

KEY QUOTES ON CRITICAL ISSUES SURROUNDING THE ESL V UEFA DISPUTE

1. Claim: The current model of sports governance in Europe is suffering from fundamental structural deficiencies that lead to anti-competitive behaviour

Steven Weatherill (Emeritus Jacques Delors Professor of European Law, Oxford University), 13th January 2023:

“My sense is that the conflation of regulatory and commercial activities in sports governing bodies is a serious structural problem. It leads to conflicts of interest”

[...]

“Competition law does not address the fundamental structural problem, which is the location of regulatory and commercial power in the sports governing body, which tends to generate conflicts of interest that may have caused all sorts of harm before we finally drag them through the courts six years later. The best way to address the problems in European Sports are through legislative initiatives adopted by the European Union which could tackle directly and through a transparent and democratic process how best to resolve the tensions which arise as a result of the conflation of regulatory and commercial powers in sports governing bodies.”

Oliver Budzinski (Professor of Economics, Technical University of Ilmenau), 13th January 2023:

“From my perspective as an economist, the European Sports Governance Model has a huge problem, because it has a lot of market power, and it lacks checks and balances to keep this market power in control. We see violations of fair and open competition that we would never accept in any other industry.”

[...]

“What we know from lots of markets, not only from sports markets is that dual roles provide very strong incentives for anti-competitive behavior, to behavior that is not in the sense of society but that is in the sense of the self-interest of the dual-role company and of those who exercise this market power.”

[...]

“We have in Europe just enacted the Digital Markets Act in order to cope with dual roles in several markets and to reduce, going beyond competition law, not only applying competition law in full, but going beyond that because we think we have to step in more strongly against dual-role problems and the anti-competitive incentives coming from that.”

[...]

“In the pyramid model we actually don’t see that there are very strong control mechanisms, or very strong checks and balances for the top of the pyramid, which is exercising a dual role.”

[...]

“The control mechanism from the lowest level of the pyramid to the top is getting weaker and weaker and weaker and it is not realistic to say that the grassroots clubs or any clubs through this pyramid actually provide strong checks and balances to the top of the associations.”

[...]

“Among the big advantages of a monopoly and of market power is not only to have a quiet live and to not have competition but also to be able to devote your resources instead of competing to lobbying and to securing your rents.”

Romain Bouniol (Vice-Dean, University of Perpignan), 13th January 2023:

“The situation of the sports governance in Europe is not an option. We are perhaps at the beginning of a balance between the application of competition rules to a particular sector and the specificity of sports. The specific characteristics of the world of sports. But it needs adjustment. There is not just one European sport model. We often think that European football model is the only model, but they are plenty of other models, plenty of sports.”

[...]

“The European sport Model is not the European Football Model and organizing European sports is really a competition.”

[...]

“It is not the role of UEFA [to ensure that the ESM is respected]. Absolutely not. UEFA is a company, a company in dominant position and in fact the Advocate General says that UEFA is in a dominant position. [UEFA] does not protect the European sport model, but her model of European football and this situation is not to ensure the respect of the European sport model.”

[...]

“I do not defend this model, the European football model, which can be greatly improved. And I hope that the Court of Justice can help open the regulation of sport competitions. The European Commission can play an important role, I think.”

Stefaan van den Bogaert (Vice-Dean, Professor of European Law, Leiden University), 13th January 2023:

“Change is needed in sports governance. First, FIFA and UEFA need to become more open and transparent. There should be a stricter separation between the regulatory and economic role. The current conflict of interest is untenable. Secondly, important stakeholders should get a greater say in sports governance: players, clubs, federations. Thirdly, there should be more financial solidarity. That is the aspect – you can make the claim that financial solidarity is a legitimate objective, but is there truly a lot of financial solidarity? The current sporting balance is completely lost. The Champions League currently is the playground for an increasingly smaller number of clubs coming from an increasingly smaller number of countries. That also goes against the so-called European Sports Model.”

