

# ON THE VIABILITY OF BREAK-AWAY COMPETITIONS IN FOOTBALL

*An analysis of the interplay between internal and external regulations  
affecting the organization of private football competitions according to  
European and Dutch Law*

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For this thesis I am very grateful to have been granted the opportunity to write about my main academic and professional interest: sports law; or rather, the intersection between sports and the law. Having always been passionate about sports, I realized early on during my legal studies that there is a whole field of law revolving around the organization and regulation of professional sports. Throughout my studies I have tried to supplement the education offered by Tilburg University with the latest developments in the field of sports law. Moreover, the mandatory internship, part of the Ondernemingsrecht program, allowed me to get acquainted with working with sports law in practice. Having completed the internship at Vissers Legal, a law firm specializing in corporate sports law, I am eager to start my professional career at the same firm soon. The aspect that makes sports law, in my opinion, an exciting field of law is, that it is rather dynamic and multidisciplinary, being an amalgamation of different fields of law which intersect and interplay within the sports industry. This is also reflected in the subject of this thesis, where the notion of break-away competitions in football is analyzed from multiple different, yet connected, angles. Recent developments in the industry indicate that the professional sports industry is currently located at a crossroad, whereby the traditional dominance of sporting associations is challenged. Hence, current actions taken by the actors involved may have far-reaching implications for the future development of sports globally. Hopefully this thesis can contribute to the legal and social discussion on break-away competitions and add to the already consisting academic body on sports law.

Obviously, I could not have completed this thesis without the support of a number of people, for which I am forever grateful. First and foremost, I'd like to thank both supervisors, Dr. E.P. Joubert and Dr. G.J.H. van der Sangen, both of whom have proactively helped me selecting a suitable topic for this combined master's thesis. Moreover, I am grateful for the insights they gave in the multiple feedback rounds during the writing process. Secondly, I want to express my sincerest gratitude to my girlfriend, who devoted her precious time into endlessly proofreading each individual chapter and provided invaluable comments and suggestions. Last but not least I'd like to thank my colleagues from Vissers Legal and in particular mr. Johan Vissers, who at multiple stages has taken the time to proofread my work and offered valuable feedback and alternative points of view which I had not considered myself.

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## Abbreviations

CAS	Court of Arbitration for Sport
CED	Coöperatie Eerste Divisie
CJEU	Court of Justice of the European Union
CWC	FIFA Club World Cup Tournament
DCC	Dutch Civil Code
ECJ	European Court of Justice
ECV	Eredivisie Commanditaire Vennootschap
ENV	Eredivisie Naamloze Vennootschap
ESL	European Super League
EPL	English Premier League
EU	European Union
FA	The Football Association
FAPL	The Football Association Premier League Ltd.
FDC	FIFA Disciplinary Code
FIFA	Fédération Internationale de Football Association
GC	General Court of the European Union
ISU	International Skating Union
KNVB	Koninklijke Nederlandse Voetbal Bond
TFEU	Treaty on the Functioning of the European Union
UCL	UEFA Champions League
UDR	UEFA Disciplinary Regulations
UEFA	Union of European Football Associations

# Chapter 1 – Introduction

## **1.1. Background**

What many thought was a misplaced April Fools' joke turned out to be one of the biggest shockwaves in the recent history of sports, when on 1 April 2021 a dozen of Europe's elite football clubs announced they intended to form the European Super League (ESL), a break-away football competition that would only host a handful of clubs. The ESL would *de facto* replace the Union of European Football Associations (UEFA) Champions League (UCL), the highest grossing annual football club competition worldwide.<sup>1</sup> The plans caused huge backlash amongst fans, players, politicians etc. who all denounced the plans. Moreover, the global governing body of football, the Fédération Internationale de Football Association (FIFA) and the European governing body, UEFA, threatened to impose heavy sanctions on the participating clubs. The ESL, as initially proposed, started to crumble to pieces within days as the six English teams which signed up, announced that they were pulling out after mass fan protests sparked and under threat sanctions of the governing bodies of football.<sup>2</sup> Whilst the media storm surrounding the ESL has halted, the legal implications and proceedings between parties are raging on.

The ESL is not a stand-alone event, nor is it the first time that multiple sports clubs try to force an exit from the traditional organizational structure of sport. However, over the last years, the notion of forming a break-away sports competition has once again become a hot-topic, especially in football. Hence, the ESL-saga fits perfectly into the wider legal discussion on break-away sports competitions. This was confirmed only two months after the ESL-announcement, when the representing bodies of the Dutch professional football clubs announced that they intent to break away from Koninklijke Nederlandse Voetbal Bond (KNVB), the Dutch football association, and form a break-away competition coined the NL-League. This in a bid to exert more control over the commercial exploitation of the sport.<sup>3</sup> Whilst the NL-League was not as well covered in the news, its proposed formation will have profound effects on Dutch professional football.

Clearly, there is a renewed need in the sports industry to reform current organizational structures. Yet, this view is not shared by everyone; both national and international sport associations have condemned the recent attempts of organizing break-away competitions and used their internal disciplinary regulations to impose sanctions on the protagonists. The concept of break-away competitions can be defined as a closed, or partly open private league created by a group of clubs or organizations that are joined together by some common commercial interest.<sup>4</sup> Most often, a break-away competition is organized without the authorization of the relevant associations, and therefore lack the recognition of the governing bodies of the sport. The formation of these alternative private leagues is often considered to be one of the most

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<sup>1</sup> 'How Clubs' 2019/20 UEFA Champions League Revenue Will Be Shared' (UEFA, 2020) <<https://www.uefa.com/uefachampionsleague/news/0253-0e99cd398188-f80e968d0ab3-1000--how-clubs-2019-20-uefa-champions-league-revenue-will-be-shared/>> accessed 9 January 2022.

<sup>2</sup> Murad Ahmed, Samuel Agini and Daniel Dombey, 'Super League Plan Collapses As More Clubs Pull Out' (*Financial Times*, 2021) <<https://www.ft.com/content/f3ab9f68-65b2-4839-96b3-ec4d2928053b>> accessed 5 January 2022.

<sup>3</sup> Joris Kooiman, 'Met Nieuwe NL League Nemen Profclubs Afstand Van KNVB' (NRC, 2021) <<https://www.nrc.nl/nieuws/2021/07/01/met-nieuwe-nl-league-nemen-profclubs-afstand-van-knvb-a4049496>> accessed 6 January 2022.

<sup>4</sup> Katarina Pijetlovic, *EU Sports Law And Breakaway Leagues In Football* (TMC Asser Press 2015) 46.

structural threats to the classical pyramidal structure which characterizes most sports, including football.<sup>5</sup>

The ratio's behind organizing a break-away competition are most often financial incentives, the ESL and NL-League are no exception to this rule. The decision to break away from the previous organizational structure of a national or international federation is thus most often triggered by the feeling that there are unexploited financial prospects outside the confines of the current structures.<sup>6</sup> When assessing the ESL, it becomes clear that financial incentives were the main driving force behind the initiative as the break-away competition would yield the participating clubs substantially more than the current UCL, to which the ESL would be an alternative.<sup>7</sup> The NL-League is no exception to the rule that underlying motives for the formation of a break-away competition are mostly financial, as it becomes clear from the NL-League plans that the driving force behind the formation is for the involved clubs to gain more control over the commercial exploitation of professional football.<sup>8</sup>

Evidently, the notion of break-away competitions is inherently connected to the commercial exploitation of sports. This however, creates substantial tensions between the incumbent sports associations and other stakeholders that want to restructure the organizational structures, as was evidenced by the fierce reaction of FIFA and UEFA to the ESL. Whilst commercial interests in the sports industry have been increasing strongly, they have not been omnipresent throughout history.

Sport has always been an important aspect of society. However, after the second world war, the nature of sports started to change rapidly as the 1950's marked the start of the commercialization of sports. Sporting events were increasingly being converted into mass media events, making optimal use of new sorts of media outlets such as television.<sup>9</sup> Rapid technological developments have resulted in the global sports market being valued at \$388 billion in 2020. The described commercialization went hand-in-hand with the *juridification* of the industry, referring to the notion that the sports industry became subject to a complex system of legal rules. Traditionally, sport is organized through a federated association model. By delegating regulatory and organizational powers to a general association, it became possible to establish a centralized governing body for sports on a national level. As the sports industry developed, the national associations started to assemble themselves in international federations, thereby creating *de facto* one international governing body per sport. These international sports associations are thus generally umbrella-structures, existing from national associations.<sup>10</sup> On the national level the individual athletes and sport teams are members of the association. This structure is often referred to as the one-federation-model, as both on a national and international level there is only one regulating association per sport.<sup>11</sup>

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<sup>5</sup> Ibid 53.

<sup>6</sup> Ibid 46.

<sup>7</sup> Samuel Agini and Arash Massoudi, 'Jpmorgan Apologises For Backing Breakaway Football Super League' (*Financial Times*, 2021) <<https://www.ft.com/content/bc927efb-1b05-4f2c-947d-a3832bfe7b36>> accessed 9 January 2022; Murad Ahmed and Arash Massoudi, 'Breakaway Dozen European Football Clubs Sign Up To Super League' (*Financial Times*, 2021) <<https://www.ft.com/content/4cbef20a-7599-4580-82aa-2af383bd0f5a>> accessed 9 January 2022.

<sup>8</sup> Kooiman (n 3).

<sup>9</sup> Robert Hughes and Jay Coakley, 'Mass Society And The Commercialization Of Sport' (1984) 1 *Sociology of Sport Journal* p.57.

<sup>10</sup> Margareta Baddeley, 'The Extraordinary Autonomy Of Sports Bodies Under Swiss Law: Lessons To Be Drawn' (2019) 20 *The International Sports Law Journal*.

<sup>11</sup> Jacob Kornbeck, 'What Can Sports Governing Bodies Do To Comply With EU Antitrust Rules While Maintaining Territorial Exclusivity?' (2020) 20 *The International Sports Law Journal*.

The above-mentioned association structure allowed the sports industry to develop rather autonomously, as most international associations have opted to be domiciled in Switzerland, which legal system is characterized by a very liberal association law framework.<sup>12</sup> As a result, the current international sports associations yield significant power to regulate all aspects of the relevant sport, including the commercial exploitation of sport events.<sup>13</sup>

Sport was thus traditionally characterized as a predominantly social field; however, the increased value of the industry meant that sports has become subject to a system of extensive legal control, both internal and external.<sup>14</sup> Internally, associations exert a hefty amount of control over the functioning of the sports industry through *inter alia* imposing their statutes on members and introducing regulations. Initially, as mentioned above, associations were founded by sport clubs in order to have the clubs represented on the national and international stage by a unified body.<sup>15</sup> This benefitted the respective sport as a whole as it allowed for better commercialization, and to a certain extent this is still true today. However, the relationship between clubs and associations in the football industry has become tensed as there are major disagreements on the authority these associations have. Externally, national and international legislators have deemed that the sports industry is not capable of complete self-regulation and have intervened. For example, the European Union (EU), has decided that the rules of sporting organizations regulating, amongst other things, players' contracts and transfers, training compensation fees, the profession of coaches and agents, or eligibility for participation in certain matches and competitions, may fall under the scrutiny of internal market and competition laws.<sup>16</sup>

The notion of break-away competitions therefore involves both the internal and external regulatory side of sports. Internally, a number of sports clubs are involved in a tug-of-war with football associations about how the sport should be organized from a commercial point of view. The ESL-protagonists, for example, heavily object against the regulatory framework of FIFA and UEFA, which to a large extent set the limits on the commercial freedom of football clubs, deeming the current regulations to be in breach of EU competition law. Any party that wishes to restructure the organization of a sport will thus be faced by the regulatory framework of the relevant association. Externally, applicable domestic and international law may also set limits on the commercial freedom of sport clubs. However, at the same time, the legal systems to which both sport clubs and associations are bound may also create possibilities for the creation of a break-away sports competition by limiting the freedom of association of the sports federations involved; thereby granting more room for the freedom of entrepreneurship, allowing private companies the commercial freedom to establish privately organized sports competitions.

The recent developments surrounding the ESL and NL-League provide two interesting case studies in which both the internal and external regulatory aspects of sports are reflected. Yet, as the ESL is a European competition and the NL-League domestic, the applicable internal and external regulations differ substantially. A complete overview of the legal complications

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<sup>12</sup> Baddeley (n 10).

<sup>13</sup> Jörg Krieger, Lindsay Parks Pieper and Ian Ritchie, 'International Federations And National Governing Bodies: The Historical Development Of Institutional Policies In Response To Challenging Issues In Sport' (2020) 51 *Sport History Review* 3.

<sup>14</sup> Pijetlovic (n 4) 5.

<sup>15</sup> Heiko van Staveren, *Sport en Recht* (Arko Sports Media 2007) 47.

<sup>16</sup> *Ibid.*



surrounding the notion of break-away competitions, including the latest judicial developments, is yet to be written. Hence, this thesis will create said overview of the legal complications surrounding the formation of a break-away competition from a European and Dutch law perspective

## **1.2. Problem Statement and Research Question**

### **1.2.1. Problem statement**

The world of sports is currently witnessing a new wave of attempts to restructure the current organizational models of sports.<sup>17</sup> The legal implications of break-away competitions are significant and touch upon many different fields of law. In this thesis, the notion of break-away competitions will be approached from two different, yet connected perspectives. This dual approach is needed in order to give a complete overview of the legal status of break-away competitions and the viability of ever seeing a successful formation of one. Therefore, this thesis will start off with an analysis of the ESL, as an international manifestation of a break-away competition. This section will focus on the effect of the internal regulations of football associations and the application of EU law on the sports industry. Secondly, the NL-League will be analyzed from a Dutch corporate and association law point of view. The vocal point of this part is how a break-away competition can be structured using Dutch association law, and whether such a break-away competition can retain its ties with the current pyramid structure characterizing the sports industry.

### **1.2.2. Research Questions**

Based on the foregoing, this thesis aims to answer the following research question with regard to the notion of break-away sports competitions:

*To what extent can the (inter)-national football associations prevent the formation of break-away competitions through their internal regulations or does the freedom of entrepreneurship outweigh the freedom of association?*

In order to come to an answer, multiple sub-questions, closely related to the subject matter at hand will be answered. The sub-questions can be divided into two groups. The first four sub-questions are related to the ESL and the last four sub-questions are related to the NL-League:

1. What is the European Super League?
2. To what extent is the EU competent to regulate the field of sports?
3. What is the current framework on break-away sport competitions established by the *ISU*-case?
4. Are the regulatory frameworks of UEFA and FIFA in accordance with the legal test established by the *ISU*-case?
5. What is the current organizational structure of Dutch professional football?
6. How can the NL-League be structured?
7. Does the current regulatory framework allow for the creation of the NL-League?
8. What lessons can the NL-League learn from the English Premier League?

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<sup>17</sup> The concept of break-away competitions is not limited to football, for a recent attempt to form a break-away competition in golf see *inter alia*: 'Golf Braces For A Saudi Showdown' (*Financial Times*, 2021) <<https://www.ft.com/content/91a1ffad-f22f-4568-9b3c-3635cc5e6124>> accessed 7 June 2022.

### 1.3. Literature Review

The intersection between law and sport has long been a popular topic amongst legal scholars. As a result, an extensive body of academic literature on this matter has been published. Many academics in the field have labelled the intersection between law and sport as sports law. This however can be a rather misleading conception. The traditional view is that sports law, as an independent field of law is a mirage. Rather, sports law represents nothing more than an amalgamation of different fields of law which intersect and interplay within the sports industry.<sup>18</sup> This traditionalist view therefore presupposes that sports law, as an independent body of law, does not exist.

However, as the sports industry developed, the focus of regulation shifted increasingly onto international sports federations.<sup>19</sup> As a result, sports regulations emanate mostly from international federations, transcending the borders of national legal orders. Hence, due to this inherently transnational character it is difficult to disregard sports law as merely being an amalgamation of different fields of substantive law. Moreover, the sports industry has developed a wide array of self-regulating legislative and judicial bodies. FIFA is a prime example of a transnational self-regulating body.<sup>20</sup> As the international football association, it sits at the very top of the footballing pyramid, which will be covered in more detail in Chapter 2.4. As a result, it can autonomously draft and enforce regulations in that apply to the football industry worldwide. Moreover, having established an internal disciplinary system, FIFA has the possibility to sanction its members.<sup>21</sup>

In the foregoing, it has been argued that there are in general two kinds of sports law. On the one hand, there is the legal orders created by sport federations which are to a large extent independent from national legal orders. This is often referred to as *lex sportiva*, and can be regarded to be a proper, though not unified, body of sports law.<sup>22</sup> The self-proclaimed autonomy of said associations is based on the explicit or implicit acceptance by national and international legislators. On the other hand, there is the amalgamation of traditional fields of law which are also applicable on the sports industry, this can be referred to as law on sports. These two fields together regulate the entire sports industry. However, the cooperation between *lex sportiva* and law on sports is becoming more tensed with both sporting associations and public legislators grappling for more authority to regulate the sports industry. This thesis will *inter alia* describe this field of tension and fit the recent attempts to form break-away competitions within the current power struggle.

Whilst the notion of break-away competitions is not new and various attempts have been made over the last decades, the available literature on the topic is limited. The most complete work on the topic is the book *EU Sports Law and Breakaway Leagues in Football* written by Katarina Pijetlovic. However, as this book was published in 2015 it does not include the current legal framework on break-away sport competitions established through European case law.<sup>23</sup> This currently applicable legal framework will be discussed extensively in chapter 4. Moreover, the ESL was the largest and most serious attempt of forming a break-away competition in football

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<sup>18</sup> Robert C. R Siekmann and Janwillem Soek, *Lex Sportiva: What Is Sports Law?* (T.M.C. Asser Press 2016) 3.

<sup>19</sup> Ibid 36.

<sup>20</sup> Bodo Bützler and Lisa Schöddert, 'Constitutionalizing FIFA: Promises and Challenges' (2020) 25 *Tilburg Law Review* 40.

<sup>21</sup> Article 55 FIFA Statutes (2021).

<sup>22</sup> Pijetlovic (n 4) 16.

<sup>23</sup> Case T-93/18, *International Skating Union v European Commission* ECLI:EU:T:2020:610.

in the last decades. Since the announcement of the ESL in April 2021, a limited body of legal literature on the ESL has been published. Nonetheless, considerable lacunas remain as a complete legal overview of the ESL in the wider context of EU law and *lex sportiva* is absent.<sup>24</sup>

When turning to the second part of this thesis, where it will be analyzed how a break-away competition can be structured and whether this can be achieved whilst retaining ties with the current pyramid structure of the sports industry, it must be noted that very little substantive literature on this topic is available. Hence, this thesis will be the first legal work on the formation of a break-away competition within the framework of Dutch corporate and associational law. Compendiums on Dutch corporate and association law such as, the *Asser-series*, *Pitlo Ondernemingsrecht* by Raaijmakers, *Handboek Stichting en Vereniging* by Hamers *et al* and *Van vereniging & stichting, coöperatie en onderlinge waarborgmaatschappij* by Dijk and van der Ploeg will serve as the basis for the analysis. Furthermore, the statutes and regulations of the KNVB will be used extensively as these serve as the status quo of professional football in the Netherlands.

#### **1.4. Research Methodologies**

In order to answer the research question and sub-questions, different methodologies will be used. The first sub-question, will be answered using the descriptive method as the major purpose is to describe the state of affairs pertaining to the ESL.<sup>25</sup> A major source of information will therefore be news articles. Amassing the available information and subsequently analyzing the relevance will be of importance in order to set the factual framework surrounding the ESL on which the further sub-questions are based.

The second, third and fourth sub-question will be answered using the doctrinal approach. An analysis of European law, case law and the statutes and regulations of both FIFA and UEFA will be necessary. Firstly, the relation between EU law and the sports industry will be uncovered. The relevant information is to be found in the relevant EU treaties and regulations and the available literature on sports law. The third sub-question will be answered through European case law. The fourth sub-question will bring the contents of sub-questions one through three together in order to judge whether the legal actions undertaken by FIFA and UEFA are compliant with EU law. Therefore, the answer on whether the formation of the ESL, or a similar break-away competition, can be prohibited by governing bodies will be provided here.

The fifth sub-question will be answered using the descriptive method. As the goal is to describe the current organizational structure of Dutch professional. Having a good understanding of its current structure is quintessential for analyzing how Dutch professional football can reorganize itself according to the NL-League plans. The information needed will mostly stem from the statutes and regulations of the KNVB; yet, general sources on Dutch corporate and association law will also be used to explain why a certain legal form or structure has been adopted.

The sixth and seventh sub-question will again be answered using the doctrinal method. First it will be examined how the NL-League can potentially be structured. The Dutch Civil Code (DCC) will *inter alia* be used in order to provide a possible organizational structure of Dutch

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<sup>24</sup> See *inter Alia*: An Vermeersch, De Impact van de ISU-zaak' (2021) 1 *Voetbal- & Sportjuridische Zaken*.

<sup>25</sup> C. R Kothari and Gaurav Garg, *Research Methodology: Methods And Techniques* (2nd edn, New Age International 2004) 2.

professional football outside the auspices of the KNVB. However, the statutes and regulations of the KNVB will also serve as an information source to uncover in what ways the NL-League will have to and can retain ties to the KNVB. The seventh-sub question is where the information gathered in the two sub-questions before will be bundled in order to answer whether the formation of the NL-League is viable and fits within the regulatory framework of the KNVB.

The final sub-question will be answered using the comparative method. The initiators of the NL-League have on multiple occasions compared them to the way professional football is organized in the England. Therefore, in this part a comparison between the NL-League and the English Premier League (EPL), the highest professional football league in England. Especially interesting in this regard is how the Premier League is still connected to the FA, the English football association.

## Chapter 2 – The European Super League

This chapter will provide an overview of the ESL-project and what happened in the aftermath of its announcement. Though reference is made of the influence of EU law on the sports industry, an in-depth analysis will be provided in Chapter 3.

### **2.1. The European Super League Initiative**

As mentioned before, the world of football witnessed a seismic shock in April 2021, when the ESL was announced. After months of secret deliberation, twelve European football clubs from England<sup>26</sup>, Spain<sup>27</sup> and Italy<sup>28</sup> unveiled a private club competition, the ESL. This private competition would consist of a total of 20 European clubs, with three more founding clubs to be added to the twelve initiating clubs before the inaugural season, thereby leaving five places for non-founding clubs that can qualify based on sporting achievements.<sup>29</sup>

The ESL intended to be played as a mid-week competition, allowing each club to remain active in their respective domestic club competitions. This would, however, mean that the ESL would be a direct competitor to the UCL, which in its current format, is also played mid-week. The rationales for launching the ESL were two-fold. On the one hand the initiating clubs were in disagreement with UEFA over a proposed UCL reform that would drastically alter the format of the competition by adding over 100 hundred games to the annual competition. The European Club Association, an international body which represents the interests of over 200 leading European football clubs, had been in secret negotiations with UEFA over a renewed governance structure for the UCL, without informing the participating clubs about the possible reforms. A new joint venture was to be formed which would control all media and sponsorships rights for the UEFA European club competitions, allowing for better commercial exploitation.<sup>30</sup> Some clubs however, felt that UEFA had failed to introduce more concrete measures on the future governance of the UCL. More specifically, the clubs wanted more authority over all commercial matters pertaining to the UCL, something the UEFA did not want to concede. In other words, the clubs wanted more control over the organizational elements of European club football, feeling that their interests were not adequately represented by the relevant associations.<sup>31</sup>

On the other hand, the ESL was driven by financial incentives. European football is a multi-billion-dollar industry; yet at the same time, most clubs struggle to be profitable. Revenues of the European football market decreased by over 13% over the 2019/2020 season as

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<sup>26</sup> Arsenal FC, Chelsea FC, Liverpool FC, Manchester United FC, Manchester City FC and Tottenham Hotspur FC.

