



ÉTUDES CONSEIL

THE EUROPEAN MODEL OF SPORT

Evaluation and perspectives

DECEMBER 2021

POUR





ÉTUDES CONSEIL

PROJECT TEAM

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THE EUROPEAN MODEL OF SPORT

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While the European Commission announced in 1998 in a document entitled "The European Sport Model"¹, that "sport in Europe (...) is built around a pyramidal hierarchical structure", its position in the "White Paper on Sport"² of 2007 seemed to demonstrate the difficulty of understanding such a concept. Indeed, it stated in this text that "in view of the diversity and complexity of European sports structures, it is not realistic to try to define a common model for the organisation of sport in Europe". The statements of the Vice-President of the European Commission, Mr Margaritis Schinas, concerning the football "Super League" project seem to return to the initial position and the recognition of a European sport model, since he considers that "we must protect the European sport model, which is based on a balance between clubs and national competitions, in order to ensure the development of the discipline in an open and non-discriminatory area"³.

Several elements suggest that something similar to the European model of sport was born in Great Britain at the end of the 19th century. While the first codified modern sporting practices appeared in English colleges - football, rugby, polo and athletics had rules that allowed them to be played universally - the British hegemony during the Industrial Revolution worked to spread modern sport throughout the world: on the route from India to the Commonwealth, or in the various European ports, sports clubs were founded under the impetus of British commercial employees or engineers in charge of building the railways⁴.

In addition, a few English football club presidents were behind the organisation of regulated competitions that helped to structure the sport in Europe: given the importance of the sport in society, but also the desire of athletes to compete with other players at different levels, they understood that it was imperative to organise competitions. Thus, in 1863, the Football Association (FA) was born, which was to provide a framework for the practice of the game and for competitions based on pre-established rules. The FA's success led to the creation of other rival associations in the country, yet very quickly, the general organisation of the game suffered from all these initiatives and the multiplication of competitions made the championships unreadable and less attractive to spectators. In reaction to this situation, the Football League was founded in 1888, proposing for the first time a set calendar of fixtures drawn up before the sporting season began, thus increasing the visibility of competitions for spectators but also for clubs and players. The Football League had the option of organising its

¹ *The European Sport Model*, 1998, DG X Consultation Paper

² *White Paper on Sport*, COM (2007)391, 11 July 2007

³ <https://www.politico.eu/article/eu-uefa-superleague-opposition-ceferin-von-der-leyen-meeting/>, accessed on 04 February 2021

⁴ Lejeune (D.), *Histoire du sport XIXe-XXe siècles*, Collection Vivre l'histoire (Paris), Editions Christian, 2001, 219p.

own competitions and marking its independence from the FA, but decided to submit to the latter's authority, thus marking the advent of the federations' monopoly and their regulatory power. Finally, in 1898, two divisions of different levels were created and the principle of promotion/relegation between these two divisions was established⁵.

This structure was then extended to other disciplines, which quickly became institutionalised through the creation of national federations. International federations were then swiftly created, driven by the advent of the first Olympic Games of the modern era in 1894 which, combined with the introduction of the stopwatch⁶, forced the disciplines to establish universal sporting rules within international sporting institutions⁷. For example, the first international federation for gymnastics was established in 1881, followed by rugby in 1886, then rowing and skating in 1892.

This process of institutionalisation led to the emergence at the beginning of the 20th century of a model for the organisation of sport in Europe. This model is based on a certain number of pillars, which appear to be essential indicators defining the European model of sport:

- The monopoly of federations;
- The regulatory power of federations;
- Membership of sportspeople in clubs;
- The participation of athletes in a single competition;
- The organisation of sport according to a hierarchical system reinforced by the promotion/relegation phenomenon;
- The structuring of sporting bodies in the form of federations, supported by the advent of the principle of association, which was developing strongly at that time and which made it possible to reconcile the private initiatives of the founders of federations with a great deal of freedom in the implementation of their projects;
- The voluntary nature of the leaders of sporting bodies, a corollary of the adoption of the associative form and its non-profit nature.

⁵ Szymanski (S.), Zimbalist (A.), *National Pastime: How Americans Play Baseball and the Rest of the World Plays Soccer*, Washington, Brookings, 2006, p.47

⁶ www.eduki.ch/fr/doc/dossier_13_dev.pdf, accessed on 15 December 2020

⁷ Zintz (T.), Winand (M.), *Les fédérations sportives*, *Courrier Hebdomadaire du CRISP* 2013/14 (n°2179), P.5 à 52

Throughout the 20th century, the sports movement developed and structured itself with the creation of major international sporting institutions, which continued to adopt the associative form. This phenomenon profoundly anchored voluntary work in the functioning of sporting institutions, as well as the idea of the absence of profit in the practice and management of sporting activities.

However, this structuring, combined with the multiplication of international sporting events during this period, contributed to the growing interest of fans and the media in sport competitions. From the 1980s onwards, sport definitely took on an economic dimension. The privatisation of the financing of the Los Angeles Olympic Games, the commercial exploitation of the Olympic symbols, the creation of a worldwide marketing programme for the Games, the abandonment of public television monopolies, particularly in Europe, and the concomitant launch of numerous private television channels⁸, are all determining factors explaining the development of interactions between sport and the market during this period.

This economic dimension became exacerbated by the arrival of professional sport, which gave a new dimension to the sport model. Indeed, strong interactions between the top of the pyramid, consolidated by the professionalisation of sport, and its base progressively appeared through two fundamental principles, solidarity and training. These two notions are at the heart of the European sport model, as they allow amateur sport to be financed by professional sport, thanks to financial systems of repayment. These two principles are then added to those already integrated into federal policies in the pyramid model, namely the territorial networking of sport, the respect of integrity and the pursuit of sport's social functions. Thus, these five principles represent the values that characterise the European model and make it a unique model of sport organisation.

These principles, although representative of an inclusive and universal model, do not make it possible to curb the perception of sport as an economic activity, as illustrated by the "*growing commercialisation of sport*"⁹. This trend had been anticipated by the European Community, which as early as the 1970s had brought the concepts of sport and economic activity closer together, as shown by the analysis of case law of the European Court of Justice (ECJ), which later became the Court of Justice of the European Union (CJEU).

⁸ Bourg (J.-F.), *L'économie du sport. Les cahiers français*, Paris, La Documentation française, June 2004

⁹ Mrkonjic (M.), *The state of governance of European sports federations: lessons and recommendations for a "better" governance of sport in Europe*, Dact. thesis, Public Administration, Lausanne, 2015, 329p.

Thus, in its *Walrave and Koch* judgement of 12 December 1974¹⁰, the Court, for the first time, addressed the issue of sport as an economic activity. In this case, two Dutch cyclists challenged the regulations of the International Cycling Union (UCI), which required trainers and riders on the same team to be of the same nationality, on the basis of the violation of the article of the EC Treaty on the free movement of workers. The Court began by stating that *"having regard to the objectives of the Community, the pursuit of sport falls within the scope of Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty"*. This formulation thus enabled the Court to justify its emerging interest in sport and to include it in its scope. Indeed, at that time, the EEC had no competence in the field of sport and could not intervene in this area; it was only by considering sport as an economic activity that the ECJ extended its scope to this area. However, in the *Walrave and Koch* judgement, the ECJ made a distinction that the sports movement interpreted as a sporting exception in its favour¹¹. Indeed, the Court added that the prohibition of discrimination on the basis of nationality *"does not concern the composition of sports teams, in particular in the form of national teams, the formation of such teams being a matter solely of interest to sport and, as such, unrelated to economic activity"*.

The Court confirmed its position two years later in the *Donà* judgement¹², holding that a rule reserving the right to participate in professional or semi-professional football matches solely to nationals of a Member State is contrary to Community law, unless it is justified on non-economic grounds. The Court understands "non-economic reasons" to mean reasons *"relating to the specific nature and context of those matches and thus solely concerning sport as such, as is the case, for example, with matches between national teams from different countries"*. Even if the Court innovates by specifically targeting the rules of sports organisations, it takes up its argument developed in the *Walrave and Koch* judgement and even seems to reinforce the idea of a sporting exception by including club competitions in situations that are not considered economic activities.

It was not until almost 20 years later that the situation changed significantly for sports organisations. In the *Bosman* judgement¹³, the Court considered that nationality quotas and

¹⁰ ECJ, 12 December 1974, *Walrave and Koch v. UCI*, case 36/74

¹¹ Duval (A.), *La Lex Sportiva face au Droit de l'Union Européenne : Guerre et Paix dans l'Espace Juridique Transnational*, Thèse dact, sciences juridiques, European University Institute, 2015

¹² ECJ, 14 July 1976, *Gaetano Donà v. Mario Mantero*, case 13/76

¹³ ECJ, 15 December 1995, *Union Royale Belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal Club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman*, Case C-415/93

transfer fees when a player's contract ended were contrary to Community law. However, while recalling its *Donà* case law, it considered that "*this restriction on the scope of the provisions in question must remain limited to its own purpose*" and that consequently "*it cannot be relied upon to exclude an entire sporting activity from the scope of the Treaty*". This position of the Court is a real blow to what was then considered a sporting exception, since for the first time non-economic reasons are no longer sufficient to exempt sporting activity from Community rules. As sports organisations can no longer enjoy an automatic sporting exception, their sporting regulations are now potentially subject to the fundamental freedoms defended by European law¹⁴.

Since then, the European authorities have constantly extended the scope of application of Community law, gradually moving closer to the submission of sport to competition law. It was in the *Meca-Medina* judgement¹⁵ that the ECJ brought these two areas together. In its review of the compatibility of the International Olympic Committee's (IOC) anti-doping rules with the Community rules on competition and the freedom to provide services, the ECJ considered that the sporting exception applicable to fundamental freedoms was not necessarily and automatically applicable to competition rules. Thus, from now on, all sporting rules are likely to be subject to Community competition law, with only the judge's assessment being able to decide on the outcome of appeals in this area.

The *Meca-Medina* ruling thus puts an end to the sporting exception for purely sporting rules, with the CJEU justifying its position by the fact that sport has become a full economic activity. Indeed, the importance of the revenues generated by major sporting events, as well as the (explosion of TV rights and the growing professionalism of certain sporting disciplines, allow the Court to define sport as a competitive economic market, in which sports organisations must be considered as economic operators whose operating rules, whatever their nature, are likely to have economic consequences. From this definition, the submission of sport to European competition law will follow.

With the gradual abandonment of the concept of the sporting exception in ECJ case law, another concept emerged, that of the specificity of sport, which, if not exactly excluding the applicability of EU law to sport, was meant to combat its application¹⁶. The trigger for this concept was undoubtedly the *Bosman* ruling, in which the ECJ decided to apply Community law to sport regulations, without taking into consideration the then existing sporting exception.

¹⁴ Ibid.11

¹⁵ ECJ, 18 July 2006, *Meca-Medina & Majcen v. Commission*, Case C-519/04 P

¹⁶ Ibid.11

The objective of the specificity of sport was to highlight the uniqueness of sport so that these particularities would be taken into account by the Court in the future and that a decision along the lines of the Bosman ruling would not be repeated. Thus, the specificity of sport took into account the pyramidal organisation of sport, but also the interdependence between competitors, or the particularity of the regulation of sport.

The European institutions then took up this concept of the specificity of sport: as early as 1997, the European Parliament recognised the specificity of sport and the autonomy of the sports movement¹⁷, and constantly urged the ECJ and the European Commission to respect it through its resolutions. The latter also strongly adheres to the concept of specificity of sport, with a first position taken in the 1999 Helsinki report¹⁸, where it states that the specificity of sport must be taken into account when applying the competition rules of the Treaty to the sport sector. The high point of the recognition of the specificity of sport remains the "White Paper on Sport" of 2007¹⁹, in which the European Commission defines its constituent elements, distinguishing between the specificity of sport activities and that of sport structures. It recalls that this specificity of sport is intended to be taken into account by the case law of the European courts when they carry out a proportionality review in order to verify whether the restrictions emanating from the rules of sports organisations pursue a legitimate interest and are proportionate to the attainment of that interest. This position of the Commission establishes a direct link between the specificity of sport and proportionality review, and states that while its role is not to exempt the rules of sports organisations from Community law, it does allow the Court to take into account the specificities of the sports movement when considering the application of EU law to these rules. The Commission continued to defend the specificity of sport, even after its integration into the Treaty on the Functioning of the European Union²⁰, known as the Lisbon Treaty of 1st December 2009, as for example in its Communication "Developing the European Dimension in Sport"²¹ of 2011, in which it specifies the function of

¹⁷ European Parliament resolution on the role of the EU in the field of sport, published in OJ C 200 of 30 June 1997, p. 252

¹⁸ Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework - Helsinki Report on Sport, COM/99/0644 final

¹⁹ Ibid. 2

²⁰ Article 165 of the Treaty on the Functioning of the European Union: "The Union shall contribute to the promotion of European sports, while taking account of its specific characteristics, its structures based on voluntary activity and its social and educational function", 2012 consolidated version, OJEU No. C 326/47 of 26 October 2012

²¹ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Developing the European Dimension in Sport, COM/2011/0012 final

the specificity of sport now enshrined in the Treaty, namely "to assess *the extent to which sports regulations comply with the requirements of European Union law*".

Finally, the Council of Europe has also contributed to the promotion of the specificity of sport and has reminded the European institutions to "*consult sports associations when important issues relating to sport are concerned*"²², or has taken a position in favour of preserving "*the cohesion and links of solidarity uniting all levels of sports practice, the fairness of competitions, the moral and material interests, and the physical integrity of athletes*"²³.

