatives, players, local communities and others. A club like Athletic de Bilbao, for example, deliberately and explicitly only employs players with the Basque nationality (whether officially French or Spanish) as part of their heritage and understanding of their role in the community. A host of Spanish and German clubs have historically committed to giving fans a voice in core management decisions; and research suggests that different clubs and fans have embraced the European element to different extents, as an articulation of one of the many components of what it means to be a fan of a specific club.<sup>56</sup> In some clubs, this process of adaptation and internalisation is explicit, in so far as they see themselves and their club as almost constitutively wedded to a more international perspective.<sup>57</sup> In other instances, this organic or bottom-up process of adaptation to and renegotiation of the changes brought about by the Europeanisation of football takes more implicit forms. After decades of Europeanisation, however, it is safe to say that all clubs have gone through a process of internal realignment of their identity, whether driven by a particularly successful stint of a Belgian midfielder in Spain, an incipient rivalry in European club competitions, the growth of fan networks and fan engagement in online forums across Europe, seeing their players perform for their country in European or World Cups, or simply dreaming of reaching the preliminary stages of the European Conference Cup.<sup>58</sup> All these are examples of ways in which the changes brought about through Europeanisation are internalised or normalised by the engagement of a wide diversity of stakeholders involved in football. What matters, for our purposes, is the organic nature of this process: it is not imposed but instead *acted out* through the club.<sup>59</sup> This does not mean that this process is necessarily harmonious within clubs or uniform across them: some stakeholders embrace the transnational elements while others are sceptical; some actors play more explicit roles than others; some choices have an immediate impact while others have a longer shadow.<sup>60</sup> What remains, however, is that

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<sup>56</sup> P. Millward, ‘We’ve all got the bug for Euro-Aways’. What Fans Say about European Football Club Competitions’ (2006) 41 *International Review for the Sociology of Sports* 375. See for a conceptualisation of the role of fans in club and football governance B. Garcia & R. Llopis-Goig, ‘Supporters’ attitudes towards European football governance: structural dimensions and sociodemographic patterns’ (2020) 22 *Soccer & Society* 372.

<sup>57</sup> D. Ranc, ‘Foreign Players and Football Supporters: the Old Firm, Arsenal, Paris-Saint Germain’ (Manchester University Press 2012), 88.

<sup>58</sup> For an account of the diverse ways of managing this renegotiation see P. Millward, ‘The Global Football League: Transnational Networks, Social Movements and Sport in the New Media Age’ (Palgrave 2011); A. Niemann & A. Brand, ‘The UEFA Champions League: A Political Myth?’ (2020) 21 *Soccer & Society* 333.

<sup>59</sup> On the power of re-enactments L. Smith, ‘Uses of Heritage’ (Routledge 2006), 195. See also Millward for examples of re-enactments in football culture: P. Millward, ‘We’ve all got the bug for Euro-Aways’. What Fans Say about European Football Club Competitions’ (2006) 41 *International Review for the Sociology of Sports* 390.

<sup>60</sup> R. Weber, A. Brand, F. Koch, A. Niemann, ‘Cosmopolitans and communitarians: A typology of football fans between national and European influences’ (2021) 56 *International Review for the Sociology of Sport* (forthcoming); B. Garcia & R. Llopis-Goig, ‘Club-Militants, Institutionalists, Critics, Moderns and Globalists: A Quantitative Governance-Based Typology of Football Supporters’ (2020) 55 *International Review of the Sociology of Sports* 1116.



this process of renegotiation about the identity of a club, its heritage and tradition involves, in one form or another, all the diverse actors that relate to it on an affective level.<sup>61</sup>

#### 4. THE REGULATION OF FOOTBALL IN EUROPE

The previous section looked at the Europeanisation of football through a sociological lens, tracing the way in which developments such as the creation of European club competitions and the increase in player mobility have been negotiated by those involved in the sport. It emerged that the stability of this renegotiation depends, first, on a celebration of what is 'local' in a European context and, second, on the inclusion rather than the marginalisation of a wide variety of stakeholders – fans, players, local communities – in the process. But the Europeanisation of football also has an important second, regulatory dimension. Through its law and policy in the field of sports, the EU has influenced what other actors in the world of football can and, crucially, cannot do.<sup>62</sup> This process has primarily been driven by proceedings before the EU courts and the Commission, the legal basis for which have been the free movement and competition rules (as well as, more recently, the state aid provisions). In addition, a number of softer regulatory measures, laying down aspects of the Union's sport policy or stating its position vis-à-vis policies of football governing bodies, have been adopted over time.

The impact which the EU has, thus, had on football is multifaceted. Most visibly, European law has acted as a regulatory constraint, restricting the autonomy of football governing bodies which, historically, have enjoyed great liberties when it comes to running the game. The expansive reading of the internal market provisions by the Court and Commission has meant that rules touching on most significant aspects of football can come within the scope of EU law. Where they do, they must be justified based on legitimate objectives and be designed in a proportionate way, or else will be struck down. This is a "conditional"<sup>63</sup> or "supervised"<sup>64</sup> form of autonomy. The European institutions control its outer limits but, in the process, they also fill the resulting space with certain principles and values. Four have been of particular significance in EU case law and decision-making practice: a recognition of the social function of football; a protection of financial solidarity and competitive balance within the football pyramid; a concern for the integrity of the sport that is meant to promote sporting merit and prevent undue financial aid; and questions relating to the governance of football. By analysing how the EU regulates football, we get an understanding of how it conceptualises the sport.

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<sup>61</sup> B. Garcia & R. Llopis-Goig, 'Supporters' attitudes towards European football governance: structural dimensions and sociodemographic patterns' (2020) 22 *Soccer & Society* 380.

<sup>62</sup> Since the Lisbon Treaty, the EU has a supplementary competence in the field of sport (see Arts. 165-166 TFEU), but it has been active in this area since the 1970s already.

<sup>63</sup> S. Weatherill, 'Principles and Practice in EU Sports Law' (OUP 2017).

<sup>64</sup> R. Parrish, 'The Birth of European Union Sports Law' (2003) 2 *Entertainment Law* 20.

## A) SOCIAL FUNCTION

In many ways, the meeting of EU law and football is a clash of rationales. The former is based on the ideas of free movement, non-discrimination and a Europe-wide market without borders. The latter's basic units of organisation are leagues that are divided along geographic lines; its showpieces are tournaments in which national teams face each other; and many of its *aficionados* have a distinctly local orientation, not caring about the sheer endless possibilities that an internal market, in theory, offers them. The EU has tried to navigate this delicate space by accommodating some of the specificities of football which distinguish it from other 'ordinary' sectors, while protecting the key interests and principles of the Union. One of these particularities is the strong embeddedness of football in the national and local socio-cultural fabric. This embeddedness was prominently recognised in the Amsterdam Declaration which "emphasise[d] the social significance of sport, in particular its role in forging identity and bringing people together".<sup>65</sup> It is similarly, if more cryptically, reflected in the wording of Article 165 TFEU which commits the Union to take account of the "social function" of sport.

Perhaps the most visible way in which this peculiarity – and the tension which it creates with EU law – has come to the fore is in the regulation of the fielding of players. Both national and international federations have laid down rules on the players a team can put on the pitch (or bench), and these rules tend to restrict free movement. The first time this became apparent was in *Donà*, a case decided by the Court of Justice in the mid-1970s.<sup>66</sup> A football scout brought a complaint against the rules of the Italian football federation whereby only players who were affiliated to the federation could participate in matches, with membership only being open to Italians. Reiterating the principles established in the earlier *Walrave and Koch* ruling,<sup>67</sup> the Court started by saying that professional football came into the scope of the European Treaties as it constituted an economic activity. Consequently, football federations, despite being private entities, had to comply with the free movement rules and the principle of non-discrimination. Measures restricting this principle, e.g. by excluding foreign players from matches, were only possible for reasons which were "not of an economic nature" and of purely "sporting interest", but they had to "remain limited to [their] proper objective".<sup>68</sup> According to the Court, rules limiting participation of foreigners in international games were thus protected as a means to facilitate competitions between national teams – a huge concession, given that non-discrimination on grounds of nationality constitutes a fundamental principle of free movement law. Whether and to what extent, by contrast, rules limiting their participation in domestic league games were justified, the Court left for the referring judge to decide.

Two decades later, the CJEU was less ambiguous in *Bosman*.<sup>69</sup> Proceedings brought by Belgian midfielder Jean-Marc Bosman raised the issue of whether two aspects of

<sup>65</sup> Amsterdam Declaration [1997] OJ C340/136. In the same vein, see Commission in 'The European Model of Sport: Consultation Document of DG X' (1998) and the Nice Declaration (2000), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A135007>.

<sup>66</sup> Case 13/76, *Donà* ECLI:EU:C:1976:115.

<sup>67</sup> Case 36/74, *Walrave and Koch* ECLI:EU:C:1974:140.

<sup>68</sup> Case 13/76, *Donà* ECLI:EU:C:1976:115, paras 14 and 15.

<sup>69</sup> Case C-415/93, *Bosman* ECLI:EU:C:1995:463.