<sup>27</sup> Atlético Madrid, FC Barcelona and Real Madrid CF.

<sup>28</sup> AC Milan, FC Internazionale Milano and Juventus FC.

<sup>29</sup> Tariq Panja, 'Top European Soccer Teams Form Breakaway League' (*The New York Times*, 2021) <<https://www.nytimes-com.tilburguniversity.idm.oclc.org/2021/04/18/sports/soccer/super-league-united-liverpool-juventus-madrid.html?action=click&module=RelatedLinks&pgtype=Article>> accessed 11 February 2022.

<sup>30</sup> Murad Ahmed, 'Crunch Talks Loom In Battle For Control Of Champions League' (*Financial Times*, 2021) <<https://www.ft.com/content/49aef25a-a133-4fea-b9db-2f1851273bca>> accessed 11 February 2022.

<sup>31</sup> Frits Conijn and Gaby de Groot, 'Grote Voetbalclubs Haken Af, Maar Winnen Toch' (*Financieel Dagblad*, 2021) <<https://fd.nl/ondernemen/1381101/grote-voetbalclubs-haken-af-maar-winnen-toch>> accessed 26 June 2022.

competitions were suspended worldwide due to the Covid-19 pandemic.<sup>32</sup> As a result, a vast majority of European top clubs generated operating losses over the 2020 fiscal year, with the 32 highest ranked football clubs reporting combined losses of over €1.6 billion.<sup>33</sup> Clubs are thus in need of structural higher revenues in order to close these financial deficits. The financial trajectory of the ESL promised participating clubs structural payouts regardless of their sporting achievements, which are considerably higher than what clubs receive from partaking in the UCL. Moreover, revenues earned from the UCL are directly linked to a clubs' performance in the competition.<sup>34</sup> Poor results will therefore automatically lead to lower revenues. The ESL *inter alia* guaranteed a 'welcome bonus' to the 15 initiating teams worth between €200-300 million in order to help the clubs to recover missed incomes due to the pandemic.<sup>35</sup> Moreover, the projected revenues of €4 billion, consisting of broadcasting and sponsorship rights, would be split between the 20 participating teams.<sup>36</sup> Furthermore, American bank JPMorgan Chase facilitated a €3.25 billion start-up fund in the form of debt financing, secured against the future broadcasting rights of the competition.<sup>37</sup> This would allow the ESL to make the necessary investments to start the competition.

One of the stand-out features of the ESL is that it would be a practically closed competition model. The founding clubs agreed to become an alliance, with all founding teams being guaranteed a fixed spot in the competition every year, regardless of sporting achievements. As a result, these teams cannot be relegated from the competition, ensuring a steady stream of revenues. This competition model would bring the ESL closer, in concept, to American sports competitions such as the NFL and NBA in which it is impossible for teams to be relegated based on performances. This kind of competition structure directly contradicts the traditional European sporting model, as participation in the ESL is not decided on sporting merit.

The current pyramid structure of football is characterized by a financial solidarity structure, which is incorporated in a wide range of aspects connected to the football industry.<sup>38</sup> This structure ensures that the billions in revenue are funneled through the various domestic competitions, through *inter alia* transfer payments, training compensation and solidarity contributions; thereby sustaining smaller teams that are not able to compete in financial lucrative competitions.<sup>39</sup> The closed competition format denies smaller teams of the opportunity of drawing a top club in an international competition such as the UCL, which generate substantial revenues for smaller teams in i.e., extra broadcasting and matchday revenues. The

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<sup>32</sup> Deloitte, 'Annual Review Of Football Finance 2021' (Deloitte 2021)

<<https://www2.deloitte.com/fi/fi/pages/about-deloitte/articles/annual-review-of-football-finance-2021.html>> accessed 11 February 2022 3.

<sup>33</sup> KPMG Sports Advisory Practice, 'The European Elite 2021' (KPMG 2021)

<<https://www.footballbenchmark.com/documents/files/KPMG%20The%20European%20Elite%202021.pdf>> accessed 11 February 2022.

<sup>34</sup> 'Distribution To Clubs From The 2021/22 UEFA Champions League, UEFA Europa League And UEFA Europa Conference League And The 2021 UEFA Super Cup Payments For The Qualifying Phases Solidarity Payments For Non-Participating Clubs' (UEFA, 2021) <[https://editorial.uefa.com/resources/0269-125fde34ba54-30a4c9aeaa13-1000/20210520\\_circular\\_2021\\_35\\_en.pdf](https://editorial.uefa.com/resources/0269-125fde34ba54-30a4c9aeaa13-1000/20210520_circular_2021_35_en.pdf)> accessed 23 June 2022.

<sup>35</sup> Samuel Agini, 'Barcelona Defends Super League And Seeks Review Of Tournament Plan' (*Financial Times*, 2021) <<https://www.ft.com/content/46cc7a08-95c9-44c3-9aea-136ca3ae80b5>> accessed 11 February 2022.

<sup>36</sup> Murad Ahmed, 'It Was Utter Chaos': The Inside Story Of Football'S Super League Own Goal' (*Financial Times*, 2021) <<https://www.ft.com/content/flaf5993-21ed-4b92-9679-27f71482f76d>> accessed 11 February 2022.

<sup>37</sup> Agini et al. (n 7).

<sup>38</sup> Jakub Laskowski, 'Solidarity Compensation Framework In Football Revisited' (2018) 18 *The International Sports Law Journal* 151.

<sup>39</sup> Ibid.

ESL revenues would thus only be split between the founding clubs and five other clubs that get the chance to participate, eliminating the chance for smaller teams to partake in the distribution of revenues.<sup>40</sup> Yet, Florentino Pérez, the president of Real Madrid who also chairs the ESL project, has defended the closed competition model by claiming that revenues would eventually trickle down to smaller teams.<sup>41</sup>

## 2.2. Disciplinary Actions in Response to the European Super League

The ESL was not received well by the general public, politicians and the governing bodies of football. The overall judgement was that a private closed competition would *de facto* kill the meritocratic aspects of football that have characterized the sport from the outset.<sup>42</sup> The day after the announcement fan protests sparked in England, prominent politicians such as the UK Prime Minister Boris Johnson denounced the plans and threatened to introduce legislative actions. FIFA stated that the founding clubs would be eliminated from the FIFA football framework with no chance of re-entry.<sup>43</sup> This would *inter alia* mean that individual players of the participating clubs would no longer be allowed to represent their national team at a FIFA World Cup tournament.

Moreover, and more interesting with regards to this thesis, is the underlying power struggle within the football industry between the clubs and the sport's governing bodies, which heavily resisted the attempted break-away.<sup>44</sup> Though the battle for supremacy already existed before the ESL, its announcement acted as catalyst and launched it into the spotlights. Where the disagreements were first negotiated about behind closed doors, the publication of the ESL plans opened up the door for public legislators to get involved.

The day the ESL plans were unveiled the UEFA, the English Football Association (FA), the EPL, the Royal Spanish Football Federation, LaLiga (the highest Spanish football competition), the Italian Football Federation and Lega Serie A (the highest Italian football competition), published a joined statement stipulating that all parties fiercely opposed the ESL. The statement *inter alia* quoted that 'the clubs concerned will be banned from playing in any other competition at domestic, European or world level, and their players could be denied the opportunity to represent their national teams'.<sup>45</sup> In particular, UEFA stated that the ESL was in clear violation of Articles 49 and 51 of the UEFA Statutes. These articles confirm the monopolistic position of UEFA with regards to the organization of European football competitions.

As a result of the mass fan protests and the threat of sanctions, nine of the twelve founding teams announced that they were abandoning the ESL project, merely days after it was first

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<sup>40</sup> Panja (n 29).

<sup>41</sup> Ahmed et al. (n 2).

<sup>42</sup> Miles Johnson, Jim Pickard and Leila Abboud, 'European Political Leaders Vow To Block Super League Football Plan' (*Financial Times*, 2021) <<https://www.ft.com/content/4f7291cf-1225-4127-8972-6e46cc3f1ce1>> accessed 11 February 2022.

<sup>43</sup> Tariq Panja, 'You Are In Or You Are Out,' FIFA Tells Super League Clubs' (*The New York Times*, 2021) <<https://www.nytimes.com.tilburguniversity.idm.oclc.org/2021/04/20/sports/soccer/super-league-fifa-psg.html>> accessed 13 February 2022.

<sup>44</sup> Agini and Massoudi (n 7).

<sup>45</sup> 'Statement By UEFA, The English Football Association, The Premier League, The Royal Spanish Football Federation (RFEF), LaLiga, The Italian Football Federation (FIGC) And Lega Serie A | Inside UEFA' (*UEFA*, 2021) <<https://www.uefa.com/insideuefa/mediaservices/mediareleases/news/0268-12121411400e-7897186e699a-1000--joint-statement-on-super-league/>> accessed 11 February 2022.

announced.<sup>46</sup> Three teams however, FC Barcelona, Real Madrid and Juventus pledged loyalty to the ESL.<sup>47</sup> UEFA agreed on reintegration measures with the nine founding teams that swiftly abandoned the ESL initiative after the fierce backlash, including that the clubs had to acknowledge that the ESL project was a mistake and that the clubs unreservedly acknowledged the binding nature of the UEFA Statutes. Moreover, the clubs attested to take all steps necessary to terminate involvement in the company established to form and operate the ESL. UEFA also imposed financial penalties on the clubs, agreeing to have 5% of the revenues due from UEFA club competitions be withheld, compelling the clubs to make a donation totaling an aggregate of €15 million to local grassroots football programs and agreed to a provisional penalty of €100 million that could be imposed automatically if any of the clubs every played in a European club competition not authorized by UEFA.<sup>48</sup> The three clubs that remained loyal to the project did however not agree on any settlement with UEFA; as a result the confederation pushed on with imposing internal disciplinary sanctions.

The ESL thus seemed to crumble swiftly as nine out of twelve pledged to abandon the project. This however, would be a premature verdict. The founding teams, for example, signed binding contracts that could not be unilaterally terminated before June 2025, breaching these contracts could result facing financial liabilities worth hundreds of millions of Euros for leaving the project.<sup>49</sup> Moreover, questions arose regarding whether the UEFA is actually competent to impose the sanctions outlined above and prohibit the organization of a European club competition such as the ESL.

### **2.3. Preliminary Questions Referred to CJEU by the Madrid Commercial Court**

FC Barcelona, Juventus and Real Madrid, the three founding ESL clubs that remained committed to the project, were not satisfied with the sanctions imposed and threats made by FIFA and UEFA. More specifically they claimed that the actions of FIFA and UEFA were in direct breach of EU competition law. The statutes of FIFA and UEFA namely confer the exclusive power to organize football competitions on these associations, preventing any other party from organizing an international club competition such as the ESL.<sup>50</sup> The ESL deemed this to be anti-competitive. Therefore, the clubs joined forces to initiate legal proceedings against both UEFA and FIFA in order to challenge this monopolistic behavior and position. As the Super League Company is statutorily seated in Spain, proceedings were started before the 17<sup>th</sup> Madrid Commercial Court. On the one hand the clubs challenged the monopolistic position of UEFA and FIFA and their power to impose sanctions on the founding clubs. On the other hand, a preliminary injunction was requested in order to render all sanctions imposed by UEFA inconsequential and prevent any further sanctions from being imposed. On 1 July 2021 the Madrid court rendered the preliminary injunction, which forced UEFA to annul all commenced proceedings against the ESL. Moreover, the financial penalties referred to in the foregoing

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<sup>46</sup> Ahmed et al. (n 2).

<sup>47</sup> Ibid.

<sup>48</sup> 'UEFA Approves Reintegration Measures For Nine Clubs Involved In The So-Called 'Super League' | Inside UEFA' (UEFA, 2021) <<https://www.uefa.com/insideuefa/mediaservices/mediareleases/news/0269-123871bd86ca-d9571aa78f72-1000--uefa-approves-reintegration-measures-for-nine-clubs-involved-in/>> accessed 13 February 2022.

<sup>49</sup> Murad Ahmed and Arash Massoudi, 'Clubs Signed Up To Punitive Exit Clauses For Super League' (*Financial Times*, 2021) <<https://www.ft.com/content/7b5f6f0d-2fa7-4fba-9ecb-89276b96d116>> accessed 13 February 2022.

<sup>50</sup> Articles 22(3), 71, 72 and 73 FIFA Statutes (2021); Articles 49 and 51 UEFA Statutes (2020).



paragraph had to be annulled and the founding clubs could not be excluded from any UEFA club competition on the basis of their involvement in the ESL project.<sup>51</sup>

With regards to the claims pertaining to the possible infringement of EU competition law the Madrid court decided to refer six preliminary questions to the Court of Justice of the European Union (CJEU). Questions 1-3 and 5 will be discussed in more detail, as the other two questions transcend the scope of this thesis. The first two questions pertained to whether a football associations' statutes can require prior approval for the organization of a new, private, competition. The statutes of *inter alia* FIFA and UEFA have conferred on themselves the exclusive power to organize or give permission for the organization of international club competitions, lacking any regulated procedure that can be used to rule over the legitimacy of a newly-proposed competition.<sup>52</sup> The ESL deemed this to be anti-competitive and an abuse of a dominant position within the meaning of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The third question pertained to whether Articles 101 and 102 TFEU prohibits FIFA and UEFA from making threats to impose sanctions on the founding clubs and individual athletes, such as exclusion from existing competitions like the UCL. The threat of sanctions has a deterrent effect, whilst there are no objective and transparent criteria on which possible sanctions can be based; the ESL deemed this to be anti-competitive.<sup>53</sup> The fifth question enquires whether the conduct of FIFA and UEFA to prevent the development of the ESL is to be regarded as a restriction to competition within the meaning of Article 101 TFEU as the sanctions, by effect, restrict innovation on the internal market.

The preliminary injunction granted by the Madrid court was intended to last until the CJEU has rendered a judgement over the preliminary questions referred to it. Yet, the preliminary injunction was lifted on 20 April 2022.<sup>54</sup> As a result, FIFA and UEFA may proceed with pursuing internal disciplinary proceedings against any member club affiliated to the ESL that infringes their regulations. An in-depth analysis of the preliminary questions, the relevant legal framework and the anticipated ruling will be provided in chapters 3 through 5 of this thesis.

## **2.4. The International Footballing Pyramid**

Within this thesis multiple references to the international football pyramid, and how the ESL would defy this system, have been made. This paragraph will give an overview of this notion and explain how the ESL would deviate from the traditional conception of European football.

Sports is typically organized in a pyramid structure, though this is not true for all sports. Motorsports for example, has opted out of the traditional pyramid structure.<sup>55</sup> The pyramid structure, also often coined the European Sports Model, dates from the time before mass-commercialization of professional sports.<sup>56</sup> This becomes apparent from the fact that the protection of vital interests of professional clubs is not an integral party of the structure.<sup>57</sup> At

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<sup>51</sup> Juzgado de lo Mercantil nº 17 de Madrid - Pieza de Medidas Cautelares 150/2021, *European Super League Company S.L. v. FIFA & UEFA*.

<sup>52</sup> Case C-333/21, *Request for a preliminary ruling from the Juzgado de lo Mercantil n.º 17 de Madrid (Spain) lodged on 27 May 2021 — European Super League Company, S.L. v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA)*.

<sup>53</sup> Ibid.

<sup>54</sup> *European Super League Company S.L. v. FIFA & UEFA* (n 51).

<sup>55</sup> Pijetlovic (n 4) 38.

<sup>56</sup> Robert Siekmann, *Introduction To International And European Sports Law* (T.M.C. Asser Press 2012) 233.

<sup>57</sup> Ibid.

the base of the pyramid are all amateur, semi-professional and professional clubs and/or individual athletes that play/perform in a given competition based on sporting achievements.<sup>58</sup> Remarkably, amateur and professional sports reside in the same level of the pyramid structure. This however, allows for clubs to promote and relegated based on sporting merits; hence, an amateur team can become professional based on its performances and vice-versa.

At the second level of the pyramid are the national associations which regulate the sport in question and organize competitions on a national level. With regards to football in the Netherlands this is the KNVB. Above the national associations are the continental associations, often referred to as confederations, which is UEFA in the case of European football. Oddly enough, in football, the confederations are not a member of FIFA; nevertheless, the confederations are statutorily recognized by FIFA.<sup>59</sup> On the very top of the pyramid sits the international federation, which in case of football is FIFA. As the European sports is characterized by a one-federation-per sports structure, the international associations is the highest authority for its sport. This grants the federation an apparent monopolistic position to regulate the sport from the top of the pyramid all the way to the grassroots.<sup>60</sup> The figure below shows a schematic overview of the international football pyramid structure.

**Figure 1: The international football pyramid**



<sup>58</sup> James A.R. Nafziger, 'A Comparison Of The European And North American Models Of Sports Organisation' (2008) 3 The International Sports Law Journal.

<sup>59</sup> Article 22(1) FIFA Statutes (2021).

<sup>60</sup> Pijetlovic (n 4) 37.

As mentioned before, one of the reasons why the ESL was so widely opposed is that the competition would defy the meritocratic aspects of football that have always characterized European football. The ESL intended to be a closed competition, as a result of which the founding teams cannot be relegated based on sporting merits. This contradicts the European sports model according to which the best achieving teams promote to a higher competition, if possible, and the worst achieving teams relegate to a lower competition. On paper, this grants ambitious amateur clubs the possibility to turn professional based on sporting merits. The purpose of this system is thus to give small and medium-sized clubs a better chance to reward merit, which will generally foster competition amongst teams.<sup>61</sup> The ESL project would directly object this notion by virtually closing the competition. For outside teams that are currently not a part of the elite of European football, participation in the ESL would remain impossible regardless of sporting achievements.

To conclude, this chapter has discussed the ESL project and the legal battle that it instigated. The following chapter discusses the competence of the EU to intervene in the sports industry. This will be a crucial element to establish as it sets out to what extent the EU can limit the power of sports associations on the one hand and break-away competitions on the other hand. Once this is established this thesis will turn into a substantive analysis of the prejudicial questions referred to the CJEU.

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<sup>61</sup> Nafziger (N 58).

## Chapter 3 – Competence of the EU in the Sports Industry

### **3.1. The Traditional Approach of the EU**

Through the preliminary questions referred to the CJEU mentioned in the previous chapter, the EU has the possibility to intervene in the power struggle between the ESL and governing bodies of football. However, whether the EU can intervene depends on the competence it has to regulate the sports industry. As stated before, multiple preliminary questions, regarding the application of EU law on the ESL, are currently pending before the CJEU. The quick conclusion would therefore be that the EU does have competence to intervene in the sports industry. However, the relationship between EU policy and sports has traditionally been a rather precarious one. Before the introduction of the TFEU the EU lacked the necessary treaty base to develop an encompassing regulatory framework aimed at the sports industry.<sup>62</sup> Lacking this basis, the EU opted for a socio-cultural approach to sports, in which sports was mainly viewed as a social activity rather than an economic one.<sup>63</sup> Nevertheless the various EU institutions were able to introduce a *de facto* direct sports policy through the use of the different Community competences such as culture, education and public health.<sup>64</sup> Yet, it proved difficult to introduce an effective sports policy. Lacking a Treaty base the EU institutions had no legal basis for legislative actions in the domain of sports. As a result, Community institutions would easily exceed their competences when introducing far-reaching policies in the domain of sports.<sup>65</sup>

However, as the sports industry commercialized quickly from the 1970's onwards, professional sports was being increasingly viewed as an economic activity that falls within the scope of the EU treaties. In 1974 the European Court of Justice (ECJ) ruled for the first time in the *Walrave* case that professional sport falls within the scope of EU law insofar it constitutes an economic activity in accordance with Article 2 of the Treaty of Rome.<sup>66</sup> The rule established was upheld four years later in the *Dona*<sup>67</sup> case, in which the ECJ ruled that regulations introduced by sport federations which limit the mobility of sportsmen are not in conformity with the fundamental principle of free movement of workers.<sup>68</sup> However, almost twenty years lapsed before the ECJ rendered judgement in the landmark *Bosman*<sup>69</sup> case, which undeniably confirmed the competence of the EU to interfere in professional sports insofar as it constitutes an economic activity.<sup>70</sup> The most far-reaching consequence of the *Bosman* ruling, as compared to *Walrave* and *Dona*, is the direct effect, both horizontally and vertically, of the free movement of workers principle that was laid down in Article 48 of the Treaty of Rome at the time.<sup>71</sup> As a result, it could be invoked by both private and public parties in the sports industry.<sup>72</sup> Therefore, sports associations could no longer take refuge behind the self-proclaimed authority they have in the

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<sup>62</sup> Richard Parrish, *Sports Law And Policy In The European Union* (Manchester University Press 2003) 6.

<sup>63</sup> Ibid 24.

<sup>64</sup> Stefaan van den Bogaert and An Vermeersch, 'Sport and the EC Treaty: a Tale of Uneasy Bedfellows?' (2006) 31 *European Law Review* 822.

<sup>65</sup> Ibid 823.

<sup>66</sup> Case 36/74, *Walrave and Koch v UCI* [1974] E.C.R. 1405 [4].

<sup>67</sup> Case 13-76, *Gaetano Donà v Mario Mantero* [1976].

<sup>68</sup> Siekmann (n 56) 82.

<sup>69</sup> Case C-415/93, *URBSFA/Bosman* [1995].

<sup>70</sup> Steven Jellinghaus, *Capita Sportrecht* (2nd edn, Gompel & Svacina 2021) 96.

<sup>71</sup> Now codified in: The Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

<sup>72</sup> Amikam Omer Kranz, 'The Bosman Case: The Relationship between European Union Law and the Transfer System in European Football' (1999) 5 *Columbia Journal of European Law* 449.

domain of sports.<sup>73</sup> Yet, the competence of the EU did not turn out to be all-encompassing as was confirmed by the court. Despite the rulings in *Walrave*, *Dona*, and *Bosman* the free movement provisions do not prevent sports associations from introducing limitations to the free movement of workers in circumstances, for reasons which are not of an economic nature and relate directly to the specificity of the sport.<sup>74</sup>

### **3.2. Article 165 TFEU – Setting the Limits on EU Influence**

In the aftermath of *Bosman*, it became clear that the EU treaty provisions on the free movement of workers apply directly to athletes when three cumulative criteria are met. Firstly, the athlete has to be citizen of an EU Member State. Secondly, the endeavors of the athlete have to amount to an economic activity. Finally, there needs to be a cross-border element connected to the economic activity of the athlete.<sup>75</sup> The *Bosman* ruling however, did not foster the legal certainty of the sports industry. Rather, a legal vacuum was created in which it was unclear what the boundaries of EU competence were.

The EU institutions recognized the legal uncertainty that had been created. As a result, the sport industry, and especially the notion of specificity of sport, became a focal point of subsequent EU Treaty Declarations. The declarations emphasized the social significance of sport and underlined that the EU institutions are to listen to sports associations when important questions affecting the sport are at issue and that sport must be able to assimilate the new commercial framework in which it must develop, without at the same time losing its identity and autonomy.<sup>76</sup> Though the EU hereby implicitly acknowledged that it is competent to regulate the sports industry, the practical effect of the declarations was limited as they lacked legal enforceability.