Despite the unanimous position of the European institutions in favour of the application and preservation of the specificity of sport, the latter has not been able to avoid the advent of a certain number of phenomena of private commercial origin that have undermined the European model of sport. Indeed, some sport federations have been confronted with the emergence of private commercial operators who have created their own supranational sport competitions, freeing themselves from the obligations applicable to federations. This is the case, for example, of the EuroLeague, a closed European basketball competition organised by the company ECA²⁴, which competes with the open federal competitions organised by FIBA Europe. Examples of competitions organised by structures other than federal sports organisations are multiplying in Europe, threatening the balance of the European sport model and its pillars: KHL in ice hockey, ISL in swimming, etc. Thus, in order to protect their monopoly, some federations have reacted by sanctioning athletes who wish to participate in private competitions. Hence, the International Skating Federation, faced with the threat of organising a lucrative private competition attracting the best skaters in the world, not only refused to authorise the organisation of this competition but also, at the same time, threatened to heavily sanction the athletes who wished to take part in it. "*Providing for severe penalties against athletes who participate in speed skating events not recognised by it are contrary to the Union's rules on competition*"²⁵.

These conflictual situations demonstrate that the specificity of sport is struggling to play its role as a protector of European sport, all the more so as the European institutions seem to be hesitating as to which position to adopt. Indeed, in the conflict between FIBA and the

²² *Declaration on Sport*, Treaty of Amsterdam, 2 October 1997

²³ Declaration of the European Council on the specific characteristics of sport and its social functions in Europe to be taken into account in implementing common policies, Annex IV of the Nice European Council, 7-10 December 2000

²⁴ Euroleague Commercial Assets SA

²⁵ EU, 16 December 2020, *International Skating Union v. Commission*, Case T-93/18

EuroLeague²⁶, the European Commission did not manage to decide in favour of the federated sport movement by identifying the necessary arguments to justify the non-application of competition law to this situation, a competition law that allows several economic operators to be in a competitive position on a given economic market.

Beyond the organisation of competitions, the European sport model is also under attack at its base with the development of new practices, which differ from historical practices in that they take place outside the pyramidal organisation of sport at the centre of which is the club. In fact, many people today practise a sport outside the federated offer, either alone or within non-affiliated structures that develop a free and individualised practice. This is how, among other things, indoor basketball complexes have been created, under the "Hoops Factory" brand, which make it possible to practise the discipline without being licensed, or even indoor football facilities, which have made it possible to develop a new sport; 5-a-side football.

It can be seen that although the European model of sport is one of the two most important models of sport organisation in the world, along with the North American model, it is constantly under attack and its existence is being called into question. Between the decisions of the CJEU, which seems to apply EU law objectively, and the increasingly intensive development of practices and competitions that run counter to its founding principles, it seems legitimate to ask the question of how to defend the European sport model, especially in a context of heterogeneous legislation and sport organisation models within European countries.

Therefore, the issue we raise is the following:

Why defend the European model of sport?

In order to accurately reflect the reality of today's European sport model, it will be essential that this study takes into account all its components. This is why particular attention will be paid to the mention not only of top-level sport, which symbolises the top of the pyramid, but also of grassroots sport, which represents the bottom of the pyramid. In the same way, an equal place should be given to collective and individual disciplines, as well as to professional and amateur disciplines. In addition, the reality of the heterogeneity of legislation and

²⁶ In February 2016, Euroleague filed a complaint with the European Commission against FIBA and FIBA Europe for violation of European competition law; in April 2016, it was FIBA's turn to file a complaint with the European Commission against Euroleague for abuse of a dominant position.

organisational models of sport within European countries also imposed itself on us in the context of data collection and forced us to focus mainly on French examples.

The objective of this study is above all to demonstrate that the European model emanates from a vision based on fundamental values that must take sport beyond the mere consideration of economic activity. One of the challenges is to maintain the interactions between the different levels of the pyramid. However, it would be wrong to think that the difficulties that the European sport model has been experiencing for many years are simply the result of a misunderstanding or an injustice, which is why this study will also aim to analyse its vulnerabilities.

We will therefore first present the challenges faced by the European sport model in the face of the emergence of competing commercial initiatives. We will then analyse how the respect of the principles that constitute sport as a collective good, ensured by the European sport model, justifies, for national and supranational public authorities, the maintenance and even the reinforcement of the defence of the model. Based on this analysis, it will finally be necessary to propose prospective scenarios that will allow us to project what the future of the European sport model could be.

1. THE CHALLENGES FACED BY THE EUROPEAN SPORT MODEL IN THE FACE OF THE ADVENT OF PRIVATE MARKET COMPETITION

The pillars of the European sport model, and more particularly the federations' monopoly and the principle of membership, have been undermined for several years by numerous phenomena that all have the common denominator of originating in the private commercial sector, which is progressively integrating the sporting sphere.

This trend can be observed at all levels of the European pyramid model, from the top, which is characterised by elite-level sport, to the bottom, which is made up of grassroots sport.

The emergence of private market actors represents a challenge for the European sport model in several ways:

- First of all, they organise official competitions - mostly supranational - whereas this function is normally the exclusive preserve of sport federations;
- Secondly, they develop an offer outside of any federal framework, without the need to be licensed in a federation;
- Above all, they do not respect the principles underlying the functioning of the traditional model of sport organisation, notably solidarity and training, which allow the financing of mass sport and the survival of the pyramid model.

These new economic actors are of great concern to the federal movement, which is under repeated attack, both at the top of the pyramid and at its base. An analysis of the reasons for the appearance of these offers from the private commercial sector is therefore necessary in order to understand the challenges facing both elite and amateur sport.

1.1 The will to emancipate of certain actors from the top of the pyramid

· The origins of this phenomenon

Media coverage of the activities at the top of the pyramid has largely highlighted the tensions that can exist between the activities of federations, which we will describe here as non-market, and the activities of private market actors. Although this distinction may seem less and less relevant as the economic interests of the federations grow, it allows us to distinguish between the action of the federation in organising competitions for elite athletes in a given discipline, with the aim of awarding world or continental championships and thus promoting the sporting careers of athletes, clubs or delegations, and the action of private market actors whose objectives are financial.

This financial aspect is one of the main reasons why some actors want to break away from the traditional organisation of sport in Europe. This is what happened when 12 presidents of powerful European football clubs²⁷ attempted to launch a new continental competition, the Super League, as a closed league in the spring of 2021. This format would allow them to secure a long-term presence in a competition that they considered to be of huge sporting interest, and thus secure revenues that were said to be higher than those distributed by the UEFA Champions League, making the Super League a competition of great financial interest. The reason why the rebel clubs wanted to leave the federal competition and create a rival competition was that they felt it was not remunerative enough. While pressure from many stakeholders has prevented this competition from taking place - for the time being - other attempts have been made in other disciplines, against the background of the difficulty for federations not only to generate sufficient revenue to satisfy all stakeholders, but also to defend their economic interests without using overly restrictive instruments that eliminate all competition by the sheer force of their regulations.

Consequently, in 2019, the International Swimming League (ISL) was launched by a Ukrainian billionaire, a competition in the form of stages bringing together all the world's best swimmers and offering them substantial income, far more than that which the International Swimming Federation (FINA) was able to guarantee them²⁸. In addition to FINA's inability to generate sufficient revenue to satisfy the athletes, another problem had arisen at the time of

²⁷ These clubs are the following: Real Madrid, FC Barcelona, Atletico Madrid, Manchester United, Manchester City, Chelsea, Arsenal, Tottenham, Liverpool, Juventus Turin, Inter Milan and AC Milan.

²⁸ Brocard (J.-F.), "Une ligue privée commerciale lancée en natation", *Jurisport* n°198, 2019, p.12

the creation of this new competition. Indeed, the founder of the ISL had initially proposed his project to FINA and then to the European Swimming Federation, both of which agreed to it on the condition that they would be able to collect all the revenue. Faced with these demands, the founder of the ISL chose to organise his competition independently, on the fringes of the federal authorities, thus breaking with the traditional system of organising competitions. Beyond the format of the competition, it was an entrepreneurial vision of sport that challenged the traditional organisation of sport in Europe.

Similarly, the Union of European Basketball Leagues (ULEB) decided to create a new European competition in 2000, the EuroLeague. The ULEB member clubs complained about the lack of transparency in the management and distribution of revenues generated by the European competitions organised by FIBA Europe and wanted to create their own competition that would generate much more revenue. The EuroLeague situation is equally interesting insofar as the economic reasons were accompanied by political reasons. Indeed, the European clubs also complained that FIBA Europe did not include them in the decisions and governance of European competitions. This claim represents one of the common criticisms of the federal bodies, namely that they do not sufficiently take into account the interests of the various stakeholders, thus not sufficiently ensuring democracy, transparency and responsibility of each party in the governance of the federations.

The issue of governance was also central to the decision of the European Union Tribunal in the International Skating Union (ISU) case²⁹. In this case, professional skaters accused the international federation of threatening to impose sanctions deemed disproportionate in the event of participation in competitions organised by a private operator, which the ISU had *a fortiori* refused the right to organise competitions. Beyond the sanctions applied to athletes, which the European Court of First Instance deemed disproportionate, this judgement also raises the question of the governance of international federations. In 2015, the European Commission had defined sport governance as "*the relations between the different stakeholders belonging to or closely linked to the structure headed by the sports federations*"³⁰. The position of the European Union Tribunal was in line with this definition and required the ISU to work closely with the athletes, which was supposed to strengthen the good governance of the federation.

²⁹ Ibid. 25

³⁰ European Commission press release, IP/15/5771, 5 October 2015

This judgement also highlights one of the major difficulties encountered by federations faced with the appearance at the top of the pyramid of a competition organised by a private market player, which is the apprehension of the concept of specificity of sport. Indeed, the Court recalls that the specificity of sport continues to apply and thus allows federations to benefit from a monopoly in regulatory matters with regard to the integrity and safety of competitions, or even the safety of athletes, although this capacity is not unlimited and must respect the principles of good governance³¹. This stance, which more broadly reflects the position of all the European institutions, is not, however, the one claimed by the sporting institutions.

- **The sports movement's misunderstanding of the use of sport specificity by the European authorities**

The sports movement has long considered that the broad autonomy of federations in the organisation of sport competitions, as well as their power of self-regulation devolved by States, expressed the existence of a specificity in sport³², thereby allowing the sports movement to free itself from certain European rules, notably the rules of free competition. This is why, in the wake of the *Bosman* ruling³³, and then the *Meca-Medina* ruling³⁴, the defenders of this position, whether national and European sporting institutions or public authorities³⁵, considered that the European institutions had not respected this specificity of sport, which then seemed "*derisory in the eyes of the European judge*"³⁶.

Nevertheless, despite the feeling of incomprehension that drove the public authorities and the sports movement at the time, it must be recognised that the European institutions have since fully grasped the concept of the specificity of sport and have integrated it perfectly into the decision-making process in matters of sports litigation.

Thus, when European judges opt for the proportionality test in order to verify whether a sporting rule is compatible with fundamental freedoms or European competition law, they

³¹ Fonteneau (M.), "La gouvernance du sport et le droit européen de la concurrence", *Jurisport* n°220, 2021, p.35

³² Arnaut (J.-L.), *Independent European Sport Review*, 2006

³³ ECJ, 15 Dec. 1995, *Bosman*, Case C-415/93, ECR I-4165

³⁴ ECJ, 18 July 2006, *David Meca-Medina and Igor Majcen v. Commission of the European Communities*, Case C-519/04 P

³⁵ Information report on European financial fair play and its application to the economic model of French professional football clubs, T. Braillard, M-G. Buffet, P. Deguilhem and G. Huet, National Assembly, 3 July 2013, p.145.

³⁶ Information report on the European Union and professional sport, J-F. Humbert, Senate, 2013, p.37.

choose to put forward the specificity of sport and permit the contested sporting rule to evade European law as long as it complies with this proportionality test.

This legal tool first appeared in the field of competition law in the *Wouters* judgement³⁷, concerning the prohibition of cooperation between lawyers and accountants in the Netherlands. It was then taken up in the field of sport in the *Meca-Medina* judgement, where the ECJ verified the necessity of the anti-doping rules in view of the objective they pursue.

When the Court and the Commission set up this proportionality test, they must focus on verifying several elements:

- Firstly, they must verify whether **the objective pursued** by the contested rule is **legitimate**.

There is no objective definition of legitimate interest, and the Court and the Commission will, in the course of their decisions, draw up a non-exhaustive list of legitimate interests which, in the light of the case law, is specific to the field of sport and thus demonstrates that this specificity of sport is taken into account.

Thus, in the *Bosman* judgement³⁸, the "objectives of maintaining a balance between clubs, preserving a certain equality of opportunity and uncertainty of results, and encouraging the recruitment and training of young players" are considered legitimate³⁹.

Later, in the *Lehtonen* judgement⁴⁰, the ECJ put forward a new legitimate objective, that of the regularity of sporting competitions; thus, it considered that "*late transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole.*"⁴¹.

In its decision in the *Bernard* case, the CJEU considered the recruitment and training of young players to be legitimate objectives⁴², as well as the fairness, integrity and objectivity

³⁷ ECJ, 19 February 2002, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raadvan de Nederlandse Orde van Advocaten, case C-309/99, ECR p.I-1577, pt.97.