2. Claim: There is no basis for the constitutionalisation of the European Sports Model in Article 165 TFEU

Steven Weatherill (Emeritus Jacques Delors Professor of European Law, Oxford University), 26th January 2023:

“What is surprising is just how concrete Advocate General Rantos' conclusions are about what article 165 dictates. If you look at his argument in paragraph 29 of his opinion, he cites a raft of soft law instruments which refer to the European model of sport, and then in the next paragraph, paragraph 30 of the opinion, he leaps to make the claim that the European model of sport has constitutional recognition as a matter of Primary Law. He attributes three particular characteristics to that European model of Sport: the pyramid structure, open competitions and some financial solidarity.

Now, to me as an orthodox constitutional lawyer that's surprising even shocking. You can't jump from soft law for constitutional recognition of a principle a model which is not found in any constitutional text. The part which

surprises me is his willingness to draw such concrete conclusions from article 165 for the purposes of the interpretation of the competition or provisions of the treaty.”

[...]

“The Court would not need to endorse the concrete notion of the European model of sport that The Advocate General proposes, and I'd be rather surprised that the court did endorse that concrete understanding of the European model of sport as a constitutionally recognized principle. When I read paragraphs 30 - 31 of Advocate General Rantos' opinion talking about the pyramid structure, the need for open leagues, the need for financial solidarity the preservation of the Ein platz prinzip, you know it feels as if I'm reading a quasi-legislative text, not an interpretation of competition law and that's where I get surprised.”

[...][...]

“It seems to me that there are a lot of things that could probably be addressed and improved in the world of sport by regulatory intervention. The question is what should be the proper source of that regulatory intervention?”

My concern with the approach proposed by Advocate General Rantos in his opinion is that he wishes to use competition law as a quasi-legislative instrument. He wishes to establish a regulatory framework through the interpretation of primary European Union law which would fix the definition of the European Sports model.

It seems to me that goes beyond a plausible basis or plausible methodology for legal interpretation when one looks at the text of the Treaty version. He purports to deduce these principles from, articles 101, 102 and 165, which in the case of 101 and 102 are not sport specific and in the case of 165 is deliberately ambiguous.”

Steven Weatherill (Emeritus Jacques Delors Professor of European Law, Oxford University), 13th January 2023:

“The reaction to the Advocate General's opinion has largely been to emphasize that he is permitting UEFA to maintain the status quo – and that certainly is what he is advocating. But I think it is stronger than that, it is a constitutional recognition of the European Sports Model. It is not just permissive, it is mandatory. He is saying: this is how sports shall be run. That constitutional recognition of Article 165 in the European Sports Model means that those bodies engaged in the organisation of sporting activities in Europe must comply with his vision of the European Sports Model, which is an interpretation of primary law.

More than that, that interpretation binds the European Union legislative Institutions. As a matter of constitutional hierarchy, the Treaty prevails over secondary legislation, so if Rantos' opinion is accepted by the Court, it would mean that the EU legislature could not change by legislation the European Sports Model, which he [Rantos] identifies as lying within the Treaty. That seems to me completely the wrong way round. It should be the EU legislative institutions that are taking the lead in establishing the terms and conditions of the European Sports Model, not the Court interpreting extremely vague provisions of primary law. To conclude, I have got no dog in this fight. I do not work for the Super League; I do not work for UEFA. I am an academic lawyer; I sell only my objectivity. It seems to me that this opinion goes far too far in placing a concrete shape on the European Sports Model.”

[...]

“In European Union law we do not go back to the negotiations that led to the adoption of particular Treaty provisions to understand why they were phrased in the way they were. But let's assume we can and should: If we look at the way in which the negotiations on what subsequently became Article 165 were conducted through the Convention on the Future of Europe, through the negotiation of the Lisbon Treaty, it is clear that sports governing bodies pressed time and time again to have their autonomy from legal regulation written into the Treaty – and that was resisted by the European Institutions and by the Member States. So, it is not true if we look at the history of the negotiations, to say that Article 165 represents an acceptance of the existing European Sports Model. Instead, Article 165 is deliberately vague and ambiguous to avoid taking a stance on the very important and contested issues.”

