Home
About ESLJ
ESLJ Team
ESLJ Issues
Volume 4
Number 3
Garcia
Submission Standards
Call For Papers
News
Conferences
Copyright
Exclusivity
Links

ESLJ Volume 4 Number 3 Interventions

ISSN 1748-944X

The Independent European Sport Review: Half Full or Half Empty?

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ABSTRACT

This contribution reviews the ongoing debates on the role of European public authorities in the governance of sport, focusing on the recently published Independent European Sport Review, an initiative of British sports minister Richard Caborn during the 2005 UK Presidency of the EU. Former Portuguese Presidency minister, José Luis Arnaut, was charged with the task of carrying a review of the current state of European football in the aftermath of major corruption scandals in Germany, Belgium and Italy. With the support of UEFA, FIFA and the European sports ministers, Arnaut delivered his report last May, claiming that, despite being focused on football, it presents a template to improve the governance standards of sport in Europe, define the role the EU has to play and to preserve the so-called European Sports Model. The Independent European Sports Review is now featuring heavily in the consultation process conducting to the forthcoming European Commission White Paper on Sport.

KEYWORDS

European Union – sport – governance – regulation - football

INTRODUCTION

The Independent European Sport Review (IESR) was set up by a group of European sport ministers in the view of recent scandals surrounding the governance of football, with the objective to find out whether football governing bodies in Europe

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are fit for purpose in the efforts of preserving the soul of the game and the so-called European Model of Sport (Interview, UK Government Official, London 17 July 2006). This paper examines the origin, development and final recommendations of the IESR report presented by the review's chairman, José Luis Arnaut, in May 2006. As the IESR's future is uncertain at the time of writing, this short contribution does not seek to provide a robust legal analysis of the feasibility of Mr. Arnaut's recommendation for the governance of sport in Europe, but rather to put the whole initiative in context in order to better understand the content of the report. It will also raise the main contentious issues in the IESR that deserver further debate and analysis with an aim to start the debate on the merits of the proposals and come to a more in-depth analysis when the future of the review is clearer.

The Origin of the Independent European Sport Review

2 The IESR is the brainchild of British sports minister Richard Caborn. He noted and shared the concerns of his European colleagues about the worrying trends surrounding professional football (as expressed during the informal meeting of European Sports ministers held in Liverpool on 19 and 20 September 2005 as part of the UK presidency of the European Union (Interview, UK Government Official, London, 17 July 2006)). Caborn has the experience of several reviews of English sports federations, see for example Lord Burn's thorough review of the English Football Association that recommended several changes in the decision-making structures of the FA, some of which have been adopted not without difficulties and after bitter debate in the FA Council (Kelso 2006). In the light of these experiences, Richard Caborn considered that this could be a way forward to identify the problems facing European football and to curb what he sees as 'the excesses of modern football' (Scott, 2006). Despite the reluctance of FIFA's president Sepp Blatter (Kelso, 2005a), the review was finally launched at a meeting of leading European sports ministers and football governing bodies in Leipzig in December 2005 (Kelso, 2005b; Conn, 2005).

3 The terms of reference of the review, 'drafted in consultation between UEFA and, under the UK presidency, some of the EU member states'(Independent European Sports Review 2006) state that the overall aim of the project is 'to produce a report, independent of the Football authorities, but commissioned by UEFA, on how the European football authorities, EU institutions and member states can best implement the Nice Declaration [on sport] on European and national level. The report will take into account relevant

input from UEFA's high level strategy Vision Europe' (Independent European Sports Review, 2006). The review was asked to examine the so-called European model of sport, the arrangements for overseeing control and managements of clubs, the level of expenditure in respect of players, the arrangements by which football authorities oversee the activities of agents, the distribution of revenues generate within European football, the role of EU institutions, member sates and football authorities in respect of the provision of funding to generate opportunities for all people to participate in football (Independent European Sports Review 2006).

At this point it is necessary to note that the review 4
was initially conceived as an exercise focused only on European football (see for example Department for Culture Media and Sport 2006). It was not until the review's chairman, Jose Luis Arnaut, presented his report in Brussels on 23 May 2006 that the initiative was re-branded as the Independent European Sport Review, with the claim that the IESR is a study on how to preserve the European model of sport with the case-study of football, as stated by José Luis Arnaut himself in the Conference 'Play Fair with Sport' (organised by UEFA and the Council of Europe, Strasbourg 29 September 2006). At the time of writing, José Luis Arnaut is presenting the second (and for the moment final) version of the IESR, in which following the suggestions of the European sports ministers it is stressed the IESR has possible application for the European model of sport in general and not just for football, hence the possibility of the Review featuring heavily in the upcoming European Commission's White Paper in Sport (Financial Times, 2006).