The general approach to EU influence on sports that can be deducted from the abovementioned declarations is that sports associations are predominantly autonomous and that the EU will only interfere when the principles of the internal market are at stake.<sup>77</sup> Yet, another seven years lapsed before EU competence in the domain of sports was enshrined in the EU treaties. The 2007 Treaty of Lisbon introduced the TFEU, which contains a specific article on EU competence on sports. Article 165(1) TFEU states that ‘The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function’.<sup>78</sup> Article 165(2) subsequently states ‘Union action shall be aimed at: ... developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen’. The competence of the EU to interfere in the sport domain is thus limited by the concept of specificity of sports. Yet, the introduction of Article 165 had little practical effect on the influence of the EU in the

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<sup>73</sup> Ibid.

<sup>74</sup> Antoine Duval and Ben Van Rompuy, *The Legacy Of Bosman* (T.M.C. Asser Press 2016) 244.

<sup>75</sup> Jellinghaus (n 70) 100.

<sup>76</sup> Treaty of Amsterdam—Presidency Conclusions (2 October 1997) OJ 1997 C 340, 10/11/1999, (No. 29: Declaration on Sport); Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies 13948/00, Annex to the Presidency Conclusions following the Nice European Council Meeting of 7, 8 and 9 December 2000 (‘Nice Declaration’).

<sup>77</sup> Siekmann (n 56) 73-74.

<sup>78</sup> The Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, art 165(1).

domain of sports due to the absence of a horizontal clause which would require EU institutions to take sporting issues into account when making policies in other areas, such as free movement and competition law.<sup>79</sup>

Therefore, after the introduction of Article 165 TFEU it became clear that the EU does not have competence to interfere directly into sporting autonomy via legislative action, as to protect the integrity of sports associations. However, any aspect relating to the domain of sports and any sporting rule that produces cross-border economic effects may become subject to EU law. These provisions dictate the limits of the authority of sporting associations. As such, EU law will interfere into sporting authority inasmuch as their rules and practices are in breach of Treaty provisions.<sup>80</sup>

### 3.3. EU Competition Law & Sport

After *Walrave, Dona* and *Bosman* it became clear that the EU has the competence to interfere in the sports industry, especially insofar it constitutes an economic activity. However, for the purpose of this thesis it is imperative to determine the applicability of the EU competition law provisions on the domain of sports. EU competition law will undeniably be an important factor in the ESL proceedings, as becomes apparent from the preliminary questions referred.

Initially the EU institutions were hesitant to provide a framework for the application of competition law on the sports industry. Rather, they opted to decide cases on the basis of the free movement principles as had *inter alia* happened in *Bosman*.<sup>81</sup> Some aspects closely connected to the sports industry have always been considered to fall within the scope of EU competition law, such as the marketing of broadcasting rights and match tickets. However, it took the ECJ up to 2006 to provide a legal framework concerning the application of EU competition law on sports in the *Meca-Medina* case. In this case two professional swimmers argued that the anti-doping regulations of the international swimming federation<sup>82</sup> violated competition law.<sup>83</sup> The ECJ ruled that the anti-doping regulations had a legitimate objective; the protection of the integrity of the competitions organized under its auspices. Subsequently, the court ruled that the restrictions on competition resulting from a doping violation were proportionate.<sup>84</sup> More importantly however, the court decided that regulations and sanctions that have an exclusively sporting character still fall within the scope of EU competition law. The ratio for this is that in professional sports it has become almost impossible to separate the economic aspects of the sporting aspects due to the commercialization of sports.<sup>85</sup> Consequently, since *Meca-Medina* it is evident that sporting rules fall within the scope of EU competition law insofar the activities concerned establish an economic activity.

Articles 101 and 102 TFEU are the EU treaty provisions on competition law and applicable to the domain of sports owing to the *Meca-Medina* judgement. Article 101 TFEU prohibits restrictive agreements between undertakings and Article 102 prohibits undertakings from

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<sup>79</sup> Pijetlovic (n 4) 21.

<sup>80</sup> Robert Siekmann, Simon Gardiner and Richard Parrish, *EU, Sport, Law And Policy* (T.M.C. Asser Press 2009) 79.

<sup>81</sup> Jellinghaus (n 70) 133.

<sup>82</sup> The *Fédération Internationale de Natation*.

<sup>83</sup> Jellinghaus (n 70) 134.

<sup>84</sup> Case C-519/04 P, *Meca-Medina v Commission* [2006] EU:C:2006:492, [42-56].

<sup>85</sup> *Ibid* [27].

abusing a dominant position. Both articles solely apply to undertakings, which has to be interpreted in the broadest sense, encompassing every entity that undertakes an economic activity.<sup>86</sup> Additionally, the provisions are only applicable to the sports industry when the challenged sporting regulations and/or decision affects the trade between member states.<sup>87</sup> Due to the international dimension of contemporary professional sports and the fact that most sporting regulations and decisions emanate from international associations due to the pyramid structure, trade between member states is rather swiftly affected by the regulations of these international sports associations.

### **3.4. The ESL & EU Competition Law**

Having established in the foregoing paragraphs that EU law is applicable to the domain of sports, albeit with due consideration of the specificity of sports, this paragraph will determine whether the ESL falls within the legal framework for the application of EU competition law on the sports industry. Merely the applicability of EU law will be considered, a more substantive application of EU law on the ESL-project will be provided in Chapter 5.

Following from *Meca-Medina*, the Commission applies a methodological approach when assessing whether a rule/regulation adopted by a sports association pertaining to the organization of sports infringes EU competition law.<sup>88</sup> This approach consists of four steps. First, it must be determined whether the sports association that adopted the rule is to be considered as an undertaking or an association of undertakings. Both national and international associations are an undertaking insofar they carry out an economic activity themselves. A sports association is an association of undertakings if its members carry out an economic activity. For the football industry it can be duly concluded that FIFA and UEFA are both undertakings and an association of undertakings. FIFA and UEFA do themselves engage in economic activity by for example the selling of broadcasting rights. However, its members, the national football associations also engage in economic activity through *inter alia* organizing domestic football competitions.

Second, the rule in question must restrict competition within the framework of Article 101(1) TFEU or constitute an abuse of a dominant position in accordance with Article 102 TFEU. The ESL argued that the statutes of FIFA and UEFA constituted a breach of both provisions. A substantive analysis of this criteria will be provided in Chapter 5.

Third, the rule must affect trade between Member States. Rules adopted by international sports associations will normally affect the trade between member states due to the highly commercial and international character of professional sports.<sup>89</sup> Rules of national associations do not automatically affect the trade between Member States as they do not have an inherent international dimension. However, taking into consideration that rules of national sport associations usually affect a sport in the whole territory of a given Member State and the high level of internationalization of professional sport, rules adopted by national sport associations may often affect trade between Member States.<sup>90</sup> Therefore, the statutes of FIFA and UEFA

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<sup>86</sup> Case C-41/91, *Höffner & Elsner/Macrotron* [1991], ECLI:EU:C:1991:161 [21].

<sup>87</sup> Jellinghaus (n 70) 135.

<sup>88</sup> Siekmann (n 56) 100.

<sup>89</sup> EU Commission Staff Working Document, *The EU and Sport: Background and Context*, Accompanying Document to the White Paper on Sport, COM (2007) 67.

<sup>90</sup> *Ibid* 67-68.

and the threat of sanctions against ESL participants are to be considered to affect trade between Member States.

Finally, when the rule of a sports association is considered to be in violation of Article 101(1) TFEU, it must be determined whether the justification of Article 101(3) TFEU is applicable. This provision states that a restriction of competition may be declared compatible with the internal market in case the rule of a sports association contributes to improving the production or distribution of goods or economic progress, while allowing consumers a fair share of the resulting benefits, with the violations being proportional for the attainment of these benefits.<sup>91</sup> Whether such justification applies will be analyzed in chapter 5.

This chapter has provided the framework for the application of EU law on the domain of sports. Where the EU traditionally adopted a restrained approach, various landmark cases such as *Bosman* and *Meca-Medina* confirmed that EU law, including competition law, apply to the sports industry insofar the sporting activities constitute an economic activity. Finally, it was argued that EU competition law is applicable to the currently pending legal proceedings regarding the ESL, as the conduct of FIFA and UEFA falls within the scope of the *Meca-Medina* test.

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<sup>91</sup> Siekmann (n 56) 104.



## Chapter 4 – The Current Legal Framework – *ISU v Commission*

### **4.1. Background & Decision of the Commission**

In the previous chapter, it was established that the EU is able to intervene in the domain of sports, especially when the internal market is affected through a decision taken by sports association. This chapter provides an overview of the landmark ruling of the General Court of the EU (GC) in a case pertaining to the organization of a break-away competition in skating. This case has established the precedence on which the preliminary questions regarding the ESL will be based. In the analysis only the elements that relate to the possible infringement of EU competition law will be discussed, as the other questions of law such as the legality of arbitration clauses, do not fall within the scope of this thesis. In 2014, the Korean company Ice-Derby International intended to organize a skating competition in Dubai. The competition would see long-distance skaters compete against short-trackers on a specially created course. However, the International Skating Union (ISU), the international sport association of long-distance skating and figure-skating, opposed the competition and threatened to impose life-time bans on athletes that intended to compete.<sup>92</sup> The ISU Eligibility Rules, which regulate *inter alia* the conditions for a third-party to organize a skating event, included a pre-authorization system according to which skaters may participate only in events authorized by the ISU or a national association.<sup>93</sup> The Eligibility Rules are supplemented by ISU Communication No 1974, which sets out the procedural rules pertaining to the pre-authorization system, applicable to both ISU members and third-party organizers.<sup>94</sup>

The Commission, upon request of two professional skaters, ruled that the ISU regulatory framework violated Article 101 TFEU. More particularly, that the Eligibility Rules created significant barriers to entry for skaters wishing to compete in new competitions and for third parties wishing to start organizing and commercially exploiting international speed skating events.<sup>95</sup> Thereby the regulatory framework was found to limit the commercial freedom of skaters and third-party organizers of skating competitions.<sup>96</sup> Applying the *Meca-Medina* test discussed in Chapter 3.4., the Commission ruled that the restrictions on competition flowing from the ISU Eligibility Rules lacked a direct link with legitimate objectives, such as the integrity of the sport and safety or the organization and proper conduct of sport. Rather, the rules suggested an anti-competitive interest.<sup>97</sup> Hence, the Commission ordered the ISU to terminate the infringement of Article 101 and take appropriate measures to prevent future infringements.<sup>98</sup>

### **4.2. Analysis**

The ISU appealed the decision to the GC, seeking to annul it in its entirety. The GC first established that in order to determine whether the Eligibility Rules infringe Article 101(1) TFEU, it is necessary to examine the rules in light of their genuine objectives and the specificity

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<sup>92</sup> Vermeersch (n 24).

<sup>93</sup> *International Skating Union v European Commission* (n 23) [6].

<sup>94</sup> *Ibid* [13].

<sup>95</sup> Commission Decision Case AT.40208, *International Skating Union's Eligibility rules* [197].

<sup>96</sup> *Ibid* [6].

<sup>97</sup> *Ibid* [163].

<sup>98</sup> *Ibid* [349].

of the sports industry.<sup>99</sup> The position of the ISU is inherently capable to give rise to a conflict of interests, as it organizes skating events at its own discretion but at the same time has the power to authorize events organized by third-parties.<sup>100</sup> Consequently, the ISU must ensure that third-party organizers of skating events are not illegitimately denied market entry when assessing whether to authorize such a third-party event.<sup>101</sup> In other words, the regulatory framework of the ISU and more in particular the Eligibility Rules, may not raise unlawful barriers to entry.

The GC ruled, in line with the Commission, that the ISU Eligibility Rules infringed Article 101(1) TFEU as the pre-authorization system erected an unlawful barrier to entry for third parties. As a result, other event organizers have no practical way to enter the market for the organization of international skating events.<sup>102</sup> The pre-authorization system lacked clearly defined, objective, transparent, non-discriminatory and reviewable criteria capable of ensuring effective market entry for third-party organizers.<sup>103</sup> Moreover, the threat of sanctions on athletes competing in non-authorized competitions, including *inter alia* an automatic five-year ban or a life-time ban in case of aggravating circumstances, was ruled to be disproportional. Subsequently, the GC considered that the Eligibility Rules did not meet the *Meca-Medina* test. The court considered that the ISU could have legitimate justifications to establish authorization rules for the organization of third-party competitions, for example, to prevent sports betting from creating a risk of match fixing, thereby protecting the integrity of the sport. Yet, the restrictions on competition resulting from the Eligibility Rules are disproportional compared to the legitimate objectives the rules seek to protect.<sup>104</sup> Interestingly enough, the GC considered that a sports association that wishes to protect its own economic interests through a pre-authorization system does not automatically infringe Article 101(1) TFEU, as the pursuit of economic objectives is inherent to an undertaking, which includes sports associations when carrying out an economic activity.<sup>105</sup> Nevertheless, the procedural rules set out in ISU Communication No 1974 were considered to protect the economic interests of the ISU disproportionately. The ISU imposed more extensive standards on third-party organizers than on its own members pertaining to *inter alia* the financial information that has to be disclosed and the applicable time limits for an application to organize a competition. Additionally, the procedural rules were non-exhaustive, leaving the ISU a broad discretion to either accept or reject an application.<sup>106</sup>

Based on the foregoing, the GC rejected the appeal to annul the contested Commission decision.<sup>107</sup> Hence, the ISU Eligibility Rules were ruled to be anti-competitive as they erect unlawful barriers to entry for third parties that wish to enter the market for the organization of skating events. The pre-authorization procedures set out in the ISU Eligibility Rules did not provide objective, clearly-defined, transparent, non-discriminatory and reviewable criteria based on which a third-party application for the organization of a skating event would be decided on. Therefore, the *ISU*-case serves as potent warning to other sports associations that

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<sup>99</sup> *International Skating Union v European Commission* (n 23) [67-68].

<sup>100</sup> *Ibid* [75].

<sup>101</sup> Vermeersch (n 24).

<sup>102</sup> *International Skating Union v European Commission* (n 23) [89].

<sup>103</sup> *Ibid* [88].

<sup>104</sup> *Ibid* [102-103].

<sup>105</sup> *Ibid* [109].

<sup>106</sup> *Ibid* [110].

<sup>107</sup> *Ibid* [179].

serve both a commercial and regulatory function.<sup>108</sup> On the one hand, the judgement confirms that sports associations have the freedom to adopt and implement authorization rules pertaining to third-party organization of sports competitions, with the associations having a margin of discretion in identifying the legitimate objectives of the authorization rules, which may include the protection of the association's own economic interests.<sup>109</sup> On the other hand, sports associations need to ensure that they only restrict competition insofar it is justifiable by transparent, non-discriminatory, proportional and legitimate objectives in order to prevent scrutiny under EU competition law. A pre-authorization system thus needs to have fair and proportionate rules which may not unlawfully foreclose competition.<sup>110</sup> If a sports association can *de facto* prohibit third parties from organizing a competition in order to protect its own economic interests or for other reasons that go beyond the legitimate objectives mentioned above, the association is at severe risk of infringing EU competition law.<sup>111</sup>

Notwithstanding the foregoing, it must be noted that the ISU appealed the decision of the GC to the CJEU in February 2021. Hence, the legal framework created by the judgement is not yet definitive. Nevertheless, a number of important principles pertaining to the position and authority of sports associations can be diluted from the judgement of the GC.<sup>112</sup> Especially since the main plea of the ISU to the CJEU alleges that the GC misinterpreted the case-law of the CJEU by finding that the ISU Eligibility Rules restrict competition by object.<sup>113</sup> However, the GC also established that the ISU Eligibility Rules by effect, against which the ISU did not appeal.

#### **4.3. The ISU-Case and the European Super League**

The judgement of the GC in the *ISU-case* provides a novel legal framework on the formation of break-away sports competitions, that can be transplanted to other sports, including football. The *ISU-case* has thus created a precedence which, to a large extent, will be applicable to the ESL proceedings currently pending before the CJEU. Thereby the GC has fostered the legal certainty by providing a coherent framework on the notion of break-away competitions.

In the ESL proceedings, it will be analyzed whether the regulatory framework of FIFA and UEFA unlawfully restrict competition by prohibiting third parties from organizing football competitions and imposing a threat of sanctions on football clubs and individual players in case they participate in such a competition. The judgement in the *ISU-case* will serve as a guideline for the analysis. However, it must be observed that there are considerable differences between the skating and football industry. Most notably is the difference in economic interests between the ISU and FIFA/UEFA, with the football industry having substantial higher revenues.<sup>114</sup>

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<sup>108</sup> C. McMahon, 'Sporting Organisations On Thin Ice: Speed Skating, Arbitration And The Competition Rules (T-93/18 International Skating Union)' (2021) 5 *European Competition and Regulatory Law Review* 435.

<sup>109</sup> A. Cattaneo, 'International Skating Union v Commission: Pre-authorisation Rules and Competition Law' (2021) 12 *Journal of European Competition Law & Practice* 320.

<sup>110</sup> M. Cole, P. Vinis and M. Chatziantoniou, 'The Potential Implications Of The CJEU'S ISU Judgement On The European Super League: Football "On Thin Ice"' (Covington, 2021) <<https://www.covcompetition.com/2021/07/the-potential-implications-of-the-cjeus-isu-judgement-on-the-european-super-league-football-on-thin-ice/>> accessed 24 April 2022.

<sup>111</sup> McMahon (n 108).

<sup>112</sup> Vermeersch (n 24).

<sup>113</sup> Case C-124/21 P, *Appeal brought on 26 February 2021 by International Skating Union against the judgment of the General Court*.

<sup>114</sup> Vermeersch (n 24).

Moreover, there are substantial organizational differences between the two sports; *inter alia* the relation between the associations, clubs and individual athletes cannot be compared.<sup>115</sup> Therefore, it cannot be concluded that the legal framework established in the ISU judgement can be directly transplanted to the ESL proceedings currently pending, as there considerable differences between the cases. Yet, it will serve as an important guideline for the analysis that is to be conducted in the following chapter.

To conclude, this chapter has provided an overview of the *ISU*-case. The Commission initially ruled that the regulatory framework of the ISU infringed Article 101(1) TFEU by unlawfully restricting market access to third parties wanting to organize a skating competition. The GC upheld the decision, ruling that the pre-authorization procedures set out in the ISU Eligibility Rules did not provide objective, clearly-defined, transparent, non-discriminatory and reviewable criteria based on which a third-party application for the organization of a skating event could be decided on. As a result, other organizers of skating competitions have no practical way of entering the market for the organization of international skating events. Therefore, from the proceedings it can be concluded that any association may draft an *ex-ante* authorization system for the application of a private sports competition. Yet, the criteria in said system may not disproportionately restrict competition, as was the case with the ISU Eligibility Rules. The judgement has set an important precedence for the analysis of the ESL proceedings currently pending before the CJEU. In the next chapter, the preliminary questions pertaining to the ESL referred to the CJEU will be analyzed based, where applicable, on the legal framework stemming from the *ISU*-case.

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<sup>115</sup> Ibid.

## Chapter 5 – The ESL and Article 101 TFEU

Having established the applicability of EU law on the sports industry and the latest legal framework on the organization of break-away competitions in the foregoing, this chapter will apply the legal doctrine developed in the *ISU-case* to the ESL proceedings currently pending. To that end, the regulatory frameworks of the relevant associations will be analyzed in light of the aforementioned test. The outcome will ultimately determine whether FIFA and UEFA can block the formation of the ESL and/or an equivalent break-away sports competition.

### **5.1. FIFA & UEFA's Statutes on the Formation of Break-Away Competitions**

An essential element of the judgment of the GC in the *ISU-case* is that the regulatory framework of sports associations may not erect unlawful barriers to entry for third parties that wish to enter the market for the organization of sport competitions. These barriers will especially be considered to be anti-competitive if the association concerned both regulates the sport, thereby having the discretion to authorize or prohibit third parties the right to organize a competition and simultaneously organizes competitions itself, therewith engaging in economic activity.<sup>116</sup>

#### **5.1.1. FIFA & UEFA Competitions**

Both FIFA and UEFA undeniably engage in the activity of organizing football competitions. The FIFA Statutes explicitly state that the organization of international competitions is one of its objectives.<sup>117</sup> The most notable tournament is the FIFA World Cup organized every four years, in which national teams compete against each other in a predefined format. Moreover, FIFA organizes a plethora of other competitions, including *inter alia* the FIFA Women's World Cup and FIFA Club World Cup (CWC).<sup>118</sup> Especially the CWC is of importance with regards to the ESL, as this is the only club tournament organized by FIFA. Therefore, the CWC is the only tournament organized by FIFA that may compete directly with the ESL. Likewise, UEFA organizes a number of competitions for both national teams and clubs.<sup>119</sup> With the UEFA European Football Championship and UCL being the most notable tournaments for respectively national teams and clubs. Therefore, the position of both associations is likely to give rise to a conflict of interest, as they engage in regulating the game of football as well as organizing competitions.

#### **5.1.2. Restrictions on the Organization of Third-Party Competitions – FIFA**

The FIFA Statutes contain a number of provisions that prohibit the formation of break-away competitions – *ab initio*. Article 22(3)(e) stipulates that the confederations<sup>120</sup> have the obligation to ensure that international competitions shall not be formed without the consent of the relevant confederations and the approval of FIFA. In other words, no international club competition can be organized without the authorization of FIFA and the relevant confederation. Moreover, Article 70 states that no competition shall take place without the prior permission of FIFA, the relevant confederation and/or national association(s) and that the FIFA Council may issue further provisions for such competitions. Additionally, FIFA has drafted the FIFA Regulations Governing International Matches. This regulation stipulates the criteria that *inter*

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<sup>116</sup> *International Skating Union v European Commission* (n 23) [75].

<sup>117</sup> Article 2(b) FIFA Statutes (2021).

<sup>118</sup> Article 30(2) FIFA Governance Regulations (2020).

<sup>119</sup> Article 49(a)-(b) UEFA Statutes (2020).

<sup>120</sup> Confederations are the continental football associations in accordance with: Article 22 FIFA Statutes (2021).

*alia* an international club competition such as the ESL has to comply with. Clubs that want to compete in a newly formed competition have to obtain the required authorization from the national and continental football associations.<sup>121</sup> However, it does not provide any further substantive criteria. FIFA, thus, has to grant final authorization before an international club competition can be established and may reject any application for authorization.<sup>122</sup> Authorization can only be requested by FIFA members, being the national football association and individual clubs, a third party is therefore not able to request authorization for the organization of an international competition.

### **5.1.2. Restrictions on the Organization of Third-Party Competitions – UEFA**

The regulatory framework of UEFA fiercely obstructs the formation of any break-away competition by being drafted in such a way as to impose severe penalties on teams that participate in a private competition without prior consent.<sup>123</sup> Article 49 of the UEFA Statutes states that ‘UEFA shall have the sole jurisdiction to organize or abolish international competitions in Europe in which Member Associations and/or their clubs participate.’<sup>124</sup> The Statutes furthermore stipulate that international club competitions, which are not organized by UEFA, require prior authorization by FIFA and/or UEFA in accordance with the aforementioned FIFA Regulations Governing International Matches mentioned above.<sup>125</sup> Therefore, any international club competition that is to be played in the territory of UEFA needs *ex-ante* authorization. UEFA has not introduced further regulations which specify the criteria which need to be met in order to be granted authorization to organize an international club competition.

Both FIFA and UEFA have thus opted to restrict the formation of club competitions within their respective regulatory framework. Any club that wishes to compete in a newly organized competition has to receive prior authorization from UEFA and/or FIFA. Yet, neither FIFA nor UEFA provides a set of pre-determined criteria that need to be met in order to be granted authorization. The statutes of both associations do not include any objective criteria relating to the organization a private club competition, nor any clear procedural rules setting out the timing of the application procedure.<sup>126</sup> Even more remarkable, the statutes of FIFA and UEFA only mention the possibility for individual clubs to be granted authorization to form a competition not organized under the auspices of either association. Thereby implicitly stating that a third party intending to organize a break-away competition can under no condition be granted the necessary authorization.