[...]



"It would be dangerous to draw concrete, quasi-legislative conclusions from an interpretation of relatively ambiguous Treaty provisions. The Court should be very wary about over-constitutionalizing European Union law, and I would say to the Court: remember what happened when you decided Viking Line."

Oliver Budzinski (Professor of Economics, Technical University of Ilmenau), 13th January 2023:

"We hear a lot about legitimate objectives in the whole discussion about competition and sports and the European football model and I fully agree that there are legitimate objectives and when you hear them, when you read them, I have no objection that they are important and that they should be relevant. However, what I miss a lot, also in the opinion of Mr. Rantos, is that there is any empirical evidence that the current system is to any degree sufficiently fulfilling these legitimate objectives."

[...]

"I am not against legitimate objectives, but I wonder whether UEFA is not revenue maximizing and is not commercializing, so that these legitimate objectives are actually really the driving force of the model that we are seeing."

Antonius Manders (Member of the European Parliament), 13th January 2023:

"If the opinion of Mr Rantos will be taken over by the Court of Justice, that means this is touching upon democracy, because the new definition now which is described by Mr Rantos has no legal basis at all, because nobody can find it in Art 165. The democracy is talking already since the Bosman case about the European sport model: we did not find the definition yet. And now there is suddenly an Advocate General who describes the definition and takes over the role of the democracy. We have to think about that. And if football is that important, then we have to say that."

3. Claim: Football is not different than basketball and other sports

Steven Weatherill (Emeritus Jacques Delors Professor of European Law, Oxford University), 26th January 2023:

"I will certainly suggest that there is an oddity in Advocate General Rantos' opinion in which he at the one hand asserts the importance of constitutional recognition for a European Sports model; and then on the other hand he admits that some sports do things differently. I'm not quite sure how we can have a constitutionally recognized model, which only some sports sign up to but clearly as a matter of empirical observation sports do things differently and you've mentioned the case of football and basketball and they're not the same."

Peter Thyri (Independent lawyer specialized in European and Austrian competition law), 26th January 2023:

"I don't know, it's a big word to call it flaw in the Advocate General's opinion- but he unnecessarily relies on any constitutional value of article 165 and the European Sports model. [...] That's the thing, we were thinking about why this European Sports model - which I agree with you doesn't exist because you can't be the same model for all the different sports that we've been citing here in this discussion, right, because they're all very different, also differently organized- that's why we shouldn't turn our brains too much around this thing because there's no reason why this would be necessary for the opinion but yeah it's a tricky case."

4. Claim: It is highly problematic that UEFA lacks an authorization procedure for competitions

Stefaan van den Bogaert (Vice-Dean, Professor of European Law, Leiden University), 13th January 2023:

„For a system of prior authorisation to be acceptable, as a federation you need clear, transparent, objective, and non-discriminatory rules. You need, in addition, to provide for the possibility of review of certain decisions. These are not present in this case. What is crucial is whether you can envisage a procedure whereby you can avoid the conclusion that as a federation in a situation such as that of UEFA and FIFA at the moment you are induced to commit an abuse, because of the specific conflict of interest in which you find yourself. I'm not so sure about that.”

Luis Alonso (Partner, Head of Corporate/M&A practice, Clifford Chance LLP Spain), 26th January 2023:

“Just a week or two weeks or three weeks no more than that, before the hearings in Luxembourg, in front of the European Court of Justice, suddenly overnight they approved for the first time ever- for the first time ever- a procedure to authorize competitions.”

[...]

“A procedure that has more pages devoted to explaining which are the sanctions for those breaching it, than actually to authorize competitions. But it's funny because you can actually find a sentence saying, "by the way we will never authorize a competition that has the purpose of competing with Champions League". This is the story now because you just mentioned a lot of case law and in European Union being fined, combining the role regulator and Commercial operator as long as you have procedures... and you can be considered a respectful gatekeeper in this process.”

