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**(Sports) Economics Upside Down? – A Comment on the Advocate
General Opinion in European Super League versus UEFA/FIFA**

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(Sports) Economics Upside Down? – A Comment on the Advocate General Opinion in European Super League versus UEFA/FIFA

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Abstract: This comment addresses the opinion of the Advocate General (AG) of the European Court of Justice on the pending case European Super League versus UEFA/FIFA. It takes a critical perspective on selected aspects of the opinion's reasoning from a (sports) economics perspective. Highlighting the special characteristics of sports markets, the assessment of the AG Opinion raises questions such as (i) the (lack of) empirical evidence that the incumbent pursues and/or meets the legitimate objectives while the latter is still used as justifying reasons for anticompetitive conduct and arrangements (section III), (ii) the prohibitive entry barriers raised by the non-existence of a transparent and non-discriminatory authorization system preventing open competition for championships formats and organization by objective and effect (section IV), and (iii) the difficult search for a convincing theory of harm justifying the brutal enforcement of single-homing by the incumbent (section V).

Keywords: European football, sports economics, antitrust, competition policy, Super League, Champions League, abuse of dominance, market power

JEL-Codes: Z20, K21, L12, L40, L83

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I. Introduction

The December 2022 opinion of Advocate General (AG) Rantos on the European Court of Justice Case C-333/21 (European Super League versus UEFA/FIFA)¹ argues that rules implemented by UEFA and FIFA requiring that any new football competition must seek prior approval by UEFA and FIFA are compatible with competition law as are most of the sanctions that UEFA has issued and is threatening on potential participants of any unapproved competition. Consequently, the organizers of the possible European Superleague (ESL) could only enter the market for European football if they set up their competition completely outside the UEFA ecosystem. According to this opinion, participants (football clubs) in the competing competition (ESL) cannot continue to participate with their teams in competitions within the UEFA ecosystem (UEFA Champions League (UCL), national professional leagues, amateur leagues, youth leagues, etc.) anymore. Furthermore, the opinion argues that the current practice or system of conceding or rejecting prior approval to third-party competitions by UEFA is also compatible with European competition law. The opinion also holds, however, that sanctions on players of the “deviating” clubs (including banning them from national team competitions) are disproportionate and not compatible with European competition law. The opinion is influential but not binding to the European Court of Justice.

This comment does not address the question whether the interpretation of the law in the AG opinion is correct in a legal science sense.² However, every exercise in competition law also involves the underlying economics, i.e., the pro- or anticompetitive effects of arrangements and conduct in markets. As far as I understand the AG Opinion, the economic market character and the commercial business dimension of premium-level football in Europe is not denied. Thus, this comment addresses the economics reasonings in the AG Opinion which at times contradict general economics as well as specific sports economics wisdom and raise a couple of interesting questions from an economic perspective.

II. The Special Characteristics of Sports Markets (Are Calling for Competition Policy Action)

While fundamentally commercial sports markets work similar to markets in other entertainment industries, they are characterized by a special necessity for cooperation among the competitors: in order to organize a championship or a league format (like in football), the competitors must agree on sporting rules of competition and the enforcement of these rules require a market-internal regulator. In an organizing model that is widespread in European sports³, the so-called pyramid model, the potential participants of sports leagues (here: football clubs) form regional sports associations/federations acting as market-internal regulators at this geographic level. These associations then form national associations which in turn form international

¹ See *Rantos* (2022).

² See for law-oriented comments, inter alia, *Houben* (2023); *Monti* (2023).

³ However, it is – by far – not the only model that exists in European sports.

associations. European football follows that pyramid model. Each football association (UEFA on the European level, e.g. DFB on the national level in Germany, e.g. TFV on the regional level in Thuringia⁴) acts as the sole market-internal regulator in a geographic market on a defined league level. At the top of the pyramid, the UEFA enjoys a monopoly as the market-internal regulator for premium-level football in Europe. This model is not contested by the AG Opinion and it inevitably creates market power for the sports associations as market-internal regulators, which increases with the levels within the pyramid. This market power in competition-organizing services offers scope for anticompetitive abuse because (i) the dual role of the market-internal regulator (foreclosure, self-preferencing) and (ii) the lack of control through the stakeholders on the way through the pyramid chain of associations creating higher associations and establishing a system of lower-level officials “controlling” higher-level officials (principal-agent problems). The second phenomenon (principal-agent problems) creates considerable scope for UEFA and its officials to follow their own interests over the interests of the (grassroots and other) clubs – or the football stakeholders (like fans, for instance also as members of clubs). The first phenomenon (dual role of acting as a regulator and conducting own economic activities) generates the incentive for UEFA to foreclose the market for football competitions against third parties and self-prefer its own, highly profitable competitions.⁵