## **5.2. Threat of Sanctions**

One of the reasons that the GC ruled that the Eligibility Rules restricted competition in the *ISU*-case is that the ISU threatened to impose heavy sanctions on athletes that would compete in an unauthorized break-away competition. The threat of sanctions, enshrined in the Eligibility Rules, was ruled to prevent athletes from offering their services to organizers of international

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<sup>121</sup> Article 8(2) FIFA Regulations Governing International Matches (2014).

<sup>122</sup> See *inter alia*: Article 4(4) FIFA Regulations Governing International Matches (2014); Article 6(4) FIFA Regulations Governing International Matches (2014).

<sup>123</sup> Pijetlovic (n 4) 54.

<sup>124</sup> Article 49(1) UEFA Statutes (2020).

<sup>125</sup> Article 49(3) UEFA Statutes (2020).

<sup>126</sup> R. Houben, J. Blockx and S. Nuyts, 'UEFA And The Super League: Who Is Calling Who A Cartel?' [2022] *The International Sports Law Journal*.

competitions not authorized by the ISU.<sup>127</sup> Moreover, the system of penalties was deemed to be unpredictable, thereby presenting a risk of arbitrary application causing the penalties to have an excessive deterrent effect.<sup>128</sup> Similarly, FIFA and UEFA threatened to impose sanctions on clubs and individual players that intended to participate in the ESL.

FIFA has statutorily delegated the imposition of disciplinary sanctions to the confederations and national associations.<sup>129</sup> Nevertheless, FIFA has a designated Disciplinary Committee, which is governed by the FIFA Disciplinary Code (FDC).<sup>130</sup> The Committee is competent to impose sanctions on *inter alia* national associations, clubs and individual players.<sup>131</sup> The FDC is applicable to any breach of FIFA's statutory objectives; hence, clubs and players that join an unauthorized break-away competition may be subject to disciplinary measures.<sup>132</sup> The sanctions that may be imposed on both clubs and players include fines, suspension and ultimately expulsion from all football activity. The Committee has a rather broad discretion when deciding what sanctions to impose as the relevant judicial body is free to determine the type and extent of the disciplinary measures, in accordance with the objective and subjective elements of the offence.<sup>133</sup> Any sanction imposed may be appealed to the Court of Arbitration for Sport (CAS)<sup>134</sup>, which will have final jurisdiction to decide on the matter.<sup>135</sup>

Likewise, the UEFA Statutes stipulate that disciplinary measures may be imposed for contravention of the statutes, regulations and decisions.<sup>136</sup> Pursuant to Article 56 of the Statutes, UEFA has introduced the UEFA Disciplinary Regulations (UDR) which contain the substantive and formal provisions governing the punishment of disciplinary offences.<sup>137</sup> The UDR applies *inter alia* to any breach of the UEFA Statutes and/or its statutory goals.<sup>138</sup> Similar to FIFA, the competent UEFA disciplinary body determines the type and extent of the disciplinary measures to be imposed in accordance with the objective and subjective elements of the offence, taking account of both aggravating and mitigating circumstances.<sup>139</sup> Any decision taken by an UEFA pursuant to the UDR may also be appealed to the CAS.<sup>140</sup>

### **5.3. Legitimate Objectives to Restrict Competition**

Foreclosure of competition may be permitted if the sports associations involved have legitimate objectives to do so, as was confirmed in the *ISU-case*. In other words, the restrictions on competition may not go beyond what is inherent in the pursuit of the statutory objectives of the sports association.<sup>141</sup> Therefore, even if the conditions of Article 101(1) TFEU are found to be

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<sup>127</sup> *International Skating Union v European Commission* (n 23) [129].

<sup>128</sup> *Ibid* [93-94].

<sup>129</sup> See *inter alia*: Article 15(g) FIFA Statutes (2021); Article 23(g) FIFA Statutes (2021).

<sup>130</sup> Article 51(1) FIFA Statutes (2021).

<sup>131</sup> Article 51(2) FIFA Statutes (2021).

<sup>132</sup> See *inter alia* Article 2(2) FIFA Disciplinary Code (2019); Article 11(2) FIFA Disciplinary Code (2019).

<sup>133</sup> Article 24(1) FIFA Disciplinary Code (2019).

<sup>134</sup> CAS is an international arbitration court for sports related disputes, serving *de facto* as the Supreme Court for sports. See: Johan Lindholm, *The Court Of Arbitration For Sport And Its Jurisprudence* (T.M.C. Asser Press 2019) 3.

<sup>135</sup> Article (4) FIFA Disciplinary Code (2019).

<sup>136</sup> Article 51 UEFA Statutes (2020).

<sup>137</sup> Article 1(1) UEFA Disciplinary Regulations (2020).

<sup>138</sup> Article 2 UEFA Disciplinary Regulations (2020).

<sup>139</sup> Article 23(1) UEFA Disciplinary Regulations (2020).

<sup>140</sup> Article 62(1) UEFA Statutes (2020).

<sup>141</sup> *Pijetlovic* (n 4) 278.

fulfilled, this does not necessarily lead to the conclusion that the regulatory framework of the association under scrutiny is unlawful.<sup>142</sup> Especially the specificity of sports doctrine, which plays an important role in the application of EU law on the domain of sports, grants sports associations a certain margin of discretion when it comes to the organization of sports competitions. The GC clarified that the integrity of sport, the protection of health and safety, the organization and proper conduct of competitive sport and solidarity between participants might constitute legitimate objectives that could justify a restriction of competition by a sports association.<sup>143</sup> Moreover, the protection the association's own economic interests may constitute a legitimate objective.<sup>144</sup>

FIFA and UEFA have repeatedly referred to the need to protect the integrity of football when addressing the ESL.<sup>145</sup> One of the main elements relating to the protection of the integrity of the sport is the objective of the development of football through a solidarity model.<sup>146</sup> The solidarity mechanism is an important element of the football pyramid, ensuring amongst other things that funds and revenues generated are distributed throughout all levels of the sport, from the elite clubs at the very top to the grassroots-level at the bottom. Revenue streams generated under privately organized break-away competition may not be redistributed according to this notion of financial solidarity as the revenues are likely to be distributed solely amongst the participating clubs.<sup>147</sup> Another important element of sporting integrity is the concept of open competition, which allows clubs to promote and relegate on the basis sporting merits.<sup>148</sup> The importance of open competition, which is intrinsically linked to the European Sports Model discussed in Chapter 2.4., has been acknowledged by the EU in multiple policy documents.<sup>149</sup> The protection of the integrity of football is thus an important argument for FIFA and UEFA to impede the formation of the ESL and might constitute a legitimate objective to do so. The ESL-project, as it was initially designed, did not comply with the solidarity mechanisms as the revenues were to be distributed solely amongst the competitors and the competition would be mainly closed, preventing promotion and relegation based on sporting merits.

The protection of sporting integrity is one of the statutory goals of both FIFA and UEFA and runs as a common thread through their respective regulatory frameworks.<sup>150</sup> Moreover, their statutes emphasize the notion of open competition as a quintessential element of sporting integrity.<sup>151</sup> Hence, clubs and individual players that intend to join a break-away competition that contravenes this notion of sporting integrity, directly violate the statutes of FIFA and UEFA. As the ESL intends to be a competition that is situated outside of the international football pyramid, FIFA and UEFA contend that its formation endangers the sport as a substantial amount of revenues will be abstracted from the financial solidarity mechanism that characterizes the sport.

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<sup>142</sup> Houben, Blockx and Nuyts (n 126).

<sup>143</sup> *International Skating Union v European Commission* (n 23) [219-222].

<sup>144</sup> *Ibid* [109].

<sup>145</sup> 'Statement By FIFA And The Six Confederations' (UEFA.com, 2021) <<https://www.uefa.com/insideuefa/about-uefa/news/0265-1162b4daabdc-011165939444-1000--statement-by-fifa-and-the-six-confederations/>> accessed 5 May 2022.

<sup>146</sup> Houben, Blockx and Nuyts (n 126).

<sup>147</sup> Pijetlovic (n 4) 280.

<sup>148</sup> Vermeersch (n 24).

<sup>149</sup> See *inter alia*: Commission of the European Communities White Paper on Sport of 7 November 2007, COM(2007) 13; Communication of the European Commission of 18 January 2011, Developing the European Dimension in Sport, COM(2011) 11.

<sup>150</sup> Article 2 FIFA Statutes (2021); Article 2(1) UEFA Statutes (2020).

<sup>151</sup> Article 10(1) FIFA Regulations Governing the Application of the Statutes (2021); Article 51bis(1) UEFA Statutes (2020).



#### 5.4. Proportionality of Restrictions

When the regulatory framework of a sports association restricts competition but it does so in light of legitimate objectives, the restrictions must be strictly proportional to these objectives.<sup>152</sup> Sporting rules must thus be proportionate in relation to its objective in order for it not to foreclose competition and must be applied in a transparent, objective and non-discriminatory manner.<sup>153</sup> Therefore, the question that needs to be answered is whether there are other less restrictive measures capable of achieving the intended objective. With regards to the ESL, it must thus be determined whether the objective of protecting sporting integrity can be achieved through less restricting measures than the effectively *ab initio* prohibition to organize a competition without prior authorization. Additionally, the threat of sanctions on clubs and players also needs to be proportional in light of the objective of protecting sporting integrity.

As mentioned before, the UEFA Statutes require *ex-ante* authorization of FIFA, UEFA and/or the relevant national association(s) for the organization of international club competitions that are played on UEFA's territory.<sup>154</sup> However, the regulatory framework does not prescribe any criteria pertaining to the organization of a private competition, nor does it contain any procedural rules for an application to organize a competition. In October 2005, UEFA set out a number of principles that require compliance in order to be granted authorization for the organization of a private competition. These principles *inter alia* require that the competition is authorized by UEFA and FIFA, does not conflict with UEFA club competitions and is organized in accordance with the UEFA Statutes.<sup>155</sup> Yet, these principles have not been enshrined in the UEFA Statutes or other regulations; hence, whether they are still relevant is unclear. Even if it could be ascertained that the principles are still applicable, they seem to rule out the organization of any break-away competition from the outset. The current football calendar is crammed with matches, so any newly formed competition would automatically conflict with existing UEFA club competitions. Moreover, some of the principles themselves form new authorization requirements, which in turn lack any substantive criteria that need to be met by a third-party competition organizer.

Besides the *ex-ante* authorization system statutorily embedded in the regulatory framework of both FIFA and UEFA, the threat of sanctions on players and clubs could be ruled to be disproportional. In the *ISU*-case the GC ruled that the sanctions that the ISU intended to impose on individual skaters, including 5-years and life time bans on competing in official skating competitions, were disproportional in view of the average length of a skater's professional career.<sup>156</sup> FIFA and UEFA announced that clubs and players that intent to participate in the ESL would not be allowed to compete in FIFA competitions, i.e., the FIFA World Cup, and UEFA club competitions.<sup>157</sup> Nevertheless, the exact scope of the sanctions remains unclear, as it has not been disclosed how long clubs and players will be banned from partaking in official FIFA and UEFA competitions. Contrary to the *ISU*-case, FIFA and UEFA thus intend to sanction both clubs and players. Though there are considerable differences between the professional career of a skater and a football player, the current threat of sanctions by FIFA and UEFA is unlikely to be proportional. Whilst the length of a skater's career is similar to that of a football player, skaters are financially more dependent on world cup tournaments than football

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<sup>152</sup> *International Skating Union v European Commission* (n 23) [118-119].

<sup>153</sup> Commission Staff Working Document (n 90) Annex 1 [2.1.5].

<sup>154</sup> Article 49(3) UEFA Statutes (2020).

<sup>155</sup> Pijetlovic (n 4) 73-74.

<sup>156</sup> *International Skating Union v European Commission* (n 23) [93-94].

<sup>157</sup> UEFA (n 45).

players, who earn the majority of their income through club competitions.<sup>158</sup> Ultimately, the FDC and UDR mentioned earlier, leave the respective disciplinary committees a rather broad margin of discretion when deciding on what sanction to impose on a player. Lacking any clear guidelines or procedural rules pertaining to the disciplinary measures to be imposed on players joining a break-away competition, FIFA and UEFA can effectively expulse players from the footballing pyramid indefinitely.<sup>159</sup>

Alternatively, the analysis of the proportionality of the threat of sanctions on clubs might have a different character. Clubs that are banned from competing in UEFA club competitions will not be impacted in the same way as individual players that are expelled from the football pyramid, as these clubs intend to join a break-away competition that is aimed at replacing the UEFA club competitions. Moreover, by joining the alternative competition, the clubs are not likely to be financially impacted by the sanctions, as revenues generated by the break-away competition will compensate the financial impact of a ban on playing in UEFA club competitions. Therefore, it appears that clubs are not prevented from withdrawing from the incumbent football pyramid and join a break-away competition such as the ESL.<sup>160</sup>

## **5.5. Anticipation of CJEU Judgement – Can the ESL Formation be Blocked**

As mentioned in Chapter 2.3., the Madrid commercial court referred six preliminary questions to the CJEU, with the second, third and fifth question being most prevalent for this analysis. To reiterate, the second question states whether Article 101 TFEU must be interpreted as meaning that it prohibits FIFA and UEFA from requiring in their statutes the prior approval of those entities, which have conferred on themselves the exclusive power to organize or give permission for international competitions in Europe, in order for a third-party entity to create a new European club competition like the ESL, in particular where no regulated procedure, based on objective, transparent, reviewable and non-discriminatory criteria, exists, and taking into account the possible conflict of interests affecting FIFA and UEFA.<sup>161</sup> Meanwhile the third question asks whether Articles 101 and/or 102 TFEU must be interpreted as meaning that they prohibit conduct by FIFA, UEFA, their member associations and/or national leagues which consists of the threat to adopt sanctions against clubs participating in the ESL and/or their players. If sanctions are adopted involving exclusion from competitions or a ban on participating in national team matches, would those sanctions, if they were not based on objective, transparent, reviewable and non-discriminatory criteria, constitute an infringement of these articles.<sup>162</sup>

### **5.5.1 Restrictions on competition**

The analysis of the CJEU will commence by determining whether the *ex-ante* authorization system for the organization of a break-away competition embedded in the statutes and regulations of FIFA and UEFA restrict competition. Article 70(2) of the FIFA Statutes stipulates that the FIFA Council may issue further provisions for the organization of a new club

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<sup>158</sup> Houben, Blockx and Nuyts (n 126).

<sup>159</sup> Ibid.

<sup>160</sup> Robert Parrish and Samuli Miettinen, *The Sporting Exception In European Union Law* (T.M.C. Asser Press 2008) 213.

<sup>161</sup> *Request for a preliminary ruling from the Juzgado de lo Mercantil n.o 17 de Madrid (Spain) lodged on 27 May 2021 — European Super League Company, S.L. v Union of European Football Associations* (n 52). (UEFA) and Fédération Internationale de Football Association (FIFA).

<sup>162</sup> Ibid.

competition, even in case a confederation authorizes the competition. Therefore, FIFA ultimately has the possibility to deny authorization to any proposed break-away competition. UEFA, on the other hand, requires ex-ante authorization for the formation of any international club competition that is to be played on UEFA territory through Article 49(3) of its statutes. However, UEFA does not provide any criteria that need to be met by a third-party organizer, nor any procedural rules that guide the application for authorization. As a result, UEFA can prohibit the formation of any European break-away competition – *ab initio*. Unlike the ISU, UEFA does not provide any authorization procedure, nor does it provide objective, clearly-defined, transparent, non-discriminatory and reviewable criteria based on which a third-party application will be decided on. This leads to the conclusion that the current Article 49 of the UEFA Statutes does not comply with EU competition law by restricting competition in the sense of Article 101(1) TFEU. Especially the fact that UEFA has the sole discretion to prohibit the formation of any European club competition, without providing authorization criteria, is hard to reconcile with the legal framework on the break-away competitions.<sup>163</sup> It is likely that the CJEU will rule that the FIFA Statutes also foreclose competition as it has omitted to introduce any authorization criteria itself, whilst it does have the discretion to prohibit any newly formed competition. Additionally, EU competition law may also be infringed by the threat of sanctions of FIFA and UEFA on clubs and players. These sanctions can deter clubs and players from joining a break-away competition and through a ban on playing competitive football, FIFA and UEFA can deny a player the opportunity to earn an income.

### 5.5.2. Legitimate Objectives

The established case law of the EU has confirmed that international sports associations may invoke the protection of sporting integrity as a legitimate objective to restrict competition.<sup>164</sup> FIFA and UEFA have mainly contended that the ESL endangers the financial solidarity mechanism of football. Moreover, the ESL contradicts the European Sports model through which teams can promote and relegate based on sporting merits. These arguments can constitute legitimate objectives to restrict competition, as was confirmed in the *ISU*-case and EU policy documents such as the 2007 White Paper on Sport. Moreover, the protection of the associations' economic interests has also been confirmed to be a legitimate objective to restrict competition.<sup>165</sup>

### 5.5.3. Proportionality

Even if the CJEU rules that FIFA and UEFA have legitimate objective to restrict competition, these restrictions must be strictly proportional. FIFA and UEFA restrict competition by requiring any third party to be granted *ex-ante* authorization before forming a new club competition and threatening to impose disciplinary measures on club and athletes. As explained in the foregoing, neither FIFA or UEFA has established any pre-determined authorization criteria or procedures. So, whilst the protection of sporting integrity itself is a legitimate objective to restrict competition, the absolute competence of FIFA and UEFA to prohibit the formation of any break-away competition without providing objective, clearly-defined, transparent, non-discriminatory and reviewable criteria is disproportional. Sporting integrity can be protected through the establishment of a pre-defined *ex-ante* authorization procedure in which the elements of the sport that FIFA and UEFA seek to protect are embedded. For example, the requirement that any break-away competition must not conflict with the current

<sup>163</sup> Houben, Blockx and Nuyts (n 126).

<sup>164</sup> See *inter alia*: *Meca-Medina v Commission* (n 84) [43].

<sup>165</sup> *International Skating Union v European Commission* (n 23) [112-114].

financial solidarity mechanism embedded in an authorization procedure, is likely to be a proportional restriction of competition based on a legitimate objective to do so.

Moreover, the threat of sanctions on players is likely to be disproportional. FIFA and UEFA have not disclosed how long they intent to ban players from competing in their competitions nor have they published any guidelines pertaining to the disciplinary measures to be imposed on players joining a break-away competition. As a result, based on the current disciplinary regulations, FIFA and UEFA can effectively expulse players from the footballing pyramid indefinitely. Hence, the severe *a priori* threat of sanctions on players is unlikely to be proportional, as FIFA and UEFA can effectively deny players the opportunity to earn an income through these sanctions.<sup>166</sup>

#### **5.5.4. Article 101(3) TFEU Justifications**

Any infringement of Article 101(1) TFEU can be justified on the basis of the efficiency considerations of Article 101(3) TFEU.<sup>167</sup> In the *ISU*-case, the Commission had rejected the possibility of justifications as it did not identify any efficiencies. Rather, the authorization system limited the consumer's choice as they were deprived of a wider choice of competitions offered.<sup>168</sup> Based on the reasoning of the Commission in the *ISU*-case it will be futile for FIFA and UEFA to demonstrate that their *ab initio* prohibition creates any efficiencies that might serve as a valid justification to restrict competition in accordance with Article 101(3) TFEU, as the formation of the ESL would provide consumers with an additional football competition, diversifying the supply of live football matches.

#### **5.5.5. Anticipated Judgement**

Taking the foregoing into account, the regulatory framework of FIFA and UEFA violates Article 101(1) TFEU by distorting competition by both object and effect. The requirement, that any third party that intends to form an international club competition is to be granted prior authorization, without providing objective, transparent, reviewable and non-discriminatory criteria, forecloses competition. It denies any undertaking that intends to form such a competition effective market entry, as FIFA and UEFA have the competence to deny any application based on the current authorization system. Whilst the protection of sporting integrity is a legitimate objective to restrict competition, the above-mentioned measures, taken to protect this objective, are disproportional. FIFA and UEFA could have introduced measures that have a less anti-competitive effect. Finally, the possible justifications of Article 101(3) are not applicable as the current restrictions of competition do not lead to any efficiencies. Hence, it must be concluded that FIFA and UEFA currently infringe EU competition law through their *ex-ante* authorization system for the organization of an international club competition and the threat of sanctions on any player that joins such a competition.

The preliminary questions referring to Article 102 TFEU therefore do not have to be answered. As from the legal framework established in the *ISU*-case it can already be concluded that the regulatory framework of the FIFA and UEFA currently unlawfully restrict competition. A possible caveat regarding the ESL is that a closed competition format, such as the ESL, may foreclose EU competition law itself, through its closed competition format.<sup>169</sup> However, an analysis of this aspect lays outside the scope of this thesis.

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<sup>166</sup> Vermeersch (n 24).

<sup>167</sup> Houben, Blockx and Nuyts (n 126).

<sup>168</sup> *International Skating Union's Eligibility rules* (n 96) [266].

<sup>169</sup> See *inter alia*: Houben, Blockx and Nuyts (n 126); Dwayne Bach et al., 'The Super League And Its Related Issues Under EU Competition Law - Kluwer Competition Law Blog' (*Kluwer Competition Law Blog*, 2021)

This chapter has sought to answer the question whether the regulatory framework of FIFA and UEFA pertaining to the formation of break-away competitions is currently in compliance with EU competition law, the answer to which is negative. The regulatory framework of both associations violates the legal rule established in the *ISU*-case and therefore infringe Article 101(1) TFEU. The required *ex-ante* authorization for third parties intending to organize an international club competition forecloses competition, as FIFA and UEFA do not provide any criteria or procedures which apply to an application for said authorization. Hence, the CJEU is anticipated to rule that FIFA and UEFA may not prohibit the ESL – *a priori*. In the following chapter it will be established whether the formation of the ESL is still viable and will provide some interim concluding remarks.

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<<http://competitionlawblog.kluwercompetitionlaw.com/2021/04/22/the-super-league-and-its-related-issues-under-eu-competition-law/>> accessed 10 May 2022; Vermeersch (n 24).

## Chapter 6 – Interim Conclusions – the ESL Dead or Alive?

Though many believe the ESL has had the lifespan of a fly, the power struggle between the elite European football clubs and FIFA and UEFA is far from over. The judgment of the CJEU pertaining to the aforementioned preliminary questions, which is expected to be delivered early in 2023, will set a long-awaited precedent on the formation of a private international club competition in football. The previous chapter has provided an anticipated ruling on the proceedings, in which it was concluded that the current regulatory framework of FIFA and UEFA forecloses competition. As a result, based on the current framework, FIFA and UEFA may not prohibit the formation of an international break-away competition, as the authorization system is not based on objective criteria.