5. Claim: The opinion of AG Rantos does not acknowledge the conflict of interest sanctioned in MOTOE

Steven Weatherill (Emeritus Jacques Delors Professor of European Law, Oxford University), 26th January 2023:

“I would only say that that's of course a brilliant analysis - you're trying to squeeze the absolute maximum out of the MOTOE ruling you're actually squeezing the maximum and a bit more that isn't there out of the MOTOE ruling.

But I tend to agree with you that AG Rantos could have said more about this issue than he chose to do and this is an Opinion which was already really quite long, it could have been longer. The conflict of interest is it is clearly an important one - Sports governing bodies do appear to have a conflict of interest in in all sorts of areas in particular in the one that we are dealing with.”

6. Claim: The opinion of AG Rantos fails to address all potential abuses under Article 102 TFEU because he is convinced that Article 165 TFEU gives UEFA encompassing immunity

Steven Weatherill (Emeritus Jacques Delors Professor of European Law, Oxford University), 26th January 2023:

“That it's exactly his inflated view of the Constitutional significance of Article 165 that leads into that approach. It would encroach on Article 101. He says that he wants a narrow interpretation of the ancillary restraints doctrine so as to preserve the vitality of article 101, but he then adopts a very inflated view of the legitimate objectives pursued by UEFA and I think it's a similar story for article 102, as you've mentioned. One could have envisaged a much more elaborated discussion of potential abuses under article 102, but he doesn't want to

explore that aspect because he is persuaded that Article 165 goes so far in effect in immunizing UEFA from the allegation of abuse.”

Peter Thyri (Independent lawyer specialized in European and Austrian competition law), 26th January 2023:

“He [Rantos] kills the arguments from the back, right? Because he comes with the objective justification and says, well it's all well I don't even need to take a closer look because we have this overwhelming objective justification, be 165 or be the case-law talking about the specific nature of sports. That's a very general argument. It kills all the rest and then takes out the burden to analyse everything in detail, which we have very often in Court cases. I mean, not the Court, but our courts do that quite often. They say, 'we don't need to consider these aspects because we have the justification here and it's reliable, so we don't even mention them'. I think that's what happened in the Rantos opinion as well.”

Miguel Odriozola (Partner, Head of antitrust team, Clifford Chance LLP Spain), 26th January 2023:

“A few other aspects of the Rantos opinion which I think are important that we discuss. One would be the 102 analysis. The problem I have with it is that Rantos applies the essential facilities test but fails to engage in any other analysis of potential abuses. For instance, in the Google shopping case Google had argued that the essential facilities applied, and the General Court stated: NO, self-preferencing is enough.

Here, there are plenty of abuses (starting with discrimination), but one clear abuse is: Tying. What UEFA is basically demanding is: if you want to participate in domestic leagues you need to also participate in the Champions League. They are tying a market where they are dominant, the domestic leagues, with the European market and they are tying both together and demanding that you participate in all or be expelled. That's a tying abuse! And Rantos doesn't even address the issue. He only applies the essential facilities test. Not that we think that his essential facilities analysis is correct, it is not, but what is worse is that he ignores all other kind of abuses. I'll pause here if anybody wants to comment.”

7. Claim: The “one place principle” discriminates against clubs from small countries

Luis Alonso (Partner, Head of Corporate/M&A practice, Clifford Chance LLP Spain), 26th January 2023:

“You just mentioned the one place principle which is something key for the sports pyramid, and I wonder if that is really a principle, or this is the way organized by UEFA and my FIFA in terms of organizing the corporate governance. Because what means one place? What's the meaning of that? Because to me one place means that there is one place which is the executive committee of the regulator, where the markets are split. Split normally by validation, not always because when it comes to domestic competitions like the Premier League there are two federations combined the English and the Welsh Federation combined. And basically, discretionally it is decided that for the weekends which is a very important portion of the calendar for football events, you have to play exclusively with football clubs belonging to the region that you have been allocated by UEFA.

