

## Editoriale RDES 3/2021

### THE EUROPEAN PARLIAMENT RESOLUTION OF 23 NOVEMBER 2021 ON EU SPORTS POLICY: FROM CONFRONTATION TO INTERVENTION, SUPERVISION, AND PROTECTION OF THE EUROPEAN MODEL OF SPORT

by *Durante Rapacciulo\**

Every five years, the European Parliament adopts a resolution on sports covering most issues concerning the current state, the evolution, and the main, critical questions of the European sport.

After the 2012 and 2017 resolutions on the European model of sport, the third one<sup>1</sup> is the most ambitious and politically motivated resolution on sports in Europe.

The resolution has an oversize, comprehensive list of 93 points regarding seven chapters dealing with:

- a) strengthening visibility, cooperation, and the mainstreaming of sport in EU policies,
- b) enhancing the principles of a European sports model,
- c) renewing good governance and integrity,
- d) ensuring safe, inclusive, and equal sport,
- e) promoting healthy and active lifestyles together with education and development opportunities,
- f) helping sport to ensure a successful recovery,
- g) supporting the transition to a sustainable and innovative future.

The constant, noticeable engagement of the European Parliament has become the political motor to steer the EU action for designing and building the European Model of sport, based on solidarity, inclusiveness, open competition and fairness.

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<sup>1</sup> European Parliament, Resolution of 23 November 2021 on EU Sports Policy: assessment and possible ways forward.

The merits of this parliamentary initiative are unanimously appreciated all over Europe. It reminds the other EU institutions that sport may have its own role in building and strengthening the European social and cultural values of integration of the Member States in one cohesive and solid Union.

The resolution strikes the reader for the strong emphasis put on the urgency of making sport a full EU policy with its own spot in the other EU policies.

The European Parliament holistic approach invites the other EU institutions to replace the fragmentary way of dealing with sport with a comprehensive methodology to deal, debate and deliberate on all the facets of the sport and its critical problems.

The methodological shift calls on the EU Commission to double its efforts in defining this comprehensive approach through studying and reviewing all the issues in close relationship and cooperation with the sport stakeholders. The overall scope is devising possible, appropriate proposals to strengthen the European model of sport. The latter would cover the elite and professional sports without neglecting the amateur and grass roots sportive initiatives. The European Parliament pledges increasing and improving the funds and actions to promote the laymen physical exercise. Both the EU institutions and the Member States are to promote and execute the most effective programs to develop the amateurs sport and the physical exercise of the European people.

The resolution is clear and punctual in demanding a policy of inclusion and solidarity between the rich professional sports and the grass roots sports. This is not the first time the EP pushes for promoting the fair distribution of a part of the huge professional sports' financial resources to the amateur clubs and athletes.

This resolution is not the usual, seldom intervention of the European Parliament in the sport area.

This time the EP has adopted the resolution while the professional sports in Europe are harshly beaten by COVID's pandemic, and the European football model has suffered an attempted of major clubs' breakaway from the UEFA Champions League. Those clubs have threatened to create the ESL-European Super League to play an autonomous, parallel competition in Europe outside the UEFA domain.

That threat is still alive since the three ESL founders have tabled a case before a Spanish judge, who has referred it to the EU Court of Justice to interpret the EU relevant rules on competition law. The EUCJ should clarify as to whether UEFA and FIFA are breaking EU competition rules in the way they govern football in Europe and impeding professional clubs creating new, parallel leagues of football. The Super League accuses UEFA of acting as a regulator, sole operator and dominant gatekeeper in European football at the same time. Before the EUCJ UEFA is strongly supported by EU member countries in their legal observations on the case.

Furthermore, the European football model seems menaced also by the FIFA President proposal of reducing the four-year term to two-year term for the World Championship. The UEFA, some national federations and professional footballers have manifested their opposition to this timeline reform.

The EP resolution condemns clearly and strongly both the breakaway action and the proposed FIFA reform, strongly impacting the football governance's domestic order.

Though this act is not legally binding, the EP has taken a clear and strong position supporting the UEFA European Model of football against the ESL project in line with most of the European fans protests and Member States' governments and federations declarations.