³⁸ Ibid. 33

³⁹ Ibid.33, pt 106

⁴⁰ ECJ, 13 April 2000, Jyri Lehtonen and Castors Canada Dry Namur - Braine ASBL v Fédération Royal Belge des Sociétés de Basketball, Case C-176/96, ECR I-2681, pt.53

⁴¹ Ibid. 40, pt.54

⁴² CJEU, 16 March 2010, Olympique Lyonnais SASP v. Olivier Bernard and Newcastle UFC, Case C-325/08, REc. I-2177, pt.39.

of sporting competition, equality of opportunity for athletes, ensuring the health of athletes and the ethical values in sport which are defined in *Meca-Medina*⁴³.

In its more recent case law, the Court maintains the search for legitimate objectives, as for example in the Biffi judgement⁴⁴, where it identifies two of them, the proper conduct of competitions and the fact of reserving the award of the championship title to a national of the country.

Finally, in the ISU judgement⁴⁵, the Court of First Instance of the European Union, after recalling the existence of a specificity in sport arising from Article 165 of the Treaty on the Functioning of the European Union (TFEU)⁴⁶, and its consideration in the application of the proportionality test, considers that the protection of the integrity of speed skating against the risks associated with betting⁴⁷, the fairness of the conduct of competitions, and the protection of the physical and moral integrity of sportspeople are a legitimate objective.

An analysis of this case law shows that a large number of legitimate objectives in the field of sport have been defined, thus proving that the European courts do take account of sport and its specificities.

- They must then determine whether the measures put in place are proportionate: at this stage, the Court and the Commission will have to determine whether **the measures complained of are appropriate and necessary**.

The examination of these two criteria proves to be complex insofar as there is no objective definition of these two notions, and they require an analysis that takes into consideration not only the specificities of the discipline in question, but also its environment, which is not limited to the economic aspect of the measure in question, but also integrates social or territorial considerations.

This analysis of the environment, which leads to the application of this proportionality test, has been applied to the issue of the joint selling of the UEFA Champions League broadcasting rights⁴⁸. This possibility for the European federations to provide for the collective

⁴³ Ibid. 34, pt.43

⁴⁴ CJEU, 13 June 2019, TopFit eV and Daniele Biffi v Deutscher Leichtathletikverband eV, Case C-22/18; pt.50

⁴⁵ Ibid. 25

⁴⁶ Ibid. 25, pt.78

⁴⁷ Ibid. 25, pt. 103

⁴⁸ Miège (C.), *Sport et droit européen*, Le droit aujourd'hui, Paris, L'Harmattan, 2017, 304 p.

sale of broadcasting rights constitutes an essential element from an economic point of view but may appear to be an anti-competitive practice under European Union law.

For example, in the late 1990s UEFA introduced a procedure for the joint selling of TV rights to a single operator per country on an exclusive basis for up to four years. The European Commission rejected these marketing rules, asking UEFA to develop a marketing system that would not be considered anti-competitive⁴⁹. UEFA then proposed a new marketing system in the early 2000s, which was accepted by the Commission⁵⁰. The Commission accepted it because, in accordance with the elements of proportionality control, this new system pursued the two-fold objective considered by the Commission as legitimate by not only benefiting the consumer, but also making it possible to guarantee solidarity between the clubs thanks to a better redistribution between them, thus taking into account economic but also social elements specific to the environment of the sporting field. Furthermore, the means put in place were more proportionate and adapted since UEFA proposed a division of its offer into several lots that allowed the clubs to exploit certain rights to the matches in which they participated, over a period of three years, which the Commission considered more reasonable⁵¹. This example shows once again that the European institutions are willing to dialogue with the sports movement in order to help the federations better understand their position in terms of competition law and to adapt to the criteria that the European Commission and the CJEU consider to be decisive for a practice not to be considered anti-competitive.

The analysis of the proportionality test applied to sport makes it possible to establish several observations: firstly, it can be seen that, by their number and their sporting nature, the objectives considered by the European institutions as legitimate prove that the latter have fully grasped the concept of the specificity of sport and are inclined to integrate it into the proportionality control mechanism.

Secondly, the use of the proportionality test makes it possible not to systematically subject sporting rules to EU law, which, by respecting the criteria set up by the European institutions, can be exempted from it.

⁴⁹ EC Communication, No. IV/37.398, UEFA, OJEC 10 Apr. 1999.

⁵⁰ Communication from the EC Commission, Case COMP/C.2/37.378, Joint selling of media rights to the UEFA Champions League on an exclusive basis, OJEC 17 August 2002, No C 196

⁵¹ The pursuit of similar objectives and the use of proportionate means also justify the possibility for national leagues to collectively market the media rights of their competitions, as is the case in France, where this possibility is set out in Article L. 333-2 of the Sports Code. However, there is no European uniformity, since in some countries - the Netherlands in particular - ownership of the rights is recognised to the clubs themselves.

However, this mechanism is not able to guarantee the sports movement optimal legal security, since the case-by-case analysis does not allow for the identification of objective principles that would *de facto* apply to sporting rules; moreover, the use of proportionality review marks the clear rejection by the European courts of the existence of a sporting exception that would allow them to totally escape the application of European rules. Nevertheless, the recognition and use of the specificity of sport also demonstrates that the European courts are aware of the particular character of sport and its values, as well as the reasons that justify the protection of the sports movement and that, in this sense, they comply with the Treaty on the Functioning of the European Union.

On the basis of European case law, it can also be considered that the use of proportionality review demonstrates the pragmatism of the European institutions when it came to applying competition law to sporting disputes before them⁵².

Indeed, when the regulations of national and supranational federations were confronted with competition law, a fundamental question arose: how can competition law, which in essence opposes the domination of private powers that would threaten economic freedoms, be applied to a set of sporting rules created to institute a social and economic playing field and consequently frame the freedom of its sporting subjects⁵³ ?

One solution could have been to simply remove sporting rules from the scope of competition law, thereby creating a sporting exception that would allow them to be entirely exempt from European competition rules.

This total exclusion was not adopted by the European institutions, which realised the importance of these unique sporting rules; indeed, some of these rules have the particularity of being transnational in scope and application, since they are likely to apply uniformly to all clubs and licence-holders of a discipline, regardless of their country of origin.

They are thus closer to the rules laid down by the European institutions, even though the sports movement is composed solely of private entities. The strength and importance conferred on these private regulations, particularly in the organisation of sporting competitions or in the structuring of a discipline and its decision-making bodies, have led the European

⁵² Ibid. 11

⁵³ Ibid.11

institutions to recognise the need to constitute an equivalent counterweight to enable those who denounce these rules to benefit from adequate protection and consequently from a control of these sporting regulations to prevent any abusive or discriminatory position.

This is essentially what the CJEU and the General Court of the European Union criticised the federations for in the MOTOE judgement⁵⁴ in 2008 and the ISU judgement⁵⁵ in 2020, both decisions highlighting the conflicts of interest that can arise when the sporting institution has both a regulatory function and a commercial activity⁵⁶. In the second case, the Court stated that "*the exercise of this regulatory function must therefore be subject to limits, obligations or control in order to prevent the legal person in question from distorting competition by favouring the competitions which it organises or those in the organisation of which it participates*".

This is clearly the position that the European institutions have chosen to adopt, thus forcing sporting institutions to justify the legitimacy of their regulations, as well as the respect of the rights of sport actors.

This is indeed one of the other objectives that the European Commission and the CJEU wished to achieve by applying competition law to sporting regulations, that of bringing sporting institutions to justify, explain and dialogue around their regulatory power, in a concern for democratisation and openness of their actions.

It is therefore not by chance that the European institutions have chosen the mechanism of proportionality control to confront the rules issued by sporting institutions with competition law. Indeed, it allows the establishment of a dialogue around these rules, and gives the challenged institutions the chance to explain the objectives that these rules are supposed to achieve by proving their legitimacy, as well as the necessity and proportionality of the means implemented to achieve them.

Even though this pragmatic approach seems to take into account the specificities of sport and opens the way for dialogue and justification, the sports movement does not seem to be satisfied with it.

⁵⁴ ECJ, 1er July 2008, Motosykletistiki Omospondia Ellados (MOTOE) v. Elliniko Dimosio, Case C-49/07

⁵⁵ Ibid. 25

⁵⁶ Ibid. 30

- **A contradictory perception of the degree of protection provided by the European Union to the European sport model**

One of the main points of tension between the sports movement and the European institutions is the contradictory perception of the degree of protection that the European Union is supposed to provide to the European sport model, and more precisely concerning the application of competition law.

Thus, the sporting institutions consider that, as the traditional organisation of sport in Europe, the European sport model must benefit from the highest protection, especially when it comes to prohibiting private market actors from intervening in the market for the organisation of sporting competitions. For their part, the European institutions consider that sport is an economic activity in its own right, within which sport federations must comply with European competition law, like any other economic operator.

It is in this context of divergent points of view that private market competition appears, which is likely to interest sportspeople and clubs constituting the top of the pyramid. Indeed, as competition law prohibits cartels⁵⁷ and the abuse of a dominant position⁵⁸, it allows the emergence of competing operators who wish to organise sporting competitions. However, as these operators are external to the sports movement, they are not subject to the same obligations as the federations that are part of the traditional sport organisation model. Relieved, among other things, of training obligations, but above all of solidarity towards the amateur world, these private market actors have additional resources to meet the demands of athletes at the top of the pyramid and can in particular offer them better remuneration for their participation in these new competitions.

This rivalry represents a real danger not only for the top of the pyramid, but also for the entire traditional sport model.

This instability equally concerns the bottom of the pyramid, i.e., grassroots sport, as opposed to high-level sport, which constitutes the top of the pyramid. Indeed, we are witnessing the appearance of a private commercial offer aimed at the simple "leisure"

⁵⁷ Article 101 of the Treaty on the Functioning of the European Union

⁵⁸ Article 102 of the Treaty on the Functioning of the European Union

practitioner, which can be explained by the evolution of the demand for sport on the part of amateur sportspeople, to which the sports movement has been insufficiently responsive.

1.2 The evolution of the demand for practice partially met by a private market offer

· The origins of this phenomenon

If the top of the pyramid is marked by an exclusively competitive practice, it is different for the base of the pyramid. Indeed, the practice of amateur sport can take different forms, ranging from competitive practice to free practice, otherwise known as "self-organised practice" or "informal practice".

Competitive practice historically takes place within a sport club, in a federally licensed framework. It allows participation in championships organised by the federation and its decentralised bodies, which allow the winners to become national champions or champions of a smaller geographical area depending on the level of sport at which the competition takes place. This practice is said to be "supervised", insofar as it requires the intervention of a sporting association to manage the organisation of the discipline, the presence of qualified trainers or educators to develop the practice, and federations to regulate and organise the competitions.

Conversely, free practice is carried out without constraints, according to the desires of the practitioner. More focused on well-being and leisure, it is not motivated by sporting performance or the desire to surpass oneself. It is conducted outside of any federal structure - and therefore outside of any legal ties - without imposed schedules, the practitioner having the power to choose to practise alone or within a group that he or she has selected.

For many years, there has been a shift between these two types of practice, both in France and in Europe.

Indeed, an analysis of the evolution of the ways in which Europeans practise sport shows the emergence of free sport. Thus, if in 2009, 67% of Europeans declared that they were not members of a sporting club, this figure climbed to 74% in 2014 to return to its initial

level of 69% in 2017⁵⁹, it being understood that the sporting club here refers to any club that allows physical activity to be practised (sport club, but also fitness club or socio-cultural club). More specifically, federated practice remained at a relatively low level of 12% of participants over the same period.

In France, the proportion of people who are members of a sport federation is 24% in 2018, while 61% of practitioners choose a more autonomous and less restrictive practice⁶⁰.

One of the reasons that may explain this phenomenon of changing demand for practice is precisely the fact that practitioners wish to free themselves from the institutional or associative framework, which they consider too restrictive. Indeed, training times and access to facilities are all obligations to which they are subject in sport associations. Sport enthusiasts want to be able to adapt their sporting activity to their lifestyle and to practise it freely, where and when they wish. Thus, in 2016, the growing number of sporting practices in France all had one thing in common: they were unsupervised⁶¹.

Another reason for this evolution is that for several years now, other motivations have been taking precedence over performance and competition criteria in explaining sporting practice⁶². Accordingly, in 2017, European citizens ranked health (54%), improving physical fitness (47%), relaxation (38%) and fun (30%) as the main reasons for their physical activity, well ahead of the spirit of competition, which received only 5% of the votes⁶³. The same phenomenon can be observed among the French, who mention health (27%), relaxation (19%) and pleasure (19%) as reasons for practising sport, with only 4% motivated by competition⁶⁴.

Nowadays, the practice of sport is also more ecological and closer to nature. Thus, 40% of Europeans say they practise a physical activity outdoors⁶⁵ and 36% of the French in a natural environment⁶⁶. This observation is confirmed by the type of discipline favoured by the

⁵⁹ European Commission "Special Eurobarometer 412 - Sport and physical activity" - March 2014; European Commission "Special Eurobarometer 472 - Sport and physical activity" - March 2018

⁶⁰ Croutte P., Y., Müller J., 2018, Baromètre national des pratiques sportives 2018, Barometer carried out by CREDOC under the direction of Hoibian S. for the INJEP and the Ministry of Sports, INJEP Notes & reports/Study report

⁶¹ These practices are: fitness, trail, Nordic walking, running, futsal, triathlon, Padel and indoor climbing

⁶² CDES "Diagnosis of the gap between the supply of and demand for sport in France" - March 2016

⁶³ European Commission "Special Eurobarometer 472 - Sport and physical activity" - March 2018

⁶⁴ Ibid. 60

⁶⁵ Ibid. 59

⁶⁶ Ibid. 60

French, namely hiking (18%), jogging (12%) and, to a lesser extent, cycling (5%)⁶⁷, which are practised outdoors, without any particular infrastructure.

