



THE EUROPEAN SPORT MODEL

I. SPORT ORGANISATION MODELS

The European Sport Model goes through a period of threats and change facing in there respective disciplines more and more alternative competitions by third party organisers.

This trend is wideopenend due to the hugh an partly unexploited investment opportunities in sports today and in the future.

Athletes are claiming that they should be allowed to profit from private sponsors, threatening Federations as well as Associations' team or pool sponsoring.

Sports organizations are responsible to uphold fair competition but are they themselves obliged to respect competition regulations?

The European Commission as well as national competition authorities are assessing more than in the past wether rules implements by sport governing bodies are risking to be anti-competitive.

A. THE AMERICAN MODEL

- The logic is purely economic and means to maximize profit.
- Clubs are franchised companies.
- Sporting results are not a condition of retention in a league.
- System of “draft” and “salary cap”.
- There is a clear separation of amateur and professional sports.

B. THE EUROPEAN MODEL

- Sport is a human activity based on essential social, educational and cultural values. It is a factor in the integration of participation in social life, tolerance, acceptance of differences and respect for rules
- From the point of view of institutions, a distinction is drawn between:
 - governmental structures (centralising or federalist)
 - non-governmental structures (IOC, ASOIF, COE (...))
- The sports movement: amateurs and professionals

- The different sports are organised on a pyramid structure - clubs, national and international federations - which are in a monopoly situation and organise championships.
- The model is based on the fundamental principle of promotion-relegation and the monopoly enjoyed by federations.

This is a concept where:

- volunteer leaders are or should be more inclined to preserve sports logic and ethics than shareholders in an entertainment industry.
- sport primarily has cultural issues with aims and values.

But the central element is undoubtedly the ownership of structures and competitions.

In Europe, federations and bodies in charge of the professional sector are non-profit-making entities, run by elected leaders and not specifically owned by individuals or companies (clubs).

At a national, continental or world level, championships or events belong to the party organising them (federations)

Losing control over such is significant from the viewpoint of loss of identity and financial loss.

“The commercial dynamic has grown so rapidly in recent years and decades that professional teams and leagues are increasingly tempted to free themselves from the supervision of these federations, which gradually appear to be torn between the traditional supervision of amateur sport and the management of professional sport, which is gaining in autonomy every day. There is a risk that such rapid and poorly controlled changes will precipitate the decline of the association model, which has already been damaged by the erosion of voluntary action”

(Colin Mège, Les Organisations Sportives et l'Europe, INSEP, 2000).

According to the European Commission:

“such a model is likely to break down in the face of pressure from economic groups wishing to draw inspiration from experienced formulae, particularly in the United States with its high level of professional sport, and this could endanger basic structures ...”

For the European Commission, these threats are principally due to excesses linked to the commercialisation of sport (including breaches of provisions on the protection of young athletes, combating doping).

C. TODAY'S SPORT SECTOR

- New media technologies (digital) and changes in consumer behaviour as sponsors have caused significant change in the world of sport (USD 169.4 billion (an increase of 37% since 2012).
- It involves a stranger athlete's autonomy and is largely commercially driven (role of rights owners/broadcasters).

- Unexploited investment opportunities.

D. STAKES AND RISKS

AMERICAN MODEL VS EUROPEAN MODEL ON THE LEVEL OF THE FUTURE OF FOOTBALL

We are confronted by a major issue of “governance”.

Americanisation of professional sport with the virtue of attracting significant capital ?

Considering sport as a pure economic activity... without the vocation of “solidarity”?

Indeed, in the face of the uncertainty represented by random sports results, voices are increasingly being raised with regard to the creation of closed leagues. The objective would be to guarantee professional clubs a continuous presence in a closed league regardless of the results they obtain.

Or, on the other hand, should we retain a (rather) exclusively sporting or ethical vision?

A “vast majority” of European teams seem to be against plans by elite clubs to radically change the shape of the Champions League, according to the organization representing national leagues.

That proposal would represent the biggest change to the Champions League since some domestic league runners-up were allowed entry in 1997.

The clubs’ idea is fiercely opposed by the leagues, which fear fans and broadcasters could lose interest in their competitions if Champions League entries can be secured elsewhere.

What is the future of European football ?

Several years ago, Stefan Szymanski wrote an article with Tom Hoehn entitled ***“The Americanization of European Football”***.

“In this article, they argued that there was the potential to increase consumer welfare substantially by creating a format that preserves the most important domestic rivalries while ensuring more competition between the big European clubs that employ the most talented players.