Moreover, Weatherill<sup>2</sup> called for an EU political reaction on the ESL to save the European model of football together with the UEFA power. And apparently the EP fully received that call.

The political ambition is to steer the Commission and the Council action to promote the policy initiatives to make such breakaway actions impossible for ever while keeping firm the traditional World Cup calendar.

The offset is the European Parliament is intruding the reserved domain of the sport organization, which is safeguarded by the so-called specificity of sport designed by the Article 165 TFEU provision to limit the Commission and the Council of Ministers' scope of intervention in this sensitive area for the Member States.

Even worse, those references to the ESL might be seen as an improper attempt to influence the still running EUCJ proceedings and future ruling on the ESL pending case.

Finally, the resolution raises questions about the current understanding of the legal and political meaning of the provisions of Article 165 TFEU on the specificity of sport. This norm was pushed in the Treaty by the member States to precisely limit the intervention capacity of the EU institution in the sport matters when UEFA kept a confrontation attitude towards EU Commission. So, the specificity rule had the task to keep the EU away from the autonomous governance of the sport's federations.

Right now, the EU institutions and UEFA are fully and closely cooperating in working on European non-binding actions on various sport matters. UEFA called for the EU institutions intervention to help in stopping the ESL breakaway. The European Parliament got the message and expressed solidarity and promoted actions.

Indeed, on 23 November 2021 UEFA published a press release showing satisfaction for the EP positions on both the two threatening issues of the ESL breakaway competition and the FIFA project of approving a two-year term for the football world championship.

<sup>2</sup> S. WHEATHERILL, *Never Let a Good Fiasco go to waste why and how the governance of European football should be reformed after the demise of the superleague*, Asser Sports Law Blog, 23 April 2021.

«The European Parliament today adopted a comprehensive resolution on EU Sport Policy and called for action to protect European sport from the threat of breakaway competitions like the attempted European super league .....».<sup>3</sup>

For the UEFA, the report also “acknowledges the efforts made by sport organizations and federations to ensure the implementation of good governance principles in sport”.

Against this background, UEFA has invited the leader of the resolution and Co-Chair of the European Parliament Sports Group, Tomasz Frankowski, to discuss his report with major European football stakeholders at the next plenary meeting of the Convention on the Future of European Football in early 2022.

Commenting on the Resolution, UEFA President Aleksander Čeferin said: “The European Parliament’s message on behalf of EU citizens is clear: Europe and Europeans fundamentally oppose breakaway projects like the failed European super league that threaten the values of European sport. European football is not a market meant to serve only elite interests and financial gains – it is a European success story that serves all of society. We will continue to work with the EU to strengthen and protect the European sports model in European football”.<sup>4</sup>

The ECA-European Clubs Association<sup>5</sup> declaration welcoming the EP resolution shows its distance from the three ESL founders still fighting for their project.

This association represents 240+ professional, football clubs and fully endorsed the EP condemnation of any form of breakaway league project, which “threatens the very essence and fabric of European sport”.

ECA also endorsed the European Parliament’s position on the proposals for a biennial World Cup for men and women.

Like UEFA ECA pledges to engage with the European Parliament and other EU Institutions in addressing the challenges of the European Model of football.

The shift of UEFA from the age of confrontation to the age of cooperation or compliance in dealing with the football organization’s governance sees the institutional actors, EU, and UEFA in an awkward situation.

According to the commonly understood notion of the sport’s specificity as provided by Article 165, TFEU, the EU institutions should keep themselves away from legislating in the sport matters, considering the autonomy of the sport’s governance.

It is worth to note that in its 2011 Communication<sup>6</sup> on the European dimension in sport, the European Commission even stresses that good governance

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<sup>3</sup> UEFA press release, UEFA welcomes European Parliament Resolution on EU sport policy, 23 November 2021.

<sup>4</sup> Ibidem.

<sup>5</sup> ECA Endorses European Parliament Resolution, 23 November 2021.

