Constitutionalising the European Sports Model: The opinion of Advocate General Rantos in the European Super League case

On 15 December, Advocate General Rantos, a member of the Court of Justice of the European Union, published an initial opinion on whether UEFA and FIFA's opposition to the creation of a European Super League in 2021 breached EU competition law. **Jan Zglinski** *examines what the opinion means for sport in Europe.*

As most football fans – at least those who did not choose to boycott the tournament – have begun to wonder whether Messi or Mbappé will lift the World Cup trophy on Sunday, a major development in the world of football has taken place, far away from the climate-controlled stadia in Qatar.

Yesterday, Advocate General Rantos, member of the Court of Justice of the European Union, published his opinion in the European Super League case. The timing was no coincidence: the opinion came out 27 years to the day after the Court's *Bosman* ruling, unarguably the most consequential judgment in the field of EU sports law. The Super League litigation, too, promises to have significant effects on the future of football governance.

To recap: last April, twelve football clubs, known as the 'dirty dozen', announced their intention to establish a breakaway league comprising some of the best teams on the continent. Backed by JP Morgan, this new European Super League would generate eye-watering revenue for the teams involved and function as a quasi-closed shop, with permanent members being able to participate regardless of their performance at the national level.

Within less than 48 hours, the project collapsed. Fans protested, politicians got involved, UEFA threatened sanctions against the breakaway clubs and their players. As a result, nine of the twelve clubs withdrew and a legal battle ensued. The Super League

masterminds brought a case before the Commercial Court of Madrid, arguing that UEFA violated EU competition rules by trying to stop the league. UEFA, in turn, claimed that its actions were justified, even protected, by EU law.

Vindication for UEFA

The Advocate General's opinion largely vindicates UEFA's position. It finds that the mere fact that a sport governing body regulates and organises sporting competitions is not, at least not *per se*, a violation of competition law. That FIFA and UEFA reserve the right to authorise third-party competitions like the European Super League restricts market access, but can be justified if legitimate policy objectives are pursued in a proportionate manner.

These include promoting sporting merit, equal opportunities, and financial solidarity. Although the Advocate General defers parts of the proportionality assessment to the referring court, especially regarding the effectiveness of UEFA's revenue redistribution mechanism, his conclusion appears to suggest that the system is justified and proportionate. For similar reasons, there is no violation of free movement law.

The rules for prior approval need to be objective, transparent, and non-discriminatory which, again, will be for the national court to examine. The football governing bodies anticipated this requirement and changed their regulations during the course of the proceedings. Yet, in an odd addendum, the opinion stresses that even if the regulations were found to fall foul of these criteria, it would not mean that the European Super League has to be authorised, particularly if it runs counter to legitimate sporting objectives.

UEFA can issue sanctions against the clubs participating in the Super League – not, however, against the players 'who were not parties to the decision to set [it] up' (but could, one might object, choose to profit from it). Mind you, none of this means that breakaway leagues cannot be established. In fact, the opinion explicitly states that they can be created freely outside of FIFA and UEFA's ecosystem. It simply means that breakaway clubs cannot have 'dual membership', i.e. be simultaneously part of a Super League and official competitions.

Implications for breakaway leagues

There are many intriguing elements in the opinion, too many for a brief summary, so I shall limit myself to three points. Most immediately, its findings – if they are followed by the Court – imply that establishing breakaway leagues will become, or rather remain, very difficult. FIFA and UEFA cannot completely prevent third-party competitions within their structures, but they are allowed to have a system of prior approval to protect their economic and non-economic interests.

Clubs can create new formats outside those structures, but will face the prospect of being excluded from all other national and international competitions. This is a tough choice. At least for now, it is hard to imagine teams like Liverpool, Barcelona, or Juventus leaving their domestic leagues, even for financially lucrative projects like the European Super League. Despite the rapidly advancing globalisation of football, the core market for football clubs still tends to be national.

Constitutionalising the European Sports Model

Perhaps more significantly, the opinion appears to constitutionalise the European Sports Model. What started as a loose concept in a Commission memo from 1998, only to be practically discarded in a 2007 White Paper on Sports, has experienced a remarkable revival over the past year-and-a-half.

According to this model, European sports are organised according to a pyramid structure, with (international) professional sports at the top and (local) amateur sports at the bottom; embrace the idea of open competitions, which is defined by a system of promotion and relegation, a comparatively strong belief in sporting merit, as well as tools for maintaining competitive balance; and promote financial solidarity by redistributing revenue from the higher to the lower echelons. AG Rantos proposes that Article 165 TFEU ‘gives expression… to the “constitutional” recognition’ of that model. This includes both its institutional features and the cultural values underpinning it.

Will this recognition matter in practice? Only time will tell. The language of constitutionality would suggest that organisational choices which are contrary to the European Sports Model are off the table as a matter of EU primary law. This does not sit well with the parallel acceptance of different forms of sports governance in the opinion. Instead, the passage is probably best read as a plea for taking Article 165 TFEU seriously, as an, in the words of the Advocate General, ‘horizontal provision’ that must

be considered when interpreting other EU rules.

This could still leave a mark on European sports law and policy. It imbues the idea of federations exercising monopolies of the governance of a sport with heightened legitimacy, rendering challenges to their rules more difficult. It may affect the legality of third-party competitions, which could have to comply with substantive principles like the idea of promotion and relegation in order to be authorised. By contrast, it does not seem to have much purchase when it comes to scrutinising the decisions of sport governing bodies themselves. *In casu*, Article 165 TFEU appears to have led to the adoption of a very lenient standard of review in relation to the justifications put forward by UEFA, most of which are directly connected to the European Sports Model.

UEFA and the EU: From confrontation to co-option?

Which brings me to my final point. The opinion is a striking testament to how much the relationship between the EU and UEFA/FIFA has changed. Long gone are the days of *Bosman* where the two sides held at daggers drawn. Over time, both football governing bodies and EU institutions understood that improving their rapport was mutually beneficial.

They started developing policies together, issued joint statements, and, since 2014, have had formal cooperation agreements. The Super League dispute is yet another watershed in this regard. The European Parliament and Council went to UEFA's rescue, adopting resolutions that explicitly opposed breakaway leagues and endorsed the pyramidal structure. In the litigation before the Court, UEFA is, for the first time, not just defending itself from – but also on the basis of – EU law. The European Union is not a threat, but a vital source of support for the football pyramid.

One may feel a sense of delight about this given the deeply unpopular nature of the opponent. But it also comes with risks. The world of football suffers from a number of problems, ranging from antiquated governance structures, to continuous gender inequalities and growing financial imbalances. Using EU law and institutions to protect the *status quo* rather than to challenge it can be counterproductive to effect change.

AG Rantos's opinion illustrates this neatly. Without much hesitation, it accepts the objectives pursued by UEFA as legitimate and the means to achieve them as

proportionate. Yet, is there a genuine equality of opportunities in present-day European football? Is there sufficient redistribution? Do we still have a meaningful competitive balance? The Super League case was an opportunity to ask football governing bodies some legitimate questions, an opportunity that has been largely missed. Some years ago, Borja García quipped that the relationship between UEFA and the EU had moved 'from confrontation to co-operation'. The EU needs to make sure that it does not end in co-option.

Note: This article gives the views of the author, not the position of EUROPP – European Politics and Policy or the London School of Economics. The author warmly thanks Antoine Duval, Borja García, Alexandra Ortolja-Baird, and Steve Weatherill for their insightful – and timely – comments. Featured image credit: Thomas Serer on Unsplash

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