In a rational world, there be agreement through negotiation among all the interested parties to ensure that sports fans were supplied with the most attractive possible product, and then to agree some reasonable division of the spoils.

My feeling is that we were right about the attractiveness of international club competition, and that the big clubs are straining to create a format that will deliver more of this kind of competition. However, the football world is not noted for its conformity to the principles of rationality.

Instead, we appear to have reached a stage where there are two entrenched camps, one advocating change, the other resistant to all change.

These two camps are fighting their corners, either in the courts or with the politicians. The outcome of this conflict will tell us much about the future of Europe as it will about the future of football."

(The future of football in Europe, Stephan Szymanski Economie Deport 17/1/2007.)

II. IOC AND EOC ADDRESSES

IOC President Thomas Bach: (2018)

"Our European Sport Model is based on solidarity, inclusivity and millions of volunteers across our continent," Bach said. "Our European Sport Model is under pressure, if not under threat. The value of an organisation, of an activity, is no longer determined by the contribution to society but just on money and markets. We are entering into serious problems as this purely market approach ignores the societal contribution sport has all over Europe ... We have to start defending our European Sport Model. It is not only about our own interests; it is in the interest of European society."

EOC President Janez Kocijančič: (2018)

"We are the strongest continent in sport, collecting 50 percent of medals in the summer Olympic Games and over 70 percent in the Olympic Winter Games,". "This gives us not only pride but responsibility. The Olympic Games and the IOC are based on the structure of the European Sports Model. It starts from the grassroots level, sport for all, and goes all the way up to the elite competition.

"Our model is based on values and youth – a healthy spirit and healthy body. If you let through only the market and money values, you endanger our model,". "We should speak quite openly about the social inclusivity of sport and the dangers of the neoliberal approach where everything is based on money."

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Mrs. Vestager, European Commission: (2017)

Answer from Mrs Vestager on behalf of the European Commission to European Parliament:

"The Commission shares the views of the Honourable Members on the importance of national team.

The commission regrets the overlap between certain matches of the basketball World Cup qualifiers and certain matches of the Turkish Airlines Euroleague. It urges the International Basketball Federation (FIBA) and Euroleague Commercial Assets (ECA) to find a solution for the good of the athletes and the entire sport.

The commission is closely monitoring the situation in order to ensure that athletes' rights are respected and is in constant contact with the relevant actors. The Commission cannot provide further insights as there is an open investigation ongoing."

III. THE SPECIFIC NATURE OF SPORT

Competition law are prohibiting agreements between undertakings and decisions by associations of undertakings which have the effect or the objective of distorting competition.

- But an agreement may be exempted from Article 101(1) TFEU prohibition under certain circumstances and may fall outside Article 101(1) in so far as the Commission can take into account the specificities of sport in order to regulate the sector in the most effective and proportionate way.
- Competition law also prohibits unilateral abuse of a dominant position (Article 102 TFEU)

A sporting Rule restricting competition can be justified if it pursues a legitimate objective and is proportionate and necessary for reaching such objective.

This test may not be reached if the objective pursued can be reached by a less restrictive rule.

Until the entry into force of the Lisbon Treaty on 1 December 2009 there was no express mention of sport in the constituent Treaties of the EU.

« The Union shall contribute to the promotion of European Sport issues, while taking into account of the specific nature of sport, its structures based on voluntary activity and its social and educational function (Article 165(1) paragraph 2).

1. According to the Commission, the “specificity” of European sport can be approached through two assumptions:

- **the specificity of sporting activities and of sporting rules**, such as separate competition for men and women, limitation on the number of participants in competitions or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions; and
- **the specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions** from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport.

2. Following, **the Commission acknowledged that there organisational sporting rules, that based on their legitimate objectives, are likely not to breach the anti-trust provisions of the Treaties if they are based, provided that their anti-competitive effects, if any, are inherent and proportionate to the objectives pursued.**

- The Rules of the Game (number of players on the pitch, length of a game the functioning of event calendars transfer periods).
- The Rules on selection criteria for sport competitions.
- The Rules preventing multiple ownership in club competitions.
- The Rules of the composition of national teams.
- Anti-Doping Rules, Health preventors.