<sup>6</sup> Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Developing the European Dimension in Sport /\* COM/2011/0012 final \*/.

is a condition for the self-regulation and autonomy of the sports sector (European Commission, 2011).

Accordingly, the Commission has never been eager to engage in the matters considered of exclusive responsibility of the national and international sport governing bodies. Although it has made manifest its interest in governance rules transparent and non-discriminatory as a condition to ensure the “autonomy and the self-regulation of sports organizations”.

Now, the EU institutions are under the pressure and lobby of those same sport governing bodies to become actively involved in managing their sensitive governance problems. Moreover, some scholars solicit high and loud the active intervention of the EU institutions to deal with those problems. They seem oblivious of the key limits the TFEU puts on the European legitimate authority to deliver binding acts for the football governance.

Unless the planned EU conference to reform the TFEU may amend the relevant rules and confer the proper powers to the EU institutions to intervene in the sport governance.

For the time being, the legal situation is complicate and the UEFA lobby on the EU institutions might raise serious problems of interpretation and application of the EU rules.

Indeed, in support of this position stands the statement made by the European Super League in a letter to the European Parliament.

As reported by Politico,<sup>7</sup> Anas Laghrari, Secretary General of the ESL and John Hahn, founders of A22 Sports Management, a consultant agency, which makes the operative works for the ESL, sent a letter to the European Parliament to detail the ESL position on the breakaway league before the resolution adoption.

The Super League officials say that the Parliament’s committee has not incorporated one “key issue” into its report: “The need for all sport bodies to adhere to the core values and legal framework of the European Union,” with which, they argue, UEFA’s “monopoly” position in European football is contradictory. They are asking MEPs to “incorporate this issue in your deliberations”, according to the letter.

The Super League officials call for the UEFA’s conflicts of interest, which wouldn’t be compatible with the relevant EU competition law rules.”

The ESL raises the question of the compatibility with the EU competition law rules of the double powers of commercial operator and regulator under the control of the same UEFA bodies.

Moreover, Weatherill<sup>8</sup> has dealt with this major problem and solicited a reform of the UEFA management to solve it in a sound way in conformity with those European rules. He concedes that the sport governance does not fall within

<sup>7</sup> Politico, Super League slams UEFA in new letter to European lawmakers, 19 November 2021.

<sup>8</sup> S. WHEATHERILL, *Never Let a Good Fiasco go to waste why and how the governance of European football should be reformed after the demise of the superleague*, Asser Sports Law Blog, 23 April 2021.

the EU responsibility but remains with the domestic power of the UEFA. However, he is convinced that UEFA should exploit the EU protection/support to defend the football governance and the Champions League competition. Accordingly, UEFA should pursue a “more intimate relationship with the EU” as the most effective way to defeat the breakaway attempt of the biggest clubs, even at the expense of the autonomy from the European regulation. Finally, for this scholar a more assertive EU should go beyond the ad hoc application of competition law to endorse a proactive role to promote minimum standards of good governance with absolute exclusion of football competitions without merit-based criteria for admission and commitment to redistribute football funds among the poorer European clubs.

Now the ball is in the EU institutions’ court. As far as we know, there has been no formal declaration or intervention of the EU Commission and Council of Ministers on this sensitive issue.

We are convinced that those EU institutions will keep a cautious, reasonable low profile in line with the TFEU principles and rules and out of respect for the role of the CJEU and the fundamental principle of the division and balance of the diverse powers of the European Union.

Though the EU institutions will welcome the close co-operation and participation of the UEFA to the European projects and actions in the sport area, the ESL case will remain in the exclusive judicial responsibility of the CJEU till the final, definitive ruling.

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Nel presente volume sono pubblicati i seguenti saggi:

#### FOOTBALL DIPLOMACY IN AFRICA: ANALYSIS OF THE FOOTBALL RELATIONSHIP FIFA – MEMBER ASSOCIATION – GOVERNMENT (FROM INTERFERENCE TO COLLABORATION)

by *Sarah France Solémalé*

The relationship between sport and politics is an age-old and enthralling one. Sport vis-à-vis international relations has been analysed and travestied as “war minus the shooting” (G. Orwell). The internationalisation of sport has also displayed the latter as an essential tool for development, social awareness, and peacebuilding. Howbeit, a much lesser attention has been given to the means of these exchanges: sport diplomacy. The concept of sport diplomacy at present may be grasped as “the conscious, strategic, and ongoing use of sport, sportspeople, and sporting events by state and non-state actors to advance policy, trade, development, education, image, reputation, brand, and people-to-people links”. Amongst African states, most of them seem not to have yet mastered fully how to apply sport to build political power and influence regionally and globally.