Thus, UEFA enjoys the scope for anticompetitively abusing its market power and experiences incentives to do so. From the perspective of economics, the pyramidal structure of the football sports organization (lack of effective checks and balances) plus the special characteristics of sports markets (requiring a powerful market-internal regulator) combined with strong incentives to pursue commercial self-interests (a virtually unrestricted dual role situation) generate a mixture which require market-external regulators like competition authorities to be highly alert and willing to intervene. In contrast to some of the legal reasoning, an economics-based perspective implies that the special characteristics of sport call for more competition policy action and not for a more lenient approach.

The AG Opinion acknowledges that UEFA performs a dual role of regulatory power and economic activity (*Rantos* 2022: rec. 47), which is not per se prohibited. However, it also emphasizes that it generates a special responsibility for UEFA; especially it obliges the dual role holder to ensure that third parties are not unduly denied access to the market (*Rantos* 2022: rec. 48). The principal-agent problems are not mentioned in the opinion although they importantly interact with the anticompetitive incentives because of the dual role. In this comment, I explore three areas of reasoning which raise interesting questions from a sports economics perspective: the interrelation of market power and the pursuance of legitimate objectives (section III), open and fair competitions and the prior authorization system of UEFA

⁴ UEFA = Union of European Football Associations; DFB = Deutscher Fußball-Bund (German football association); TFV = Thüringer Fußball-Verband; Thuringian football association).

⁵ See on the underlying economics of sports market governance more elaborately, inter alia, *Budzinski & Szymanski* (2015) and *Budzinski & Feddersen* (2023).

(section IV), and (horizontal and vertical) single- versus multiple-membership in football competition systems (section V).

III. Legitimate Objectives and Market Power: Looking Beyond Assumptions of Public Goals

Regarding the question whether restrictive conduct or arrangements by sports associations can be justified despite being anticompetitive, the following reasoning developed in Europe from former court judgements: restrictive conduct or arrangements are justified if they (i) pursue a legitimate objective⁶, (ii) are inherent to this objective, and (iii) proportionate (*European Commission* 2007). Thus, anticompetitive conduct and arrangements by powerful sports associations are only justified if they serve the necessary special characteristic of sports and are instrumental in achieving these goals while no less-restrictive alternative is available. While these conditions derive from law, they make sense from a sports economics perspective as well: only the absolutely necessary and indispensable restrictions of competition should be acceptable.

The latter is particularly true since the market power of the market-internal regulator with its scope and incentives to anticompetitively pursue its own commercial goals (see section II) raises the question whether stated legitimate objectives are actually pursued or whether the deliberation that its position entails is rather used for exploiting (commercial and political) self-interests. Thus, a strict analysis whether stated objectives are actually empirically pursued and achieved is indispensable (revealed behavior/preferences trumps stated behavior/preferences). From an economic perspective, the analysis in the AG Opinion is unconvincing in this regard. The problem is that the opinion jumps from quoting objectives that it classifies as being legitimate without further analysis to consider UEFA's rules and action appropriate to achieve these goals. This, firstly, assumes that stated legitimate objectives are actually pursued to any relevant degree in reality, and, secondly, that they are actually reached. However, this is an empirical question that requires an empirical analysis which is not conducted in the opinion – and there is also no reference to empirical studies confirming or justifying the jump in conclusion.