The question that however remains unanswered is whether the ESL, as it was initially announced in April 2020 is still alive. As explained in Chapter 2.1., nine of the original twelve clubs abandoned the project within days when it came under heavy bombardment.<sup>170</sup> This lead many to believe that the ESL-project is indeed dead and buried. Yet, three clubs have pledged loyalty to the formation of a new European club competition that is to compete with the UCL. They firmly believe that European football is in dire straits and it is in need of deep and profound reforms; hence, they have remained involved in the legal proceedings currently pending.<sup>171</sup> Nonetheless, the remaining protagonists recently suffered a substantial setback when the Madrid Commercial Court lifted the preliminary injunction granted by the same court in April 2021 which prohibited UEFA and FIFA from imposing sanctions on the clubs that intended to join the ESL.<sup>172</sup>

Therefore, in anticipation of the judgment of the CJEU, the conclusion is that within the current regulatory framework of FIFA and UEFA cannot prohibit the formation of an international break-away competition – *ab initio*. The *ex-ante* authorization system which is not based on any objective criteria infringes EU competition law and in particular Article 101 TFEU. In the opinion of the author the CJEU is expected to rule that the current regulatory frameworks of FIFA and UEFA infringe EU competition law. However, the CJEU is not expected to rule whether the formation of the ESL is to be allowed; rather, FIFA and UEFA are to be ordered to alter their regulations in order to comply with EU competition law, forcing FIFA and UEFA to implement a coherent pre-defined authorization system based on which any application for the organization of a third-party organization will be decided upon.

Given that almost all of European football has turned their backs on the ESL project, it is unlikely that the ESL, in its current format, will ever see the light of day. Nevertheless, the aspiration to form a new club competition is very much alive. Sports associations can thus not prohibit the formation of an international break-away competition from the outset. It can therefore be concluded that external EU law, applicable to sports associations, in principle outweighs the internal regulations of the associations. Nevertheless, the fact that sports associations may not *ab initio* prohibit the formation of a break-away competition does not create an absolute right for organizations such as the ESL to form a private competition. The legal framework should be interpreted as allowing sports associations to introduce regulatory

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<sup>170</sup> Ahmed (n 36).

<sup>171</sup> Ian Johnston and Samuel Agini, 'Top Football Executives Attack Plans To Revive European Super League' (*Financial Times*, 2022) <<https://www.ft.com/content/f2ecab33-14bb-46d5-9d90-c3fbfe7a68fd>> accessed 10 May 2022.

<sup>172</sup> Juzgado de lo Mercantil nº 17 de Madrid - Procedimiento: Pieza de Medidas Cautelares 150/2021 – 0001 *European Super League Company S.L. v. FIFA & UEFA*.

limitations for the formation of break-away competitions, as long as these limitations aim to protect the legitimate objectives of the association and are proportional to achieving those objectives.

Having provided the European Legal framework, this thesis will now turn to a domestic manifestation of a break-away competition. The desire to reform professional football also exists on a national level, as is exemplified by the proposed formation of the NL-League in the Netherlands. The legal framework on the formation of a break-away competition may thus differ substantially, as EU law does not impact the analysis to the same extent. Therefore, the following chapters will provide a legal analysis of the proposed formation of the NL-League, with a particular focus on Dutch corporate and association law. Rather than focusing on the competition law aspects this analysis will concentrate on how a private competition can be structured from a corporate law point of view, and what possibilities a private football competition has to retain ties to the football pyramid.

## Chapter 7 – Current Legal Structures of the KNVB

### **7.1. The NL-League Revisited**

#### **7.1.1. The NL-League Announcement**

In June 2021, the Eredivisie Commanditaire Vennootschap (ECV) and Coöperatie Eerste Divisie (CED) released a statement which stipulated that they will be merging into one entity, the NL-League, which will promote the collective interests of all Dutch professional football clubs as of 2025.<sup>173</sup> Thereby aiming to organize the Dutch professional football competitions outside the confines of the KNVB. The ECV and CED are the advocating entities of respectively the Eredivisie and Eerste Divisie, the only two professional football competitions in the Netherlands. Together they are in charge of the commercial exploitation of these two competitions, albeit whilst being tied down by the statutes and regulations of the KNVB. In the name of more sporting and commercial successes, 30 of the 34 professional football clubs, distributed over the Eredivisie and Eerste Divisie publicly supported the initiative.<sup>174</sup> Whilst a mere merger between the advocating corporations of professional football clubs is not groundbreaking in itself, the NL-League formation will have profound consequences for the organization of professional football in the Netherlands.

The aim of the NL-League is to structurally elevate the level of Dutch professional football to a higher level and bring together the various aspects that directly relate to the commercial exploitation of professional football. The NL-League will be comprised of four competitions, the Eredivisie and Eerste Divisie, being the two professional men's competitions, the Eredivisie Vrouwen, the women's competition and the E-Divisie which focusses on e-sports. By bundling all professional competitions in one entity it is claimed that the NL-League will be better fit to exploit commercial opportunities, especially in the streaming, broadcasting rights, e-sports and gambling markets.<sup>175</sup> Better commercial exploitation of professional football and the diversification of revenue streams is therefore a common thread in the NL-League plans.

#### **7.1.2. Governance Model**

Besides the sporting and commercial incentives, the current governance model of professional football of the KNVB also lies at the root of the NL-League initiative. Clubs are faced with rather rigid decision-making procedures, which offer them rather little actual influence. Implementing far-reaching changes to Dutch professional football is therefore quite onerous, as uncooperative minorities can effortlessly block any unwanted changes. Moreover, clubs have also been frustrated by decisions taken by the KNVB in light of the Covid-19 pandemic. The KNVB decided not to complete the 2019/2020 seasons of both the Eredivisie and Eerste Divisie, not to crown a champion and not enforce the ordinary promotion/relegation standards after the competitions had been suspended in March 2020, leaving clubs disillusioned. The decisions of the KNVB lead to interim proceedings in front of court in order to nullify the decisions taken, which turned out to be unsuccessful.<sup>176</sup>

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<sup>173</sup> 'Eredivisie En Keuken Kampioen Divisie Samen!' (*Eredivisie.nl*, 2021)

<<https://eredivisie.nl/nieuws/eredivisie-en-keuken-kampioen-divisie-samen-n/>> accessed 20 January 2022.

<sup>174</sup> Achmed Majid, 'Het Betaalde Voetbal Stevent Af Op Een Bestuurlijke Revolutie' (*Financieel Dagblad*, 2021) <<https://fd.nl/economie-politiek/1389837/het-betaalde-voetbal-stevent-af-op-een-bestuurlijke-revolutie>> accessed 20 January 2022.

<sup>175</sup> Iwan van Duren, Freek Jansen and Marc Timmer, 'Een Duik In De Plannen Van De NL League: Meer Punten Én Munten' (*VI*, 2021) <<https://www.vi.nl/pro/een-duik-in-de-plannen-van-de-nl-league-meer-punten-en-munten>> accessed 20 January 2022.

<sup>176</sup> Rb. Midden-Nederland 14 May 2020, ECLI:NL:RBMN:2020:1841 (*SC Cambuur, de Graafschap/KNVB*).



Currently, the KNVB is the competent body to regulate everything that pertains to football in the Netherlands, both on amateur and professional level. The NL-League seeks to pry itself loose from the auspices of the KNVB and become a largely independent entity. By having more authority over the sporting and commercial aspects of professional football substantial opportunities for football clubs are created to structurally increase revenues. Currently, the professional football market in the Netherlands grosses roughly €600 million on an annual basis, the NL-League aims to increase to over €700 million after its formation.<sup>177</sup> Therefore, the ratios behind the formation of the NL-League are clear, structural higher revenues through better commercial exploitation means that Dutch professional football clubs are better suited to compete with foreign clubs for sporting successes.

The clubs thus deem that the KNVB is not the right entity to exert decisive control over professional football. Rather they feel that the KNVB should take on a facilitating role, by taking charge over the football regulatory side instead of the commercial aspects. To a limited extent, the KNVB has already taken granted the clubs a margin of discretion pertaining to the commercial exploitation of football through the private companies ECV and CED. However, as will be covered in detail in the following, these companies are still bound by the regulatory framework of the KNVB. As a result, introducing far-reaching changes to the organizational structure is rather cumbersome as there are many procedural rules that have to be adhered to. Moreover, as mentioned in the foregoing, the NL-League intends to bring together various aspects that are associated with the exploitation of professional football such as e-sports and gambling. Yet, these aspects cannot reside within the KNVB as they fall outside of its statutory goal. The *status quo* of professional football in the Netherlands is thus that various elements pertaining to its exploitation are fragmented, resulting in an intricate web of regulations that are applicable. The NL-League intends to bundle all these aspects together in order to allow for a more efficient regulations and effective exploitation of professional club football.

### 7.1.3. The NL-League & KNVB

For the NL-League to succeed the current structures of professional football have to be restructured. The envisaged new organizational structure leaves ample room for the KNVB, which will thus largely lose its influence over the exploitation of Dutch professional football. Nonetheless, the NL-League cannot operate without the cooperation of the KNVB. Within the international football pyramid, the KNVB is the designated member of the international federations FIFA and UEFA.<sup>178</sup> The NL-League *inter alia* needs to be affiliated to these associations in order for Dutch professional football clubs to compete in international competitions such as the UCL.<sup>179</sup> Moreover, it is unlikely that the NL-League will be well-suited to manage certain aspects of professional football, such as disciplinary proceedings. Therefore, whilst the goal of the NL-League is to break-away from the KNVB, it will need to retain ties to the KNVB for the NL-League to function properly.

The establishment of the NL-League would therefore bring about a major restructuring of the KNVB, resulting in a substantial loss over the exploitation of professional football. This raises the question why the KNVB would cooperate with the NL-League. Though the intended restructuring means the KNVB will have to take a step back from the day-to-day exploitation of professional football, it is quite possible that the KNVB can benefit from the establishment of the NL-League. Better commercial exploitation and structural higher revenues may

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<sup>177</sup> Van Duren et al (n 175).

<sup>178</sup> Article 11(1) FIFA Statutes (2021); Article 5(1) UEFA Statutes (2020).

<sup>179</sup> Article 5(1) UEFA Club Licensing and Financial Fair Play Regulations (2018).

constitute an increased income for the KNVB through the financial solidarity mechanisms that characterize professional football. This notion will be covered in greater detail in Chapter 9.3.2. where the importance of this concept for the NL-League will be explained and in Chapter 10.2., in which a comparison is made to the EPL, a competition that has succeeded in structurally elevating revenues through private exploitation.

## 7.2. The KNVB as an Association Under Dutch Law

The KNVB is the largest sports association of the Netherlands with about 1.2 million members.<sup>180</sup> Whilst the KNVB has opted to refer to itself as a federation (*bond*)<sup>181</sup>, it still qualifies as an association, as federations are not a legal entity recognized by Dutch law. Rather, federations are deemed to be a manifestation of an association.<sup>182</sup> Associations are deeply rooted in the Dutch legal tradition, the freedom of association has been a fundamental constitutional right since 1848 and is still codified in Article 8 of the Dutch Constitution.<sup>183</sup> This freedom of association is profound and can only be lawfully restricted if the association endangers public order and/or policy in accordance with Article 2:20 DCC. Moreover, associations are a recognized legal entity under Article 2:3 DCC, hence associations are deemed to be an autonomous bearer of rights and obligations that can validly enter into contractual relations. Internally associations are governed by its statutes and regulations, which are objective rights.<sup>184</sup> As a result, those who join any given association are subject to its legally valid statutes and regulations without prejudice; one cannot opt to become a member of an association but be exempted from conforming with its internal governance structures.<sup>185</sup> In principle, associations are characterized by a membership structure and the corresponding voting rights that are *de facto* attached to the membership of an association. Through the general assembly of members, members can use their voting rights to influence the decision-making of the association. These elementary characteristics are still very recognizable in traditional associations such as a local football association. However, within large associations such as the KNVB or FIFA, the core characteristics of an association can become overshadowed, resulting in associations that coincide more with the distinguishing features of a corporation, as will be explained in more detail in the following.<sup>186</sup>

The KNVB thus classifies as an association under Dutch law, as is also stated in Article 1(1) of the statutes. It has the statutory goal to promote football in the broadest sense, which is *inter alia* achieved through the establishment of regulations, its membership of international associations UEFA and FIFA and the organization of football competitions.<sup>187</sup> Membership of the KNVB is defined in a rather broad sense, which is needed in order to fit the dual structure encompassing professional and amateur football. A member can be any natural or legal person which takes part in any football competition organized by the KNVB.<sup>188</sup> Hence, both associations, amateur or professional, and natural persons who are member of a football club

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<sup>180</sup> Eva Moison, 'De Verenigingsstructuur Van De Voetbalbonden' (2021) 2021/55 Ondernemingsrecht 348.

<sup>181</sup> For the sake of clarity this thesis only uses the term association rather than federation.

<sup>182</sup> P.L. Dijk and T.J. van der Ploeg, *Van Vereniging En Stichting, Coöperatie En Onderlinge Waarborgmaatschappij* (8th edn, Wolters Kluwer 2021) 372.

<sup>183</sup> Ibid 6.

<sup>184</sup> S.G.M. Buys, 'Statuten, Reglementen En Besluiten Beschouwen Als Algemene Voorwaarden?' (1992) 6/77 *TVVS. Maandblad voor Ondernemingsrecht en rechtspersonen*.

<sup>185</sup> Dijk and van der Ploeg (n 182) 83.

<sup>186</sup> Moison (n 180).

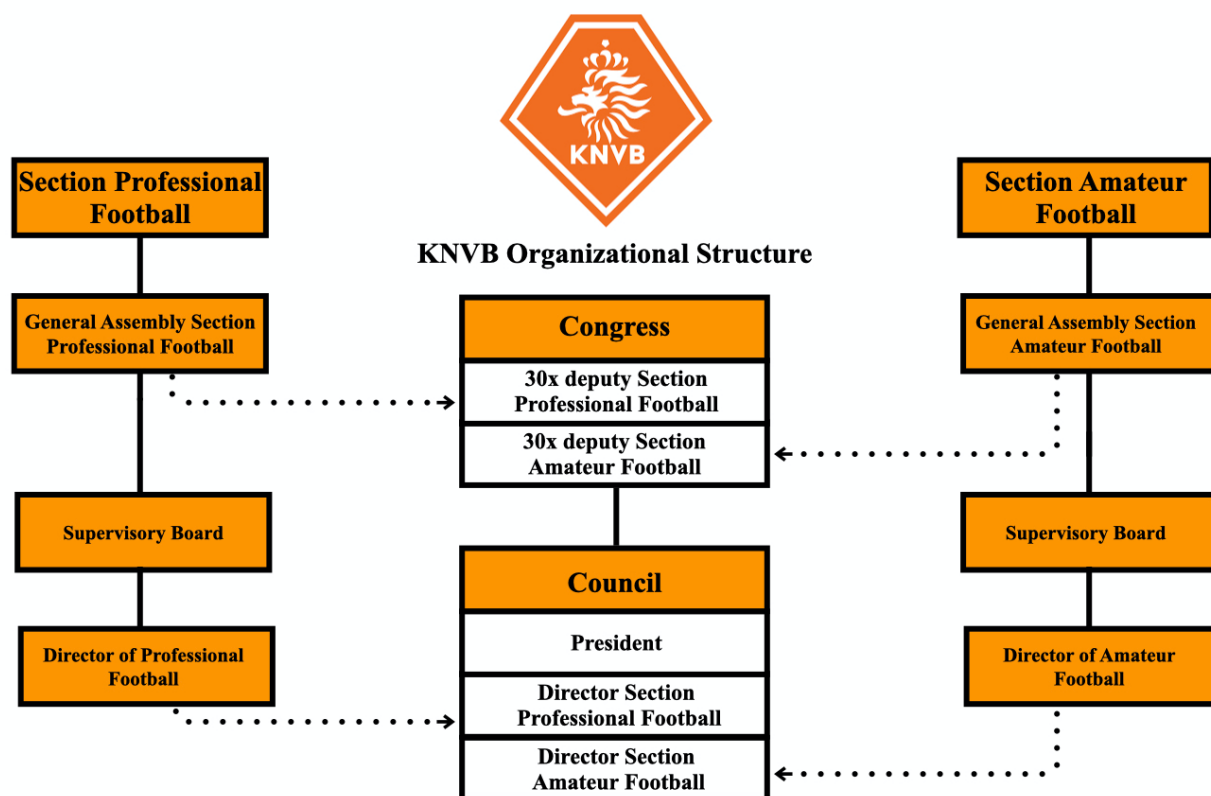
<sup>187</sup> Article 4 KNVB Statutes (2021).

<sup>188</sup> Article 6 KNVB Statutes (2021).

are members of the KNVB. This broad definition is used in order to ensure that all parties involved in Dutch football are bound by the KNVB Statutes and regulations.<sup>189</sup>

The KNVB is thus characterized by a dual governance model, for the sake of which multiple governing and supervisory bodies have been established. The KNVB has two sections, the amateur football section and the professional football section, which both have their own board and regulations.<sup>190</sup> Both sections operate relatively autonomous within their own scope. Consequently, both have their own general assembly and supervisory boards.<sup>191</sup> The overarching governing body is the *Bondsbestuur* (Council) which is formed by the KNVB President, the chairman of the section amateur football and the chairman of the section professional football.<sup>192</sup> The highest legislative body of the KNVB is the *Bondsvergadering* (Congress), which functions as the general assembly. However, contrary to the traditional notion of the general assembly in which every member can represent themselves, KNVB members are represented indirectly in Congress by deputies of the section they reside in. The Congress is formed by 60 deputies, 30 from both sections, which in turn represent all members of the KNVB.<sup>193</sup> This deviation of the traditional notion of general assemblies has been made in order to keep the Congress manageable. A general assembly, in which 1.2 million members want participate is of course unworkable. Therefore, the Dutch legislator introduced Article 2:39(1) DCC which makes it possible to have members being represented by deputies in the general assembly. The following table shows a simplified overview of the organizational structure of the KNVB.

Figure 2: Overview Organizational Structure KNVB



<sup>189</sup> Moison (n 180) 351.

<sup>190</sup> Article 18 KNVB Statutes (2021).

<sup>191</sup> See *inter alia* Articles 10 and 18 KNVB Reglement Betaald Voetbal (2021).

<sup>192</sup> Article 12 KNVB Statutes (2021).

<sup>193</sup> Article 20 KNVB Statutes (2021).

### 7.3. Section Professional Football

As stated before, the KNVB has a dual structure as a result of which both professional football and amateur football reside in an own section. These sections have to be regarded as a department of the association without individual legal personality in accordance with Article 2:41a DCC.<sup>194</sup> A department can be defined as an organizational unit within the main association to which members are assigned.<sup>195</sup> The legislator has opted to leave departments within associations virtually unregulated, granting associations a considerable amount of freedom to set up departments to fit their intended purpose. Departments are most often established for the association to become better suited and more efficient in meeting the statutory goal of the association.<sup>196</sup> For the KNVB it is also easier to reach its goal of promoting football if a separation is made between amateur and professional football as both aspects differ considerably in practice. For the purpose of this thesis the section professional football will be studied in greater detail through the following sections, in order to unveil the current governance of professional football within the Netherlands.

#### 7.3.1. Members

The members of the professional football section are the 34 clubs of which their first team plays in either of the two professional football competitions organized by the KNVB, and any natural person that has been admitted by the section board.<sup>197</sup> The natural persons admitted are *inter alia* the players and coaching staff employed by professional football clubs.<sup>198</sup> Remarkably, the highest competitions of women's football in the Netherlands, the Vrouwen Eredivisie, currently does not reside within the professional football section, but rather in the amateur section.<sup>199</sup> One of the reasons that the highest level of women's football is still regarded as amateur sport is that the willingness of clubs to invest structurally in women's football is too low.<sup>200</sup> The creation of the NL-League would result in the Vrouwen Eredivisie to reside within the same organization as men's professional football.

For professional football players active in the Netherlands membership of the KNVB is not voluntary; the KNVB has *de facto* a monopoly on the organization of professional football in the Netherlands. This monopolistic position is partly due to the international football pyramid discussed in paragraph 2.4., this is further exemplified by the FIFA Statutes which designate membership to one national football association which bears responsibility for the organization of football in that country.<sup>201</sup> Professional football players thus have no option than to submit to the statutes and regulations of the KNVB.

#### 7.3.2. Governance

Similar to the main association of the KNVB, the general assembly professional football is the legislative body of the section professional football. The general assembly professional football does not allow for every member to directly represent themselves; rather, a partial system of indirect representation through deputies is administered. All clubs that reside in the section are

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<sup>194</sup> See *inter alia* Article 1(2) KNVB Reglement Betaald Voetbal (2021).

<sup>195</sup> Dijk and van der Ploeg (n 182) 346.

<sup>196</sup> Ibid 347.

<sup>197</sup> Article 1 KNVB Reglementen Betaald Voetbal (2021).

<sup>198</sup> Moison (n 180) 352.

<sup>199</sup> See *Inter Alia* Article 6(2)(b) KNVB Statutes (2021).

<sup>200</sup> Willem Vissers, 'Officieel Valt Zelfs De Gelauwerde Nationale Vrouwenploeg Onder De Amateursectie Van De KNVB' (*De Volkskrant*, 2020) <<https://www.volkskrant.nl/sport/officieel-valt-zelfs-de-gelauwerde-nationale-vrouwenploeg-onder-de-knvb~bfadce4b/?>> accessed 22 January 2022.

<sup>201</sup> Article 11(1) FIFA Statutes (2021).

directly represented through a delegate. The players of the clubs are indirectly represented by two deputies of the central players council, similarly the coaches are represented through two deputies of the central coach's council. The daily management of the section lies with the professional football board.

### 7.3.3. Affiliated Bodies

The section professional football has several bodies, some of which are solely affiliated to that section, and thus do not perform a function to the KNVB in general and others that serve an over-arching function to the KNVB.<sup>202</sup> A body of an association, lacking any statutory definition, can be defined as an institution, which is tasked with performing a to be specified function pursuant to statutory provisions and/or the associations statutes; granting that body a certain level of decision-making power over the executed tasks.<sup>203</sup> Decisions made by an association body are therefore to be regarded as a decision of the association itself. As a result, a body of an association which is not granted any decision-making power does not meet the legal definition of an association body.

The governing bodies covered in paragraph 7.3.2. are all defined as bodies; additionally, the ECV, CED, disciplinary committees and licensing committee are also considered as bodies of the section. Especially the position of the ECV and CED is interesting to delve deeper into for the purpose of this thesis. The ECV and CED are namely the only two bodies that serve a purpose outside of the KNVB. ECV and CED function as umbrella entities in which all professional clubs are united; all Eredivisie clubs in the ECV and Eerste Divisie clubs in the CED. Most importantly they are tasked with the commercial exploitation and the international marketization of the competitions. Additionally, they are charged with fostering liaisons between professional football clubs and driving innovation for clubs.<sup>204</sup>

The ECV and CED are thus, defined as bodies of the section professional football of the KNVB. But at the same time, they are external legal entities, which also perform functions outside of the KNVB. External legal entities are *de facto* outsiders to the association; however, if these bodies are assigned a statutory function within the association, they are no longer to be considered as an outside legal entity but have rather become an integral part of the association.<sup>205</sup> Nevertheless, when assessing the KNVB Statutes, it becomes apparent that no decision-making authority of either the ECV and/or CED is statutorily embedded. As a result, even though the ECV and CED are named as bodies of the section professional football in Article 2 of the *Reglement Betaald Voetbal*, they cannot be considered as valid bodies of the KNVB according to the legal definition as no decision-making authority is embedded in the KNVB Statutes.

### 7.3.4. Dispute Resolution

Professional football is a dynamic industry where the stakes are high; therefore, an efficient dispute resolution system is needed to settle disciplinary offences. The KNVB has established a disciplinary system in order to settle disputes internally. All conduct or omissions that infringe the statutes, regulations, decisions of a body of the KNVB and all conduct that harms the interests of the KNVB or the game of football in general are subject to the disciplinary system of the KNVB.<sup>206</sup> As professional and amateur football differ substantially, the KNVB has

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<sup>202</sup> Article 2 KNVB Reglement Betaald Voetbal (2021).

<sup>203</sup> Dijk and van der Ploeg (N 182) 103.