This thesis hence focuses on analysing the emerging concept of African football diplomacy. It will especially revolve around the tripartite relationship between FIFA, its 54 African member federations and respective government. In football, general experience on the spot has revealed that such a relationship lacks collaborative bound and joint effort. Instead, the relationship maladroitly relies upon seemingly absolute written, the interpretation of which may create at times thorny situations.

As per the Golden Circle theory of Simon Sinek, the ‘Why’ of this study is embodied by a genuine motivation to bring the beautiful game to its highest level on the motherland, as this is long overdue. ‘How’ to do this? It shall start with the building and the wide spread of a coordinated diplomatic action in football, preferably tackling the whole African continent. Such a plan shall essentially revolve around a continuously nurtured virtuous tripartite collaboration inspired by best practices in other areas and globally. The research is based on a systematic review of academic, sport governing bodies and governmental documents, as well as a series of structured interviews conducted with senior representatives of European and African institutions, national governments, sports organisations and think tank. This analysis is an essential preliminary step to be undertaken for football governing bodies to deliver final projects sustainably and accurately in a near future.

## IL VINCOLO SPORTIVO: GENESI, ANALISI E PROSPETTIVE ALLA LUCE DELLA RECENTE RIFORMA DELL'ORDINAMENTO SPORTIVO di *Cosimo Simone Saglimbene*

Il presente elaborato, analizza l’istituto del vincolo sportivo, le origini, il suo sviluppo e le influenze sulle principali discipline sportive maggiormente investite dalla rilevante portata innovativa del D.lgs. n. 36 del 28 febbraio 2021 (pubblicato in Gazz. Uff. n. 67 del 18 marzo 2021) all’interno della c.d. “riforma dello sport” che, a fronte di ulteriori modifiche, ne consentirà l’abrogazione, solo a partire dal 1° gennaio 2023.

Lo scopo di questo lavoro è quello di guidare chi opera nel mondo dello sport, in un momento storico in cui il confronto sull’argomento diventa fondamentale.

Vengono, infatti, affrontate le novità normative, inquadrandole in un esame generale dell’istituto cui segue l’indicazione della giurisprudenza che ha influenzato il tema, onde favorire l’acquisizione di una capacità orientativa nel nuovo contesto disciplinare.

L’elaborato nasce sulla scia di continuità del lavoro pluriennale svolto, sull’argomento, dall’autore, anche grazie al patrocinio presso gli organi federali sportivi, il quale conclude suggerendo alcune misure per rendere il “nuovo” sistema più efficiente e non penalizzante per società, atleti ed operatori del settore.

## L'INDIPENDENZA E L'IMPARZIALITÀ NELLA RISOLUZIONE DELLE CONTROVERSIE SPORTIVE di Nicolò Juglair

L'indipendenza e l'imparzialità sono due principi fondamentali del giusto processo, tutelato sia dalla nostra Costituzione che dalla Convenzione Europea dei Diritti dell'Uomo e delle Libertà Fondamentali.

In questo breve saggio, l'autore analizza dapprima il ruolo di tali principi nella giustizia statale per poi soffermarsi sulla loro applicazione nei procedimenti di natura arbitrale.

In tale contesto si concentrerà sulla disamina delle IBA Guidelines, introdotte nel 2004 dall'International Bar Association con l'intento di mettere per iscritto quei principi generali condivisi nella pratica arbitrale internazionale, evitando fraintendimenti sia sulle procedure da seguire sia sul comportamento degli arbitri.