UEFA's regulations were compatible with EU free movement law. One of them was the '3+2'-Rule, which stipulated that clubs could only have up to three foreign and two 'assimilated' players (who had played in the domestic league for at least five years) on their team sheet. The Court had no trouble finding that the quotas for foreign players constituted a restriction on freedom of movement; this was a clear instance of direct discrimination. UEFA tried to justify the rules, *inter alia*, by arguing that they were necessary to maintain the traditional link between a club and its country. Limiting the role of foreign players was crucial so that supporters could identify with their team and that clubs taking part in European competitions would be perceived to represent their country. The Court was sceptical. It was not willing to accept that football clubs, like national teams, had to be connected with their fanbase through the bond of nationality.<sup>70</sup> Fans were able to identify with their local clubs although these recruited players from all parts of the country, not just their immediate surroundings. It was not evident why this should be different with regard to players from abroad.

UEFA abolished the nationality quotas after *Bosman*, but the underlying tensions have not vanished. In the mid-2000s, the Homegrown Player or '4+4'-Rule was adopted, which requires teams to have a minimum of eight locally trained (but not necessarily national) players in their squad, four of whom must be from the club's own academy. The system carries more than a little resemblance with the pre-*Bosman* regime and is motivated by the same concerns. Several scholars have, therefore, questioned its compatibility with free movement law.<sup>71</sup> Yet, both the Commission and the EU Parliament have expressed the view that the rule constitutes a justified and proportionate measure to promote training of young footballers in the EU.<sup>72</sup> The finding is a clear demonstration of the special status that football enjoys in the EU. Requiring employees to have a local connection with their employer would be unthinkable in most other industries, as it would amount to indirect discrimination. It is hard to imagine laws forcing supermarkets, banks or dry cleaners to hire staff that has been schooled in the vicinity of the workplace being held to be compatible with the free movement rules.

The overall picture that emerges is best understood as a compromise between the worlds of football and European law. The EU institutions have, on the one hand, acknowledged the social and cultural context in which football is situated and the expectations that this context produces vis-à-vis the way in which the game and its teams are shaped. On the other, they have attempt to protect the fundamental tenets of the internal market, whose aim is to break down national boundaries and create an integrated

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<sup>70</sup> Ibid, 131 et seq.

<sup>71</sup> S. Miettinen and R. Parrish, 'Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)' (2007) 5 *Entertainment and Sports Law Journal* 2; S. Gardiner and R. Welch, 'Nationality and protectionism in football: why are FIFA's '6+5 rule' and UEFA's 'home-grown player rule' on the agenda?' (2011) 12 *Soccer & Society* 774; V. Smokvina, 'The UEFA Home-Grown Player Rule: Does It Fulfil Its Aim?' (2013) 3 *The International Journal of Sport and Society* 67.

<sup>72</sup> Commission Press Release, 'UEFA rule on "home-grown players": compatibility with the principle of free movement of persons' [2008] IP/08/807; European Parliament, Resolution of 29/03/2007 on the future of professional football in Europe, 2006/2130(INI). This does not mean that the regulation would not, if put before the Court, be found to violate free movement law – the '3+2'-Rule that was overturned in *Bosman* had also been given the Commission's blessing.

economic space “without borders”.<sup>73</sup> This is why we see strong opposition to accept instances of direct discrimination on grounds of nationality (unless it concerns national teams which, by definition, are organised in a discriminatory manner) which constitutes a ‘cardinal sin’ in free movement law, whereas other less serious impediments to cross-border movement are accepted as a legitimate reflection of the specific nature of football.

But EU action in this area also shows how difficult it is to legally protect the “social function” of football. Part of the problem is practical. The EU’s role is largely reactive and *ad hoc*: the Court (and, to some extent, even the Commission) cannot control which cases it is asked to decide and must assess them in the light of the demands of free movement and competition law, not from a perspective of policy making. However, part of the problem is also substantive. It is hard to pin down what exactly the social function of football is and how to translate it into workable regulatory arrangements. Rules like the pre-*Bosman* transfer regime or the Homegrown Player system rely on the assumption that football requires a certain link between players and their fans/teams. This link is meant to create a feeling of common identity, which is believed to be essential for fully enjoying the game or supporting a club. The ‘3+2’-Rule operationalised that bond bluntly via the criterion of nationality (the idea being: we feel closer to our fellow citizens) and a combination of ‘being and time’ (we feel close to those who have been around us for long enough).<sup>74</sup> The ‘4+4’-Rule uses the slightly more refined idea of local provenance which privileges those brought up in the – national or local – vicinity, no matter where they are originally from. (Although its practical effect has been that wealthy clubs simply secure the services of footballers at a younger age to make them eligible as homegrown players.) Both, however, ultimately remain crude approximations for what it means to be connected to a club and its fanbase, as our findings on player mobility demonstrate.

## B) FINANCIAL SOLIDARITY AND COMPETITIVE BALANCE

A second particularity of football that has emerged in its encounter with EU law is the relevance of protecting financial solidarity and, relatedly, ensuring a competitive balance. Companies operating in most regular economic sectors neither have the obligation nor the desire to subsidise their competitors. By contrast, the football pyramid has in-built redistribution mechanisms which are aimed at ensuring a degree of both vertical solidarity, i.e. between higher and lower tiers (including between professional and amateur football), and horizontal solidarity, i.e. between clubs competing at the same level.<sup>75</sup> These are translated into a variety of rules that affect different aspects of football and typically, from the perspective of EU law, constitute restrictions on free movement or competition.

<sup>73</sup> Similarly, see A. Duval, ‘La *Lex Sportiva* face au droit de l’Union Européenne: guerre et paix dans l’espace juridique transnational’ (PhD Thesis, EUI 2015).

<sup>74</sup> On the idea of ‘being and time’ in a different context, see A. Somek, ‘Solidarity Decomposed: Being and Time in European Citizenship’ (2007) 32 *European Law Review* 787.

<sup>75</sup> A new UEFA proposal seeks to further strengthen these solidarity mechanisms and improve competitive balance by means of a ‘luxury tax’, which would oblige clubs to pay a tax for spending more on wages than laid down in a pre-defined threshold (e.g. 70% of turnover), see <https://www.thetimes.co.uk/article/uefa-plans-salary-cap-and-luxury-tax-for-teams-who-breach-it-5vrvf8cm7>.

One of them is the transfer system. Footballers rarely spend their entire career playing for the same club and change allegiances at least a few times. This raises some economic as well as redistributive issues. The aforementioned *Bosman* case put them in the spotlight. In addition to the national quotas, the applicant alleged that the transfer system that was in place across Europe violated the free movement of workers. The then-binding rules made it effectively impossible for players to leave their club without a transfer fee, even after the expiration of their contract. The fee was, unlike the nationality quotas, not discriminatory, but the Court saw in it an obstacle to market access as players might be in the position of being unable to join a foreign side. However, UEFA argued that the system was necessary to ensure that affluent teams did not poach all the quality footballers from their rivals and that smaller teams had incentives to train young players as they could expect a compensation for their efforts. The Court accepted these motivations as justified:

In view of the considerable social importance of sporting activities and in particular football in the [Union], the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.<sup>76</sup>

Clubs need credible opponents: this is true in a banal sense, as you cannot play football with one team only; but it is also true in a more substantive sense, as every match and competition requires some uncertainty of result which, in turn, presupposes an approximate balance of forces.<sup>77</sup> Also, the world of football relies on a steady supply of new talent, which typically develops in lower-tiered or smaller sides before joining bigger clubs. Hence, the objectives advanced by UEFA were legitimate. Yet, the actual transfer system also had to be a proportionate means of pursuing these. The Court was not convinced that requiring a transfer fee after the end of a player's contract would prevent rich clubs from securing the services of the best players and, thus, gain an advantage over their competitors. If you had the money, you would still end up signing the player. Nor did it think that the fee would contribute to greater investment in young athletes, given the disconnect between the fee charged and the actual training costs of a player. The ruling quickly became celebrated as the foundation for the free movement of footballers in Europe, while also turning into a symbol of the hyper-commercialisation of football, marked by ever increasing transfer fees and wages, and the EU's role in it.<sup>78</sup>

After *Bosman*, FIFA and UEFA reached an agreement with the Commission on a reformed transfer system, in a process that involved the participation of the players'

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<sup>76</sup> Case C-415/93, *Bosman* ECLI:EU:C:1995:463, para 106.

<sup>77</sup> S. Szymanski, 'Income inequality, competitive balance and the attractiveness of team sports: some evidence and a natural experiment from English soccer' (2001) 111 *Economic Journal* 69; J. Garcia and P. Rodriguez, 'The determinants of football match attendance revisited' (2002) 3 *Journal of Sports Economics* 18.