In other words, you are splitting the markets where you can operate during the weekends. If you are a Spanish club, it's not so bad. You have more than 50 million population, potential broadcasters, strong team, so you can grow. If you are in Germany, this is normally good news you have very 80-90 million population so you can really grow. If you are based in Luxembourg or you are based or your based in a small country, e.g. Austria, suddenly UEFA has decided that you will never compete and be a prosperous team because you have to spend all your weekends playing to a narrower market, a domestic level with a smaller number of clubs and with no real prospects of growing.”

[...]

“What's the difference between the Bosman case and this? Because in Bosman case we were talking at players at individual level. For historical reasons, a Belgium team used to have 9-10-11 players from Belgium and the same for every country, and the European Union, particular European Court of Justice considered that European Union means really a union and means that someone from the Netherlands should have the same

right to play in Spain and a Spanish person on the other way around. Why that freedom within the European Union only applies to players and cannot apply to clubs?"

8. Claim: There is a political reluctance to change the status quo – but it should be democratic institutions that shape the governance of sports/football in Europe

Antonius Manders (Member of the European Parliament), 13th January 2023:

"There is a weakness of the political players because they do not want to touch religion. And professional sport is like religion [...] The first lesson in politics is: don't touch religion. And that is what is happening now. I can even give you an example: I wrote an article for Politico and immediately had eight colleagues from the European Parliament who wanted to co-sign this article. We send it in and the day before it would be published, Politico called and said we do not publish it because all eight co-signatories withdrew their name because they were influenced by their national football associations, their national parliaments and even by people from the European Commission."

[...]

"If we look at the Treaties, for me it is clear what the outcome should be in this case. If I follow the arguments in the Bosman case, in the Achmea case, in other cases even the ISU, the International Skating Union. It was even Commissioner Vestager who picked up the tweet of Mark Tuitert, the skater, and she said that we have to do something about this, because well, there are only 100,000 people who are skating in Europe so then you can show that you are very powerful as a Commissioner. But with football, where millions are playing: do not kill your voters. That is what is happening. And for me, that is really the weakness of politics nowadays."

[...]

"I do not think that will be there (sport legislation from the EU). Because, as I said, do not touch upon the religion, and football is a sort of a religion, and so politicians do not dare that. So that is why I think it will not happen. It is a pity, because actually I want to call on the European Commission to come forward with proposals that the Parliament and even the Council can have a real legal debate on that. But the long arm of UEFA is too long and too strong to come forward with such a proposal."

Melchior Wathelet (Former Judge and First Advocate General at the CJEU), 13th January 2023:

"It's very strange: the European Commission had opened an investigation against the [ISU] about the dual role and about the forced arbitration. It took the initiative; the Commission took the initiative for Formula 1 – for football: no initiative."

9. Claim: The Super League project is all about governance by the clubs

Luis Alonso (Partner, Head of Corporate/M&A practice, Clifford Chance LLP Spain), 26th January 2023:

"And another point is that let's not forget something which is what the Super League is trying to achieve with football at the European level is as simple as organizing the clubs at European level in the same way they are organized at domestic level"

Historically, national competitions like Premier League or La Liga, were not, let's say, own control and managed by the clubs, but by the national federations and decades ago, many years ago, clubs at domestic level were able to organize themselves, create the structures companies or associations where the clubs participated in the competition organized, their own competition, sell the broadcasting rights, organize themselves in the market and basically take care of their own business.

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In the same way that that was achieved many years ago - Premier league is not so recent, I think it's 90s/80s something like that - In the same way clubs did that at the domestic level, why clubs cannot organize themselves in the same manner at a European level?

That's the Super League. It's quite a lot about controlling their own activities rather than being under the direction of someone that doesn't have any skin in the game."