Finally, the emergence of new sporting practices such as pilates, yoga or bodybuilding has resulted in a more connected practice. Indeed, the use of digital technology, thanks to tutorials available on the Internet, or to platforms that make it possible to find co-practitioners or trainers, has given rise to a new way of experiencing sport, essentially at home, free of the constraints imposed by federated practice in clubs.

These strong evolutions in the demand for sport can partially explain the disengagement of sportspeople from federated sport. However, the image and actions of sporting associations and federations are also one of the causes of the lack of adherence to this type of practice.

· The difficulty for federations to take account of changes in practice

First of all, sports clubs and federations are often seen by practitioners only as competition organisers, so it is not generally this type of structure that they turn to when they want to practise more freely. Furthermore, observers note the difficulties encountered by the federal world in adapting and supporting these changes⁶⁸, as well as its inability to modernise its offer and diversify the modes of practice in order to meet the new demands of the sporting public. Finally, few sport federations are able to explain the advantages of a federated practice, such as sport insurance or the availability of professional coaches trained in the teaching of a discipline.

The difficulties of adaptation of sporting federations, combined with the evolution of the demand for practice, allow a private commercial offer to emerge in the field of "sport-leisure".

The largest private market offer is also the oldest and consists of fitness clubs. In Europe, the number of fitness clubs jumped by 23% between 2017 and 2019, from 54,710 clubs to 63,644. Similarly, the number of members rose from 55 million in 2017 to 65 million in 2019⁶⁹.

Team sport is also concerned by the phenomenon, since for several years a significant offer has been developed around 5-a-side football. This example is interesting to study

⁶⁷ Ibid. 60

⁶⁸ PIPAME "Prospective - Challenges and prospects for the sports industries in France and internationally" - 2016

⁶⁹ Europe Active, European Health & Fitness Market Report, 2020

because, beyond the remarkable increase in the number of players in this discipline, it should be noted that this is a new practice that was born outside the federal structure in order to respond to the changing motivations of sportspeople, who are younger, more connected and more free. This is how 5-a-side football was born and developed, without the French Football Federation managing to integrate it - at least at the start of the practice - into the federal system. This led to the development of practice centres, which have undergone significant growth, with an estimated 8 in 2005, 235 in 2015⁷⁰ and 350 in 2017⁷¹. At the same time, the number of regular practitioners has soared from 1 million in 2015 to 2.6 million in 2017.

It should be noted, however, that the rapid evolution of practices and the motivations of players oblige private-market actors to constantly renew themselves in two ways: on the one hand, they must diversify the activities offered to maintain their attractiveness; this is how Padel or badminton rooms have developed in 5-a-side football structures. On the other hand, they must modernise the services offered to participants to provide them with a new experience that would renew their interest and enable them to stand out from the competition. This is why the digitalisation of services is very present in these centres, which offer to record matches or to analyse actions in order to offer advice from a specialised coach.

The evolution of users' expectations has provoked a profound change in the supply of physical and sporting activities. This has paved the way for the development and perpetuation of a private commercial offer better prepared to respond to these new trends. It has also led to a weakening of sport federations and associations, which are having difficulty renewing their offer and adapting to this phenomenon of free practice.

Beyond the concern that the drop in the number of members and its impact on the economic models of the federal movement's components may generate, one may wonder about the consequences of the arrival of new actors in the sporting landscape on the organisation of sport in Europe. Indeed, it seems that their presence significantly modifies the balance of the pyramid system of the traditional model of sport in Europe, weakening the structural base and consequently threatening the whole organisation.

The entire European organisation of sport is currently under attack from private initiatives that are undermining its balance. Whether at the top of the pyramid with top-level sport, or at the bottom with grassroots sport, the whole structure is shaking as a result of the appearance of private market actors.

⁷⁰ Kantar Sport, 5-a-side football study, 2015

⁷¹ Cabinet Xerfi, Les sports et loisirs indoor à l'horizon 2020, 2018

The latter's presence is explained by the fact that they manage to offer services that better respond to the new expectations of sportspeople than the associations and federations.

This is also the case for the top of the pyramid where these market actors are likely to fill a gap or respond to a demand that the federations are unable or unwilling to meet. Additionally, they manage to anticipate the needs of certain stakeholders who do not feel sufficiently listened to in order to propose solutions likely to satisfy them.

In view of the repeated attacks on the model, what are the reasons that justify the sports movement's desire to maintain and defend this organisation at all costs? Why not establish a new model that would leave room for all actors, including those from the private market sector?

The answers to these questions lie in the very nature of sport. Indeed, as we will develop in the second part of this study, sport must be considered economically as a collective good. From this conception of sport, a certain number of principles will follow, the existence of which alone justifies the protection of the European model of sport by all actors.

2. RESPECT FOR THE PRINCIPLES THAT CONSTITUTE SPORT AS A COLLECTIVE GOOD: THE VOCATION OF THE EUROPEAN SPORT MODEL

Sport is a particular economic good. Theoretically, it has the qualities of a so-called 'collective good': it is generally non-rival, in the sense that the fact that one individual practises a sporting activity does not prevent another from doing so (e.g. cycling), and it is non-exclusive in the sense that one cannot prevent an individual from practising a physical activity if he or she so wishes (e.g. running). If a public good is, by definition, a non-rival and non-exclusive good⁷², these two characteristics seem theoretically sufficient for it to be determined as such, there is a more pragmatic reason why sport can be elevated to the rank of public good: not only is it useful to the greatest number of people, but the cost of financing it is such that no private interest would agree to finance it, having no certainty as to the profitability of its investment. As early as the 18th century, Adam Smith introduced this reasoning by noting that the market failed to produce this type of good and that the public authorities could be entrusted with it⁷³. The mode of production of sport thus leads to its characterisation as a "public good", rather than a collective good. The choice of this terminology is, however, open to criticism: if, in the strict sense, a public good is a good that is both produced and supplied by the public authorities, the term public good is often used instead of collective good because of a problematic anglicism⁷⁴. As the production of public goods is not optimal in the market, they are often produced and provided by the public authority and are therefore often public goods, but this should not be taken as automatic and necessary. We will therefore favour the use of the term "collective good", which does not prejudge the mode of production or management of sport, which may be public, community or even private in certain circumstances⁷⁵.

⁷² Beitone (A.), "Biens publics, biens collectifs, Pour tenter d'en finir avec une confusion de vocabulaire", Revue du MAUSS permanente [online] at <http://www.journaldumauss.net/?Biens-publics-bienscollectifs>, 22 April 2014

⁷³ Vérez (J.-C.) "From collective goods to common goods in Europe. Quelles réglementations?", L'Europe en Formation, vol. 376, no. 2, 2015, pp. 61-74.

⁷⁴ In French, the word "public" refers to the state sphere in the broad sense (central state, local authorities, social security administrations). [The meaning of the Anglo-Saxon word 'public' is very different. A "*public company*" is not a public company, but a company whose capital is held by the public via transactions on the "stock market". In the same vein, in French '*public goods*' is translated as 'biens publics' but this translation is clumsy because it characterises not the nature of the good but the way it is made available: a public institution.

⁷⁵ Godard (O.), "La pensée économique face à la question de l'environnement", Cahiers du laboratoire d'économétrie de l'Ecole polytechnique, n° 2004-025, 2004.

The introduction to this concept of collective good is essential to justify the protection and defence of the European model of sport. Indeed, it appears as a model that allows the production of sport while respecting the principles that make it a public good, the latter being directly or potentially undermined by the erosion of the pillars of the European sport model and the desire of the private sector to focus only on profitable activities.

Sport is in fact being seized and transformed by market forces, in particular with the advent of a financial logic that underlies the behaviour of most actors⁷⁶. If it becomes exclusively an entertainment that aims to entertain the crowds, there is a risk of moving away from educational and ethical purposes. Tensions arise from the conflict between the objective of maximising profit and respect for the principles that constitute sport as a public good.

The following chapter will aim to present these principles. **Solidarity**, and in particular, vertical solidarity, **the social functions** attributed to sport, **the territorial coverage** of sport, **the integrity of competitions** and the moral and physical integrity of athletes, and finally **the training of talent** will be developed. The aim is to demonstrate how these principles are constitutive of sport as a collective good and to describe how the European sport model offers conditions favourable to their respect, unlike alternative models.

2.1 Solidarity

This principle describes the existing vertical solidarity mechanisms between elite and amateur sport, whose objective is to secure funding.

The European Commission's White Paper on Sport states that the specificity of sport at the European level is based, amongst other things, on "*the mechanisms of structured solidarity between the different levels and the different stakeholders*"⁷⁷. This is what Jean-Michel Brun, in his speech at the 2008 National Sports Conference, called "*organic solidarity*"⁷⁸, which is based on federal unity. It is this unity that makes it possible to set up vertical solidarity mechanisms between professional and amateur sport, a solidarity whose

⁷⁶ Bourg (J.-F.), Gougnet (J.-J.), *Sport et territoire, les enjeux pour les collectivités locales*, Sciences humaines et sociales, Presses Universitaires du Sport n°89, 2017

⁷⁷ Ibid. 2, art. 4.1

⁷⁸ National Sports Conference - 20 November 2008

organisation may differ according to the countries and disciplines in Europe, but which in any case aims to secure the financing of the bottom of the pyramid.

This vertical solidarity mainly takes a direct and an indirect form. The direct form consists of transfers of funds from the top to the bottom of the pyramid and is complemented by a more indirect solidarity, which consists of transferring part of the lottery revenues to the field of sport, again with heterogeneity depending on the country. An exhaustive study of European countries carried out in 2019⁷⁹ shows that 13 countries out of the 27 studied do not have a direct solidarity mechanism between professional and amateur sport. Indeed, although the European Commission, in its White Paper on Sport, recommends that countries create and maintain solidarity mechanisms⁸⁰, this text has no binding value, leaving each country free to implement such a mechanism or not.

Of the 14 countries with solidarity mechanisms, two categories can be distinguished: countries where the system is regulated by the state, and countries where the system is regulated at the level of federations.

In the first category, 8 countries have a law regulating the distribution between professional and amateur sport⁸¹. For example, Article 37 of the 2004 Hungarian law on sport stipulates that the federations must include a section dedicated to solidarity with amateur sport in the negotiation of TV rights. In all these countries, with the exception of Italy and Romania, this organisation is accompanied by a system regulated by each federation.

In the second category, 6 countries provide for the solidarity mechanism to be implemented by each federation individually individually⁸². In Germany, for example, the sporting organisations determine the amount of the redistribution, which is set by the statutes of the sporting federations.

Regarding German football, in 2019 the German League paid the federation €5 million in aid to the Länder associations, €10 million for the federation's talent promotion programme and the creation of its own training centres, and a solidarity bonus of €1 million annually to the federation for amateur sport, shared between the regional and Länder associations.

⁷⁹ Analysis carried out in the framework of the study "Impacts, externalities and benefits of the sport organisation model in Europe in the light of its professionalisation", conducted by CDES, not published to date

⁸⁰ Ibid.2, recommendation no. 48

⁸¹ These are Denmark, France, Hungary, Italy, Lithuania, Romania, Spain and the UK

⁸² These are the Czech Republic, Estonia, Germany, Ireland, Poland and Portugal

At the international level, the principle of solidarity is also defended, as illustrated by the mechanism provided by FIFA in the context of transfer regulations. Article 21 of the Regulations on the Status and Transfer of Players states:

“If a professional player is transferred before the end of his contract, any club that has participated in the training and education of the player shall receive a proportion of the compensation paid to the former club (solidarity contribution). The provisions concerning the solidarity contribution are set out in Annex 5 of these regulations.” This levy mechanism is made possible by the existence of the transfer fee base, which currently exists only in football.

This so-called direct solidarity is complemented by a more indirect solidarity that also benefits amateur sport: the distribution of lottery revenues.

All European countries have a mechanism for the redistribution of lottery revenues; lotteries include both games of chance and sport betting, when managed by the state.

There are, however, some country specificities:

- In Italy, the current regulatory framework does not provide for an automatic mechanism to transfer revenues from gambling and sport betting to sport; however, a portion of lottery revenues is paid to the Italian National Olympic Committee;
- In Romania and Slovenia, it is not the lottery revenues that are distributed, but a percentage of the gaming licence fee.

As with the solidarity mechanisms between professional and amateur sport, there are two types of redistribution: redistribution expressly in favour of sport, and redistribution in favour of 'good works'.

18 countries have made provision for redistribution directly to sport⁸³. In Sweden, for example, Svenska Spel, the national lottery, is committed to the Swedish Sports Confederation, via a specific fund, which finances sports clubs chosen by lottery users to the tune of 50 million kronor (approximately €4,770,000).

In other European countries, redistribution is provided for in favour of 'good works', among which we can find sport. For example, in Belgium, Article 23 of the law relating to the

⁸³ These are Austria, Bulgaria, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden and the United Kingdom

rationalisation of the operation and management of the national lottery provides that the King shall establish annually the plan for the distribution of the profits of the lottery for the benefit of causes of public utility; sport, in the same way as culture or the fight against poverty, appears in the list of causes of public utility.

It can be seen that solidarity initiatives are very disparate depending on the country, which has the freedom to choose the rules it enacts due to the absence of constraint from the European Union in the field of sport. However, despite this heterogeneity, solidarity remains a strong representative principle of the European sport model.