Take, for instance, the objective of financial solidarity that is frequently mentioned in the opinion. The opinion argues that restrictive conduct and arrangements by UEFA are justified because they pursue this objective. However, the opinion does not analyze whether UEFA actually achieves this objective through the (ab-)use of the anticompetitive scope it enjoys. Does the part of its revenues that UEFA devotes to grassroots and youth sports, for instance, actually equal (or exceed) the monopoly rent it cashes in because of (ab-)using its market

⁶ Legitimate objectives usually relate to the organisation and proper conduct of competitive sport, which may include (without being exhaustive) ensuring fair and open sport competitions, protecting the integrity of sports results by the absence of match-fixing, the protection of the health and safety of athletes and spectators, the promotion of youth sports, safeguarding financial stability of sport teams, setting and enforcing the rules of the game, etc. (*European Commission* 2007: 68).

power/monopoly? If UEFA redistributes only a minor percentage of its anticompetitive revenue, the objective of financial solidarity may be legitimate in theory, but the supracompetitive scope is only marginally used for pursuing this goal – and most of the monopoly rents go to other (self-) interests.

Similarly, promoting competitive balance by re-distributing centralized revenues (mostly from bundling broadcasting rights and selling them as a monopolist) among the (potential or actual) participants of UEFA competitions may be a legitimate objective.⁷ However, a re-distribution scheme that allocates the biggest revenue shares to the winners of the competition/league and creates significant jumps in revenue between clubs qualified for UEFA competitions and clubs that did not qualify, does not (more than negligibly) contribute to more balance. Remarkably, a widespread criticism of UEFA's Champions League competition is that it (i) erodes competitive balance in the national leagues (generating serial winners like in Germany's Bundesliga and several other countries)⁸ and (ii) suffers from decreasing competitive balance itself (inter alia, *CIES Football Observatory* 2019). How can UEFA's (ab-)use of its market power in bundling broadcasting rights to monopoly pricing be justified by the legitimate objective "promoting competitive balance" when it does not even implement re-distribution schemes that clearly follow this goal and have respective effects?⁹ On the other hand, a recent comparative empirical analysis shows that the most competitive balance-oriented re-distribution scheme is actually employed by a closed league (*Budzinski & Müller-Kock* 2018) – further demonstrating that just rejecting closed leagues as unsuitable for this legitimate objective without actual analysis (like the AG Opinion does) is not sufficient.

Surprisingly, the AG Opinion claims in a number of recitals (*Rantos* 2022: rec. 101-110) that the ESL would not pursue or reach these legitimate objectives¹⁰ – but without providing any (empirical) evidence. At the same time, it does not hold UEFA's conduct and arrangements to the same aspiration level as the opinion appear to simply assume the mentioned goals are actually effectively pursued by use of the granted market power scope. From an economic perspective, systematic – and maybe comparative – empirical analysis would be required to substantiate whether a claimed objective is actually achieved by the use of granted market power or not. Beyond the opinion at hand, this may be a research desideratum.

Perhaps, we are confronted with a variant of a widespread fallacy here: if competition or competitive markets do not fulfill certain public interest goals, this frequently leads to calls for exemptions from competition laws. However, that competition does not accomplish the mission does not allow for the conclusion that restricting competition will necessarily or automatically improve the reaching of the public interest goal. Instead, it requires a theory or mechanism how market power or economic power (which is the consequence of exemptions from competition

⁷ In the sports economics literature, it is controversial if and how much competitive balance is in the fans' interests. See for a recent overview *Pawłowski & Nalbantis* (2019).

⁸ See, inter alia, *Dessus & Raballand* (2020); *Wagner* et al. (2021).

⁹ See on competitive effects of different re-distribution schemes *Budzinski* (2018).

¹⁰ In this part, sometimes it seems to refer to goals, sometimes to effects in a somewhat unsystematic way.

law) sets incentives to effectively contribute to a public interest goal. It is well possible that economic power makes it rather worse than improving the public interest case. Empirical studies of the public interest effects of the German ministerial exemption or other public interest exemptions from competition law reveal a devastating picture: hardly ever did the exemptions from competition law and the granted restrictive conduct and arrangements anything good regarding the (usually fully legitimate) societal goals (*Budzinski & Stöhr* 2021).