<sup>78</sup> Critically, see A. Duval, 'Dérives financières du football: *Bosman* innocent, l'Europe aussi' (2014) Cahier du football, available at <https://www.cahiersdufootball.net/article/derives-financieres-du-football-bosman-innocent-l-europe-aussi-5265>.

organisation FifPro.<sup>79</sup> Yet, many of the underlying tensions have periodically resurfaced. This especially concerns the rules on compensation fees for young players. In *Bernard*, a French scheme for young talented footballers was challenged before the CJEU.<sup>80</sup> Under its rules, players between the ages of 16 and 22 were employed by professional clubs as trainees under a fixed-term contract and had, at the end of the training period, the obligation to sign their first professional contract with that club. There was no compensation mechanism for players who trained with one team and then signed with another; instead, the player and their new side could be sued for damages. Again, the rationale was to encourage the training of youngsters and, again, the Court of Justice accepted it as legitimate but found the measure to be ill-suited for this purpose because of the hit-and-miss fashion in which it had been designed. Actions for damages were not based on the costs put into training a professional footballer and they could not account for the many uncertainties involved in this process.

The transfer system is not the sole area in which the ideas of financial solidarity and competitive balance shine through. The same is true in the field of broadcasting rights. There has been a sharp increase in revenues from the sale of rights to broadcast football matches over the past three decades, which is the combined result of developments such as the privatisation of the media, the rise of the internet and the spread of football into new markets. Clubs in most federations sell these rights jointly.<sup>81</sup> Other than being more practicable than individual selling for competitions involving a high number of actors, collective selling is meant to ensure better redistribution. Revenues are not concentrated among the few high-performing clubs but are spread (more) evenly across all participating clubs to support competitive balance, or at least that is the hope.<sup>82</sup> From an antitrust perspective, this is a serious restriction on competition, which some have called a ‘supply-side cartel’.<sup>83</sup> Yet, when enquiring into the legality of the practice, the Commission gave it the green light, albeit stipulating limitations.<sup>84</sup> In its decision on the sale of UEFA Champions League rights, the Commission underlined that collective selling was not an indispensable element of football but rather a commercial choice. It was willing to accept this choice under certain circumstances – notably the unbundling of rights, 3-year limits for exclusivity and the returning of unexploited rights to clubs – as it came with some

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<sup>79</sup> Commission Press Release, ‘Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international football transfers’ [2001] IP/01/314.

<sup>80</sup> Case C-325/08, *Bernard* ECLI:EU:C:2010:143.

<sup>81</sup> Italy and Spain were exceptions to this for a while, but have now reverted (back) to collective selling. In the case of Spain, this change happened after a strike initiated by smaller clubs: see A. West, ‘Spanish football suspended: Is the season really over?’ (2015) BBC Sport, available at <https://www.bbc.co.uk/sport/football/32619740>.

<sup>82</sup> A. Lelyukhin, ‘The impact of EU on sport broadcasting: what does the line of recent ECJ cases signal about?’ (2013) 13 *International Sports Law Journal* 104, 109. There has been doubt among economists to what extent this holds true; see T. Peeters, ‘Broadcast Rights and Competitive Balance in European Soccer’ (2011) 6 *International Journal of Sport Finance* 23.

<sup>83</sup> P. Massey, ‘Are Sports Cartels Different? An Analysis of EU Commission Decisions Concerning Collective Selling Arrangements for Football Broadcasting Rights’ (2007) 30 *World Competition* 87.

<sup>84</sup> Interestingly, AG Lenz had introduced the idea of revenue distribution among football clubs in his opinion in *Bosman* already as an alternative means for maintaining a competitive balance which would be less restrictive of free movement than the then-existing transfer system; see Case C-415/93, *Bosman* ECLI:EU:C:1995:293, Opinion of AG Lenz, para 226.

benefits for clubs, broadcasters and fans.<sup>85</sup> Financial solidarity was acknowledged as a justifying rationale for joint-selling, even if the decision's outcome made it unnecessary to probe the degree to which this was achieved. In subsequent proceedings, the same principles were applied to national leagues.<sup>86</sup>

### C) INTEGRITY OF SPORT

A third concern that permeates EU law and policy on football is the protection of the sport's integrity. The notion of integrity is one of the most frequently used but, equally, among the least clearly delineated concepts in national and international sports law. In a narrow sense, it refers to the objective of keeping sports 'clean' by eliminating factors that can distort fair competition between athletes, such as doping.<sup>87</sup> In a broader sense, it can be understood as protecting sports from all undue external interference, with the aim of ensuring that sporting success reflects sporting merit, not an economic or other type of advantage. This, of course, is connected with the previously discussed idea of promoting fair competition.

There are several ways in which this objective has manifested itself in the EU context. The most direct example is the treatment of restrictions on club ownership. The increase in revenue from broadcasting and merchandising has led to football becoming financially more interesting for investors. UEFA has, on the one hand, actively supported this commercialisation process; on the other, it has made efforts to counteract some of the problematic side-effects. One measure that was adopted for this purpose was the rule on multiple ownership of clubs. Although not outlawing investments into multiple football clubs as such, UEFA prohibited that more than one club controlled by the same person or entity start in any given European competition. The rule's official title – "Integrity of the UEFA club competitions: independence of clubs" – reveals its rationale. The prohibition was meant to protect clubs from external interference. The worry was that if two teams belonging to one owner would face each other, that owner might exercise undue influence on them. British investment company ENIC, which had majority stakes in a handful of clubs across Europe (and, in addition, was providing betting services), launched an attack against the limitation, arguing that it constituted both an anti-competitive agreement and an abuse of a dominant position. The claim failed before the Court of Arbitration for Sport (CAS), which did not find a breach of EU competition rules,<sup>88</sup> as well as, shortly after, before the Commission, which acknowledged the prohibition's restrictive effects on economic freedom, but concluded that these were necessary and proportionate to protect the public confidence in the integrity of football.<sup>89</sup> Fair and

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<sup>85</sup> R. Butler and P. Massey question whether consumers have profited from this; see 'Has Competition in the Market for Subscription Sports Broadcasting Benefited Consumers? The Case of the English Premier League' (2015) 20 *Journal of Sports Economics* 603.

<sup>86</sup> COMP/C-2/381.73 – Joint selling of the media rights to the FA Premier League (2006).

<sup>87</sup> Case C-519/04 P, *Meca-Medina* ECLI:EU:C:2006:492. See also Art. 165(2) TFEU which, looking more widely at the wellbeing of athletes, states that the EU is obliged to 'the physical and moral integrity of sportsmen and sportswomen'.

<sup>88</sup> CAS 98/200, *AEK Athens and Slavia Prague v. UEFA* (1999).

<sup>89</sup> COMP 37.806 – ENIC/UEFA (2002).

honest sport competitions were the foundation of football, both as a sport and an economic activity. Multiple ownership created a conflict of interest which could affect a club's on-pitch performance, notably where two teams controlled by the same person met. Investors might have a financial interest in one of the teams progressing instead of the other and, directly or indirectly, influence the result of the game.

There are not only restrictions on who can purchase clubs, but also on how clubs are run. The most significant limitation in this respect stems from the Financial Fairplay Regulations (FFP) which were introduced in 2012. Their core element is the 'break-even rule', which requires that clubs, over a three-year period, do not spend more than they generate in football-related revenues. Teams that do not comply with it can face significant sanctions, up to an exclusion from participating in European competitions. UEFA justified this step by reference to improving the financial stability of football clubs and, in the long run, the sustainability of European football in general.<sup>90</sup> By the same token, it was meant to limit the role of 'sugar daddies' and counteract the related issue of 'financial doping'.<sup>91</sup> Football success is to be earned on the pitch, not bought.<sup>92</sup> The FFP Regulations were reformed and softened in 2015, as a reaction to court proceedings brought against them. Legal scholars argued that the system might violate EU competition and, possibly, free movement law.<sup>93</sup> In contrast to this, the Commission has, in a joint statement with UEFA, suggested that the regulations are compatible with EU law as they promote legitimate objectives in a balanced and proportionate way.<sup>94</sup> The same conclusion was reached by the CAS, which ruled that the FFP rules did not restrict competition or free movement and, even if they did, would be a justified and proportionate means to protect the financial health of football.<sup>95</sup> There has been no determination of the matter by the CJEU yet – and there might never be one. A preliminary reference submitted by a Belgian court in a dispute brought by a football agent (and stewarded by Jean-Marc Dupont, the lawyer behind *Bosman*) was deemed to be inadmissible.<sup>96</sup>

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<sup>90</sup> Tellingly, the FFP regulations have not been justified with reference to maintaining a competitive balance among football clubs, an objective they are unlikely to contribute towards or might even be counterproductive for: see T. Peeters and S. Szymanski, 'Financial fair play in European football' (2014) 29 *Economic Policy* 343; R. Gallagher and B. Quinn, 'Regulatory Own Goals: The Unintended Consequences of Economic Regulation in Professional Football' (2020) 20 *European Sport Management* 151.

<sup>91</sup> J. Müller, J. Lammert and G. Hovemann, 'The Financial Fair Play Regulations of UEFA: An Adequate Concept to Ensure the Long-Term Viability and Sustainability of European Club Football?' (2012) 7 *International Journal of Sport Finance* 117, 123.