- **The European sport model, guaranteeing respect for the principle of solidarity**

Unlike the European model, the North American sport model does not provide for this type of mechanism, due in particular to a very clear-cut split between professional sport managed by private market structures (called leagues) and a somewhat neglected grassroots sport. However, it is important to underline the existence of actions organised by the North American professional leagues, through foundations, which allow the promotion of the practice of the discipline, to anchor the leagues in their territory and to defend charitable causes. These actions can be grouped under the name of "*charity*" and are less structural than the forms of solidarity that appear in the European model. In fact, the organisation of sport is very different in North America from what we know in Europe, as sport is essentially practised (including competitively) in schools and universities or in private clubs managed by commercial actors.

In Europe, it is important to point out that all the alternative projects to the European sport model developed at the top of the pyramid do not include solidarity mechanisms. The objective of profitability that characterises most of these projects does not go well with the participation in the well-being of third parties, even if they are practitioners of the discipline concerned. Moreover, the common denominator of these projects is the search for autonomy in relation to the federal governing bodies of the disciplines concerned, in particular in order to avoid the obligations linked to vertical solidarity.

However, these forms of solidarity provide European sport associations with subsidies that enable them to offer services at affordable rates to the participants, which mechanically improves the rate of participation. The low price of licences in Europe should be compared with the higher costs offered by private commercial structures, which have to make their activity profitable.

In this respect, the European Parliament Resolution of 23 November 2021⁸⁴ confirms the "*need to strengthen solidarity and financial redistribution, in particular between professional and grassroots sport*", demonstrating once again that this principle is at the heart of the European sport model and must be defended for the well-being of European citizens.

2.2 The social functions of sport

This principle underlines the need to take into account the social functions provided by the practice of a sporting activity or the voluntary commitment in a sporting association in terms of integration, conviviality, citizenship, well-being, education, health or equal opportunities. Some of these dimensions are difficult to quantify, particularly in monetary terms, due to the absence of consideration by the market, and must therefore be considered as positive externalities linked to the practice of sport.

As early as 1913, Pierre de Coubertin highlighted the fact that sport made it possible to "*reverse the social hourglass by placing a humble craftsman above a prince*"⁸⁵, thus underlining the equal opportunities generated by the practice of sport. The White Paper on Sport⁸⁶ through the eight objectives assigned to the development of the sector in the Member States attributed a social utility to sport. The United Nations 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs)⁸⁷ also offers a role for sport as a factor for sustainable development and recognises the contributions it makes to peace, the promotion of tolerance and respect, and the empowerment of women and children as well as to health, education and social inclusion

Making an exhaustive list of the social functions attributed to sport thus seems complex (24 functions are identified in the study by De Knop and Hoyng⁸⁸).

It appears that the social utility of sport can be seen at both macro and micro levels. At the macro level, it is through the social disutility avoided that sport should be promoted. Indeed, it can help to avoid delinquency, drug and alcohol abuse, as well as various pathologies such

⁸⁴ European Parliament resolution of 23 November 2021 on EU sport policy: achievements and future prospects (2021/2058(INI))

⁸⁵ De Coubertin (P.), "Le sport et la question sociale", *Revue Olympique*, 1913, published in *Revue française d'histoire des idées politiques*, 2005, n°22, p-393.

⁸⁶ Ibid. 2

⁸⁷ Resolution entitled 'Transforming our world: the 2030 Agenda for Sustainable Development', adopted by the UN General Assembly on 25 September 2015, A/RES/70/1.

⁸⁸ De Knop (P.), Hoyng (J.), *De functies en betekenissen van sport*, Tilburg University Press, 1998

as obesity, etc. In microeconomic terms, sport generates social links, integration or education, which improves the individual situation of participants⁸⁹. Sport produces social links of proximity, social capital or collective heritage on a territory, which go far beyond the offer of sporting activities⁹⁰.

Although the results of several studies converge to demonstrate the existence of these social functions, the problem of their evaluation persists and represents the main obstacle to the justification of the investment of public funds in sporting policies⁹¹. However, it is only by adding them to the much better referenced economic indicators that the total economic value of sport may be estimated.

A landmark study on the subject was carried out by the association Sported⁹² in Great Britain between 2010 and 2012, as part of the measurement of the social legacy of the Olympic Games⁹³. Based on existing data but also on in-depth interviews with stakeholders, the study aimed to answer three questions:

- Is sport accessible to the most vulnerable groups in terms of social problems?
- How can we assess the effectiveness of sport in protecting these groups in difficulty?
- How to measure the social disutility avoided by the practice of sport?

⁸⁹ Charrier (D.), Jourdan (J.), "Le sport comme levier éducatif dans les territoires urbains en difficulté", *Informations sociales*, vol. 187, no. 1, 2015, pp. 58-65.

⁹⁰ Bourg (J.-F.) and Gougnet (J.-J.), *Socio-économie du sport, une analyse critique*, Pulim, 2021

⁹¹ <https://www.sportetcitoyennete.com/articles/refaire-societe-dans-et-par-le-sport>

⁹² <https://sported.org.uk/>

⁹³ <https://www.sportsthinktank.com/uploads/sported-sportworks-providing-the-value-of-sport-summary-1-15.pdf>

The main results of the study are outlined below in a summary table:

Domain	Risk	Potential impact Sport	Reduction Risk	Social cost	Social cost avoided
Crime	52.5%	30.11%	15.81%	£4,585	£724.89
School results	54.9%	23.22%	12.75%	£1,000	£127.50
School attendance	31.03%	14.52%	4.51%	£4,000	£180.40
Drugs	58.48%	32.84%	19.20%	£11,800	£2,265.60
Wellness	62.58%	22.92%	14.34%	£3,000	£430.20
Health/obesity	46.03%	15.81%	7.28%	£2,715	£197.65
Desocialisation	45.09%	15.06%	6.79%	£3,651	£247.90
Total					£4,174.12

Source: Sported, 2013, p. 12

The table can be read as follows, using the example of drugs: the probability of a young British person in the sample becoming a problem drug user is estimated at 58.48% in the case of a total absence of care. Assuming an effectiveness of sport of 32.84%, this results in a reduction of the previous risk of 19.20%. Since the social cost of drugs was estimated at £11,800 per individual per year, the social disutility avoided would be £2,265.60.

Taking into account all the areas covered in framework of the study, sport would save society £4,174.12 per individual per year. With a total population of 10 million young people involved, the potential saving would exceed £4 billion compared to the situation where nothing is done.

At the same time, volunteering, which is an important pillar of sport financing in the European model, also generates positive externalities in social terms. A study carried out in 2018 estimated the value of voluntary work in sport in France at between 5.2 and 10.1 billion euros, depending on whether it is compensated for by employees paid at the minimum wage

or by more qualified employees⁹⁴. For example, volunteering, like sports, helps to create conviviality and to develop citizenship and well-being. Voluntary work is now in danger, impacted by the growing individual desire to limit constraints and commitments; a desire exacerbated by the successive related confinements in 2019 and 2020 which have distanced volunteers from their sporting associations.

- **The European sport model, guaranteeing the consideration of the social functions of sport**

The European sport model, which gives the public sector a role in organising the provision of sport, provides an ideal framework for addressing this issue and implementing the necessary policies. The aim is to promote investment that encourages participation and commitment. This public investment could have positive effects at the macro-economic level and be "profitable" through the reduction of costs linked, for example, to the improvement of the health of participants and volunteers. The European sport model must therefore allow actors to develop cross-cutting policies, far from the sole purpose of competition. This implies joining forces with institutional partners in the fields of health, education, social action, justice and urban policy. This strategy is further underlined in a study produced by the European Commission in 2021: *"Any public health objective should emphasise the economic benefits and wider societal impact of physical activity"*⁹⁵.

At the same time, the autonomy demanded by the actors promoting alternative models to the European sport model does not fit well with the objective of implementing transversal policies. Indeed, the private sector cannot be expected to take up these issues, as profitability is too indirect.

⁹⁴ CDES, "Economic and Social Benefits of the Sports movement", August 2018 [online], available at: <https://cdes.fr/2018/09/01/le-mouvement-sportif-queles-effets-sur-la-societe-francaise-et-son-economie/>

⁹⁵ https://www.europarl.europa.eu/doceo/document/TA-9-2021-0045_EN.pdf

2.3 The territorial network of the sport offer

This principle describes the capacity of a sport offer to be accessible to all peoples, without distinction of social category, solvency or place of residence. This is justified in particular in view of the numerous social functions attributed to sport, which encourage the State to promote the practice of physical activity.

In order to assess the quality of the territorial network of the sporting offer, we will take the example of France and use several indicators. If we first look at the number of sporting facilities, some 318,000 according to the latest available figures⁹⁶, including 39,000 sites and areas for nature sport, were counted in France in the first quarter of 2020.

This significant amount of facilities was obtained in particular through the initiative of the public sector, and according to the national census of sport installations published in May 2006, as many facilities were created in the twenty years following the decentralisation laws as in the previous decades. In 2018, the owners of French sporting facilities are essentially public (over 80%)⁹⁷. The strong presence of facilities allows for the development of numerous reception structures, and there will be more than 165,919 clubs in France in 2020, all disciplines included⁹⁸. These numerous clubs offer the possibility of practising to a very large public and there will be approximately 18.4 million licences and other participation certificates (ATP) issued by all the federations approved by the Ministry of Sports in France in 2020⁹⁹. In 2020, 65% of French people aged 15 and over have practised at least one physical and sporting activity in the last twelve months¹⁰⁰.

⁹⁶ <https://www.data.gouv.fr/fr/datasets/r/c3ab5533-d93c-486a-879a-a30659029f73>

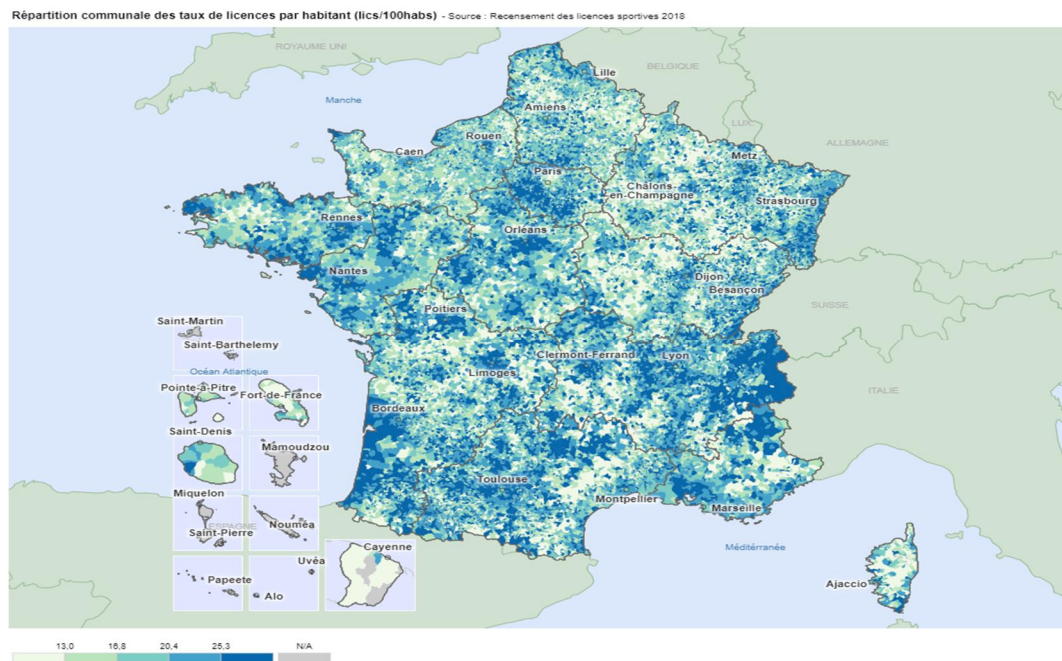
⁹⁷ <https://www.andes.fr/wp-content/uploads/2021/10/Etude-ANDES-VF-2021.pdf>

⁹⁸ <https://injep.fr/donnee/recensement-des-licences-sportives-2020/>

⁹⁹ <https://injep.fr/donnee/recensement-des-licences-sportives-2020/>

¹⁰⁰ <https://injep.fr/donnee/barometre-sport-2020/>

Below illustrates the territorial network in France, particularly when we look at the communal distribution of licences per inhabitant:



While all of these elements do not necessarily call for vigilance, this should not hide the persistent influence of a certain number of socio-demographic factors that discriminate in determining the volume of activities and the type of sporting practice. Gender and age thus continue to be factors that determine participation, despite recent favourable developments. The place of residence also influences the activities practised, sometimes for obvious reasons (e.g. sailing or skiing), but also sometimes for cultural reasons (e.g. basketball in Pays de la Loire). As for the level of income and qualifications, the importance of these two factors has resulted in the maintenance of a certain number of differences according to the professions and socio-professional categories¹⁰¹.

¹⁰¹ Ibid. 62

- **The European sport model, guaranteeing respect for the territorial network**

The territorial network of sport appears to be a strong principle of the European model, guided by the absence of profitability objectives of the delegated federations. In France, local authorities account for 80% of public funding for sport, which illustrates the importance given to sport in the territories¹⁰². This strong participation of local authorities is justified by the pursuit of the general interest, as defined by articles L. 100-1 and 100-2 of the Code du Sport.

In view of the social functions attributed to sport, it seems appropriate that the public sector ensures wide access to sport. In this respect, when in 2017 France was offered the organisation of the Olympic Games in Paris in 2024, President Emmanuel Macron communicated an ambitious objective in terms of networking: to increase the number of people practising sport by 3 million, targeting all persons and all territories¹⁰³.

It should be remembered that in the United States, in a model opposite to the one developed in Europe, apart from the proposed offer of sport within the school system, there are few offers that do not discriminate by the entry fee and very few competitions organised for amateurs.