IV. Transparent Authorization System and Appropriate Sanctions: Conquering Market Entry Barriers

I fully agree with the AG Opinion that any UEFA clauses assigning itself a prior approval right for football competitions in Europe require a transparent and non-discriminatory application system. Otherwise, third parties would indeed be unduly denied access to the market (see section 2). A transparent and non-discriminatory authorization system, then, could be accompanied by appropriate sanctions to safeguard its effectiveness. The sports economics need for one common regulator in commercial football markets may justify the implementation of a prior approval system – but the incentive to self-prefer its own competitions over third parties (dual role problem) needs to be addressed.

Therefore, it comes as a surprise from an economic perspective that the AG Opinion declares that no such system (transparent and non-discrimination application rules and admission procedure) is required in the case at hand and that the rejection and sanctioning of the ESL proposal and its clubs is – at least in tendency – legitimate, inherent, and proportionate (*Rantos* 2022: rec. 65-122). This is puzzling because whether or whether not a given proposal can be – or must be – approved can only be the result of analyzing the third-party proposal based upon transparent and non-discriminatory conditions. Just throwing the proposal out within no time after its announcement with no more reasoning than a thin press release appears to be the opposite of a transparent and non-discriminatory procedure.

To claim that this is not necessary here – if I understand it correctly – because of the alleged obvious flawed character of the ESL proposal¹¹ runs against any idea of a transparent analysis of non-discriminatory application rules and conditions. The latter requires that the properties (rules, conditions, and practices) of the authorization system must be known in advance to third parties – irrespective of anyone thinking that a given proposal has good chances to pass the test or not. Moreover, knowledge about the conditions of the authorization system influences third-party submissions and may shape their properties and contents. A black-box procedure allowing for purely discretionary rejections of third-party proposals combined with the anticompetitive

¹¹ Keep in mind that the assessment of the ESL proposal does not rest on any in-depth analysis, supported by up-to-date sports-economic theory and empirical evidence. Instead, it appears to be based on not much more than spontaneous opinion (see also section III).

incentives from the dual role imply a prohibitive entry barrier and the opposite of the open markets and competitions that are emphasized as important objectives.

The prohibitive character of the entry barrier is further strengthened by the AG Opinion's conclusion that only market entry completely outside the current European football ecosystem must not be prevented by the incumbent market-internal regulator. "Furthermore, a restriction of competition could, in principle, be established (with the necessary degree of certainty) only in so far as prior approval were in fact to prove to be objectively necessary for the creation of an alternative competition, like the ESL. However, it would appear, in the present case, that, from a (purely) legal perspective, such approval is not essential, and therefore any independent competition, outside the UEFA and FIFA ecosystem, can be created freely and without UEFA's intervention" (rec. 74). However, this would imply that any market entry needs to enter on all stages of the vertical ecosystem structure simultaneously, which – by all means – qualifies as an anticompetitive entry barrier from an economic perspective. This is particularly true since the raising rivals' cost provisions deterring entry into the football ecosystem are not natural but strategically set by the powerful incumbent (see also section V on the related dual membership topic).

In order to avoid prohibitive entry barriers, two things are essential preconditions from a sports economics perspective:

- The existence and publication of an authorization system including, inter alia, (i) the conditions that submissions must fulfill (related to the legitimate objectives), (ii) the procedures of approval or rejection, and (iii) the practices of evaluation.
- Checks and balances that prevent the authorization system from self-preferring UEFA's own competitions and discriminating against third-party proposals (for instance, through independent evaluators).

Only if these two preconditions are met, the provisions demanding prior approval can be deemed to stand in line with competition from an economics perspective. The current system is clearly anticompetitive from this perspective – irrespective of whether the ESL proposal would fulfill sensible approval conditions. Furthermore, the option to codify (even ambitious) minimum standards for financial solidarity, re-distribution of broadcasting revenues, openness of leagues, etc. as part of transparent approval criteria make very clear that neither the full foreclosure of the market nor the harsh sanctions against clubs can be inherent or proportionate. A much less restrictive option is available with a transparent and non-discriminatory authorization system. Why UEFA is not establishing such a system – this may point towards other (commercial/anticompetitive) intent.