- Integrity of sports, prevention of gambling and betting.
3. The assessment whether a certain sporting Rule is compatible with EU competition law can only be made on a case by case basis.
 4. The ECJ as well as the Commission recognises that the speciality of sport has to be taken into consideration in the sense that restrictive effects on the competition that are inherent in the organisation and proper conduct of competitive sport are not in breach of EU competition rules, provided that these are effects are proportionate to the legitimate sporting interest pursued.
 5. It does not allow for the formulation of general guidelines on the application of competition law to the sport sector.

IV. CASE LAW

ISU, BUNDESKARTELLAMT RULE 40, KRISTOFFERSON, CASTER SEMENYA.

The competition authorities, EU Commission as well as the ECJ) are demonstrating an increased interest in the Rules of Sport Governing bodies.

The ECJ found that

« the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by the role or the body which has laid it down »

(Meca-Medina cv Commission(C-519/4P) See: The Sporting Exception in EU Law, Parrish & Miettinen, TMC Asser Press,2008)

ISU Case: 2017 §210

« The Eligibility rules constitute rules related to the organisation of competitiveness sport. In Meca-Medina, the ECJ ruled that such rules are generally subject to Union competition law.

They may fall outside the application of Article 101 of the Treaty in certain circumstances, taking into account

- i. the overall context in which the rules were taken or produce their effects and their objectives*
- ii. whether the consequential effects restrictive of competition are inherent in the pursuit of the objectives and*
- iii. whether they are proportionate to them ».*

The specificity of sport i.e the distinctive features setting sport apart from other economic activities such as the interdependences between competing adversaries will be taken into consideration when assessing the existence of a legitimate objective.

Belgian National Competition Authority

Similar the Belgian National Competition Authority opened an investigation relating to the International Horse Riding Federation for its alleged anti-competitive exclusivity clause which prevented riders, horses and officials from taking part in non approved events for a period of 6 months prior to a event organised by the Federation.

Insofar, the ECJ as well as the Commission put forward the notion of specificity in two dimensions:

- Specificity related to the organisation
- and
- proper conduct of competitive sport and may include for instance, ensuring fair competitions with equal chances for all athletes, as well as protection of the athletes, health integrity and objectivity of competitive sport and ethical values in sport.

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Bundeskartellamt, Rule 40

In Germany the Bundeskartellamt initiated an investigation following a complaint of the Federal Association of the German Sports Goods Industry and analysed the potentially anti-competitive effects of Rule 40 (3) of the Olympic Charter and implemented by the DOSB.

At the end the key factor was that IOC missed the test of justification to escape a finding of anti-competitive conduct.

“Restrictions of competition may be justified by legitimate aims provided that the restraints required to achieve the aims are proportionate. As a legitimate aim for the advertising restrictions the Bundeskartellamt basically acknowledged the regular event of the Olympic Games by preventing illegal forms of advertising. However the authority’s preliminary assessment is that restrictions of advertising opportunities arising from the current application of Rule 40 of the Olympic Charter are too far reaching and thus constitute abusive conduct.

In that respect especially the case law of the Federal Court of Justice regarding the German « Olympiaschutzgesetz was taken into account“

„Vor dem Hintergrund der jüngsten Entscheidungen der Europäischen Kommission („International Skating Union’s Eligibility Rules“) und des EFTA-Gerichts („Kristoffersen“) ist es zwar grundsätzlich denkbar, dass der Schutz bzw. die Sicherung des Fortbestands eines Solidaritätsmodells, in dessen Rahmen Einnahmen entweder horizontal (z.B. zwischen allen Vereinen, die an einem Wettkampf teilgenommen haben) oder vertikal (z.B. professionellen Sportlern und Amateursportlern) um verteilt werden, ein legitimes Ziel darstellen kann, dass die

Nichtanwendbarkeit des Kartellrechts rechtfertigt. Wie auch das EFTA-Gericht im Fall „Kristofferson“ ausgeführt hat, setzt dies nach vorläufiger Auffassung der Beschlussabteilung jedoch voraus, dass das System hinsichtlich der dadurch finanzierten Förderung für die Akteure, die durch ihre Leistung hierzu beigetragen haben, hinreichend transparent ist. Es muss ihnen möglich sein, nicht nur nachzuvollziehen, welche Einnahmen erzielt worden sind, sondern auch, ob diese Einnahmen – zumindest zum weit überwiegenden Teil – tatsächlich Athleten zu Gute gekommen sind, die in Bezug auf ihre Chancen auf eine Teilnahme an den Olympischen Spielen benachteiligt sind. Eine solche Transparenz ist aus derzeitiger Sicht der Beschlussabteilung in Anbetracht der aggregierten bzw. pauschalen Angaben zur Verwendung der Vermarktungseinnahmen aus den Olympischen Spielen beim Olympischen Solidaritätsmodell nicht gegeben. Erschwerend kommt hinzu, dass die Förderung mittelbar erfolgt, d.h. die Gelder werden in einem ersten Schritt an die NOKs bzw. an das Komitee ausbezahlt, die in einem zweiten Schritt über die konkreten Fördermaßnahmen entscheiden.“