The Content of the IESR

The IESR report opens by stating clearly that 5
'football is not in good health', because there is a 'danger that an overly commercial approach to sport will end up compromising important sporting values and undermining the social function of sport' (Arnaut, 2006, p. 13). The contents of the Review can be divided in three main headings. Firstly, the IESR tries to define the elusive concept of the 'specificity of sport', linking it to the European sports model, whose features are defined. Second, the Review carries an analysis of what are considered the main worrying trends of professional sport in Europe. Thirdly, the IESR suggests what it considers the appropriate legal instruments to deal with the problems outlined in the second part. Finally, by way of conclusions, there is a set of recommendations addressed to EU institutions, to football authorities and to both of them jointly.

The Specificity of Sport

The so-called specificity of sport has been an elusive concept since the ECJ in Donà v. Mantero, (Case C-13/76 ECR (1976) 01333, hereinafter Donà), referred to certain rules of 'purely sporting interest only', which relate to the 'particular nature and context' of sport that may be accepted under community law even if they are restrictive of the Treaty's fundamental freedom, as long as 'this restriction on the scope of the provisions in question must however remain limited to its proper objective' (Donà v. Mantero, paragraphs 14-15). 6

The concept of 'rules of sporting interest' or, as it has later been put in more political words the specificity of sport, is a term that has never been quite comprehensively defined either legally or politically, although the ECJ in Bosman referred to the training of young athletes and the necessity to maintain uncertainty in sporting competitions as some of the special features of sport. However, the specificity of sport has been for a long time the cornerstone of the debate on European public authorities' role in the regulation of sport. The Amsterdam Declaration on Sport referred to the 'particular characteristics of amateur sport' and the Nice Declaration on Sport recalled the ' specific characteristics of sport and its social function in Europe' (European Council, 2000), but neither of them has gone on to specify what the specific characteristics of sport are. Moreover, it cannot be said either that sports governing bodies have produced thorough intellectual arguments about the specificity of sport (Weatherill, 2003; 2004), despite their repeated claims that EU institutions are failing to fully recognise the specific nature of sport. 7

The IESR undertakes the task to find out what the specificity of sport means in legal terms in order to avoid the case by case approach that has so far been the result of ECJ case law (Arnaut, 2006, p. 25). The IESR defines the specificity under three headings: (i) the regularity and proper functioning of competitions; (ii) the integrity of sport; and (iii) the competitive balance between participants (pp. 29-48). It is submitted in the report that rules whose aim is to maintain these three pillars, so to speak, of the specificity of sport need to be compatible with Community law, as they are rules of purely sporting interest. The Review then goes on to enumerate these rules. 8

In order to maintain the regularity and proper functioning of competitions, the administration of competitions and calendars is within the discretion of football authorities - as are the rules concerning the composition of national teams, rules concerning transfer of players and rules to encourage the attendance of spectators. The 9

Review seems to be very keen to stress that the existence of 'rules concerning the organisation of sporting competitions in the European pyramid structure of sport', where ' all levels are part of an overarching structure which is indivisible' (p. 29), is considered perfectly legal and compatible with EU law. This means that rules preventing breakaway competitions are perfectly legal: while clubs should not be prohibited to leave the whole structure of interconnected competitions, if they chose to do so they cannot cherry-pick the competitions they want to play in (it is all-or-nothing) and they will do it at their own risk (p. 30). Finally, the Review is also very keen to offer protection to the rules concerning the release of players to national teams (currently under review by the ECJ through a preliminary ruling in the Charleroi/Oulmers case) as they are 'necessary to guarantee the correct development of national team competitions'(p. 35). Of course, given the current struggles for power in football's governance structure, it is pertinent to ask whether these last two statements are not driven by political considerations rather than robust legal analysis.

10 To protect the integrity of sport, the Review considers that rules relating to good governance of clubs (such as UEFA licensing system), rules concerning the ownership of clubs and especially those rules related to player agents, they are compatible with Community law (p. 40). The competitive balance is considered paramount, as it is fundamental to ensure the uncertainty of results. In order to maintain competitive balance and a healthy future for competitions and the European model of sport, rules concerning home-grown players need to be enforced. It is also imperative that rules concerning the central marketing of TV rights are allowed, so clubs can be required to commit to the central marketing of TV rights as a condition of participation (p. 44). The Review also considers perhaps the most contentious issue - the utilisation of salary caps as a way of controlling spending in clubs and improving competitive balance. These should be also seen as compatible with EU law, according to the IESR.

The Worrying Trends of Professional Football in Europe

11 If the Review is to be praised, one of the merits will be undoubtedly the analysis of what is going wrong in modern professional sport in Europe. The authors present a clear picture of the main problems that need to be solved in order to ensure a sound and healthy future for European football.

12 First and foremost, there are important issues to be addressed relating to the governance of clubs, organisation of federations and the role of public

authorities to promote the best standards of governance (p. 67). These include the necessity to ensure principles of sound financial management and transparency in clubs, as well as to prevent unsuitable persons owning football clubs (p. 70). The Review also considers that it is necessary to address the financial management of clubs, which could be done through a strengthened club licensing system and the implementation of salary caps (pp. 73-75). There are also corporate governance issues to be tackled by sports governing authorities; thus, national associations, as well as UEFA, must be role models and adopt sound financial management and best practice, increasing the levels of democracy and transparency (p. 77). One important issue raised by the Review in this respect is also the 'critical need for a more effective regulation of agents in Europe' (p. 80).