V. Multi- versus Single-Homing in Ecosystems: Economics Upside Down

In this section, I address an area where conventional economic wisdom and widely accepted sports opinion apparently stand at crossroads: the issue of multi- vs. single-homing. In

economics, this issue is particularly relevant in platform economics and the analysis of ecosystems, or precisely: the competition between platforms and/or among ecosystems. An impressive literature has analyzed factors that promote competition in such markets or, by contrast, drive such markets towards tipping into dominance/monopoly.¹² One of the relevant factors is multi-homing by consumers and business users (procompetitive effects) versus single-homing (anticompetitive effects). Consider a marketplace ecosystem: if consumers (buying goods via the marketplace) and business users (renting selling space (real or virtual “shops”) on this marketplace) multi-home, i.e. they act on several marketplace ecosystems, then competition among marketplaces is promoted. However, if consumers and/or business users single-home exclusively on one marketplace (voluntarily or involuntarily), then this marketplace gains market power over consumers and over these economically dependent customers – and may act anticompetitively.¹³ Similar reasonings, however, apply to virtually all ecosystems – be it social networks, communication networks, upstream industry ecosystems, streaming services, etc. Always, multi-homing is preferable from a social welfare point of view, whereas single-homing is problematic. Consequently, artificial barriers to multi-homing by ecosystem dominating companies are generally viewed to constitute anticompetitive conduct.

Now, the AG Opinion explicitly discusses the UEFA ecosystem and its “business users” (here: the clubs demanding a spot in the UEFA league system) – but turns the reasoning about multi-homing and single-homing upside down. According to its reasoning, it is justified if the UEFA forces clubs to decide whether they play within the UEFA ecosystem only (single-homing) or completely outside of it (e.g. in an ESL ecosystem). It “could be regarded as inherent in the pursuit of certain legitimate objectives (...) to combat dual membership scenarios”.¹⁴ “It should be noted, in this regard, that measures which seek to tackle that phenomenon of ‘dual membership’, such as non-competition or exclusivity clauses, do not have the object of restricting competition (...)” (*Rantos* 2022: rec. 76). From an economic perspective, it seems strange to argue that single-homing should be the rule and any multi-homing requires special reasons and justification.

Now, maybe the difference in assessment is even economically justified because of the special characteristics and legitimate objectives of sport (see section II and III). Can clubs “have their cake and eat it” (as some may say) by playing ESL and staying in the national leagues of the UEFA system or would that endanger the integrity of sports, for instance? While the natural reflex may be to think of this as being problematic, it is actually not so easy to provide convincing reasons. How is the integrity of competition damaged if FC Liverpool has a team competing in ESL and another team competing in a youth league in England within the UEFA

¹² See, inter alia, *Evans & Schmalensee* (2007); *Haucap & Heimeshoff* (2014); *Haucap & Stühmeier* (2016); *Budzinski & Kuchinke* (2020).

¹³ See on the competition policy discussion around Amazon for instance *Khan* (2017).

¹⁴ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/cp220205en.pdf>.

ecosystem?¹⁵ Such a vertical multi-homing does not really appear to be a problem in my view – but what about horizontal multi-homing? How and why is integrity damaged if Bayern München chooses to compete both in the ESL and in the UEFA Champions League if both competitions would take place in parallel? It would require an explicit theory of harm to explain an inherently negative effect on integrity. Looking into other sports, for instance, motor racing team McLaren races in several premium-level motor racing championships: as of 2023 in the FIA Formula 1 World Championship, the FEH Formula E World Championship (third party competition approved by FIA), and in the Indycar Series (outside the FIA ecosystem). This does not seem to raise any integrity issues. Italian motor racing team Prema Powerteam competes as of 2023 in 9 different racing series, some of them vertically related, other standing in horizontal competition to each other. It seems that a sound theory of harm is missing how multi-homing would damage legitimate objectives like sports integrity – or like open competitions and financial solidarity which both can easily be part of transparent and non-discriminatory approval conditions (see section IV). Given the strong anticompetitive character of mandatory single-homing, I am not convinced that a strict enforcement of single-homing is necessary for pursuing legitimate objectives or that no less-restrictive means are available. Actually, I am not convinced it follows any other goal than to restrict competition.