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Kristofferson: Oslo District Court 06/05/2019

The Oslo District Court 06/05/2019 16-166104TVI-OTIR/05 had to decide to a specific enforcement of the violation of the Competition act §10/EEA Art 53 related to the dispute between the alpinist Henrik Kristofferson and the Norwegian Ski Association.

Kristofferson wants to enter into an individual sponsorship agreement with the Austrian company Red Bull .But the Norwegian Ski Association refused the athlete to enter into an individual sponsorship agreement with Red Bull with effect for races organized under the auspices of the National and International Ski Federation.

The Court cleared the Federation of Kristofferson's claim by ruling that the rights of both Kristofferson and the Federation are in balance. The athlete following the Court's decision is not allowed to enter into a personal sponsorship deal with RED BULL and having its logo on his helmet.

Following the Court the sponsorship restriction and the Federation's practise regarding individual sponsorships deals are fully in line with the EFTA Regulations.

« As can be seen the Court has concluded that the approval scheme has a legitim aim and is considered appropriate and proportionate. (...) the Court cannot see that the approval scheme or the specific decision has a restrictive effect on competition*

« Overall the District Court found that NSF has proved that the system of pre-control and consent for individual sponsorship agreement is a suitable means of achieving NSF's purpose of promoting ski sports and that the NSF actually uses a significant part

of the market revenue for the purpose of encouraging recruitment and training of young athletes ,education and children's and bread activities(§4.3.2)

To this end the Court will note that Kristofferson's market revenues show that there is not exclusionary effect from the sponsor market, nor does exploiting abuse, especially when it is seen that he has considerable income from premium money.

It seems as if Kristofferson will appeal this decision.

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Caster Semenya

Finally in regard of the test of legitimate restrictions: we revert to the Caster Semenya Case at CAS

On 30 April 2019, the Court of Arbitration for Sport ("CAS") delivered an Award with respect to the challenges brought by Caster Semenya and Athletics South Africa ("ASA") to the validity of the IAAF's Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (the "DSD Regulations").

"The Panel considers that, once it is recognised that the reason for organising competitive athletics into separate male and female categories rests on the need to protect one group of individuals against having to compete against individuals who possess certain insuperable performance advantages derived from biology rather than legal status, it follows that it may be legitimate to regulate the right to participate in the female category by reference to those biological factors rather than legal status alone.

The majority of the Panel concludes that, on the evidence adduced, the DSD Regulations are on their face reasonable and proportionate. In reaching this conclusion, the majority notes, amongst other things, that the DSD Regulations do not require any athlete to undergo any surgical intervention, and envisage that affected athletes can control their testosterone levels by using conventional oral contraceptives. The majority has also had regard to the possible side effects of such oral contraceptives, to the nature of the examinations that will be undertaken for the purpose of determining whether an athlete has experienced a "material androgenising effect" from their high testosterone levels, and the risk of individuals' medical confidentiality being compromised."

V. CHALLENGES

WHAT WILL BE THE FUTURE?

- A better understanding of consumer behaviour (technology, digital, social media)

- Innovating competitions.
- Partnership with the private sector :*Fina's decision to allow market access to rival competitions bringing its regulations in line with anti trust law.*¹

Or do we have to face in the next futur a mounting pressure of legal actions?

- With an increasing number of interventions by the European Commission and the Court of Justice as well as Competition and Anti-Trust authorities ? Are we risking war between UEFA closed and domestic leagues? Or does negative fans and public perception and strong criticism make change positions to Americanise the European Sport?

In our opinion the way to recommand should be voluntary compliance with EU Law and making federations in line with good governance principles and a close collaboration of all affected stakeholders. IOC, EOC, EU Commission and Competition Authorities.

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¹FINA acknowledges that swimmers are free to participate in competitions or events staged by independent organizers, namely entities which are neither members of FINA nor related to it in any way," FINA said following a meeting with national federations.