Ampio spazio verrà lasciato infine all'arbitrato sportivo e, in particolar modo, al Tribunale Arbitrale per lo Sport di Losanna, pilastro universalmente riconosciuto dalle Federazioni Sportive Internazionali e dagli stakeholder del settore per la risoluzione delle controversie sportive. Su questo punto l'autore prenderà in esame gli aspetti concernenti l'autonomia delle parti, la trasparenza sulla nomina degli arbitri e la pubblicazione dei lodi.

## LA TASSAZIONE DEI CALCIATORI PROFESSIONISTI IN EUROPA – UNA SINTESI RAGIONATA DELLO STUDIO COMPARATO DEL PARLAMENTO EUROPEO

di Ilaria Sticchi

Il presente contributo intende sintetizzare la ricerca e la valutazione dello studio pubblicato dal Parlamento Europeo lo scorso ottobre sul trattamento fiscale delle retribuzioni dei calciatori professionisti in tutta l'Unione Europea. Esso si basa su un'analisi comparativa di regimi nazionali selezionati. Trae conclusioni e formula suggerimenti per un futuro approccio dell'Unione europea in questo settore. Gli autori ritengono che l'approccio politico adottato nel caso del Codice di condotta per la tassazione delle imprese si presterebbe bene anche ad affrontare le sfide poste dal trattamento fiscale dei calciatori professionisti e, più in generale, le sfide poste dai diritti personali tassazione dei redditi nell'UE. Il coinvolgimento attivo dell'Unione delle associazioni calcistiche europee (UEFA), delle sue associazioni membri degli Stati membri dell'UE e di altre parti interessate interne del calcio in un meccanismo simile a un codice di condotta sarebbe un segnale forte per i responsabili politici che vedrebbero la piramide calcistica stessa impegnata verso una tassazione equa e comparata del calcio professionistico, per il corretto funzionamento del mercato interno.

## TUTELA DI MARCHI SPORTIVI: CHI TARDI ARRIVA, PUÒ PERDERE LA PARTITA. IL CASO “AC MILAN VS. MILAN”

di *Mario Vigna*

I marchi, i diritti d’immagine e di proprietà intellettuale sono strumenti di marketing indispensabili che i brand sportivi utilizzano per costruire la propria reputazione e il proprio valore commerciale. Con la tutela dei propri diritti di marchio per specifici prodotti o servizi, i club, gli organizzatori di eventi e i soggetti sportivi in genere possono costruire il proprio brand e distinguersi dai concorrenti. Tuttavia, in alcune circostanze, i marchi sportivi non sono facilmente tutelabili per tutte le categorie di prodotti e servizi. Infatti, potrebbero verificarsi conflitti con marchi preesistenti tali da provocare l’opposizione alla registrazione del marchio per una specifica categoria in un determinato mercato. Questo potrebbe comportare onerose conseguenze quali spese per controversie derivanti dalla violazione dei diritti di marchio, costi di riprogettazione dei prodotti o di rebranding. Per prevenire e superare eventuali ostacoli, nonché evitare controversie legali, è assolutamente necessario effettuare una ricerca di anteriorità. Il caso “AC MILAN vs. MILAN” dimostra quanto sia importante verificare l’esistenza di un marchio anteriore. Nello specifico, la General Court dell’Unione Europea ha rigettato il ricorso presentato dal club e confermato che lo stemma dello stesso non possa essere registrato come marchio per attrezzature per ufficio e articoli di cancelleria a causa del rischio confusorio con il marchio anteriore tedesco “MILAN”. In sintesi, la corte europea ha rilevato che (i) il marchio anteriore era effettivamente utilizzato nel mercato tedesco; (ii) la componente verbale “MILAN” era dominante e costituisce il carattere distintivo per entrambi i marchi, che presentano quindi un elevato grado di somiglianza fonetica; (iii) si debba prendere in considerazione solo la reputazione del marchio anteriore (e non anche quella del marchio per il quale si richiede la registrazione, oggetto di opposizione) per valutare se la similarità tra i prodotti oggetto di protezione sia sufficiente ad affermare che esista il rischio confusorio. Di conseguenza, il club calcistico ha perso questa partita “sui marchi”.