The analysis thus shows that discussions on access to practise are by nature public and cannot be entrusted to a private market player. Indeed, the private commercial sector is naturally encouraged to develop a sport offer only in geographical areas and towards solvent audiences, which ensure profitability. This strategy would exclude both the non-solvent public and the geographical areas with the least economic potential from the sport offer, reinforcing the discrimination of access to the practice of a supervised sporting activity.

¹⁰² <https://www.andes.fr/wp-content/uploads/2021/01/Synth%C3%A8se-Sondage-du-1er-d%C3%A9cembre-au-22-d%C3%A9cembre-2020-V5.pdf>

¹⁰³ <https://www.paris2024.org/fr/heritage-jeux-emploi/>

2.4 Integrity

This principle brings together the integrity of competitions and the moral and physical integrity of athletes, which are two essential aspects of sport that must be safeguarded in order to protect those involved and to provide spectators with clean and balanced competitions in order to maintain the uncertainty of the outcome.

The term "integrity" has a dual meaning: derived from the Latin *integer*, it emphasises wholeness, intactness. In a derived and subjective sense, it refers to sincerity, honesty. In the European Commission's 2007 White Paper on Sport¹⁰⁴, the term is used to refer to the quality of a sporting competition that should be defended but also to describe the need to protect athletes both physically and morally. Sport should therefore offer wholehearted and sincere competition and should not impair the health of athletes. From the middle of the 19th century onwards, sport was driven by a democratising impulse and a moral discourse at the initiative of Pierre de Coubertin in particular. The world of sport then appeared as a "*refuge of perfection, opposing the disenchantment of the world with one of the ultimate illusions of the sacred*"¹⁰⁵. Sport thus becomes a preserved and exemplary space necessary to our society. It is clear that this myth is as alive today as it is altered¹⁰⁶.

This myth is alive and well because the questioning of sport as a refuge activity, if it exists, is not consensual. This myth appears to be altered, however, in the sense that abuses have been observed that call into question certain ideals and, in particular, the chivalrous spirit of sport dear to Coubertin. One of the main infringements is the questioning of its integrity. Coubertin warned of the dangers of using sport for non-sporting purposes: "*sport can be chivalrous or corrupt, virile or bestial, and it can be used to consolidate peace as well as to prepare for war*"¹⁰⁷.

In the case of sporting competitions, it seems obvious to consider that their integrity is the condition of their credibility and therefore of their success. The result of the competition, unknown to anyone before it begins, must be subject to a randomness determined solely by the natural criteria that separate the opponents. It should be remembered that the quality of a

¹⁰⁴ Ibid. 2

¹⁰⁵ Vigarello (G.), "le sport dopé", Esprit, 1999, p.82

¹⁰⁶ Sauvé (J.-M.), "Intégrité des compétitions sportives", JurisEditions, 2014, p.6

¹⁰⁷ De Coubertin (P.), "Le caractère de notre entreprise", Bulletin du Comité International des jeux olympiques, Oct. 1894, published in Revue française d'histoire des idées politiques, 2005, n°22, p.389

competition can be measured by the balance of forces present and that its commercial success is directly correlated to this level of competitive balance¹⁰⁸.

In order to have integrity, a sporting competition must also be based on the respect of the rules of the game, known and respected by all participants. It is therefore up to legislators and sports organisations to lay down rules guaranteeing the integrity of sport, to ensure that they are respected and to punish breaches. Therefore, the use of any means not foreseen by the pre-established rules, whatever those means, is a violation of integrity and must be prevented and sanctioned.

The integrity of competitions can also be called into question through attacks on the physical and moral integrity of athletes. Most of the abuses observed, such as doping or match-fixing, which call into question the fairness of the activity and influence the outcome of matches, directly involve the athletes. With regard to doping, some authors consider, on the basis of the study of proven cases of doping in sport, that athletes are in fact the victims of an organisation of sport solely oriented towards competition¹⁰⁹. More recently, match-fixing practices based on the corruption of athletes (tennis and football, in particular) have been documented¹¹⁰. Here too, the athlete can and should certainly be seen as a victim, as he or she is rarely at the origin of the scheme, so that this practice calls into question their moral integrity.

- **The European sport model, guaranteeing respect for the principle of integrity**

The European sport model and the European institutions have demonstrated their willingness to consider integrity as a principle to be respected. For example, the CNOSF Charter of Ethics and Deontology defines and enshrines the values of fair play¹¹¹. This text sets out the principles of complying with the rules of the game, respecting all the players in the competition, respecting oneself, respecting the referee's decisions, refraining from all forms of violence and cheating, and being in control of oneself in all circumstances.

¹⁰⁸ Andreff (W.), "Equilibre compétitif et contrainte budgétaire dans une ligue de sport professionnel", *in Revue économique*, 2009/3 (Vol.60), pp. 591-633

¹⁰⁹ Bourg (J.-F.), Gouguet (J.-J.), *La société dopée : dopée: peut-on lutter contre le dopage sportif dans une société de marché ?* Seuil, 2019

¹¹⁰ Malik (A.), "Economie du sport: du corona à la mafia?", *Jurisport*, n°243, 2020, p.43 and Malik (A.), "Le sport business en quête de transparence", *Jurisport* n°200, 2019, p.36

¹¹¹https://cnosf.franceolympique.com/cnosf/fichiers/File/CNOSF_Juridique/CNOSF_deontologie/charte-ethique-et-de-deontologie-du-sport-adoptee-par-ag-cnosf-2012.05.10.pdf

Institutionally, the political choice of self-regulation has often been made by European sport stakeholders and has led to the creation of bodies responsible for regulating certain abuses related to integrity issues. National bodies have been created - for example in France: the French Anti-Doping Agency (AFLD) by the law of 5 April 2006, and the Online Gaming Regulatory Authority (ARJEL) which became the National Gaming Authority (ANJ) through the law of 12 May 2020 - and illustrate, in their respective fields, the affirmation of the principle of integrity of sporting competitions in the European sport model. The sports movement works in collaboration with these entities and we can underline the creation of the network of "sport competition integrity delegates" at national level and by sport discipline. In France, we can also note that the administrative judge has taken up this issue since the Conseil d'Etat recognises, in some of its decisions, not only the objective of protecting the health of athletes, but also the importance of "*guaranteeing the fairness and ethics of sporting competitions*"¹¹². This reinforces the sports movement's desire to defend these principles.

One of the difficulties encountered in the fight against the abuses observed is the impossibility of apprehending and addressing a global challenge with a national initiative. In this respect, the creation of the World Anti-Doping Agency (WADA) in 1999 is an illustration of the will of the actors of the sports movement to have an international institution armed to face the challenge of doping in sport.

The question of integrity and related abuses is particularly relevant in the context of sport as a spectacle. Indeed, from the moment when the interest of the competition organisers becomes the sale of a "spectacle", respect for integrity can become a constraint and, as a result, can sometimes be brushed aside. The management of doping in North American professional leagues or for organisers of events from the private commercial sector such as the UFC in MMA is an illustration of this. In this respect, projects competing with the European sport model, which emphasise the objective of profitability, offer few guarantees. For example, the fight against doping cannot be considered a major objective for a private commercial competition organiser, which is by nature attached to profitability.

Here again, it must be stressed that the impact of competition on the health of athletes is an externality that only a public actor can integrate into its reasoning. In the same vein, the fight against match-fixing, often linked to the sport betting sector, is costly and is for the moment only carried out by public institutions. The recent generalised legalisation of sport

¹¹² CE 2ème et 7ème sous-sections réunies, 24 Feb. 2011, n° 340122; CE 2ème et 7ème sous-sections réunies, 18 Dec. 2013, n° 364839 368890

betting in the United States will, in this respect, be followed to analyse the means implemented by the leagues to control this activity and its impact on the competition.

2.5 The training

This principle underlines the importance of training talent to support high-level competition in the various disciplines and the importance of creating the conditions for the model to be able to provide this training.

In the 2007 White Paper, the importance of this principle is underlined: "It is essential for the sustainable development of sport at all levels to invest in and promote the training of talented young sportspeople under good conditions"¹¹³. Following this, a European study was carried out on the subject of the protection of young athletes and the quality of training and offered recommendations to regulators¹¹⁴.

The case law of the ECJ also seems to recognise training as a legitimate objective for justifying regulatory intervention: "it must be recognised that the objectives of ensuring the maintenance of a balance between clubs, preserving a certain equality of opportunity and the uncertainty of results, and of encouraging the recruitment and training of young players are legitimate"¹¹⁵.

The exercise of regulatory power by federations in the area of training is justified by the high cost borne by sporting associations that are involved in training talent, while the return on investment is uncertain. This situation is mainly problematic when the trained player participates in high-level competitions with a club that has not worked entirely on his training. This is why mechanisms exist in many European leagues to compensate training clubs. These amounts are calculated as a lump sum (e.g. LNR in France)¹¹⁶, or as a proportion of a transfer fee (e.g. FIFA)¹¹⁷.

These mechanisms are monitored by the European Commission, which is invited by the European Parliament to "actively contribute, together with the federations concerned, to

¹¹³ Ibid. 2

¹¹⁴ https://www.persee.fr/doc/insep_1241-0691_2009_num_44_1_1060

¹¹⁵ Ibid.33, pt. 106; see also the Opinion of Advocate General Alber delivered on 22 June 1999 in Case C-176/96 *Jyri Lehtonen and Castors Dry Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* [2000] ECR I-02681. I-02681.

¹¹⁶ https://www.lnr.fr/sites/default/files/releve_de_decisions_cd_14_juin_2019_-_annexe_1.1_-_reglementation_rif.pdf

¹¹⁷ Art 20 RSTP <https://digitalhub.fifa.com/m/61c6787e6350f0a1/original/rcvrsbmimvqziptvqjaq-pdf.pdf>

the establishment of effective redistribution and solidarity mechanisms so that the training of young athletes and the survival of amateur clubs can be financed by means compatible with Community law"¹¹⁸. For the Court, the compensation system does indeed constitute a restriction on freedom of movement. However, by applying the proportionality test, it considers that this restriction is justified, in the interests of protecting training: "the prospect of receiving training allowances is such as to encourage football clubs to (...) ensure the training of young players"¹¹⁹. Thus, the European judge seeks not to discourage clubs from investing in the training of young players. However, it sets limits to this compensation.

A major advance in this area, the *Bernard* judgement of 16 March 2010 enshrines the legitimacy of training compensation and defines the calculation methods¹²⁰. The CJEU considers that a player's departure at the end of his training does not justify the payment of damages, as claimed by Olympique Lyonnais in this case. The Court then stated that compensation for the costs of training a player should not be limited to the nominal cost, but should take into account the costs incurred by the clubs in training both future professional players and those who will never become professionals. It thus validates a calculation of training compensation based on two essential elements: the number of years spent in the training facility and the average cost of training a player, whether he subsequently becomes a professional or not¹²¹.

To ensure that the top of the pyramid participates in training efforts, the regulations of professional leagues sometimes make it compulsory for professional clubs to have a training centre¹²². In parallel, the principle of solidarity sometimes supports the infringement of the training principle. Generally speaking, in a sport where the competitions at the top of the pyramid do not generate significant revenue, the crucial importance of organising major international sporting events (Olympic Games, world championships, etc.) must also be emphasised, as they generate revenue for the organisers and *ultimately* benefit the national federations in their objective of training talent.

¹¹⁸ European Parliament resolution on the role of the European Union in the field of sport (A4-0197/97), Official Journal C 200 of 30/06/1997, p. 0252, paragraph e.

¹¹⁹ Ibid.33, pt. 108; Ibid.42, pt. 41

¹²⁰ Ibid.42

¹²¹ Lefebvre-Rangeon (F.), *The emergence of a European sport model. Contribution à l'étude de la construction juridique européenne*, dissertation, Law, Limoges, 2014, 452p.

¹²² Article 15.3 FFR/LNR Agreement

· The European sport model as a guarantee of support for training

In the North American model, training is totally outsourced by the professional leagues: it is either done by the North American school/university system or in other countries. The professional leagues do not pay the North American university system for the training of talent, as the universities have developed their own very profitable economic model¹²³. When this talent is trained in foreign structures, a "*buyout*" mechanism is provided for, with capped lump sums, which reach for example \$800,000 in 2021, according to the collective agreement in force in the NBA¹²⁴.

The closed leagues currently existing in Europe (and in particular the EuroLeague, the UCI World Tour or the KHL) do not integrate training into their model in a frontal manner, planning to rely on training carried out elsewhere. This strategy appears firstly opportunistic and secondly particularly risky. Opportunistic because these leagues rely on talent trained elsewhere and available at no cost, and extremely risky in the sense that there is no reason to believe that the training clubs will continue this activity if they are not rewarded when players join other teams. The situation is worrying in cycling, for example, where there are many calls for the teams at the top of the pyramid to take better account of training work.

More indirectly, the closed leagues, both in North America and Europe, are in conflict with the federal world on issues related to the competition calendar. It is not uncommon for them to decide not to release players participating in national team competitions, whether in the context of qualification or in the main stages of major international events, as illustrated by the case of players participating in EuroLeague or NHL competitions. The absence of these key players playing in attractive sporting leagues can reduce the level and therefore the interest of international competitions, which tends to make it difficult for federations to fulfil their training role, insofar as the redistribution of income from these competitions will be mechanically weaker for the federations

These numerous illustrations demonstrate the need to take into account all the links in the chain that enable the training of talent. In this respect, the European sport model appears to be sufficiently inclusive to respect this training principle.