<sup>204</sup> 'Eredivisie CV' (*Eredivisie.nl*) <<https://eredivisie.nl/informatie/eredivisie-cv/>> accessed 26 January 2022.

<sup>205</sup> Asser/Maeijer & Kroeze 2-I\* 2015/186.

<sup>206</sup> Article 8 KNVB Statutes (2021).

established a separate disciplinary system for both sections, which are subject to their own regulations.<sup>207</sup> The monopolistic position the KNVB has on professional football, discussed in paragraph 7.3.1. results in professional football players being forced submit to the disciplinary system of the KNVB. The foundation of the disciplinary system is therefore membership of the KNVB, which is a prerequisite for playing professional football.<sup>208</sup> The disciplinary board and board of appeal can impose far-reaching sanctions on members, including a reprimand, fines, suspensions and as *ultimum remedium* expulsion.

#### **7.4. The status quo of professional football in the Netherlands – A legal quagmire**

Professional football in the Netherlands is characterized by an association structure, in which the KNVB has full and final authority over everything that is football related. Parties involved with professional football are, however, getting increasingly frustrated by this status quo as the KNVB is deemed unfit for the optimal exploitation of professional football. The proposed reform of Dutch professional football is the result of this ever-growing thwarting. As the KNVB is an association, in which all aspects of professional and amateur football reside, the governance structures have become rather complex and rigid. The dual structure, complemented by a convolution of different bodies, have made the KNVB into maze of governance structures. In paragraph 7.3., a closer look has been taken at the section professional football of the KNVB in which some peculiarities were uncovered. Especially the position of the ECV and CED within the KNVB is remarkable. Within the *Reglement Betaald Voetbal* they are defined as bodies of that section; yet, they do not meet the legal definition of an association body as no decision-making authority has been conferred upon them. At the same time the ECV and CED perform a crucial function to Dutch professional football, by being tasked with the commercial exploitation of the sport; this however, must be done within the regulatory framework of the KNVB. This bondage to the KNVB limits the freedom of movement of the ECV and CED considerably, which has resulted in a tensed relation between them and the KNVB. If the ECV and CED were to pry themselves loose from the KNVB the commercial success of professional football can be managed within a less complicated structure, which at the same time gives the parties involved more actual authority.

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<sup>207</sup> Article 9(1)(a) KNVB Statutes (2021).

<sup>208</sup> Diss. A. Wassing, *Het Tuchtrecht van Het Publiekvoetbal* (1978) 100.

## Chapter 8 – Potential Structure of the NL-League

### **8.1. The NL-League Company**

In order to establish the NL-League, it is imperative that the requisite corporate structure is constructed. To a certain extent this can be achieved through the current organizational structure of the ECV and CED; nevertheless, upon closer inspection of both the ECV and CED's current structures it becomes apparent that these are currently not adequate to serve as the foundations of the NL-League. As explained before, both the ECV and CED are private companies incorporated in the Netherlands and established for the purpose of promoting the quality of professional football in the Netherlands.<sup>209</sup> They do this *inter alia* through their integration with the section professional football of the KNVB. Through this affiliation with the KNVB, the ECV and CED can exert an, albeit limited, amount of control over the organization of Dutch professional football.

#### **8.1.1. Current Organizational Structures**

The current organizational structure of the ECV is as follows. The Eredivisie N.V. (ENV) is a limited liability company statutorily seated in Zeist, the Netherlands. The registered capital is divided into 18 shares with a nominal value of € 2,500, - each.<sup>210</sup> These shares are held by the 18 clubs that compete in the Eredivisie; hence, when a club relegates at the end of the season it has to transfer its share in ENV to the club that is promoting from the Eerste Divisie.<sup>211</sup> ENV is in turn the managing certificate holder of the ECV, which is the body affiliated to the professional football section of the KNVB. For the sake of commercialization of broadcasting rights of the Eredivisie, a joint venture was established, Eredivisie Media en Marketing CV. Initially ECV held an 80% stake in the joint venture, but this has diluted down to 35% with the KNVB taking up a minority stake of 5% and broadcasting group Fox Network Group having acquired a majority stake of 51%.<sup>212</sup> These parties do not have a direct stake in Eredivisie Media en Marketing CV. Rather, they are shareholders of the holding company Eredivisie Beheer B.V.<sup>213</sup> Therefore, through ENV, the Eredivisie and the belonging clubs are involved in a number of different corporations. For the sake of this thesis, ECV is the most important entity as it is affiliated directly to the KNVB. The table on the next page shows a schematic overview of the corporate structure of the Eredivisie.

The structure of the CED is somewhat simpler. CED is a cooperative with limited liability. The 20 clubs that are active in the Eerste Divisie are the members of the cooperative.<sup>214</sup> Within the Dutch corporate and association law system the cooperative is situated between the association on the one hand and the limited liability company on the other hand. As a result, the cooperative shares both distinct features with the association and the limited liability company.<sup>215</sup> Structurally a cooperative is similar to an association, with the largest distinction being that cooperatives may distribute profits amongst its members.<sup>216</sup> Therefore, the profits made by the CED can be

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<sup>209</sup> Article 3 Statutes Eredivisie N.V. (2008); Article 3 Statutes Coöperatie Eerste Divisie U.A. (2014).

<sup>210</sup> Article 4(1) Statutes Eredivisie N.V. (2008).

<sup>211</sup> Article 16(1) Statutes Eredivisie N.V. (2008).

<sup>212</sup> Handboek Introductie Betaald Voetbal – Maart 2020 (KNVB Expertise, 2020) 10-11.

<sup>213</sup> Article 4(3) Statutes Eredivisie Beheer B.V. (2020).

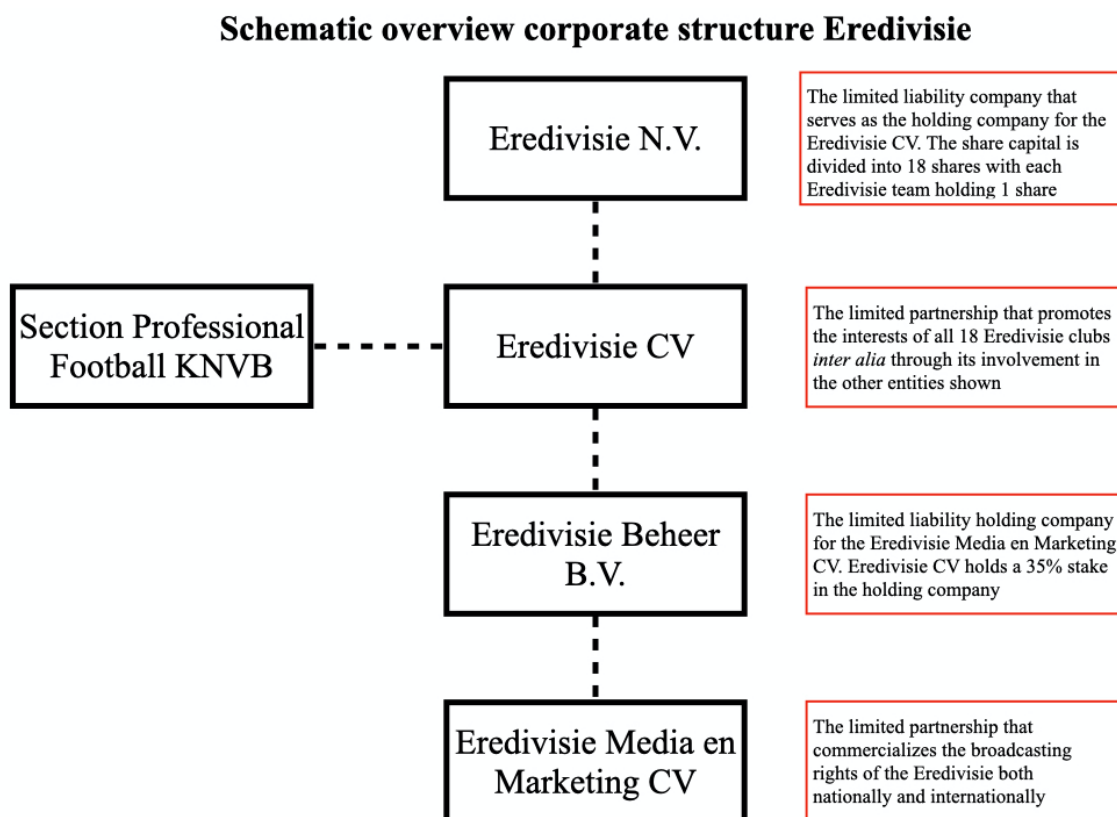
<sup>214</sup> Article 4 Statutes Coöperatie Eerste Divisie U.A. (2014).

<sup>215</sup> J.J.A Hamers, C.A Schwarz and D.F.M.M Zaman, *Handboek Stichting En Vereniging* (3rd edn, Uitgeverij Paris 2018) 349.

<sup>216</sup> See Article 2:53a(1) DCC; Article 2:26(3) DCC.

distributed amongst the member clubs. As discussed earlier, the CED is also a body of the section professional football of the KNVB like the ECV.

Figure 3: Schematic overview corporate structure Eredivisie



## 8.2. Potential NL-League Structures

### 8.2.1. Joint Venture Structure

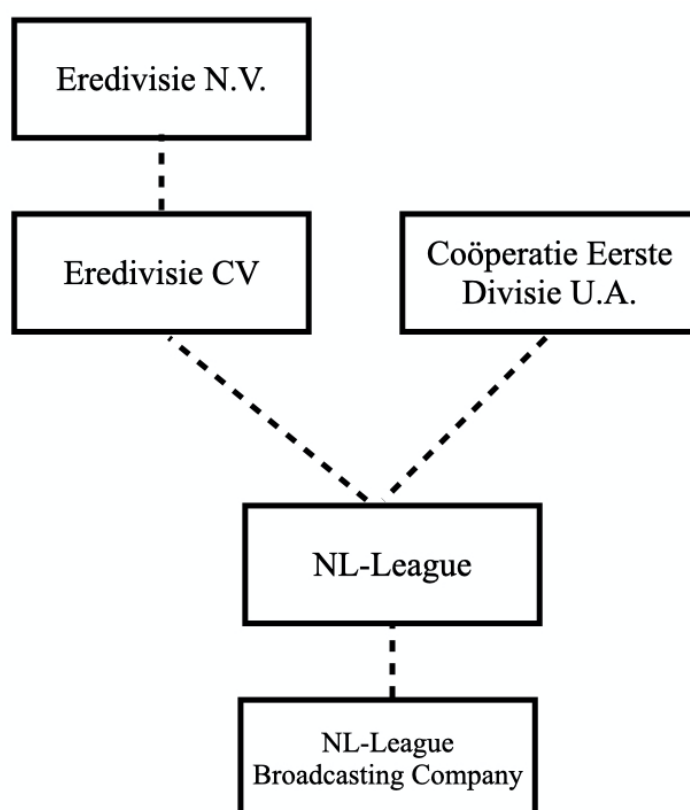
As stated above, it is likely that the NL-League will use the existing corporate structures of Dutch professional football. From the NL-League plans it becomes apparent that both the clubs represented by the ECV and those that are a member of the CED will become part of the NL-League. Hence, the current organizational structures of the ECV and CED will have to be combined. This can be accomplished through the establishment of a joint venture of which the ECV and CED will become the respective joint venture partners. A joint venture can be characterized as a commercial cooperation between two (or more) corporations. The cooperating entities establish a shared company of which they will both become shareholder. The goal of a joint venture is to establish a certain pre-defined goal through the shared pooling of efforts and assets. Therefore, the cooperating corporations share *inter alia* the financial rights and obligations deriving from that company and the voting rights in the general assembly.<sup>217</sup> For the sake of collective commercialization of broadcasting rights, the ECV's shareholdings in Eredivisie Beheer B.V. will have to be transferred to the NL-League company. This transfer of shares allows for the collective commercialization of the broadcasting rights of all competitions affiliated to the NL-League. The joint venture relationship can be divided 50/50 between the ECV and CED; this is however not the most likely scenario. The Eredivisie is by

<sup>217</sup> M.J.G.C. Raaijmakers, *Pitlo Ondernemingsrecht* (2nd edn, Wolters Kluwer 2021) 238.



some considerable margin the more prosperous. The combined revenue of all Eredivisie clubs over the 2020 season was roughly €575 million.<sup>218</sup> In contrast, in 2016 the Eerste Divisie had a total revenue of €61 million.<sup>219</sup> The following table shows a schematic overview of a potential organizational structure of the NL-League. In this scenario the ECV and CED are the only joint venture partners. However, it is not unthinkable that separate companies will be established for all the different competitions that will become part of the NL-League, such as the Eredivisie Vrouwen and E-Divisie. In that case the table below would be supplemented by a further two joint venture partners at the level of the ECV and CED. Moreover, additional corporation for the exploitation of the gambling market may be added within the corporate structure in order to comply with the intricate web of Dutch gambling laws.

**Figure 4: Potential structure of the NL-League using a joint venture structure**



### 8.2.2. Merger

Alternatively, ECV and CED can opt for a triangular merger. In that scenario a new company would be formed, the NL-League Company. Subsequently, ECV and CED would merge into the new entity. This merger is however, not possible to accomplish from the outset. The ECV is a limited partnership whereas the CED is a cooperative. Hence, both the ECV and CED have opted for different legal forms. Article 2:310(1) DCC stipulates that only those entities that have the same legal form can engage in a merger. As a result, a cooperative can merge with a cooperative, but not with a limited partnership.<sup>220</sup> Article 2:18(1) DCC does however provide companies the possibility to converse their legal form. A cooperative can thus converse its legal

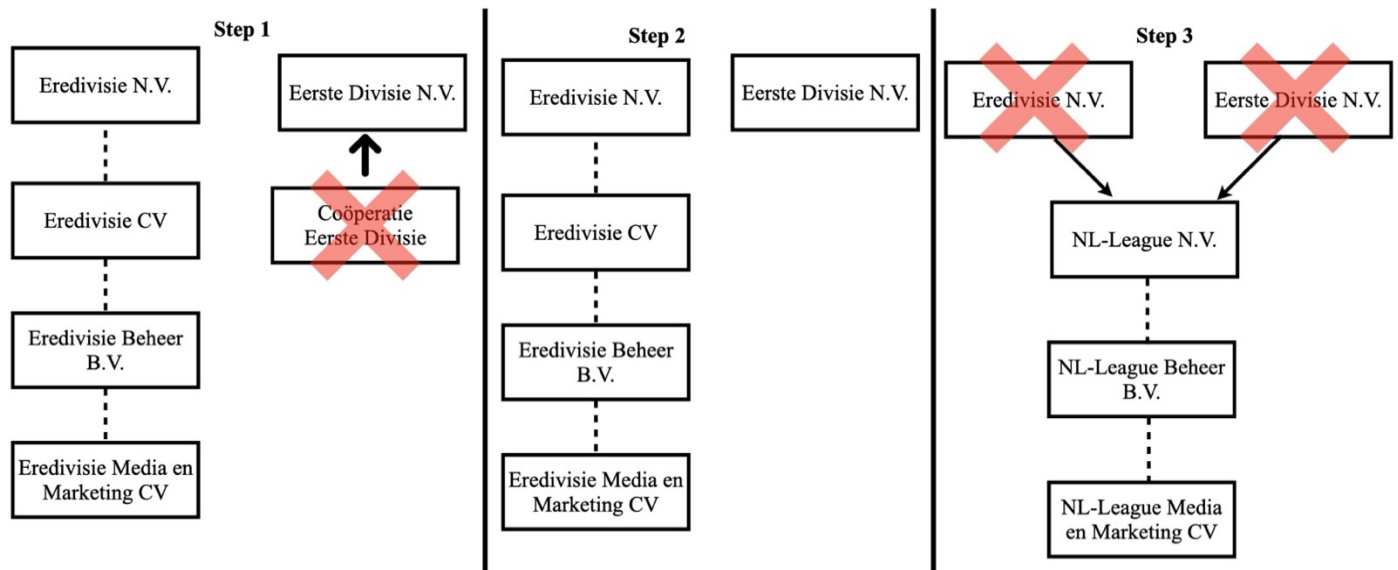
<sup>218</sup> Job Gulikers Willem de Boer, 'SERC Financiële Ranglijst Eredivisie' (SERC 2021).

<sup>219</sup> 'Eredivisie Schrijft Ruim 30 Miljoen Winst' (RTL Nieuws, 2016) <<https://www.rtlnieuws.nl/sport/voetbal/artikel/740186/eredivisie-schrijft-ruim-30-miljoen-winst>> accessed 9 March 2022.

<sup>220</sup> Jan Berend Huizink et al, *Groene Serie Rechtspersonen*, commentaar bij Artikel 2:310 Bw (Wolters Kluwer 2021) [2].

form into a limited liability company, of which the Dutch legislator has introduced two forms, the N.V. and B.V.<sup>221</sup> It is however not possible for a cooperative to converse its legal form into a limited partnership, as this is not one of the legal forms recognized by Article 2:3 DCC. Hence, a merger between ECV and CED is rather cumbersome to accomplish, as both companies would have to converse their legal form. An alternative would be to have the merger take place between ENV and CED. In this scenario CED would first have to converse its legal form into an N.V. in accordance with Article 2:18 in conjunction with Article 2:72 DCC. The following table shows a schematic overview of the different steps that need to be taken in case the ECV and CED would opt for a merger.

**Figure 5: Merger NL-League**



### 8.3. Affiliation to the KNVB

#### 8.3.1. Necessity to Retain Ties to the KNVB

Regardless of the chosen organizational structure, it is imperative that the NL-League, to a certain extent, retains the current ties the ECV and CED have to the KNVB. This is mainly due to the position the KNVB, as the national football association, has within the international football pyramid discussed in chapter 2.4. The KNVB, together with FIFA and UEFA, holds *de facto* a monopolistic position when it comes to the organization of professional football in the Netherlands.<sup>222</sup> The current regulatory framework of the KNVB stipulates *inter alia* that clubs that wish to play football at a professional level need a KNVB license.<sup>223</sup> This license can only be granted to clubs that reside within the professional football section and comply with the *Licentiereglement Betaald Voetbal*. Moreover, national football associations hold the exclusive right to grant UEFA licenses to clubs, which are needed to compete in UEFA club competitions.<sup>224</sup> Therefore, if Dutch professional football clubs want to compete in European club competitions, they need a UEFA license which can only be granted by the KNVB.

<sup>221</sup> Hamers et al. (n 215) 357.

<sup>222</sup> Article 4(2) *KNVB Reglement Betaald Voetbal* (2021).

<sup>223</sup> Article 4(4) *KNVB Licentiereglement Betaald Voetbal* (2021).

<sup>224</sup> See: Article 7(e) UEFA Statutes (2020); Article 5(1) *KNVB Licentiereglement Betaald Voetbal* (2021).

Clearly, it is imperative for the NL-League to retain ties to the KNVB. Especially the current licensing framework of both the KNVB and UEFA does not allow for a domestic break-away competition to terminate all ties with the national football association. Other football competitions in Europe, such as the EPL, have found solutions of achieving a greater sense of independence whilst retaining the required ties to the national football associations. Chapter 10 of this thesis will uncover how the EPL is organized including its ties to the national football association.

### 8.3.2. Extraordinary Membership

The retention of ties can be achieved by establishing the NL-League and subsequently affiliate the NL-League with the KNVB through an extraordinary membership. Extraordinary memberships within associations are not common, though for a cooperative it can be defined as a membership position that does not entail any business transactions between the extraordinary member and the cooperative that corresponds with the legal objective of said cooperative.<sup>225</sup> In the legal literature it has been argued that, as the name suggests, an extraordinary membership is to be regarded as an exceptional status within a cooperative.<sup>226</sup> Similarly it has been contended that an extraordinary membership position is permissible insofar it is in the interest of the cooperative.<sup>227</sup>

Analogous application of this interpretation on associations implies, in the opinion of the author, that an extraordinary member does not actively partake in the realization of the association's statutory objectives and/or activities; rather, the extraordinary member resides on the background of the association. Additionally, the introduction of an extraordinary membership within an association, falls within the scope of association law, as incumbent members are free to introduce different membership variations within the association statutes.<sup>228</sup> Pursuant to Article 2:38(1) DCC, an extraordinary member cannot be deprived of her voting rights. Hence, if the NL-League is granted an extraordinary membership, it will be able to cast minimally one vote in the general assembly. Though the KNVB Statutes may assign more votes to a member if desired.<sup>229</sup> As a result, the extraordinary member also enters into an organizational relationship with the association, as she is assigned voting rights, just as an ordinary member.<sup>230</sup> As mentioned above, extraordinary membership has to be exceptional, as to not dilute the essential membership rights or ordinary members. How many extraordinary members can be admitted is thus dependent on the voting rights that are assigned to said members.<sup>231</sup> In other words, the ordinary members have to remain dominant within the association concerned, as to protect their fundamental rights enshrined in association law.<sup>232</sup>

An extraordinary membership position of the NL-League within the KNVB should thus be theoretically possible. The establishment of the NL-League sees all of the professional club football activities being transferred to a newly established entity; as a result, the NL-League,

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<sup>225</sup> G.J.H. van der Sangen, 'Eigen vermogensvorming bij coöperaties door beleggers. Contradictie of paradox?' (1999) 14 *Ondernemingsrecht* 13.

<sup>226</sup> P.J. Dortmund, Inaugural Oration KUN 1991, 14.

<sup>227</sup> Ibid 19

<sup>228</sup> Diss, G.J.H. van der Sangen, *Rechtskarakter En Financiering Van De Cooperatie: Een Onderzoek Naar De Civielrechtelijke Kenmerken Van De Cooperatie In Het Licht Van De Vraag Of Daaruit Beperkingen Voortvloeien Voor De Financiering Van Haar Ondernemingsactiviteiten* (Tjeenk Willink 1999) 387.

<sup>229</sup> Article 2:38(1) DCC.

<sup>230</sup> Van der Sangen (n 225).

<sup>231</sup> Van der Sangen (n 228).

<sup>232</sup> S.M Bartman and E.J.M. van der Meijden, *Holdingcoöperatie, evolutie of denaturatie?* In: *Strijdige Belangen In Evenwicht* (Wolters-Noordhoff 1992) 29.

the only legal person that has to be granted an extraordinary membership in the KNVB. Therefore, the membership rights of ordinary members are unlikely to be jeopardized.

Practically, however, there are some hurdles before an extraordinary membership can be assigned to the NL-League. As the NL-League is currently not a member of the KNVB, it has to be admitted as a new member. An essential element of an association is that the incumbent members may decide upon the admission of new members, in order to protect the legal order and continuity of the association. The KNVB Statutes have delegated the authority to decide upon admission to the Council.<sup>233</sup> Lacking any procedural rules regulating the admission process the Council has a wide margin of discretion to allow or deny a requested admission. Subsequently, it is worth considering why the KNVB Council would decide to admit the NL-League as an extraordinary member, especially since the professional football clubs themselves have opted to transfer out of the association structure of the KNVB. However, as has been explained in Chapter 7.1.3., all levels of Dutch football, may benefit from a better exploitation of professional football; hence, the KNVB might consider the admission of the NL-League as beneficial to the association and its statutory goals. Though the revenues generated by the NL-League are not accrued by the KNVB *ipso jure*, financial solidarity contributions to the KNVB can ensure that all levels of football in the Netherlands benefits from the improved financial exploitation. The notion of financial solidarity in light of the NL-League will be explained in more detail in Chapter 9.3.2.