<sup>92</sup> As then-President of UEFA Michel Platini put it, the idea was to protect the 'many clubs across Europe that continue to operate on a sustainable basis' and find it 'increasingly hard to coexist and compete with clubs that incur costs and transfer fees beyond their means and report losses year-after-year'; UEFA, Foreword to the European club footballing landscape, club licensing benchmarking report financial year 2008 (2008), available at [https://www.uefa.com/MultimediaFiles/Download/Publications/uefaorg/Publications/01/45/30/45/1453045\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/Publications/uefaorg/Publications/01/45/30/45/1453045_DOWNLOAD.pdf).

<sup>93</sup> J. Lindholm, 'The Problem with Salary Caps under European Union Law: The Case against Financial Fair Play' (2011) 12 *Texas Review of Entertainment and Sports Law* 189; C. Flanagan, 'A tricky European fixture: an assessment of UEFA's Financial Fair Play regulations and their compatibility with EU law' (2013) 13 *International Sports Law Journal* 148.

<sup>94</sup> Commission and UEFA, Joint Statement by Vice-President Almunia and President Platini on Financial Fairplay Rules (2012), available at [https://ec.europa.eu/competition/sectors/sports/joint\\_statement\\_en.pdf](https://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf).

<sup>95</sup> CAS 2016/A/4492, *Galatasaray v. UEFA* (2016).

<sup>96</sup> Case C-299/15, *Striani* ECLI:EU:C:2015:519. Dupont also represented Galatasaray before the CAS (n 94) as well as swimmers Meca-Medina and Majcen in Case C-519/04 P, *Meca-Medina* ECLI:EU:C:2006:492.



Financial doping can come from private investors, but it can come from the public purse, too. This issue has, for a long time, flown under the radar,<sup>97</sup> but a concentrated effort of the Commission in the mid-2010s has resulted in the application of EU state aid provisions to public measures taken in the field of football. One group of cases concerned direct financial assistance granted to clubs. In a series of investigations into measures taken by Dutch municipalities in support of ailing local football clubs, ranging from substantial debt waivers to generous loan guarantees, the Commission took the position that most measures constituted state aid which did not meet the requirements of Article 107(3)(c) TFEU and the Rescue and Restructuring Guidelines.<sup>98</sup> The line it took was markedly strict. There was no special treatment: football was approached just like any other industry.<sup>99</sup> The respective authorities had to demonstrate that the clubs were in difficulty, the aid was limited to a minimum, was a one-off and, crucially, that compensatory measures had been taken. How brutal these measures can be is illustrated by cases like Willem II. The aid granted to the club was conditioned on a reduction of the number of players (from 31 to 27) and staff (from 79 to 61), the acceptance of a rigid salary cap (48% of turnover), and a prohibition of making transfer payments.<sup>100</sup> A similar line was pursued in a group of cases concerning Spanish football clubs in relation to tax rebates and other forms of financial support given by local authorities.<sup>101</sup> The Commission's action in this area – which is likely to be extended to financial flows from third countries in the future<sup>102</sup> – can be seen as an effort to prevent some clubs from being given an undue financial advantage. Favouring selected clubs over others distorts the economic level playing field and, ultimately, is likely to have repercussions further down the line: “The more funds clubs have available to attract the best possible players the more success they may have in sport competitions,

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<sup>97</sup> B. Van Rompuy and O. Van Maren, ‘EU Control of State Aid to Professional Sport: Why Now?’, in A. Duval (Ed.), ‘The Legacy of Bosman’ (Asser 2016), 153. But see the early decisions on aid granted to sporting clubs with training centres in France (IP/01/599) and the Commission's successful intervention in Italy's Salva Calcio legislation (IP/05/1271).

<sup>98</sup> COMP/SA.33584 – Alleged municipal aid to the professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008–2011; COMP/SA.40168 – Willem II; COMP/SA.41612 – MVV; COMP/SA.41613 – PSV; COMP/SA.41614 – Den Bosch.

<sup>99</sup> B. García, A. Vermeersch and S. Weatherill, ‘A New Horizon in European Sports Law: The Application of the EU State Aid Rules Meets the Specific Nature of Sport’ (2017) 13 *European Competition Journal* 28. This differs from the Commission's approach in cases involving large infrastructure projects, in which it has recognised the ‘responsibility of the state’ to contribute to the construction of sports venues, see COMP/SA.35501 – Financing of Construction and Renovation of Stadiums for Euro 2016, para 261; COMP/SA.37109 – Football Stadiums in Flanders, para 30; COMP/SA.37342 – Regional Stadia Development in Northern Ireland, para 91.

<sup>100</sup> As a consequence, Willem II was relegated to the Dutch second division twice in the following years but has managed to return to the first division since and has even played European football in the 2020/21 season.

<sup>101</sup> COMP/SA.29769 – Spanish Football Clubs (2016); COMP/SA.33754 – Real Madrid (2016); COMP/SA.36387 – Valencia, Hércules and Elche (2016). Although the decisions have been subject to legal challenges and the General Court has overturned several of them (the Commission won one appeal in Case C-362/19, *P FC Barcelona* ECLI:EU:C:2021:169), the reasons for this were not sport-specific, but concerned general questions relating to the standard and burden of proof in state aid proceedings. The Commission's overall approach to applying EU state aid rules to football was given the blessing by the European judges, see T-732/16 *Valencia* ECLI:EU:T:2020:98; Case T-766/16 *Hércules* ECLI:EU:T:2019:173; T-791/16 *Real Madrid* ECLI:EU:T:2019:346.

<sup>102</sup> Proposal for a regulation on foreign subsidies distorting the internal market, COM(2021) 223 final. The proposed Regulation is not specific to sport but could potentially be applied in a way that allows reviewing financial support granted to football clubs in the EU by public authorities outside the EU.

which promises more revenue”.<sup>103</sup> Economic research shows that there is a strong link between the amount of money a club can spend on players’ wages and its success.<sup>104</sup> Against this backdrop, it makes sense to apply EU law with its full force here because its objectives overlap with those of football: sporting success should be the result of good performance, not of financial strength.

#### D) GOVERNANCE STRUCTURE

The developments surrounding the ESL mark the latest chapter in the relationship between EU law and football, and they place yet another of football’s particularities in the spotlight: its governance structure. As already noted, football is organised as a pyramid, with FIFA at the top, followed by the continental confederations like UEFA, the national and regional federations, and finally clubs, players and grassroots institutions. There is a hierarchical relationship between the higher and lower tiers, but, in principle, each level exercises ‘exclusive rights’ within its scope of competence. This construct gives UEFA a *de facto* monopoly over all major decisions concerning European football. By the same token, it means that any decision making or reform initiative on football-related matters can, in principle, only take place within UEFA’s institutional structure and in abidance with the federation’s procedural mechanisms.

The impact which EU law has had on this structure is best described as complex. On the one hand, the EU institutions have indirectly contributed to solidifying UEFA’s status. The Commission has cooperated with UEFA on many occasions, some of which were mentioned above.<sup>105</sup> These include the post-1995 overhaul of the European transfer regime<sup>106</sup> and the introduction of the FFP rules, which both resulted in joint statements of the two institutions announcing that an agreement had been reached and that the new rules that were adopted were compatible with European law. Even if the legal status of these agreements has always been ambiguous at best – the transfer rules challenged in *Bosman* had, for example, been mutually accepted in a similar manner before being struck down by the CJEU – their symbolic power should not be underestimated. They provide UEFA with an aura of legitimacy as the ‘control centre’ of European football. The ad hoc cooperation between the Commission and UEFA has, in the meantime, been turned into a permanent one. In 2014 the two signed their first and, four years later, a second

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<sup>103</sup> COMP/ SA.36387 – Valencia, Hércules and Elche (2016), para 89; see also COMP/SA.33754 – Real Madrid (2016), para 85.

<sup>104</sup> S. Hall, S. Szymanski and A. Zimbalist, ‘Testing causality between team performance and payroll: The cases of major league baseball and English soccer’ (2002) 3 *Journal of Sports Economics* 149; T. Peeters and S. Szymanski, ‘Financial fair play in European football’ (2014) 29 *Economic Policy* 343.

<sup>105</sup> See also B. García, ‘UEFA and the European Union: From Confrontation to Co-operation?’ (2007) 3 *Journal of Contemporary European Research* 202.

<sup>106</sup> FIFA played a key role in this process too, see A. Duval, ‘The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of *Bosman*’ (2016) Asser Research Paper 2016-06.

cooperation agreement.<sup>107</sup> Despite a fair bit of flowery rhetoric,<sup>108</sup> the specific policies included in it are rather limited – no doubt a reflection of the EU’s limited legislative competence in the field of sport, which is of supplementary nature only.<sup>109</sup> Nonetheless, they demonstrate that the EU sees UEFA as its main contact partner when it comes to European football.