¹²³ The NCAA generated \$1.1 billion in revenue in 2017.

¹²⁴ <https://cdn.nba.com/manage/2021/03/2018-19-CBA.pdf>, Article VI.I

The protection of the European sport model is therefore essential for the perception of sport as a public good to endure, and with it all the principles that differentiate sport from a classic economic good.

This protection is today in the hands of both the European institutions and the actors of the sports movement. A prospective analysis of their behaviour is necessary to determine whether this protection will tend to weaken or strengthen in the coming years.

3. RECOMMENDATIONS FOR FEDERAL STRATEGIES IN THE FACE OF DIFFERENT PROSPECTIVE SCENARIOS

In order to describe what the future of the European Sport Model might look like, two scenarios have been constructed to reflect possible developments. Specifically, the first scenario characterises a situation in which the protection of the European Sport Model by the institutions would weaken, while the second scenario presents a favourable development characterised by a strengthening of this protection. In each of these hypotheses, it will be important to describe the process of how this scenario came about and to analyse the consequences for the European Sport Model and its actors.

With regard to this analysis methodology, it seems useful to specify that these two scenarios are framing scenarios¹²⁵, which means that they do not aim to retrace the observable reality but to start from the present situation to explore possible futures. From this point of view, they are close to the ideal-type concept¹²⁶ and thus propose simplified representations of the future. Moreover, each of the situations envisaged is based on extreme hypotheses which underpin the singularity of the scenarios. In other words, the various scenarios developed are not intended to be an exact transcription of reality, although the hypotheses on which the construction of these scenarios is based must be as close as possible to observable facts.

Therefore, the use of this typology of situations concerning the evolution of the protection of the European sport model by the European authorities allows for a simplified representation of the reality used for the analysis.

¹²⁵ Julien et al, *La méthode des scénarios en prospective*, vol. 51, n°2, L'Actualité économique, 1975, pp. 253-281

¹²⁶ Weber (M.), *Essais sur la théorie de la science*, Paris, 1965, Plon

3.1 Scenario 1: The weakening of the protection of the European sport model

· Description of the scenario

In this first scenario, we envisage a deterioration of the current situation for the sports movement, due to the weakening of the protection of the European sport model by the European institutions.

This protection was historically made possible by the concept of the specificity of sport, introduced by the Treaty on the Functioning of the European Union¹²⁷. The CJEU and the European Commission could thus take into account the specificities of sport when dealing with cases in this field.

However, considering the weakening of the protection of the European sport model means questioning the maintenance of this sport specificity. It could no longer be guaranteed and its use by the European authorities could no longer have the desired effect. Thus, the proportionality control within which the specificity of sport was intended to be applied could systematically prove unfavourable to the sports movement, thus considerably increasing the risk of condemnation of sporting institutions by the European courts.

In an even more extreme way, the European Union could decide to remove the concept of the specificity of sport from the TFEU altogether. This would require recourse to the simplified revision procedure, which can be set up by the government of a Member State, the European Parliament or the European Commission and voted unanimously by the European Council after consultation of the Parliament and the Commission. This decision, amending part of the Treaty, would enter into force after its approval by the Member States.

Although this simplified procedure was created by the Lisbon Treaty to facilitate further European integration in the areas covered by Part 3 of the Treaty - amongst which is sport - there is nothing in theory to prevent the use of this procedure to reduce the scope of the European Union's action.

¹²⁷ Ibid. 20

· Conditions for the occurrence of the scenario

There are two diametric forces corresponding to the changing position of the European institutions regarding the protection of the traditional model in Europe.

Endogenous, in which three elements can be identified as the responsibility of the sports movement:

- inadequate governance;
- insufficient consideration of sport as a public good;
- excessive heterogeneity of organisational models for sport across disciplines and countries.

And simultaneously, exogenous, where the actions of actors outside the sports movement also have repercussions on the weakening of the protection of the European sport model; in particular, at the political level, liberal ideas favouring competition are imposed in the European institutions, which leads to their application to the sport sector.

In this first scenario, we assume that the sport federations have not taken into account the recommendations of the European institutions and have insufficiently improved their governance. Indeed, the recognition of this specificity of sport by the States and the European institutions was accompanied by rewards to be paid by the European sport movement. In a Council of Europe report¹²⁸, the rapporteur invited sporting institutions to "*ensure internal respect for democracy, transparency and good governance*" and to "*work with all stakeholders in their respective sport to preserve and strengthen the European sport model while recognising the diversity that exists among and within the different sports in Europe*". As a sign of the interest of the European institutions, he referred to a Recommendation of the Council of Europe's Council of Ministers on the principles of good governance in sport¹²⁹, which gave the following criteria for good governance:

- respect for democratic procedures based on the fairness of electoral processes;
- establishment of a professional organisation and management of sporting structures;
- need to avoid conflicts of interest;

¹²⁸ Document 11467 - Council of Europe - The need to preserve the European model - José Luis Arnaut - 18 Dec. 2007

¹²⁹ Recommendation Rec(2005)8 of the Committee of Ministers to member states on the principles of good governance in sport

- implementation of accountability and transparency in decision-making.

The European Commission has identified as principles of good governance "autonomy within the limits of the law, democracy, transparency and accountability in decision-making, and inclusiveness in the representation of interested stakeholders."¹³⁰.

The inadequacy of the efforts made by the European sport movement in terms of governance is illustrated by the *MOTOE*¹³¹ and *ISU*¹³² jurisprudence, in which the Greek motorcycling and international speed skating federations respectively were sanctioned for, amongst other things, conflicts of interest between their regulatory function and their function as organisers of competitions, and therefore of commercial activities likely to distort competition with other operators. While more than ten years separate these two cases, it can be seen that the sports movement has not managed to change its governance, and has not followed the example of the International Automobile Federation (FIA) which approached the European Commission to negotiate governance principles that were suitable for the body.

In the same way, while athletes are calling for better representation within the federations' governing bodies, supported by the European Parliament¹³³, we assume that these federations, like the IPU, do not engage in this process of shared governance.

In addition to these governance shortcomings, this scenario also envisages that the respect of the principles of sport as a collective good is insufficiently ensured by the sports movement. In this hypothesis, federations no longer exercise their protective function of principles such as solidarity, training or integrity, which are regularly flouted and considered as secondary.

The debates between the private market actors and the sports movement's authorities turn to the advantage of the former, who manage to limit what they consider as leakages destined for the bottom of the pyramid: training allowances are reduced or even suppressed, as well as the amounts provided for in the framework of vertical solidarity. Simultaneously, and still with the aim of maximising the revenues linked to the organisation of competitions at the top of the pyramid, sport is increasingly seen as a pure spectacle, which clashes with the

¹³⁰ Ibid.21, pt 4.1

¹³¹ Ibid.54

¹³² Ibid.25

¹³³ Ibid.83, pt 27

principle of integrity. In particular, the fight against doping, considered ineffective and too costly, is being abandoned. In more general terms, the evolution of competitions organised at the top of the pyramid by these private market actors tends to recognise sport as merely an economic activity.

What is more, the federal world does not take sufficiently into account the social functions of sport and is content to promote competition. In this respect, it is not sufficiently different from the behaviour of private market actors to justify protection by the European authorities.

We also consider that the protection of the European sport model is undermined by the difficulty of establishing a universal definition of this model, due to the heterogeneity of sports organisations found in the different Member States.

Indeed, as sport is considered by the Treaty on the Functioning of the European Union¹³⁴ as a supporting competence, the European authorities only have a very limited action in this domain. Thus, the latter can only intervene to support, coordinate or complement the actions of the countries of the European Union, which means that in the field of sport, no European institution can impose or force a State to comply with one or more European rules. The only action that can be taken is the issuing of non-binding recommendations or resolutions, which are essentially of political value. Therefore, each Member State is free to carry out its own sport policy and to set up its own sport organisation.

There are significant differences between European countries, mainly due to the degree of state intervention and the number of actors representing the sports movement nationally. As a general rule, the southern and eastern states appear to be more interventionist than the northern and western states, considering the promotion and development of sport as a public service that should be placed under the supervision of the state. These political choices have consequences on the national organisation of sport and the number of actors representing the sports movement to the government, as well as on the legislative texts that frame the organisation of sport¹³⁵. Spain is a good illustration of this as it benefits from an interventionist legislation with a law on sport and the mention of sport in the Constitution of the Kingdom of Spain, and from several actors representing the sports movement, such as the

¹³⁴ Article 6 TFEU

¹³⁵ Ponchon (C.), "The organisation of sport in Europe: does the European model of sport exist", Sport and Citizenship, April 2012

Spanish Olympic Committee, the Olympic Sports Association, the Paralympic Committee and the sports federations. Conversely, in Slovakia, the role of the government is limited, as it is in Germany where the sports movement benefits from significant autonomy¹³⁶.

These few examples suffice to demonstrate the heterogeneity of the organisation of sport in Europe and consequently the difficulties in envisaging common action to preserve the European sport model. This is also the point of view of the Council of Europe and the European Parliament, which recognise the difficulties, if not the impossibility, of defining the European sport model¹³⁷, due to the diversity of approaches depending on the sport and the country¹³⁸.

Beyond these reasons, which can be attributed to the sports movement, the decision by the European authorities to reduce the level of protection of the traditional model of sport organisation in Europe is also due to exogenous reasons. In this case, this scenario is also supported by a strengthening of the liberal economic vision within the European institutions, leading to the generalisation of the application of the principles of free competition and free enterprise, including in the sport sector. It is possible that these ideas, which call into question the intervention of the state outside its regalian missions, will gain ground in political terms.

The combination of these elements forms the basis of our first scenario in which the essence of the European sport model is called into question, resulting in a form of distrust of this model within the European institutions, which are gradually reducing their protection.

· Consequences for the sports movement

Weakening the protection of the European sport model by neutralising the effects or eliminating the specificity of sport would be a source of significant legal uncertainty which could call into question the federations' monopoly or the pyramid-shaped organisation of sport and thus slow down the actions of the sports movement.

This context would also be favourable to private market actors. They would be able to get even more involved at the top of the pyramid by organising elite-level competitions,

¹³⁶ Id. 5

¹³⁷ Council of Europe Resolution No. 14430/21 on the essential characteristics of the European Sport Model - 30 November 2021

¹³⁸ Ibid. 83

particularly at supranational level, taking into account the athletes' expectations in terms of finance and involvement in decision-making.

The same is true at the bottom of the pyramid, where a more flexible offer, which is more in line with the new expectations of practitioners, is emerging in all disciplines and in all places where there is a solvent demand.

Faced with this uninhibited competition, the traditional organisation of European sport is in great danger, threatened by an offer that responds more adequately to the needs and desires of practitioners of all levels.

The reduction or even the absence of financial mechanisms, following the abandonment of the respect of the principles of solidarity or training, dries up the sources of financing and weakens the bottom of the pyramid. This resulting weakening of the bottom of the pyramid leads to the predominance of the commercial sector in the management of grassroots sport, which particularly calls into question talent detection. This can no longer be done within sports clubs, which have difficulty in bringing together practitioners, who have abandoned federated practice in favour of more free practice. As a result, the population of referenced athletes likely to join national teams is becoming increasingly scarce. This situation complicates the role of the federations in the constitution of their selections, so that the national selection competitions lose quality and therefore interest, reducing the federations' income.

This context is also conducive to a decrease in voluntary work in sport associations. Indeed, while volunteering is an essential pillar of the federal movement, it cannot continue in a world dominated by private market actors and in which sport associations are in difficulty.

Furthermore, as mentioned earlier, there is no common model for the organisation of sport in all Member States. The same observation can also be made at the level of the sporting federations, since each is free to organise its own discipline, within the limits of the general rules. Therefore, if the traditional European sport model can no longer count on the protection of the European institutions, the heterogeneity of the organisation of sport will lead to individual responses to the arrival of private market actors in the European sport landscape. Thus, either by choice or by constraint, Member States and sport federations will have to collaborate with these new actors, in elite-level sport as well as in grassroots sport, which will draw the contours of a new model for the organisation of sport in Europe that is less inclined to uphold historical principles.

This freedom in the organisation of sport, which results in a great heterogeneity of models at the European level, leaves only a framework of common values, which is unable to establish the traditional model of the organisation of sport as the dominant model.

3.2 Scenario 2: Strengthening the protection of the European sport model

· Description of the scenario

In this second scenario, we envisage an improvement of the current situation for the sports movement, in the form of increased protection of the European sport model by the European institutions.

To go beyond the protection provided by the specificity of the European sport model, several solutions can be envisaged.

The first would be to include sport in the Treaties as a shared competence of the European Union. As already mentioned in the first scenario, sport is currently a supporting competence of the European Union. Considering it as a shared competence would give the European Union more room for manoeuvre and, in particular, by adopting binding acts that would be imposed on the member states. However, this evolution would also have the consequence of reducing the autonomy of the sports movement, since the European institutions could interfere in the organisation of sport or regulate the powers of sporting federations. This solution seems difficult to envisage for the actors of the sports movement who, if they want more protection, would not be satisfied with this loss of autonomy.

One solution for the sports movement to preserve its autonomy while developing the protection of the European Union would be to allow sport to benefit from a sporting exception instead of the specificity formalised in the Treaty on the Functioning of the European Union. This evolution, often claimed by the sports movement, would allow the removal of sport from the scope of application of competition law, which means that European competition rules would no longer apply to sport regulations. Besides, as the envisaged exception is a general one, these sporting rules would escape submission to fundamental freedoms, such as the free movement of workers or non-discrimination on grounds of nationality. However, only the submission to competition law is questioned by the sports movement, and not the submission to fundamental freedoms. Indeed, the latter protect European sportspeople by allowing them

to freely choose the discipline they wish to practise, their place of practice and the conditions for practising the sport.