VI. Conclusion

This comment does not take a legal perspective on the AG Opinion in the case European Super League versus UEFA/FIFA. Instead, I look at it from a sports economics perspective. Interestingly, the opinion's reasoning and mainstream (sports) economic wisdom appear to mismatch regarding several points, raising interesting questions for further discussion. Highlighting the special characteristics of (commercialized) sports markets, I discuss three topical areas where the assessment of the AG raises questions from such a perspective:

- the (lack of) empirical evidence that the incumbent pursues and/or meets the legitimate objectives while the latter is still used as justifying reasons for anticompetitive conduct and arrangements (section III),
- the prohibitive entry barriers raised by the non-existence of a transparent and non-discriminatory authorization system preventing open competition for championships formats and organization by objective and effect (section IV),
- and the difficult search for a convincing theory of harm justifying the brutal enforcement of single-homing by the incumbent (section V).

While it may be unfair to expect the AG Opinion to provide answers to these economic questions, providing convincing answers to these problems in line with the vast majority of state-of-the-art sports economics insights and/or based on sound economic evidence would be

¹⁵ Keep in mind that solidarity payments towards grassroots and youth sports or competitive balance-promoting re-distribution schemes may well be part of the conditions to get a third-party competition approved (see sections 3 and 4); so, this could be solved without prohibiting multi-homing by considerably less restrictive means.

necessary to convince me of the inherence and proportionality of UEFA measures in the given case.

The fundamental disagreement seems to root in the evaluation of the dual role of UEFA as the dominant organization in the European football ecosystem. Generally, powerful dual role positions in ecosystems call for competition policy action. Both in the communities of competition law and competition economics, this is viewed to be one of the central antitrust problems of our times. Various recent, current, and ongoing competition law reforms (Germany, UK, US, etc.) and special industry regulation (like the Digital Markets Act of the European Union) sharpen and tighten the rules against anticompetitive conduct and arrangements of dual role companies in (digital) ecosystems, sometimes also labelled as gatekeepers. In summary, the combination of scope for anticompetitive behavior (gatekeeper position) and the incentive to behave anticompetitively (dual role) is viewed to be particularly dangerous and requiring extensive checks and balances if it cannot be prevented.

By contrast, the anticompetitive power of the dual role of UEFA seems to be treated lightly in the AG Opinion. Instead of calling for strict checks and balances to counter the toxic combination of anticompetitive power and incentives, (i) the pursuance (and achievement) of legitimate objectives is rather assumed than empirically controlled, (ii) transparent and non-discriminatory rules and practices are deemed to be dispensable (at least in this special case), and (iii) the inherence and proportionality of strongly restrictive sanction instruments is treated with benevolence and gets only mildly restricted (sanctions extending to players). Reconciling the contrast between the general treatment of anticompetitive dual role positions and the special treatment in the case at hand would require a convincing story of differences between the fields. However, the undoubtedly existing special characteristics of sports do not provide such a story.

The promotion of fair and open competitions includes a beneficial competition of formats, concepts, and organization of premier-level European football.¹⁶ By no means this implies that the ESL concept will automatically turn out to be superior to the current or the planned UEFA Champions League concept. However, whether one or the other is better for consumer/fan welfare and for the legitimate societal objectives of sport must be subject to a transparent and non-discriminatory evaluation and authorization process – even, or better: especially, if no free competition is desired. Finding superior solutions requires carefully analyzing proposals in contrast to foreclose markets and preserve incumbent (economic) power. Currently, such an authorization system does not exist and the case at hand offers a window of opportunity to enforce the implementation of checks and balances that safeguard a fair and open competition of concepts and ideas, exactly for the benefit of consumers and society. A window of opportunity that the European Court of Justice will hopefully use. This is particularly true

¹⁶ *Budzinski et al. (2022)*, for instance, provide an empirical analysis of the question whether television audience in non-Big Five countries actually values a broad geographical representation of clubs or prefers duels between superstar clubs.

because a transparent and non-discriminatory authorization process may also incentivize other stakeholders to inject their ideas into the model of European football.

Generally, sports governance benefits from de-constructing the monopoly power to a minimum necessary and providing checks and balances to safeguard that the unavoidable power is used for the societal good of the sport.¹⁷ In my opinion, the AG Opinion misses the opportunity of providing a breakthrough in this ongoing discussion.

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