On the other hand, and perhaps paradoxically, EU action has led to a tangible weakening of UEFA’s authority. The CJEU’s case law has played a particularly important role in this regard. Rulings such as *Bosman* turned players, who used to have no standing in football’s governance structures, into a force to be reckoned with and put FifPro, the organisation representing their interests, on the map. The Commission’s insistence on involving clubs in the negotiations surrounding the collective selling of broadcasting rights strengthened their respective position too.<sup>110</sup> The most serious threat to football’s pyramid structure yet, however, results from the ESL litigation. What is at stake is nothing less than UEFA’s monopoly on organising European football matches. Partly anticipating UEFA sanctions, partly reacting to them, the founders of the ESL have initiated legal proceedings before the Madrid Commercial Court in which they have argued that EU competition law protects their venture. Although still ongoing at the time of writing, the proceedings have already yielded several interim relief orders asking UEFA and the national federations to refrain from any measures inhibiting the organisation of the Super League.<sup>111</sup> More significantly, the competent Spanish judge has decided to refer the issue to the CJEU, which makes it likely that we will get an authoritative answer on the legality of UEFA’s behaviour and, more generally, on the possibility of restricting third-party football competitions under EU law.<sup>112</sup>

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<sup>107</sup> Cooperation Agreement Between Commission and UEFA, C(2018) 876 final. For a critical appraisal of the first Cooperation Agreement, see A. Duval, ‘The New “Arrangement” between the European Commission and UEFA: A Political Capitulation of the EU’ (2014) Asser International Sports Law Blog, available at <https://www.asser.nl/SportsLaw/Blog/post/the-new-arrangement-between-the-european-commission-and-uefa-a-political-capitulation-of-the-eu>.

<sup>108</sup> The Agreement’s objectives are to: ‘promote values and principles common in Europe (such as non-discrimination, tolerance, cultural diversity, solidarity and gender equality) through initiatives such as UEFA EURO 2020’; ‘strengthen cooperation in matters of long-term interest to football and sport in Europe, such as the principles of good governance, and ensure the healthy evolution of football at all levels with a focus on matters such as solidarity, integrity, fair competition and contractual stability’; and ‘improve the overall financial health of European football by strengthening the existing rules on ‘Financial Fair Play’.

<sup>109</sup> Arts. 165-166 TFEU.

<sup>110</sup> B. García, ‘The influence of the EU on the governance of football’ in H. Gammelsæter and B. Senaux (Eds.), ‘The Organisation and Governance of Top Football Across Europe: An Institutional Perspective’ (Routledge 2011) 32.

<sup>111</sup> Juzgado de lo Mercantil No 17 de Madrid, Order 20 April 2021; Order 17 May 2021; Order 1 July 2021.

<sup>112</sup> Case C-333/21 *European Superleague Company*. It would not be the first time that a football-related reference ends without a decision on the merits: the proceedings in *Oulmers* (on the obligation of clubs to release their players for international games) were terminated due to a compromise between FIFA/UEFA and the G-14; the preliminary question submitted in the aforementioned *Striani* (on the legality of the FFP) was held to be inadmissible by the CJEU. However, this outcome seems unlikely in the case of the Super League: a compromise appears out of reach given UEFA’s categorical opposition to allowing any rival competition and the personal disputes between some of the main protagonists; the ESL clubs have an enormous financial interest in – and a realistic chance of – obtaining a judgment that will, at the very least, restrict UEFA’s broad discretion in relation to authorising third-party competitions; and the three remaining clubs are officially holding on to the Super League plan to prevent turning this into a hypothetical and, thus, inadmissible dispute.

Can UEFA adopt sanctions to prevent the creation of a new league, e.g. by banning the participating clubs and players from all official football competitions? According to its own Statutes, it can. Articles 49 and 52 stipulate that international competitions organised by third parties require prior approval of FIFA, UEFA and/or the relevant member associations, and that disciplinary measures can be taken to enforce this. (Similar provisions exist at the level of national federations.<sup>113</sup>) Its position under EU competition law is less firm.<sup>114</sup> Although there are no direct precedents on breakaway leagues in football, there is a growing number of decisions limiting the power of federations in other sports when it comes to fending off third-party competitions. In *Formula One*, the Commission issued a statement of objections against the restrictions imposed by the Fédération Internationale de l'Automobile (FIA) on teams, broadcasters and circuit operators penalising involvement in third-party competitions.<sup>115</sup> In *MOTOE*, the Court of Justice struck down a state-sanctioned monopoly of the Greek branch of the Automobile and Touring Club on authorising motorcycling events, drawing attention to the risk that the Club, which organises races itself, could deny competitors access to the market as its powers had not been made subject to any restrictions.<sup>116</sup> In addition, there has been a number of domestic proceedings in which third-party organisers successfully challenged attempts of sports federations at fighting off rival competitions, including in basketball, wrestling, bodybuilding, as well as automotive and equestrian sports.<sup>117</sup>

But the case which is factually closest to the ESL scenario is the recent *International Skating Union (ISU)*.<sup>118</sup> The ISU stipulated in its statutes that athletes could only participate in events authorised by the Union or its members and, in case of violation, would be punished with up to lifetime bans from official competitions. The Commission found that the practice violated Article 101 TFEU, and the General Court upheld its decision in most key aspects; the judgment is now under appeal. There has been an intense debate about the implications of the ruling for the Super League.<sup>119</sup> The situation in *ISU* differs in some important aspects from that of the ESL, notably regarding the income structure (the livelihood of skaters depends to a much greater extent on participating in official competitions than that of footballers) and the dimension of the breakaway competition (off-season races do not seriously affect the attractiveness of the federation's own competitions). However, the basic underlying conflict of interest, of a sport governing

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<sup>113</sup> See e.g. Rule L.9 of the Premier League Handbook.

<sup>114</sup> Cf. B. Van Rompuy, 'The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations' (2015) 22 *Maastricht Journal of European and Comparative Law* 179, who, writing prior to the ESL saga, argues that existing EU and national case law suggests that sports governing bodies are being granted a wide margin of appreciation in this area.

<sup>115</sup> COMP/35.163 et al. – Formula One (2001).

<sup>116</sup> Case C-49/07 *MOTOE* ECLI:EU:C:2008:376.

<sup>117</sup> For an overview of the most significant developments, see K. Pijetlovic, 'European Model of Sport: Alternative Structures' in J. Anderson, R. Parrish and B. García (Eds.), 'Research Handbook on EU Sports Law and Policy' (2018 Edward Elgar).

<sup>118</sup> Commission, *ISU*.

<sup>119</sup> S. Weatherill, '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"' (2021) Blogpost for EU Law Analysis', available at <http://eulawanalysis.blogspot.com/2021/04/never-let-good-fiasco-go-to-waste-why.html>; J. Zgliniski, 'The Rise and Fall of the European Super League' (2021) EU Law Live, available at <https://eulawlive.com/weekend-edition/weekend-edition-no55/>.

body both organising events and having the power to authorise events organised by third parties, is the same. It appears likely that, therefore, UEFA will have to justify its restrictive stance on allowing new football formats, which could be seen as “unduly depriv[ing third parties] of market access”.<sup>120</sup> In addition, it will have to demonstrate that the authorisation rules it has adopted are based on clear, transparent and non-discriminatory criteria.<sup>121</sup> Possible justifications could include the protection of the official match calendar,<sup>122</sup> although the argument that UEFA and national leagues can effectively block the entire year by fixing an extremely dense match schedule seems questionable from a perspective of proportionality. A more serious consideration might be the protection of financial solidarity within football, yet the solidarity payments promised by the breakaway clubs would exceed those currently made from the Champions League revenues. This would leave the protection of the relegation-and-promotion system or the idea of open competitions, a justification ground that has not yet been tested judicially but UEFA might rely on to defend its opposition to a quasi-closed league.<sup>123</sup>

Although the outcome of the ESL litigation is uncertain at this point, it is difficult to imagine that things will revert back to the way they were. At the bare minimum, the CJEU will clarify the scope of UEFA’s monopoly of organising European football competitions. This will include the stipulation of limits. The precise extent of these limits is yet to be seen. The Court has, in the past, rendered (some) broadly framed rulings that were capable of shaping policy, while acting in a more cautious way in (many) others and pushing the big decisions back to the world of football. Nonetheless, limits there will be. The result may not turn the football pyramid upside down, but it could well lead to a tangible reduction of the power of the governance bodies at its apex (while paving the way for a further commercialisation of football). Just as importantly, it will demonstrate that EU law does not just exercise control over the substantive choices that football governing bodies make, but it also controls the status that allows them to make these choices. UEFA’s monopoly will have to be explained, justified and endure judicial review – it will no longer be simply taken for granted.

## 5. WHAT IS ‘EUROPEAN’ FOOTBALL?

The previous sections have highlighted the affective and regulatory dimensions within which the Europeanisation of football takes place. They show that the legal constraints

<sup>120</sup> See Case T-93/18 *International Skating Union* ECLI:EU:T:2020:610, para 75.

<sup>121</sup> Case C-390/99, *Canal Satellite Digital* ECLI:EU:C:2002:34. The existing rules do not seem to comply with these requirements, especially due to the broad discretion which UEFA and FIFA enjoy when deciding on whether to allow new formats, see Pijetlovic, ‘EU Sports Law and Breakaway Leagues in Football’ (Asser 2015), 291 et seq.

<sup>122</sup> As underlined in the 2020 ruling of the Luxembourg Appeal Court in FIBA/Euroleague dispute; see FIBA Press Release, available at <http://www.fiba.basketball/news/luxembourg-appeals-court-rules-in-favor-of-fiba-europe-in-euroleague-case>.