For the purpose of the extraordinary membership of the NL-League, a charter with the KNVB will have to be created which would regulate the membership position of the NL-League within the KNVB.<sup>234</sup> The current KNVB Statutes however do not allow for a legal person to become an extraordinary member.<sup>235</sup> Therefore the KNVB Statutes will have to be modified in order to accommodate the extraordinary membership of the NL-League, this will be covered in more detail in chapter 9.3.1. If the extraordinary membership of the NL-League is established, the KNVB would serve as the intermediary between the NL-League and UEFA and FIFA. The KNVB however, would no longer be involved with the other commercial elements of professional football in the Netherlands. All the matters pertaining to that would fall under the auspices of the NL-League. As a result, the NL-League would become a predominantly independent company that exploits professional football in the Netherlands. The extraordinary membership relationship with the KNVB allows for the necessary licenses to be provided to the clubs which allows them to partake in both national and international club competitions.

### 8.3.3. Contra-Affiliation

The NL-League will thus have to remain affiliated to the KNVB for the reasons set out in the above. However, as the KNVB is intended to have a facilitating role in the NL-League, it will have become affiliated to the NL-League as well. Moreover, in line with the statutory goal of the KNVB of promoting the game of football in the broadest sense<sup>236</sup>, it's facilitating role will include the protection of the integrity of the sport by *inter alia* ensuring that the NL-League does not harm the interests of the sport. In other words, the KNVB shall be entitled to a number of special voting rights, in order to protect the sporting integrity of Dutch professional football. This can be achieved by granting the KNVB a so-called golden share in the NL-League. A golden share is a special share in a company that grants the holder special voting rights, which

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<sup>233</sup> Article 6(1)(b) KNVB Statutes (2021).

<sup>234</sup> Wassing (n 208) 93.

<sup>235</sup> Only natural persons can be admitted as an extraordinary member in accordance with Article 6(3) KNVB Statutes (2021).

<sup>236</sup> Article 4(1) KNVB Statutes (2021).

cannot be effectuated by other shareholders.<sup>237</sup> Golden shares as such are not defined in the law; but they are to be considered as priority shares, which are to be regarded as shares to which special rights are attached.<sup>238</sup> In Article 2:92(3) DCC the legislator has introduced an exception to the general rule that all shareholders shall have equal rights.<sup>239</sup> After all, the statutes of a company can assign special voting rights to shares in accordance with Article 2:92(3) DCC. The NL-League statutes can thus assign special voting rights to the KNVB, granting it a right of approval on matters that pertain directly to the regulatory aspects and sporting integrity of football. A similar solution has been introduced in England, where the FA holds a special share in the company that exploits the EPL, as will be explained in greater detail in Chapter 10.1.3.

This chapter has discussed the current organizational structure of the ECV and CED. Subsequently, it was described how both companies can form the NL-League, with either a triangular merger or a joint venture structure being the most straightforward options. Finally, it was described how the NL-League can remain affiliated with the KNVB, which is *inter alia* necessary in order to be able to compete in UEFA club competitions. An extraordinary membership of the NL-League would be the most viable option as this provides the NL-League the possibility to exploit professional football at its sole discretion, whilst at the same time financially contributing to KNVB. Of course, there are many more aspects of the NL-League that have been left outside the scope of this chapter, such as the governance structure of the NL-League company. These aspects are however hard to predict and less relevant for the purpose of this thesis.

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<sup>237</sup> Raaijmakers (n 217) 408.

<sup>238</sup> Diss. Bastiaan Kemp, *Aandeelhoudersverantwoordelijkheid: De Positie en Rol van de Aandeelhouder en Aandeelhoudersvergadering* (Wolters Kluwer, 2015) 369.

<sup>239</sup> Article 2:92(1) DCC.

## Chapter 9 –The NL-League & Dutch Association Law

This chapter will delve into the position the Dutch professional football clubs have within the KNVB as its members and how they can use their rights enshrined in association law and the regulatory framework of the KNVB for the purpose of establishing the NL-League.

### **9.1. Rights of Association Members**

An association consists of its members, this is also true for the KNVB. As stated before, members of the KNVB are all natural and legal persons that engage in playing football, either amateur or professionally, in the Netherlands.<sup>240</sup> The NL-League participants are thus currently members of the KNVB, residing in the professional football section. The membership relation is a quintessential element of associations, as without members an association will be dissolved in accordance with Article 2:19(1)(d) DCC. The legislator has, however, opted not to provide a definition of membership. As a result, the relationship between the association and its members is not set in stone. On the one hand, it can be interpreted as having an institutional character due to the fact that the content of the relationship depends on the internal rules of the association.<sup>241</sup> On the other hand, it can be characterized as being purely contractual, as membership is derived from entering into a contractual relation with the association.<sup>242</sup> Nevertheless, the contractual relationship lapses as soon membership is granted. Thereafter, the membership relation is characterized by the law, association statutes, resolutions and general provision of reasonableness and fairness laid down in Article 2:8 DCC. Through membership a number of rights are obtained, which are either enshrined in law or the association statutes. The most fundamental aspect of membership is the right to vote, either directly or through a deputy.

The voting rights are typically effectuated by the general assembly, which classifies as a body of the association, during the general assembly of members, to which every member is admitted in principle.<sup>243</sup> Associations are characterized by a dualistic structure. Next to the board, the general assembly is the other compulsory decision-making body through which members can exercise their voting rights.<sup>244</sup> The general assembly is often regarded as being the most influential organ of an association, due to the fact that the legislator has granted the general assembly all powers that have not been assigned to another organ through law or the association statutes.<sup>245</sup> Through the general assembly, members have the opportunity to influence the decision-making of the association, amend the statutes and regulations, dismiss and appoint directors and decide upon the admission of new members.<sup>246</sup> Therefore, it can be considered that the general assembly can determine the character and identity of the association.<sup>247</sup> In other words, the general assembly can, through concerted members, *de facto* change the legal order of an association by for example amending the association statutes.

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<sup>240</sup> Article 6(2) KNVB Statutes (2021).

<sup>241</sup> Asser/Van der Grinten & Macijer 2-II\* 1997/269.

<sup>242</sup> Hamers et al. (n 214) 132.

<sup>243</sup> Article 2:38(1) DCC.

<sup>244</sup> Dijk and van der Ploeg (n 182) 191.

<sup>245</sup> Article 2:40(1) DCC.

<sup>246</sup> See *inter alia*: Article 2:37(2)-(6) DCC; Article 2:42(1) DCC.

<sup>247</sup> Dijk and van der Ploeg (n 182) 83.

## 9.2. The NL-League & the Regulatory Framework of the KNVB

Having established the position and rights that members hold within an association, it will now be analyzed how the professional football clubs can utilize their membership of the KNVB and the professional football section in order to facilitate the framework needed for the establishment of the NL-League. First, the elements in the current statutes and regulations of the KNVB that might cause obstacles for the formation of the NL-League will be uncovered. Thereafter the possibilities of eliminating these obstacles through *inter alia* amendments of the statutes and regulations will be analyzed. For this purpose, it is imperative to reiterate the dualistic structure of the KNVB as explained in chapter 7.2. The intended NL-League participants are thus members of both the KNVB in general and of the professional football section, which both have their own regulatory framework. The regulations which might need amending can therefore apply to solely the professional football section, or to the KNVB as a whole. The applicability of the regulations in turn determines which organ of the association is competent to vote on an amendment.

The KNVB Statutes and regulations determine to a large extent the framework in which the ECV and CED, as bodies of the professional football section, and the football clubs currently find themselves. The KNVB Statutes do not contain provisions that, at first glance, directly object the formation of the NL-League. There are, however, a number of boilerplate provisions that protect the general interests of the KNVB and prohibit members from harming these interests. KNVB members and organs are *inter alia* obliged to act in accordance with the statutes and applicable regulations and not to impair the interests of the KNVB or the game of football in general.<sup>248</sup> Upon violation, the KNVB has the possibility of imposing sanctions on members that harm these interests.<sup>249</sup> The KNVB General Regulations (*Algemeen Reglement*), however, which apply to all KNVB members, prohibits members from participating in any football competition that has not been organized or permitted by the KNVB.<sup>250</sup> If the NL-League were to be established without permission of the KNVB, Eredivisie and Eerste Divisie matches that would be played under its auspices would fall within the scope of the prohibitory provision of the *Algemeen Reglement*. Therefore, the above-mentioned provision needs to be amended in such a way to allow for the NL-League to organize matches. Alternatively, the KNVB can authorize the competitions organized by the NL-League, eliminating the risk of sanctions. This scenario is however unlikely if the KNVB opposes the formation of the NL-League.

As members of the professional football section, the *Reglementen Betaald Voetbal* of the KNVB apply to the NL-League initiators in addition to the Statutes and *Algemeen Reglement*. The professional football section has been designed in such a way that the various regulations of the *Reglementen Betaald Voetbal* have become intertwined. Football clubs, as specified in Article 6(2)(b) KNVB Statutes, can only become a member of the professional football section if they comply with the license criteria set out in the *Licentiereglement Betaald Voetbal*.<sup>251</sup> Membership of the professional football section is thus directly linked to club's compliance with the licensing criteria of the KNVB.<sup>252</sup> The licensing criteria are laid down in the above mentioned *Licentiereglement Betaald Voetbal* and have been further supplemented by the

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<sup>248</sup> See Article 2(5) & Article 7(1) KNVB Statutes (2021).

<sup>249</sup> Article 7(1) KNVB Statutes (2021).

<sup>250</sup> Article 2(1)(u)-(v) KNVB *Algemeen Reglement* (2021).

<sup>251</sup> Article 44(2)-(3) KNVB *Reglement Betaald Voetbal* (2021).

<sup>252</sup> M.J.M. Boetekees and R.D. Vriesendorp, 'De Nederlandse Licentievooraarden Voor een Betaaldvoetbalorganisatie' (2021) *Ondernemingsrecht* 2021/57, 322.

licensing directives, with the ratio of safeguarding the integrity and continuity of professional football in the Netherlands.<sup>253</sup> The licensing regulations have a twofold function, they stipulate the criteria football clubs have to comply with, to be granted a KNVB-license in order to compete in domestic football competitions organized by the KNVB and the criteria to obtain an UEFA-license which is needed to compete in UEFA club competitions.<sup>254</sup> Effectively, if the NL-League is established, the Eredivisie and Eerste Divisie will no longer be club competitions organized by the KNVB. Hence, the competing clubs, in theory, will no longer be obliged to obtain a KNVB-license. As stated before, the NL-League cannot become the entity that grants UEFA licenses to football clubs, as the UEFA Statutes have granted this task exclusively to national football associations.<sup>255</sup> Therefore, the licensing criteria have to be amended in order for NL-League participants to be able to be granted UEFA-licenses by the KNVB. Having the NL-League apply directly for UEFA membership would circumvent these hurdles. However, the UEFA Statutes strictly limit membership to one national football association per country.<sup>256</sup> As a result, the NL-League will remain dependent on the KNVB to obtain licenses to compete in UEFA club competitions. Whether this requirement remains relevant, in light of the current developments pertaining to the organization of an international break-away football competition such as the ESL, is questionable. A successful attempt to launch a private European club competition therefore has the potential to limit the NL-League's dependence on the KNVB.

Therefore, the current regulatory framework of the KNVB does not allow for the creation of the NL-League. The Statutes and the *Algemeen Reglement* contain boilerplate provisions that prevent members from harming the interests of the KNVB and *inter alia* prohibit the football competitions that have not been organized by the KNVB. Subsequently, the specific regulations of the professional football are drafted in such a way that its members have to comply with an intertwined set of regulations, which do not allow the creation of a break-away competition from the outset.

### 9.3. Freedom of Association

#### 9.3.1. Procedural rules pertaining to amending KNVB Regulatory Framework

The freedom of association determines how the NL-League protagonists can amend the KNVB Statutes and regulations that currently preclude the NL-League formation. In general, the amendment of regulations is subject to fewer formal requirements than the amendment of statutes. Statutes embody the organizational ground rules of an association and thereby govern *prima facie* the internal legal relationship between association members, the association itself and the board.<sup>257</sup> In other words, the statutes can be considered as the constitution of the association. The KNVB statutes can be amended by the Congress, which has been mentioned in greater detail in Chapter 7.2., at the general assembly of members. The proposed amendments have to be communicated to the Congress and Council at least 14 days prior the general assembly takes place. During the general assembly of members at least two-thirds of those entitled to vote have to be present or be represented. If this quorum is not met, a consecutive

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<sup>253</sup> Article 2(1) KNVB *Licentiereglement Betaald Voetbal* (2021).

<sup>254</sup> Article 1(2) KNVB *Licentiereglement Betaald Voetbal* (2021).

<sup>255</sup> Article 7(4) UEFA Statutes (2020).

<sup>256</sup> See Article 5(1) in conjunction with Article 7bis(4) UEFA Statutes (2020).

<sup>257</sup> J.R. Hurenkamp, 'Statuten, Een Kwestie Van Uitleg Op Maat?' (2016) 14 *Maandblad voor Vermogensrecht* 159.



general assembly of members has to be organized. Subsequently, two-thirds of votes have to be casted in favor of the amendment for it to be accepted.<sup>258</sup>

The first regulation that needs to be amended is the *Algemeen Reglement* as it prohibits members from participating in any football competition that has not been organized or permitted by the KNVB. The *Algemeen Reglement* can be amended through the KNVB Congress, which serves as the general assembly, as explained in Chapter 6.2. A proposed amendment has to be submitted to the KNVB Council at least two months before the general assembly of members. Amendments are adopted by majority vote, at least two-thirds of the issued votes has to be in favor of the amendment.<sup>259</sup> The KNVB Statutes and *Algemeen Reglement* are thus amended by the Congress at the general assembly of members. As stated before, the Congress consists of 30 deputies from the professional football section and 30 deputies from the amateur football section.<sup>260</sup> Therefore, even if all deputies from the professional football section act as a united front, minimally 10 out of 30 deputies from the amateur football section have to vote in accordance with the NL-League protagonists.

The *Reglementen Betaald Voetbal* can be amended by the general assembly of the professional football section which consists of 30 deputies out of the 34 professional football clubs that are currently active in the Eredivisie or Eerste Divisie. The *Reglement Betaald Voetbal* and *Licentiereglement*, can be amended at the general assembly of the professional football section with a majority of two-thirds of the votes.<sup>261</sup> However, any amendment, pertaining to discontinuing the footballing activities of the professional football section, is voidable insofar the Player's Council (*Centrale Spelersraad*) has not approved the amendment.<sup>262</sup> Moreover, the Manager's Council (*Centrale Trainersraad*) has to be consulted before such an amendment can be validly adopted.<sup>263</sup>

### 9.3.2. *De facto* liquidation?

The proposed amendments, as outlined above, will result in substantial changes to the legal order of the KNVB. The exploitation of professional football, that has traditionally always resided within the KNVB, will be moved outside its organizational structure and into a private organization controlled by the clubs. This process, in which the professional football section pries itself loose from the association structure, can potentially constitute a *de facto* liquidation of the KNVB itself. In case a decision taken by an association body causes a fundamental alteration to the identity or legal order of the association it may be considered as a quasi-liquidation. This includes the situation in which all, or a substantial part, of the association's activities are transferred to a third party, which leaves the remainder of the association unable to function.<sup>264</sup> A decision that entails a *de facto* liquidation can only be validly taken after the general assembly has ratified the decision.<sup>265</sup>

The professional football section represents an enormous economic value to the KNVB, which becomes *inter alia* clear from the fact that it contributes to over 80% of the total equity of the

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<sup>258</sup> Article 34 KNVB Statutes (2021).

<sup>259</sup> Article 23(1) KNVB *Algemeen Reglement* (2021).

<sup>260</sup> Article 20(2) KNVB Statutes (2021).

<sup>261</sup> Article 63(1) KNVB *Reglement Betaald Voetbal* (2021); Article 18 KNVB *Licentiereglement Betaald Voetbal* (2021).

<sup>262</sup> Article 31(5) KNVB *Reglement Betaald Voetbal* (2021).

<sup>263</sup> Article 31C(1) KNVB *Reglement Betaald Voetbal* (2021).

<sup>264</sup> B. Snijders-Kuipers and Günther Rensen, *Handboek Notarieel Ondernemingsrecht Deel 2* (Wolters Kluwer 2019) para 12.3.4.

<sup>265</sup> Asser/Maeijer 2-III 2000/323.

association.<sup>266</sup> Therefore, the establishment of the NL-League would cause an enormous outflow of capital from the KNVB, which can impact the functioning of the association as a whole. If the restructuring affects the KNVB to such an extent that it cannot function anymore, the proposed amendments to the regulatory framework elicits a *de facto* liquidation of the KNVB, as the remainder of the association is left unable to function endangering the continuity.

For public limited companies the Dutch legislator has introduced Article 2:107a DCC, which stipulates that any decision that may substantially alter the corporate identity or character of the corporation is subject to approval of the general meeting of shareholders. This includes the situation where a decision taken would lead to an effective liquidation of the corporation concerned.<sup>267</sup> It has been argued in the legal literature that this doctrine also applies to private limited companies by way of analogous application.<sup>268</sup> Yet, a concrete statutory provision that obliges an association board to submit certain decisions to the general assembly for ratification is absent.<sup>269</sup> Hence, it is up to associations themselves to statutorily enshrine procedural rules pertaining to *de facto* liquidations, in order to protect members that may be affected by substantial amendments to the legal order of said association.<sup>270</sup>

Nevertheless, the Enterprise Chamber of the Amsterdam Court of Appeal has ruled that a decision which effectively renders the continuation of a cooperative impossible, is tantamount to a *de facto* liquidation of the cooperative. As a result, the statutory provisions concerning liquidation are to be applied in order to ratify the decision.<sup>271</sup> As cooperatives are, according to the letter of the law, rather similar to the association, it is not unthinkable that the legal rule established in the above-mentioned case also applies to associations.<sup>272</sup> The judiciary has therefore, sought to analogously apply the liquidation principles of Article 2:19, DCC to the situation of an *de facto* liquidation for at least cooperatives and likely also to associations. The NL-League protagonists thus have to carefully assess whether the proposed amendments to the KNVB regulatory framework falls within the legal framework set out in the above. From a financial point of view the quick conclusion would be that moving all of the professional football activities to a different entity would indeed translate into an effective liquidation of the KNVB, as the professional football section represents an enormous value to the association. Yet, other football associations worldwide have demonstrated that it is possible to separate the professional football activities from the traditional football association structure, as will be covered in Chapter 10.

In case the necessary amendments constitute a *de facto* liquidation of the KNVB, the statutory provisions pertaining to liquidation have to be adhered to. Article 35(1) of the statutes stipulates that the procedural requirements regarding modification of the statutes are applicable to a liquidation decision. Therefore two-thirds of the deputies entitled to vote have to vote in favor in a general assembly in which two-thirds of the total votes is present or represented.<sup>273</sup> If the KNVB board ratifies a decision that constitutes a quasi-liquidation whilst failing to comply with the relevant procedural standards this will consequentially, in line with Article 2:107a

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<sup>266</sup> KNVB Jaarrekening Seizoen 2020/'21 (2021) 24.

<sup>267</sup> L.N. Schepers, 'Een wettelijk Goedkeuringsrecht van de AVA in het Licht van de Flex BV' (2009) 3 *Vennootschap & Onderneming* 64.

<sup>268</sup> Asser/Maeijer/Van Solinge & Nieuwe Weme 2-II\*/325.

<sup>269</sup> Snijders-Kuipers and Rensen (n 264).

<sup>270</sup> G.J.H. van der Sangen, 'Aspecten van Vermogensbescherming bij de Coöperatie' (2020) 1 *TVoB* 33.

<sup>271</sup> Hof Amsterdam (OK) 27 February 2014, *JOR* 2014/160 [3.10.].

<sup>272</sup> Article 53a(1) DCC.

<sup>273</sup> Article 34(3) KNVB Statutes (2021).

DCC, mean that the KNVB violates an internal norm toward its members.<sup>274</sup> Failing to comply can subsequently open the door to an inquiry procedure in order to assess whether the contested conducts amounts to maladministration and directors' liability pursuant to Article 2:9 DCC.<sup>275</sup> In accordance with Article 2:346(1)(a) DCC, members that together represent at least 10% of the total association members may start an inquiry procedure. Notwithstanding the foregoing, in exceptional cases, not complying with the doctrine of Article 2017a DCC may have external effect, opening the door for tortuous claims by third-parties affected by the quasi-liquidation decision.<sup>276</sup>

In order to prevent scrutiny under the legal framework pertaining to effective liquidation of the KNVB, the NL-League protagonist should provide safeguards that prevent a *de facto* liquidation. These safeguards could include financial contributions to the domestic football pyramid; thereby ensuring that the financial solidarity mechanism discussed in Chapter 5.3. is not affected. These contributions can be incorporated in the extraordinary membership agreement as discussed in Chapter 8.3.2. As the statutory goal of the KNVB is to promote football, financial contributions to the solidarity mechanism that characterizes the footballing pyramid will secure the continuation of the amateur section; as a result of which, the KNVB will not be faced with a quasi-liquidation. Rather, provided that there are sufficient safeguards, the KNVB will be able to promote the interests of amateur football supported by financial backing of the NL-League.

### 9.3.3. Reasonableness and Fairness

Provided that the NL-League will provide sufficient safeguards to avoid scrutiny under the legal doctrine a *de facto* liquidation, the amendment decisions taken must not be taken in contravention of the open norm of reasonableness and fairness. To reiterate, the regulatory framework of the KNVB contains multiple provisions that dictate how the statutes and various regulations can be amended and what formalities have to be complied with. However, as has been established in the foregoing, the freedom of association is not unlimited. In addition, the doctrine of quasi-liquidation, the legislator has introduced the reasonableness and fairness which entails, that decisions taken by an association body can be voidable under certain conditions.<sup>277</sup> Any amendment of the association statutes and/or regulations is to be regarded as a decision of the general assembly of members and therefore falls within the scope of Article 2:15(1) DCC.<sup>278</sup> Any decision of an association body is voidable if it is taken in contravention of the reasonableness and fairness of Article 2:8 DCC. Therefore, any amendment of association statutes and/or regulations may not disproportionately impair the rights of affected members. If this is the case, the affected members can initiate legal proceedings to void the decision taken by the general assembly of members to change the statutes and/or regulations. Moreover, an association itself can also file for the annulment of a decision taken by one of its bodies if it is taken in contravention of Article 2:15(1)(b) DCC. Additionally, any decision taken by an association organ is automatically null and void if it violates the association statutes or the law, in accordance with Article 2:14(1) DCC.<sup>279</sup>

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<sup>274</sup> Schepers (n 267).

<sup>275</sup> An inquiry procedure was *inter alia* opened in Hof Amsterdam (OK) 27 February 2014, *JOR* 2014/160, though maladministration was not established by Enterprise Chamber of the Amsterdam Court of Appeal.

<sup>276</sup> Schepers (n 267).

<sup>277</sup> Article 2:15(1) DCC.

<sup>278</sup> HR 18 October 2019, ECLI:NL:PHR:2019:1178 [3.25].

<sup>279</sup> Groene Serie Rechtspersonenrecht bij Artikel 2:14 Bw [2.1].

This, however, does not mean that all amendments to the association statutes and/or regulations that impair the rights of a member or this association itself will be voided by court, given that the decision itself will not primarily entail a *de facto* liquidation of the KNVB. Rather, decisions taken by association bodies are examined relatively marginally; hence, courts will not reassess the decision substantively insofar it has not been taken in violation of the law or the association statutes.<sup>280</sup> The ratio behind this marginal assessment is that the freedom of association entails that associations have a considerable margin of discretion when it comes to taking decisions that may affect members, with the proviso that they are taken in accordance with the statutes and applicable law.<sup>281</sup> Hence, in principle, courts will not put themselves in the position of the association body that has taken the contested decision<sup>282</sup>, as the freedom of association entails that members that do not want to comply with decisions legitimately taken by an association body have the possibility to terminate their membership.<sup>283</sup> In other words, courts will in principle not conduct a *de novo* assessment of the decision taken. Therefore, amendments to the KNVB Statutes and regulations are unlikely to be voided by court as long as the amendments are taken in accordance with the statutory requirements and do not violate Dutch association law.