Therefore, granting the sporting exception would be tantamount to calling into question the legal security granted to practitioners by the protection of fundamental freedoms, which may not satisfy the European institutions.

Furthermore, the fact that sport is recognised as a competence of the European Union allows for a control of the regulatory power of the sport federations, which are then under an obligation of proportionality and justification of their rules. This "counter-power" seems essential to ensure that democratic and non-discriminatory principles are respected in the exercise of the sport federations' regulatory power.

For all these reasons, it seems difficult to envisage the hypothesis according to which the European institutions would allow the sports movement to access the sporting exception, which could, likewise, not be unanimously accepted by the different actors of sport.

These first two solutions are therefore not supported by the sports movement or the European institutions. However, as things stand, there is a real imbalance between the application of fundamental freedoms and that of competition law and it is necessary to find a way to rebalance the application of competition law to sport.

It is interesting here to analyse more broadly the sectors covered by EU law that have more or less extensive derogations from competition law. This is the case for agriculture, which has an exception in Article 42 of the TFEU, which takes up the principle of the primacy of the common agricultural policy over the rules of competition that appeared in the 1957 Treaty of Rome. The TFEU states that " *The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council (...) account being taken of the objectives set out in Article 39*"¹³⁹. This text offers these two institutions the possibility of providing for a genuine derogation from the application of competition rules in the agricultural sector.

¹³⁹ The objectives set out in Article 39 TFEU are the objectives of the Common Agricultural Policy

This "agricultural exception" is therefore expressly provided for in the texts, and has been since the founding act of the creation of Europe, which is not the case for the sporting exception. Indeed, sport has no legislative basis for claiming any exception. The fact that only a specificity is attributed to it by the TFEU does not seem to allow access to an exception by a similar route to that of agriculture.

Moreover, the presence of this agricultural exception in the various treaties does not provide it with a sufficient level of legal certainty. Indeed, the Council has since 1962 emptied the agricultural exception of its substance by arguing that the competition rules apply in principle¹⁴⁰. For its part, the CJEU has ruled that "*Article 36 of the Treaty establishing the European Community, now Article 42 TFEU, establishes the principle of the applicability of Community competition rules in the agricultural sector and that the maintenance of effective competition on the markets in agricultural products is one of the objectives of the common agricultural policy*"¹⁴¹. Finally, even if the agricultural exception was rehabilitated in 2017¹⁴² by the CJEU, which gave precedence to the CAP over competition objectives, the European Commission's DG Competition has reservations about it and its application is struggling to materialise.

However, despite a solid textual basis, it seems that the agricultural exception does not succeed in opposing free competition, which remains an inescapable principle of the European Union, *a fortiori* for the sporting domain, which does not have a legislative basis.

The ultimate solution that could be proposed to strengthen the protection of the European sport model would be to integrate sporting rules into an exemption regulation, in order to allow them to escape the application of European competition rules.

An exemption regulation is a regulation adopted by the European Commission or the Council of Europe, pursuant to Article 101§3 of the TFEU, which sets out the conditions under which certain types of agreement may benefit from an exemption from the general prohibition provided for in Article 101§1 of the TFEU, namely the prohibition of agreements which may affect trade between the countries of the European Union and prevent, restrict or distort competition. This is the case, for example, with state aid, provided that it serves the public

¹⁴⁰ Regulation EC 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products

¹⁴¹ CJEU, 9 Sept. 2003, Milk Marque and National Farmer's Union, C-137-00 pts 57 and 58; 19 Sept. 2013, Panellinos Syndesmos Viomichanion Metapoisis Kapnou, C-373/11, pt. 37

¹⁴² CJEU, 14 Nov. 2017, President of the Competition Authority v. Association des producteurs vendeurs d'endives, C-671/15

interest, i.e., when it benefits the economy as a whole, or with investment aid for sport infrastructure.

Therefore, if the rules issued by sport federations to their affiliated sport associations meet the conditions to be considered as vertical restraints of competition, and subsequently the conditions to be subject to an exemption regulation, then they may be exempted from the sanctions normally imposed on practices that restrict competition in the internal market.

In this way, sport rules could be exempted from competition law, while still being subject to the application of fundamental freedoms.

· **Conditions for the occurrence of the scenario**

As in the first scenario, there are two opposing forces as to why the European institutions are moving towards greater protection for the traditional model of sport in Europe.

Endogenously, three elements can be identified as the responsibility of the sports movement:

- the development of adequate governance;
- improving communication with the European institutions;
- the implementation of actions promoting the principles of sport as a public good.

In this second scenario, we consider that the federations have made efforts to comply with the sport policy desired by the European institutions and that they have integrated the issues of protection of the model by these same institutions. In particular, they have integrated the need to defend the pillars of the model in order to ensure that the principles that make sport a collective good are respected.

As early as 2007, with the White Paper on Sport, the European Commission took up the issue of sport, followed by the European Parliament and the Council of the European Union, which in turn adopted resolutions listing the positive aspects of sport and the actions to be taken to enhance and maintain these positive aspects. For example, the European Commission, in a 2011 Communication entitled "Developing the European Dimension in Sport"¹⁴³, listed the topics that should be a priority of the EU sport programme. This roadmap included the following elements:

- Health-enhancing physical activity;
- Anti-doping;
- Education and training;
- Volunteering and non-profit sports organisations;
- Social inclusion in and through sport, including sport for people with disabilities and gender equality in sport;
- Sustainable financing of grassroots sport;
- Good governance.

¹⁴³ *Commission Communication* of 18 January 2011 "Developing the European Dimension in Sport" (COM(2011)0012)

Some of these topics have been further developed in other resolutions¹⁴⁴, as is the case for good governance, a topic frequently addressed and dealt with very recently in two resolutions respectively by the European Parliament¹⁴⁵ and the Council of the European Union¹⁴⁶. Admittedly, these texts are not binding acts that create legal obligations, and sport is still only a supporting competence of the European Union, which restricts the action of the European institutions, but it marks the constantly renewed interest that the latter have in sport, at least from a political point of view.

In the framework of this scenario, it is assumed that sport federations have become aware of their interest in following the recommendations that the European authorities mention in these texts, in order to obtain their political support. They have therefore developed strategies aimed at adopting a more virtuous behaviour, notably by promoting the principles that make sport a collective good, such as taking into account the social functions of sport or strengthening solidarity mechanisms.

More specifically, in terms of governance, the sports movement has also followed the recommendations made by the European authorities on this subject. The latter had indeed repeatedly emphasised the culture of transparency of decisions taken by federations, the separation of powers between commercial and regulatory activities, and the representation of all the actors of a discipline in decision-making. In this way, they have managed to solve the problem of the representation of professional and amateur athletes, which did not allow the collective bargaining process between federations and athletes to be effective. The access to collective bargaining that the European Commission called for in the 2007 White Paper has enabled the federations to prove to the European authorities their desire to install more democratic governance.

¹⁴⁴ European Parliament resolution of 2 February 2017 on an integrated approach to sports policy: good governance, accessibility and integrity (2016/2143 (INI))

¹⁴⁵ Ibid. 83

¹⁴⁶ Ibid. 134

They have also approached the latter by establishing a dialogue with them prior to the enactment of regulations that could be perceived as discriminatory in order to discuss and ensure that these rules are considered proportionate to the objective pursued. In this respect, they have followed the example of UEFA, which, when the Financial Fair Play system was introduced in 2012, worked with the European Commission to have it validate this new system, with particular regard to the scale of sanctions.

This strategy of cooperation with the public authorities also consisted of communicating the results of field studies, which, in a scientific and pedagogical manner, allowed the latter to better understand what sport could bring as a collective good.

This need to communicate on the benefits of the traditional model also had the effect of bringing together the actors of the sports movement, who better identified the interest that all disciplines had in having a strong European sport model, protective of the founding principles and more remunerative. This has led to a convergence of federal strategies in Europe, which have united in favour of the pyramidal and monopolistic organisation of sport that respects the founding principles.

This general awareness in favour of sport also extends to the European institutions which, well informed of the efforts made by the federations, but also aware of the threats and risks they face from actors outside the traditional organisation of sport, driven by commercial interests unrelated to the founding principles of the European sport model, have decided to strengthen the protection they can offer to European sport.

Beyond the reasons that can be attributed to the sports movement, the decision of the European authorities to reinforce the protection of the European sport model is also due to exogenous reasons. Indeed, following attempts at secession at the top of the pyramid, European political representatives became aware of the precarious situation of the traditional model and measured the consequences of its disappearance. The case of the Super League project launched in the spring of 2021 has been a catalyst in this respect, provoking in particular the worried reactions of the Vice-President of the European Commission in charge of the Promotion of the European Way of Life¹⁴⁷, as well as of the President of the French Republic who declared on this subject: "*The President of the Republic welcomes the position of French clubs to refuse to participate in a European football Super League project, threatening the principle of solidarity and sporting merit*"¹⁴⁸ and the British Prime Minister who

¹⁴⁷ Ibid. 3

¹⁴⁸ <https://www.sport.fr/football/emanuel-macron-soutient-les-clubs-francais-pour-la-superligue-781321.shtml>

said: "*Plans for a European Super League would be very damaging for football and we support football authorities in taking action. They would strike at the heart of the domestic game, and will concern fans across the country. The clubs involved must answer to their fans and the wider footballing community before taking any further steps.*"¹⁴⁹. These reactions were followed by discussions in the European institutions, leading to a willingness to further protect the model.

The combination of all these elements forms the basis of our second scenario in which the essence of the European sport model is recognised, so that the European institutions decide to give it increased protection.

· Consequences for the sports movement

This scenario reinforces the founding pillars of the European sport model, notably concerning federated practice and the federations' monopoly. It also enshrines the end of the application of competition law to sport, which has the consequence of dissuading private operators and putting an end to situations of direct rivalry in terms of the organisation of competitions, both at the elite and amateur level.

The sports movement, while reassured by the increased legal protection of the traditional model of sport organisation in Europe, must now develop in such a way as to meet the requirements set by the institutions in return for this increased protection. The strategies implemented must make it possible to stabilise or even increase the revenue generated by the organisation of high-level competitions. However, the increase in revenue should not be an objective in itself. It must first of all allow for better remuneration of the athletes. Secondly, these revenues will add to the base from which the sums paid to the bottom of the pyramid are calculated in accordance with the principles of solidarity and training, thus contributing to the financing of grassroots sport.

Increased legal certainty and the absence of direct competition from commercial actors would also allow the sports movement to dedicate part of its revenues to the respect of the integrity principle. One thinks in particular of the fight against doping, which has been an

¹⁴⁹ <https://twitter.com/BorisJohnson/status/1383865356364640259?s=20>

objective of the European institutions for a long time and which encourages the sports movement to devote more resources to it.

The political recognition of the externalities produced by physical activity should also be accompanied by an increase in public aid to grassroots sport, thus perpetuating the activity of amateur sport actors. As previously mentioned, public authorities integrate the reasoning that the increase in public expenditure committed to increase physical activity will be compensated by the avoided expenditure in other domains (health, social security, etc.), so that it is pertinent to develop such public policies.

Finally, if the federations can develop phlegmatically, while respecting the principles of the traditional model, this is the assurance of a satisfactory territorial coverage of the sport offer, without excluding citizens on the basis of geographical or economic criteria.

4. CONCLUSION

The European sport model represents, together with the North American model, one of the two main models of sport organisation in the world. The founding principles of these two models are radically different. However, in recent years, this opposition has become less clear-cut, notably due to the emergence of closed competitions and private market actors in the European sport landscape.

For various reasons, the North American model is not destined to be imposed in Europe and a new form of sport organisation has taken shape, mixing private market actors whose main objective is financial profitability with actors from the sports movement who are driven by other considerations than those of their competitors.

It is precisely this notion of competition that puts federal actors in difficulty, and more specifically the analysis made by the European authorities when they have to take a position on sport-related disputes. Thus, an analysis of their case law demonstrates a willingness to subject sport to the rules of European competition law, considering this field to be a classic economic activity to which the prohibitions laid down by the TFEU on free competition apply. This position has the consequence of weakening the defence of the European sport model and of allowing private market actors to establish themselves.

The consequences of this choice are of great concern to the sports movement, which is calling for stronger protection of the traditional model of sport organisation in Europe.

The arguments to justify this position exist and should lead to the recognition of sport as a public good, i.e., to the recognition of the social utility of sport. This is difficult to qualify or to evaluate, because it must take into account non-market elements. However, it is necessary to produce and communicate elements to highlight the strength and importance of the founding principles of sport such as territorial networking, integrity, solidarity, training or the social functions attached to this field through the practice of physical activity or voluntary activities.

In order to convince the European institutions to improve the protection of the traditional model of sport in Europe, the sports movement has a series of clues that the European institutions have been communicating in the different texts they have produced for many years. In this respect, we can consider that the European institutions have defined the roadmap to follow so that sport is considered at its true value, i.e., a domain that cannot be limited to a mere economic activity.

The sports movement must therefore take these arguments into account and comply with them, by respecting the procedure recommended by the European institutions and by developing a communication strategy aimed at these institutions, in order to promote its actions and the positive consequences for European practitioners.

This is how the sports movement will be able to claim political support that could lead to a better recognition of the European sport model, and therefore to a better protection that would allow it to shield itself from the attacks of private market actors who are determined to challenge the traditional model of sport organisation, when the latter has much more to offer than merely a simple commercial and economic vision of sport; whether it be at amateur or elite-level.

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