<sup>123</sup> S. Weatherill, ‘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”’ (2021) Blogpost for EU Law Analysis, available at <http://eulawanalysis.blogspot.com/2021/04/never-let-good-fiasco-go-to-waste-why.html>. Art. 165(2) TFEU recognises the promotion of ‘openness’ in sporting competitions as a guiding principle of EU sports law and policy.

which frame this process are as important as the way in which football is experienced and translated ‘on the ground’ by the stakeholders involved. In fact, a reflexive interaction between these two dimensions can be observed. On the one hand, the legal regulation of football takes account of how football is actually experienced, for example through principles protecting the cultural identification of fans or the importance of merit-based competition. On the other hand, the experience of football is shaped and transformed by its legal regulation, as the processes of encoding and localisation show. This means that it is difficult to appreciate what is ‘European’ about football without taking careful account of how these two dimensions interact, where they intersect (and, in doing so, create feedback loops) and where they diverge (thereby creating regulatory and cultural tension).

These findings have relevance for the idea of the ‘European Sport Model’ which has dominated debates in sports governance over the past two decades. In the late-1990s, the Commission suggested that there is a distinctly European approach to sports, which is defined by a series of characteristics that fall into two categories: governance and culture.<sup>124</sup> The former includes the pyramid structure, which produces competitions at different levels that are connected through the mechanism of promotion and relegation. The latter includes a respect for local and national identity, the running of international competitions and a commitment to developing sport in a bottom-up fashion, which involves support for grassroots efforts as well as solidarity mechanisms. Also, it entails a concern for securing fair competition by reducing the influence of factors like money and doping on sporting outcomes.<sup>125</sup> The extent to which this model adequately portrays the complex world of sports in Europe has often been doubted.<sup>126</sup> The Commission itself struck a more cautious tone in its 2007 White Paper on Sport, concluding that it was “unrealistic to try to define a unified model of organisation of sport in Europe” due to the diversity of existing structures.<sup>127</sup> It acknowledged the significant changes that had taken place since first outlining the Model, notably with regard to the increasing commercialisation of sport and the emergence of new stakeholders outside the traditional pyramid structure.

Our analysis suggests that, in the field of football, certain elements of the European Sport Model may have proven more robust than anticipated and continue to capture the way in which the sport operates today. This notably goes for the Model’s cultural aspects. Here, the affective and regulatory dimensions of football create feedback loops that reinforce values such as the commitment to local identity, solidarity and sporting merit. The situation is different when it comes to questions of governance, where ambiguity in legal regulation and pushback from football fans create significant tension. This has implications for the possible regulatory answers and the future development of football in Europe.

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<sup>124</sup> Commission, *The European Model of Sport - Consultation Document DG X (1998)*. The Commission uses the terms ‘organisation of sport’ for what we call governance aspects and ‘features of sport’ for what we call cultural aspects. See also Helsinki Report 1999.

<sup>125</sup> Similarly, see Nice Declaration.

<sup>126</sup> See e.g. S. Weatherill, *European Sports Law* (2nd edn, OUP 2014), 9.

<sup>127</sup> Commission, *White Paper on Sport, COM(2007) 391 final*, 12.

## A) THE CULTURE OF EUROPEAN FOOTBALL

Cultural elements feature prominently in the European Sport Model. The Commission identifies three main features of how sport is practiced in Europe and the values underpinning it.<sup>128</sup> First, sport has developed in a bottom-up fashion. Grassroots organisations operating at a local level, such as clubs, are the starting point for sporting activity and are, because of the function they exercise, supported by a system of solidarity. Second, sport has an important social role by contributing to “forg[ing] identities and bringing people together”:

Sport represents and strengthens national or regional identity by giving people a sense of belonging to a group. It unites players and spectators giving the latter the possibility of identifying with their nation. Sport contributes to social stability and is an emblem for culture and identity.<sup>129</sup>

Third, and relatedly, there is a tradition in Europe to have teams representing different countries compete against each other, which provides “an opportunity for European countries to demonstrate their culture and tradition, thus safeguarding the cultural diversity”.<sup>130</sup> We can add to this list the promotion-and-relegation system which, despite being discussed under the Model’s governance elements, has an important cultural dimension as it represents a comparatively strong belief in sporting merit, where only good performance allows teams to progress to higher-tier competitions.<sup>131</sup> The Commission underlines that many of these values contrast with the functioning of elite sport in the US, where clubs (revealingly called ‘franchises’) routinely change city,<sup>132</sup> State teams do not face each other in tournaments<sup>133</sup> and competitions operate as a closed-shop, meaning that sporting merit is immaterial to the ability of clubs to retain their place in the elite leagues.<sup>134</sup>

Over two decades have passed since these cultural values have been articulated but, in football, there appears to be continuous support for them from both the regulatory side and all stakeholders within the sport, ranging from ‘ordinary’ fans to high-level EU politicians.<sup>135</sup> Two, in particular, bear highlighting. The first is the commitment to local

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<sup>128</sup> Commission, *The European Model of Sport - Consultation Document* DG X (1998), 4-5. Similarly, see Nice Declaration.

<sup>129</sup> *Ibid.*, 4.

<sup>130</sup> *Ibid.*, 5.

<sup>131</sup> *Ibid.*, 4 and 7.

<sup>132</sup> In 1995, the NFL team Los Angeles Rams relocated to St. Louis (a mere 3000km away), only to move back to Los Angeles in 2015. St. Louis had previously lost its NFL team when it moved to Phoenix (about 2200km away). For reference, this is as if Real Madrid were to decide to move its club to Warsaw.

<sup>133</sup> There is no tournament in any of the major team sports in the US where, for example, New York would compete against California, in the same way that Germany face England in a competition like the Euros.

<sup>134</sup> For a legal assessment of this issue under US law, see G. Roberts, ‘Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry’ (1984) 32 *UCLA Law Review* 219; S. Ross, ‘Monopoly Sports Leagues’ (1989) 73 *Minnesota Law Review* 643.

<sup>135</sup> The haul includes Commissioner for Sport Mariya Gabriel (‘the beauty of football is that fairy tales can happen! A potential European Super League would inflict irreversible damage [i]n the entire nature of club football. We must protect our European Sport Model based on cultural heritage, integrity, diversity, inclusion & solidarity’); EP President Davide Sassoli (‘we need to defend the European model of sport. I stand against football becoming the preserve of a wealthy few, sport must be for everyone’); with both the French President Emmanuel Macron and

identity. Both at a socio-cultural and regulatory level, there is an understanding of the special relationship of football with its geographic and social surroundings. Interactions with ‘Europe’, be it through participating in international competitions or the signing of foreign players, do not supplant locally oriented self-perceptions of supporters and clubs, but are contextualised within these. Legal requirements, while protecting the free movement rights of footballers, acknowledge the importance of the local connection between players and their teams/leagues as well as the social significance of competitions between national sides. This commitment is given additional form through projects, launched both within and outside of the world of football, to protect the financial stability of clubs, their sporting heritage and access for fans. The principles and practices that are thus created at the cultural and regulatory level often act in a mutually reinforcing way. The Independent Fan Led Review of Football Governance in the UK is a recent example of how this feedback effect can play out.<sup>136</sup> Commissioned by the British government in the wake of the Super League fiasco, its objective was to explore paths towards a better regulation of English football. The expert panel included a representative of the Football Supporters Association and heard evidence from stakeholders at all levels of the football pyramid, including clubs, players and fans. Its findings include a proposal that each club should be required to have a ‘Shadow Board’ of elected supporter representatives which will be consulted when major decisions within a club are taken, as well as giving fans – through a supporter organisation acting in their interest – a ‘Golden Share’ that allows them to veto certain key decisions within their club to protect its heritage.<sup>137</sup> Where the substantive orientation of the regulatory and the affective dimensions of football intersect, commitments can be credibly protected.

A second theme in the cultural dimension of European football is the commitment to sporting merit and solidarity. There is a fundamental – if idealised – belief that success in football should be a reflection of good sporting performance, not external factors. This shows in cultural discourses on earning a spot ‘in Europe’ through good results in the domestic league just as in the regulatory tools that limit the acquisition and financing of football clubs. It is also manifested in the central place that the protection of the promotion-and-relegation system has occupied in the debates surrounding the ESL and may occupy in the legal proceedings before the Court. At the same time, there is a wide acceptance of the need for financial redistribution within football. Mechanisms like the collective selling of broadcasting rights and structures involving revenue transfers within the pyramid, which have been legally sanctioned, create a bond of solidarity between

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the Italian Prime Minister Mario Draghi highlighting the key principles of sporting merit and the social function of sports; and European Commissioner Schinas even explicitly linking the European Model of Sport to the European ‘way of life’. See <https://twitter.com/MargSchinas/status/1383908768631558150>; <https://twitter.com/GabrielMariya/status/1384206870718521345?s=20>; [https://twitter.com/EP\\_President/status/1384117156544090113?s=20](https://twitter.com/EP_President/status/1384117156544090113?s=20); <https://www.politico.eu/article/european-leaders-scramble-as-football-stands-on-the-brink/>.