### 9.3.4. Article 2:294 DCC and Associations

Throughout this thesis multiple references have been made to the analogous applications of legal doctrines applicable to other legal forms, such as foundations cooperatives. This may elucidate the impression that a specific legal rule, introduced by the legislator for foundations, pertaining to the possibility for the judiciary to unilaterally alter the foundations' statutes may also be applied analogously to associations. Pursuant to Article 2:294 DCC, a Foundations' statutes may be amended by court in case continuation of the current statutes results to situations that cannot have been reasonably envisaged when the foundation was established. Therefore, if the objective effect of a statutory provision causes the foundation to deviate from the fundamental conception on which it was founded, the judiciary may enforce a statutory amendment upon request of a stakeholder.<sup>284</sup>

Though associations and foundations, at least according to the law, are rather similar, analogous application of Article 2:294 DCC has not been accepted, with the exception of one case.<sup>285</sup> This judgement can, however, not be interpreted as opening the door for association members to request the judiciary to change the statutes, as has been confirmed in the legal literature. Amongst others, Dijk and van der Ploeg<sup>286</sup> and Rensen<sup>287</sup> argue that the legal doctrine has to be applied rather restrictively, as the judiciary must tread carefully in order to prevent taking in the position of the foundation's board. Therefore, even in the extraordinary circumstance that the judiciary decides to amend a foundation's statutes on the basis of Article 2:294 DCC, the amendments made will be rather marginal as to not stray too far from the original objective of the foundation.

The reason that Article 2:294 DCC may not be applied analogously to associations can be traced back to one of the most crucial differences between the two legal forms. As explained, an

<sup>280</sup> Rb. Midden-Nederland 27 March 2020, ECLI:NL:RBMNE:2020:1083 (*SV Atlas Papendorp/KNVB*) [4.12].

<sup>281</sup> HR 02 December 1983, ECLI:NL:PHR:1983:AG4702, [3.4].

<sup>282</sup> HR 12 July 2013, ECLI:NL:HR:2013:BZ9145 (*VEB/KLM*), [3.4.3].

<sup>283</sup> Diss. Boudewijn Waaijer, *Statuten en Statutenwijziging* (Kluwer 1993) 203.

<sup>284</sup> *Kamerstukken II* 1953/54, 3463, nr. 3 (MvT), 10.

<sup>285</sup> Rb. Noord-Holland 08-02-2017, ECLI:NL:RBNHO:2017:5799, JOR 2017/124 m.n.t. Günther Rensen.

<sup>286</sup> Dijk and van der Ploeg (n 182) 399.

<sup>287</sup> Asser/Rensen 2-III 2022/434.

association consists of members, whereas a foundation is characterized by the prohibition to have members, pursuant to Article 2:285 DCC.<sup>288</sup> Therefore, within an association, members have a supervisory function to oversee the board, being able intervene in case of maladministration through the general assembly of members. This essential supervisory mechanism is absent within foundations, which the legislator has sought to compensate *inter alia* through the introduction of Article 2:294 DCC.<sup>289</sup> In other words, associations have sufficient internal remedies to amend the statutes through the general assembly of members. Moreover, there is no legal basis for courts to amend association statutes, as is confirmed by Rensen in his annotation of the aforementioned case.<sup>290</sup>

Hence, it must be concluded that the doctrine of Article 2:294 DCC offers the NL-League protagonists no avail. Even in case the Dutch clubs argue that the current application of the KNVB statutes results into circumstances that were not envisaged upon its foundation, the judiciary may not intervene as Article 2:294 DCC may not be applied analogously, nor does any positive law derive from the single case in which application on an association has been granted.

To conclude, this chapter has discussed the position of the NL-League in light of Dutch association law. Furthermore, the current statutes and regulations of the KNVB have been analyzed in order to identify the provisions that could potentially obstruct the formation of the NL-League. Although members have numerous tools to amend association statutes, they must tread carefully to prevent that the alteration of the internal character constitutes a *de facto* liquidation. As the exploitation of professional football represents a substantial value to the KNVB's finances, a decision to establish the NL-League might endanger the continuity of the activities that remain within the KNVB. Additionally, association members are bound to the principle of reasonableness and fairness; amendments may not disproportionately impair the rights of other members. Despite these various hurdles, emanating from the regulatory framework of the KNVB and Dutch association law, it is, in the opinion of the author, theoretically possible to elicit the structural changes needed, as envisaged by the NL-League, using the tools offered by the KNVB regulatory framework and Dutch association law.

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<sup>288</sup> Dijk and van der Ploeg (n 182) 30.

<sup>289</sup> Hamers et al. (n 215) 67.

<sup>290</sup> ECLI:NL:RBNHO:2017:5799 (n 285).

## Chapter 10 – The FA & EPL – A Legal Comparison to the NL-League

Although there are significant hurdles that the NL-League has to overcome before the competition can effectively be formed, the concept of exploiting domestic professional football outside the association structure of a national federation is not new, with multiple countries having set up structures that, in concept, are similar to the NL-League. England serves as the prime example of the commercial success that a restructuring of professional football may bring about. Hence, this chapter will delve deeper into the organization of professional football in England with a specific focus on the legal structure and relationship between the FA and EPL.

### **10.1. Structure of the FA & EPL**

#### **10.1.1. The FA**

As explained, the FA is the national football association of England. However, rather confusingly the FA does not have the legal form of an association but is actually a limited company.<sup>291</sup> As a result, the FA has a share capital, consisting of 2000 ordinary shares and 2 special shares.<sup>292</sup> The ordinary shares are held by the EPL, the Football League<sup>293</sup>, members of the FA Council, affiliated member associations and member clubs. One of the special shares is jointly held by the EPL and the Football League, granting them additional voting rights on topics directly related to the organization of professional club football.<sup>294</sup> The other special share is held by the National Game Board, which represents the interests of amateur football within the FA.<sup>295</sup> Hence, instead of a membership position, the members of the FA are shareholders. Another striking difference with the KNVB-model is that amateur football is not directly incorporated within the FA; instead, amateur football is organized within 44 local football associations which in turn are a FA shareholder. Moreover, individual players do not have membership position within the FA.

Whilst the FA is not directly involved in the exploitation of the EPL, it does organize its own annual cup tournament, the FA Cup, a knock-out tournament in which amateur and professional teams compete.<sup>296</sup> Moreover, the FA is the holder of all rights emanating from the English national football teams. Due to the exploitation of these formats, the FA has considerable sources of income, as a result of which the association's turnover exceeded £440 million over 2020, resulting in a profit of £100 million.<sup>297</sup> However, the FA as a non-profit organization, distributes any surplus amongst all levels of English football, rather than distributing it amongst its shareholders.<sup>298</sup>

#### **10.1.2. The EPL**

The EPL is the highest football competition in England and is organized by the EPL teams themselves and the FA in the Football Association Premier League Ltd (FAPL).<sup>299</sup> The competition was founded in 1991 when the former First Division split off from the Football

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<sup>291</sup> Article A.2 FA Rules of The Association (2020).

<sup>292</sup> Article 3 FA Articles of Association (2021).

<sup>293</sup> Which is the over-arching entity responsible for exploiting the professional football leagues below the EPL.

<sup>294</sup> Article 2.1 in conjunction with Article 22 FA Articles of Association (2021).

<sup>295</sup> Article 2.1 FA Articles of Association (2021).

<sup>296</sup> L. O'Leary, *Employment And Labour Relations Law In The Premier League, NBA And International Rugby Union* (T.M.C. Asser Press 2017) 63.

<sup>297</sup> FA Report and Financial Statements (2021) 58.

<sup>298</sup> Article 54 FA Articles of Association (2021).

<sup>299</sup> O' Leary (n 296) 54.

League, the organization that still exploits the other levels of English professional football.<sup>300</sup> Similar to the FA, the FAPL has the legal form of a limited company. The shareholder base consists of the teams that compete in the EPL; additionally, the FA holds one special share in that gives it the authority to vote on certain matters pertaining particularly to the integrity of the sport.<sup>301</sup> The FA is, however, not involved in the day-to-day management of the competition and is not entitled to any dividend payments.<sup>302</sup>

From a commercial point of view, the EPL has been very successful ever since its conception, with revenues rising from £100 million in 1991 to £4.5 billion in 2016.<sup>303</sup> An important reason for the exponential revenue growth is the surging value of broadcasting rights. The initial broadcasting rights for the first five EPL seasons were valued at £191 million whilst the current broadcasting rights package for the 2019-2022 seasons is valued at £4.55 billion.<sup>304</sup> As a result, the EPL financially outperforms the other domestic club competitions in Europe by a considerable margin.<sup>305</sup> An essential element of the organization of the EPL is that membership of the competition constitutes an agreement between the EPL and the club and between clubs themselves to be bound by and comply with the regulatory framework of *inter alia* the FA, FIFA and UEFA.<sup>306</sup> As a result, whilst the EPL is a privately organized competition, it is still bound by the regulatory frameworks of the relevant associations. Therefore, the EPL is not completely free to organize the competition to its own discretion, as will be explained in the following.

### 10.1.3. Affiliation

The EPL is thus a football competition that is effectively organized and exploited by its competing clubs. Nevertheless, the FA has remained an important partner of the EPL. As both the FA and EPL are private companies, the manner of affiliation is different than has been contended for the NL-League and KNVB. Both the FA and EPL are shareholders in each other. Especially the special share the FA holds in the FAPL is important in this regard. The clubs enjoy a considerable margin of discretion to exploit the commercial aspects of the EPL; yet, the clubs are not completely autonomous to organize all aspects of the competition.<sup>307</sup> The FA holds a right of approval on topics that are associated with the regulatory aspects of the sport, including dispute resolution, competition format and laws of the game. Through the special share the FA can protect the sporting integrity, which is a frequently used justification for football associations to interfere in the organization of competitions. This solution is similar to the golden share that the KNVB is suggested to be granted in Chapter 8.3.3. Moreover, the FA functions as an intermediary between the EPL and the international football associations FIFA and UEFA. The clubs on the other hand are free to commercially exploit the league mainly through selling broadcasting rights worldwide.

The crucial difference with the current organization of professional football in the Netherlands is that the highest level of competition is exploited by a private company, essentially owned by the clubs. The competition is therefore, to a large extent self-governed, especially regarding the

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<sup>300</sup> W. Vamplew, 'Creating The English Premier Football League: A Brief Economic History With Some Possible Lessons For Asian Soccer' (2017) 34 *The International Journal of the History of Sport* 1807.

<sup>301</sup> Article 7.1-7.2 FAPA Articles of Association (2021).

<sup>302</sup> O'Leary (n 296) 55.

<sup>303</sup> K. Shubber and M Moore, 'Premier League Tops The Profit Tables' (*Financial Times*, 2017)

<<https://www.ft.com/content/83d0383a-09f3-11e5-b6bd-00144feabdc0>> accessed 29 May 2022.

<sup>304</sup> D. Geey, *Done Deal* (Bloomsbury 2020) 201.

<sup>305</sup> Shubber and Moore (n 303).

<sup>306</sup> Article B.14 Premier League Rules (2021).

<sup>307</sup> O'Leary (n 297) 55.

commercial aspects. An important reason for a domestic break-away competition to remain affiliated to the national football association is the fact that the association is the only competent body to grant UEFA licenses, which are needed to compete in UEFA competitions.<sup>308</sup> To that end, the FA and EPL have drafted a licensing system in which the FA is designated as licensor and the EPL is appointed to administer the licensing process on behalf of the FA.<sup>309</sup>

## **10.2. EPL Solidarity Mechanisms**

As has been explained in Chapter 9.3.2., moving the professional football activities to a private organization might endanger the continuation of the remainder of the association. An effective safeguard to prevent such a quasi-liquidation of the association is to provide solidarity payments to the lower levels of football. The EPL distinguishes between solidarity payments to professional clubs and the amateur level of English football. The EPL pledged to contribute over £1 billion to the lower leagues of professional football from 2019-2022.<sup>310</sup> This amount includes the so-called parachute payments, which are payments the EPL provides to clubs that relegate from the league for a period of up to four years following relegation.<sup>311</sup> These payments function as a financial backstop for the relegated teams to offset the loss of revenue resulting from its relegation.

Additionally, the EPL supports the grass-roots levels of English football by providing solidarity payments to charitable and community causes. This is achieved through *inter alia* the Football Foundation, which is co-funded by the EPL, the FA and the UK government, providing roughly £30 million in funding to grass-roots causes annually.<sup>312</sup> The allocated funds are used for the development of new refurbished football facilities in local communities with the aim of increasing sports participation, especially in deprived areas.<sup>313</sup> In total the EPL contributes around 15% of its total annual revenue to the above-mentioned solidarity mechanisms.<sup>314</sup> Moreover, due to the total value of the EPL, it also contributes substantially to the English economy indirectly. Throughout the 2019/2020 season, the league paid £3.6 billion in tax contributions, and its overall value added to the UK economy is estimated at £7.6 billion annually.<sup>315</sup>

## **10.3. Lessons to be Learned by the NL-League**

Though it is hard to directly compare the NL-League project to the EPL, it serves as the benchmark of how a domestic football competition can be successfully exploited separated from the organizational structure of the national football association. The most significant difference between the competitions is the affiliation to the national football association. As the

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<sup>308</sup> Article 7(4) UEFA Statutes (2020).

<sup>309</sup> Article 3.1-3.2 FA Club Licensing Manual For Participation in UEFA Club Competitions (2017).

<sup>310</sup> 'Premier League 2019-22 Funding For EFL Clubs' (*Premier League*, 2021) <<https://www.premierleague.com/news/2350343>> accessed 27 May 2022.

<sup>311</sup> O'Leary (n 296) 56.

<sup>312</sup> Geey (n 304) 206.

<sup>313</sup> 'Find Out How The Premier League Partners With The FA And Government To Support The Development Of New Sports Facilities' (*Premier League*, 2021) <[https://www.premierleague.com/communities/programmes/community-programmes/football-foundation?utm\\_source=premier-league-website&utm\\_campaign=website&utm\\_medium=link](https://www.premierleague.com/communities/programmes/community-programmes/football-foundation?utm_source=premier-league-website&utm_campaign=website&utm_medium=link)> accessed 29 May 2022.

<sup>314</sup> EY, 'Premier League Economic And Social Impact' (Ernst & Young LLP 2021) 3.

<sup>315</sup> Ibid 1.



FA is a private company rather than an association, the EPL is affiliated to it by being a shareholder. This manner of affiliation is of course impossible to achieve for the NL-League as the KNVB is an association. However, as has been argued in Chapter 8.3.2., a similar result can be attained through an extraordinary membership of the NL-League to the KNVB. The regulations of both the FA and EPL demonstrate that, though the EPL is exploited privately, they are still greatly interconnected. The Licensing Manual, through which the FA appoints the EPL to administer the UEFA licensing process is a prime example of this.

Moreover, a significant hurdle for the establishment of the NL-League will be the prevention of a *de facto* liquidation of the KNVB upon the spin-off of exploitation of the Eredivisie and Eerste Divisie. In other words, the establishment of the NL-League may not endanger the continuity of the KNVB. As mentioned above, the EPL has established extensive solidarity mechanisms through which it contributes financially to both the lower levels of English professional football and the grass-roots levels by supporting local football projects. As a result, the fact that the EPL is exploited privately does not endanger the continuation of the FA's core activities. In fact, due to the private exploitation of the EPL the revenues generated have grown exponentially, making more financial contributions available. A key take-away for the NL-League is thus to draft a solidarity mechanism itself – *ex ante*, in which it is specified how the organization will contribute financially to the core activities of the KNVB.

To conclude, this chapter has provided a brief overview of one of the most commercially successful domestic football competitions that is exploited privately, the EPL. Though there are a number of intrinsic differences between the EPL and the NL-League, it serves as the prime example of how a domestic club competition can be organized within a private company, governed by the competition clubs, whilst also remaining affiliated to the national football association. The commercial success of the EPL evidences that a split-off of the domestic football competition from the national association can be rather beneficial to all parties.

## Conclusion

This thesis has sought to provide an overview of the legal aspects pertaining to the organization of break-away competitions in football. Though the concept of break-away competitions is not a novel phenomenon, it has become rather topical recently. Within multiple levels of the footballing pyramid, a power struggle has erupted between the football associations and clubs. Traditionally, the associations are the right holders to all rights emanating from the sport, including *inter alia* the exceptionally valuable broadcasting rights. Moreover, the associations serve as the sole regulating bodies of the sport, thereby granting them effective control over the vast majority of aspects relating to the organization and exploitation of football worldwide. The *de facto* monopolistic position of the associations is now being challenged on both an international and domestic level, with football clubs contending that the *status quo* has made the federations too dominant. This has resulted in recent attempts to disrupt the organizational structures of football, as a result of which the debate on break-away sports competitions has reignited.

Two recent examples of an attempt to form a private club competition in football have been used as case studies in this thesis, in order to provide the aforementioned legal framework. First, the ESL was used to illustrate the European framework. Subsequently, the NL-League highlighted the possibilities and hurdles in relation to organizing a domestic break-away football competition. In the analysis, both the internal regulations of football associations and the effect of external regulations through the European and domestic legislators have been discussed. Together, these two case studies are able to provide an answer to the over-arching question whether sports associations can block the formation of privately organized competitions or whether the freedom of entrepreneurship will allow for their creation.

The substantive analysis commenced with the question of whether the FIFA and UEFA regulatory frameworks are in compliance with EU law, and in particular with the legal framework established by the GC in the *ISU*-case. For that purpose, it has been assessed to what extent EU law is applicable to the sports industry and, more in particular, to the legal challenges surrounding the ESL. Though the EU has traditionally been cautious to interfere in the sporting domain, it has increased its competency gradually over the last decades. Essentially, the Treaty provisions are applicable in case the sporting activity concerned constitutes an economic activity. The doctrine of specificity of sports still persists, but its practical impact has been eroded through the case law of the European institutions. The EU legal framework on the formation of break-away sports competitions was subsequently set in the *ISU*-case. Based on this framework, the statutes and regulations of FIFA and UEFA were analyzed, thereby anticipating the outcome of the preliminary questions that are currently pending before the CJEU. It was duly concluded that FIFA and UEFA undeniably foreclose competition through their respective authority to block the formation of any proposed break-away competition *ab initio*. Football associations can have legitimate objectives to prevent the formation of a break-away competition. Especially the protection of sporting integrity is a recognized ground which may justify foreclosure of competition; yet, any measures taken must be strictly proportional to these objectives. However, an absolute prohibition on the formation of any private competition cannot be considered proportional. Hence, FIFA and UEFA currently impede EU competition law through their regulations.

This does however not mean that the formation of the ESL is a fact. Sports associations may introduce regulatory conditions that any proposed break-away competition has to comply with, as long as these conditions pertain directly to a legitimate objective the association seeks to

protect and the limitations imposed are strictly proportional. Yet, the anticipated judgement may serve as a catalyzer for any forthcoming international break-away competition and will be a potent warning signal to the governing bodies of world football that their unchallenged dominance may start to crumble.

After having established the European framework, the analysis turned to the intended formation of the NL-League; a domestic manifestation of a break-away football competition that would see the exploitation of Dutch professional club football split-off from the KNVB. Currently, Dutch professional football is to a large extent exploited through the federated association structure of the KNVB. The clubs, however, feel that there are unexploited financial prospects outside the confines of the current structures, including *inter alia* the gambling and e-sports markets. As the NL-League is an intended domestic competition, the substantive analysis revolved mainly around Dutch corporate and association law. Before the first goal can be scored in the NL-League, the corporate structure first has to be formed, after which the professional football activities must be transferred from the KNVB to the newly formed NL-League company. The most significant hurdle in the formation of the NL-League is to pry the professional football activities loose from the KNVB. Not only does it require an extensive restructuring of the whole organization, splitting-off the main financial activities of an association might entail a *de facto* liquidation of the remainder of the organization. To prevent this, the NL-League will have to ensure the continuity of the KNVB by *inter alia* setting up financial solidarity mechanisms that contribute to the statutory goals of the association. The establishment as a domestic manifestation of a break-away football competition can therefore not be ruled out, though the protagonists have to thread carefully as to overcome the significant hurdles that lie in wait.

Returning to the fundamental matter of contention, the viability of a successful formation of a break-away competition in football. The quick conclusion would be that football associations cannot categorically prohibit the formation of private competitions. The fundamental freedom of association is not unlimited; rather, associations must be careful not to foreclose competition by denying any third-party effective market entry. Any undertaking that wishes organize a sports competition should theoretically be able to do so, given that the sports association concerned provides the framework the competition has to comply with. By setting pre-defined *ex-ante* boundaries and authorization procedures, through which the integrity and financial vitality of the sport can be protected, third-parties know beforehand what criteria an intended competition has to comply with. Moreover, the fundamental rights of that members have within a sports association can be utilized to alter the legal order of the association and loosen the regulatory framework pertaining to break-away competition. The freedom of entrepreneurship therefore, in theory, outweighs the barriers associations can raise to block the formation of a break-away competition using their internal regulations.

Whether there will be forthcoming successful attempts to form a break-away football competition is, of course, impossible to predict. Besides the legal framework provided in this thesis, the simultaneous social discussion on the desirability of enhanced commercial exploitation of sport, is far from over. Though the attempt to launch the ESL may not have been as successful as envisaged, the resulting legal proceedings have exhibited that the governing bodies may have become too powerful. The dominant position of FIFA and UEFA, and more in particular, their anticompetitive regulatory frameworks have, in the opinion of the author, been successfully challenged. The *status quo* of all-powerful sport associations should therefore start to crumble swiftly. The novel legal framework, allowing for the creation of break-away competitions, is to be welcomed, albeit with limitations. Sports associations should limit

themselves to the objectives for which they have traditionally been founded, the promotion and safeguarding of its designated sport. The commercial success of sports has caused associations to go beyond the fundamental ideas underlying the association model of sports. As contended in this thesis, the creation of a break-away competition, on either an international or domestic level, may be beneficial to the sports industry. Therefore, the formation of break-away competitions may only be restricted by federated sports associations in order to protect legitimate objectives such as sporting integrity. By implementing an objective and pre-determined authorization system, containing procedural rules regulating any request for authorization, sports associations have every possibility to protect the integrity of sports, whilst containing them to their fundamental tasks.

From a strictly legal point of view, a successful attempt is thus inevitable as the dominance of sports associations has been significantly curbed through *inter alia* the European case-law. Besides the legal and social hurdles, there are also practical and financial impediments that have to be overcome. Yet, as exemplified by Diego Armando Maradona's 'goal of the century'<sup>316</sup> against England in the quarter-finals of the 1986 FIFA World Cup, a seemingly impossible journey, in which challenges from all angles have to be overcome, can still lead to triumph. Only time will tell.

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<sup>316</sup> 'Diego Maradona Goal Of The Century | Argentina V England | 1986 FIFA World Cup' (YouTube, 2018) <[https://www.youtube.com/watch?v=Da\\_CDPRG2j0](https://www.youtube.com/watch?v=Da_CDPRG2j0)> accessed 9 August 2022. Thereby not referencing to the infamous 'hand of god' goal scored by Maradona in the same match, as in law one does not cheat.

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