<sup>136</sup> Fan Led Review of Football Governance, report available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1036345/Football\\_Fan\\_led\\_Governance\\_Review\\_v7\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1036345/Football_Fan_led_Governance_Review_v7_Web_Accessible.pdf).

<sup>137</sup> These decisions include ‘selling the club stadium or permanently relocating it outside of its local area, joining a new competition not affiliated to FIFA, UEFA and the FA, or changing the club badge, the club name or first team home colours’.



professional and grassroots football as well as between more and less affluent clubs. By making football ‘fairy tales’<sup>138</sup> possible and contributing to the inclusivity that is a key component of the perceived charm of the sport, they are also considered to be a fundamental pillar of the affective dimension of European football. This, again, demonstrates that where regulation and affect intersect, the values underpinning football can remain central in any process of transformation.

## B) THE GOVERNANCE OF EUROPEAN FOOTBALL

In its initial elaboration of the European Sport Model, the Commission – without much hesitation – described the governance structure of sports as one based on a pyramid structure which produces competitions at different levels led by national associations operating under the auspices of continental and global federations, holding a *de facto* monopoly on the regulation of the technical, organisational, economic and disciplinary aspects of sports. A decade later, in the White Paper on Sport, it was already more sceptical as to whether this portrayal accurately captured the European sport landscape. New actors had appeared on the horizon, including professional sports clubs and other participants from outside the traditional governance structures, a development that was “posing new questions as regards governance, democracy and representation of interests within the sport movement”.<sup>139</sup> The Commission concluded that the resulting challenges could be addressed by the sport governing bodies themselves “through self-regulation respectful of good governance principles” (while also stating that it was “ready to play a facilitating role or take action if necessary”).<sup>140</sup> At the same time, both the EP and the Parliamentary Assembly of the Council of Europe have been more sceptical of the ability of UEFA and FIFA to self-regulate, and have stressed the need to impose checks on whether good governance principles are in fact abided by.<sup>141</sup>

Football, in many ways, is a paradigmatic example of these tensions. The football pyramid has undergone a process of transformation which has affected the traditional governance structure. There has been a push for recognising the interests of under-represented actors.<sup>142</sup> Clubs have created institutions like the European Club Association (formerly the G-14); players have increased their standing via FIFPro and the social dialogue mechanism; national leagues have established European Leagues (formerly EPFL) as a representative organisation; and supporters have increasingly been making the case for greater recognition within their clubs. At the same time, the legal status of the pyramid has increasingly come under pressure. Through litigation before the CJEU and

<sup>138</sup> Commissioner for Sport Mariya Gabriel (‘the beauty of football is that fairy tales can happen! A potential European Super League would inflict irreversible damage [i]n the entire nature of club football. We must protect our European Sport Model based on cultural heritage, integrity, diversity, inclusion & solidarity’): <https://twitter.com/GabrielMariya/status/1384206870718521345?s=20>.

<sup>139</sup> Commission, White Paper on Sport, COM(2007) 391 final, 12.

<sup>140</sup> Ibid, 13.

<sup>141</sup> See PACE Report (<https://pace.coe.int/en/files/24284>) and EP Resolution of 11<sup>th</sup> June 2015 (Texts adopted - Recent revelations of high-level corruption cases in FIFA - Thursday, 11 June 2015 (europa.eu)).

<sup>142</sup> B. García, ‘The influence of the EU on the governance of football’ in H. Gammelsæter and B. Senaux (Eds.), ‘The Organisation and Governance of Top Football Across Europe: An Institutional Perspective’ (Routledge 2011), 32.

proceedings before the Commission, a number of football rules and practices have successfully been challenged by actors outside the sport's governance structure, thus curtailing the regulatory autonomy of UEFA and national associations.

The events surrounding the ESL epitomise these developments. The announcement of the plans to establish the Super League was the most direct attack on the football pyramid to date, indicating a dissatisfaction by elite clubs in the way in which football governance manages the sport. It has led to litigation which might impose limits to UEFA's monopoly of organising European football competitions. In addition, the fierce reaction against the project demonstrated how great a value the many actors in football, ranging from smaller clubs, to players, managers and supporters, attach to the idea of representation (in addition to values like financial solidarity and sporting merit). They bemoaned the way in which football clubs operated in isolation from the views and interests of fans, and the way in which football governance allowed for this marginalisation to happen.

It emerges that governance is the element of the European Sports Model where we find the strongest disparity between football's affective and regulatory dimensions. Rather than creating a feedback loop wherein legal regulation reflects and strengthens commitments underlying the experience of football, and seeks change through a contextualisation of those commitments, the dynamic between the two dimensions is much more protracted here. On the one hand, we see greater calls for representation in football governance. Although there are differences in this area across countries and competitions, there is a growing expectation that decisions in football should be taken in a manner that gives voice to all affected stakeholders, not just those in a position of power. This concerns both the micro and the macro level. Supporter groups demand to be consulted when major decisions at their own clubs are taken, while players, clubs and leagues want to have a say on how the world of football is run, especially when it comes to decisions directly impacting them.

On the other hand, there is considerable ambivalence in the way in which the EU has so far approached questions pertaining to football governance. While European sports law and policy has not hampered the turn towards more representation, it has also done little to facilitate it, and can be considered as complicit in solidifying the UEFA's monopolist position. The creation in 2008 of the social dialogue committee for professional football, which provides a negotiation platform for clubs and players regarding employment matters, is one prominent exception (even though its practical success has, so far, been limited).<sup>143</sup> Other than that, the EU's actions have mostly remained on a rhetorical level, and ambiguous at best. Various policy documents, including the aforementioned White Paper on Sport, have emphasised the importance of good governance in football and pledged allegiance to objectives such as promoting accountability, participation and

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<sup>143</sup> R. Parrish, 'Social Dialogue in European Professional Football' (2011) 17 *European Law Journal* 213; A. Geeraert, 'The European sectoral social dialogue committee in professional football: power relations, legitimacy and control' (2015) 16 *Soccer & Society* 98.

democratic structures.<sup>144</sup> However, none of this has translated into actual regulatory commitments or critical engagement with the current structures, while the very close interaction and cooperation between the European Commission and UEFA on a range of questions pertaining to broadcasting rights, financial regulations and transfer rules suggest that the EU is partially complicit in maintaining the pyramid structure of football.

### C) RE-THINKING EUROPEAN FOOTBALL

These processes provide important insights for the future of football regulation. There is a strong case for continuing to legally protect the cultural values underpinning the 'European Football Model'. Embracing the social function of football, its redistributive features and the safeguards adopted to protect its integrity not only has had positive effects on the sport, but enjoys the backing of the actors involved in it. Consequently, it should remain a cornerstone of any regulatory approach in this area, and could be pursued with even greater determination. Where, by contrast, regulatory reality departs from cultural reality, the question arises as to whether the latter needs a re-think. This notably concerns the issue of governance and representation.

It is crucial to note in this context that the pyramid structure is instrumental, not self-serving. It is not, and never has been, an end in and of itself but was created as a means of achieving certain objectives that benefit the sport (such as the above). Sports governing bodies like UEFA have tried to leverage the idea of the European Sport Model as a way of portraying the existing governance mechanisms as normatively desirable in their own right.<sup>145</sup> This, however, is a misrepresentation of the Commission's position, which always saw the pyramid-shaped organisation of sports as a choice rather than a necessity – a historically settled and in many ways useful one, but a choice nonetheless.<sup>146</sup> The regulation of football must reflect this instrumental nature of football's governance structures, provide opportunities for periodic reflection on whether they still fulfil the functions they have been assigned with and, where they do not, act in a corrective manner.

What could a re-thinking of the governance structure of European football entail? One option is legislation. The EU could enact laws that explicitly subject football federations to a set of regulatory standards. (A similar course of action could, *mutatis mutandis*, be pursued by the Member States.<sup>147</sup>) This would constitute a break from the primarily reactive and *ad hoc* method of regulating football that has marked large parts of the Union's activity in this area, towards a more coherent, policy-oriented form of

<sup>144</sup> See also Commission, Developing the European Dimension in Sport, COM(2011) 12 final; Resolution of the Council and of the Representatives of the Governments of the Member States, European Union Work Plan for Sport (2017) 9639/17 SPORT 41; Cooperation Agreement Between Commission and UEFA, C(2018) 876 final.

<sup>145</sup> B. García, 'Sport governance after the White Paper: the demise of the European model?' (2009) 1 *International Journal of Sport Policy* 267.

<sup>146</sup> Commission, The European Model of Sport - Consultation Document DG X (1998), 2.

<sup>147</sup> Historically, individual states have been reluctant to interfere with the autonomy of FIFA/UEFA or domestic federations. There would be a fear of hurting the clubs, athletes, and fans in the country by triggering disciplinary sanctions (e.g. a ban from participating in a major tournament). Also, there tends to be close connections between sports bodies and local regulators, making political capturing a greater risk. The events surrounding the ESL may have shifted the odds on this issue by demonstrating to domestic politicians that there is some genuine political potential to be tapped by regulating football.

regulation. The arrangement could take the form of a *quid pro quo*. In the wake of the ESL debacle, Steve Weatherill suggested that the EU could “establish minimum standards of good governance while ruling out sporting competitions which depart from merit-based criteria for admission”.<sup>148</sup> In a similar vein, Antoine Duval proposed that a way out of the Super League dilemma would be to grant a state-sanctioned monopoly to UEFA/FIFA which would be conditional on strict governance criteria – a solution that would recognise football as a “transnational public service”.<sup>149</sup> These governance standards might involve a commitment to incorporating a larger number of stakeholders in the decision-making processes in a more formal way than currently the case, for example by giving representatives of fans, players and smaller clubs a ‘seat at the table’, i.e. UEFA’s Executive Committee, or by creating mandatory rules on fan representation at the club level.<sup>150</sup> However, they could also be used to stipulate clearer and stricter requirements in relation to other objectives pursued by football governance bodies, for instance by requiring a greater degree of transparency, accountability and redistribution from the higher to the lower tiers of the pyramid.<sup>151</sup> The enforcement of these obligations could be placed in the hands of the Commission or, as suggested in the Fan Led Review, of a special independent regulatory body.

These obligations could extend not just to the footballing authorities, but to actors within the pyramid, such as clubs. A radical example of the regulatory entrenchment of representation is the German ‘50+1’-Rule, which stipulates that club members must hold a majority of their voting rights. This excludes the possibility of major decisions being taken without consent of the fans. A recent investigation of the German competition authority into the Rule illustrates how law and regulation can be sensitive to the idea of representation that underpins the rule.<sup>152</sup> In its preliminary assessment, the *Bundeskartellamt* found that the restriction on club ownership is justified to maintain the ‘club character’ of the sport and to ensure a competitive balance between teams. However, in order to be proportionate, the German Football League must enforce it more consistently. Exceptions for private investors have to be limited to what is strictly necessary; otherwise, the entire purpose of the regulation risks being missed.<sup>153</sup> This illustrates well the potential for feedback loops between the regulatory and affective dimension of football. It is unsurprising, then, that the ‘50+1’-Rule has been at the centre of fan-driven proposals for

<sup>148</sup> See S. Weatherill, ‘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”’ (2021) Blogpost for EU Law Analysis, available at <http://eulawanalysis.blogspot.com/2021/04/never-let-good-fiasco-go-to-waste-why.html>.

<sup>149</sup> See <https://twitter.com/ant1duval/status/1384055728575455236?lang=en-gb>.

<sup>150</sup> Although there are currently two members of the European Club Association (formerly G-14) in the Executive Committee, but the Association is known for over-representing the interests of its affluent members, as evidenced by the choice of representatives in the Committee: Nasser Al-Khelaifi of PSG and Karl-Heinz Rummenigge of Bayern Munich.

<sup>151</sup> As to the latter, see e.g. the report of the Fan Led Review which proposes to introduce a new solidarity transfer levy that would be due when Premier League clubs buy players and would be distributed across the football pyramid.

<sup>152</sup> Bundeskartellamt Press Release, ‘Bundeskartellamt provides preliminary assessment of DFL’s 50+1 ownership rule’, available at [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/31\\_05\\_2021\\_50plus1.html;%20jsessionid=5FB7E655F754ED5E0DA940A7524BCB30.1\\_cid362?nn=3591568](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/31_05_2021_50plus1.html;%20jsessionid=5FB7E655F754ED5E0DA940A7524BCB30.1_cid362?nn=3591568).

<sup>153</sup> The German Football League has disputed the *Bundeskartellamt*’s position on this issue. At the time of writing, the proceedings have not yet been concluded.

reform after the ESL saga,<sup>154</sup> and even the European Parliament has become an advocate of it.<sup>155</sup>

An important issue in this context is whether the EU has the competence to adopt legislation of such far-reaching nature. The Treaties give the Union only a supporting competence in the field of sport, which is limited to measures that support, coordinate or supplement the actions of the Member States.<sup>156</sup> Article 165 TFEU tasks the EU with contributing to “the promotion of European sporting issues” and “developing a European dimension in sport” but, crucially, excludes any harmonisation. This, however, need not be an insurmountable obstacle. Given that professional football has a strong economic component, Article 114 TFEU, the internal market provision, could constitute an alternative legal basis for EU action. Of course, the question would arise as to whether this would not circumvent the red line in the (more specific) provisions on sports, but more creative usages of Article 114 TFEU have been observed in the past.<sup>157</sup> It should be added that Member States and other non-EU European countries would not have the same problem as the Union because they enjoy unlimited regulatory competences in relation to sport. Their problem is rather one of scope: they can only influence what is happening within their territory, their national and regional federations, and their domestic competitions (even though spill-over effects are conceivable, especially with legislation adopted by authorities in Europe’s top leagues).

Even if such ambitious projects fail, there is plenty that the EU can do. As explained, many aspects of the current regulation of football restrict internal market principles and must, therefore, be justified by demonstrating that they pursue legitimate objectives and are proportionate to achieve them. It falls upon the EU (and national) institutions to review whether these requirements are fulfilled. When exercising this role, they have often taken a deferential approach, accepting justification grounds rather easily as legitimate and the means adopted in their pursuit as proportionate. Even where UEFA regulations were found to violate European rules, the modifications that were required concerned questions of detail rather than systemic issues; the reforms of the transfer system and the commitments in collective selling cases are examples.

It might be time to tighten the screws and probe more intensely whether the current structures in the world of football achieve what they are meant to, and especially to question whether the legal regulation of UEFA is sufficiently sensitive to the need for diverse stakeholders to be represented in the transformation of football. Such a more institutional and critical perspective by the CJEU and Commission might be the starting point for a more stable and more sustained negotiation between the fans and the future of football. The ESL case that is currently pending will provide an opportunity for doing exactly that and ask questions such as: what is the real benefit of having a UEFA monopoly

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<sup>154</sup> See the Petition ‘Enforce the “50+1” Rule for professional football club ownership in the UK’ that was brought to the UK Government and Parliament, available at <https://petition.parliament.uk/petitions/583310>.

<sup>155</sup> European Parliament, Resolution on EU Sports Policy: Assessment and Possible Ways Forward (2021/2058(INI)), para 18.

<sup>156</sup> Art. 6 TFEU.

<sup>157</sup> S. Weatherill, ‘The Function and Limits of Legislative Harmonisation in Making the Internal Market’, in: T. Tridimas & R. Schutze, ‘Oxford Principles of European Union Law: Volume II’ (OUP 2022).

on organising and commercially exploiting European competitions? Are the existing solidarity mechanisms it has put in place a meaningful contribution to protecting the competitive balance in football? Should UEFA comply with certain good governance principles before its decisions can be considered as representative of football in Europe? But even in cases which are not, or not directly, about the exclusive competences of football governance bodies, a stricter review approach would pay off. Take the joint-selling of broadcasting rights. In the future, the question as to whether collective selling continues to be beneficial for consumers, broadcasters but also fans should be posed with greater seriousness, alongside the issue of whether the system's contribution to redistribution is sufficient and accountable. This might lead to more radical changes of old-inherited structures within football or, at the very least, promote greater effectiveness in the way they are implemented.

## 6. CONCLUSION

In this contribution, we have analysed the idea of Europe in football and looked at both the sport's affective and regulatory dimension. The interplay between these two dimensions offers important insights into the processes of the Europeanisation of football. What makes football 'European' is a commitment to certain values, including a celebration of local spaces and identities as well as the centrality of sporting merit and solidarity. These values are widely held by stakeholders in football and internalised in the regulatory frameworks through which EU law interacts with football. This does not mean, as we saw, an ossification of football structures. Someone who has last watched football in, say, 1960, would be amazed by the changes that the game has undergone in terms of its commercial exploitation, the nationalities of players in teams, the availability of broadcasting and the importance of European-wide competitions. Yet, this process of Europeanisation and rescaling has been largely smooth, not creating much regulatory or cultural tension. Arguably, this has been due to European (regulatory) elements not supplanting but intermingling with local elements, in a process wherein affective and symbolic ties are slowly transformed rather than challenged. Europe, today, is central to the way in which local footballing identities are construed and articulated; it constitutes the pinnacle of sporting merit and competition. It is not, unlike in some other areas of contemporary life, seen with suspicion.

This feedback loop between the affective and regulatory dimension of football is absent when it comes to governance. There is a degree of tension when it comes to UEFA's monopoly in the organisation of European football as well as the lack of adequate representation of many stakeholders within existing governance structures. On both levels, we have traced processes that have led to the marginalisation of the voices of actors like fans, players and smaller clubs. A closer alignment of regulatory instruments to support these actors and combat their marginalisation would, on this view, not only make for a more representative mode of football governance but also one that understands EU law to be sensitive to the experience of those that it affects. After all, the ESL saga also tells

us something about the integration project and the study of EU law. It highlights the need to be sensitive to the way in which the processes of rescaling that are central to both the EU and EU law are experienced by the citizens. Where the experience of citizens and its regulatory intent are not sufficiently aligned, both regulatory and cultural tensions emerge.