Finally, it is argued that there is a need for very close collaboration between the public authorities and the game's governing bodies in three worrying, namely (i) criminal activities around football such as money laundering and trafficking of young children, (ii) racism and xenophobia in stadia, and (iii) gambling in football, that may result in match fixing scandals. 13

Proposals and Specific Solutions

The aim of any independent review is to recommend the measures to be taken to redress the problems encountered in the analysis of the status quo. The IESR comes also to a number of very specific proposals to preserve the European model of sport. There are conclusions addressed to the EU institutions (in particular the European Commission) (pp. 121-124), to the European football authorities (pp. 124-127) and to the EU institutions and the European football authorities jointly (p. 128). Although the number of recommendations to EU institutions and to football authorities is similar, it is worth noting the very detailed nature of the exposition regarding the legal instruments that EU institutions should adopt to ensure the recognition of the specificity of sport, which is considered 'insufficient an casuistic' at the moment (p. 93). In contrast, the recommendations addressed to 'the European football authorities' are far less detailed and, without any doubt, far less demanding and more sympathetic with the current status quo and structures. 14

The recommendations addressed to the EU institutions are mainly focused on legal instruments that need to be adopted. First and foremost, the Review considers it necessary to deal with the application of competition policy to sport. In this respect, the report highlights that 'a sporting federation or league is a natural 15

monopoly' (p. 92). The Review advocates block exemptions from Competition law, so long as the agreement in question satisfies the four conditions under Art. 81(3) TEC. Some of the areas that could be covered by such exemptions would be the joint selling of TV rights or matters relating to the movement of players (such as rules limiting rosters of teams, rules providing home-grown players schemes or transfer windows). Alternatively, if block exemptions are not possible, then clear guidelines on the application of competition policy to sport should be issued (p. 96). These guidelines will assume that sport organisations fulfil a task of relevant economic interest and, consequently, apply Art. 86(2) TEC.

Second, the application of the Treaty's fundamental freedoms to sport needs to be clarified. Since no block exemptions are possible here, the Review suggest the use of clear guidelines as to which sporting rules fall under free movement provisions and which are exempt (p. 108). 16

Third, other instruments are considered necessary to tackle specific issues. These are: (i) a Directive on minors in sport, (ii) a framework for a European Bargaining Contract where the social partners should be FIFPro (representing the players, i.e. the employees), the EPFL (representing the professional football leagues, i.e. the employers) and UEFA (the governing body), (iii) a Directive on betting in sport and the provision of betting services in Europe that provides that betting companies are not entitled to make use of sporting events without a specific license granted by the organiser. Finally, the Review calls for the creation of a European Sports Agency that could monitor and coordinate the implementation of the Review (p. 113). 17

In contrast to the very detailed recommendations addressed to EU institutions, the football authorities are only recipients of general suggestions, focused mainly on the improvement of governance and good management levels across football. UEFA is called to examine its own structures 'to ensure they are appropriate and representative given contemporary developments in football' (p. 126). Both UEFA and national associations should ' introduce minimum standards for good governance on national associations and to establish internal governance units, including specialised independent antifraud committees' (p. 127). Apart from that, there are just three concrete requirements: (i) That UEFA provides collective insurance coverage for players during the finals of the European Championships, (ii) that higher proportion of Champions League revenues is redistributed to the grass roots (p. 127), and (iii) 18

that UEFA provides statutory recognition to the existing consultative bodies and it creates an additional advisory body, 'which could comprise representatives of the UEFA Executive Committee, leagues and clubs' (pp. 56-57).

Finally, the Review asserts that UEFA needs to take a central role in the relations between football and the EU. UEFA is called upon to 're-align its current organisational functions, so that it assumes full responsibility for all EU related matters' (p. 126). For this purpose, EU institutions should 'grant official recognition to UEFA as the governing body for European football and as the counterpart of the EU when dealing with football issues' (p. 128). 19

A Preliminary Assessment

The IESR is a serious attempt to define what should be the role of European authorities in the governance of sport, and more concretely the regulation of professional sport. The authors of the Review deserve, at least, to be praised for their effort and the quick delivery of a report into a difficult issue that, so far, has attracted much attention but seen very few concrete proposals. However, despite the good intentions, has the IESR pressed the right buttons? This contribution cannot provide a definitive answer, but it seeks to flag-up some of the most contentious issues that deserve further academic discussion and consideration. 20

On the positive side, it must be said that the IESR has done a very good job in identifying the problems that European sport may be facing as result of globalisation in general, the massive commercialisation of professional sport over the last decade in particular and the large amounts of money generated around it, such as TV or marketing rights (García, 2006). There are certainly worrying trends which, as things stand, cannot be tackled by sport governing bodies alone, especially if they are not fit for purpose. The constant appeal to better governance standards across sport is also welcome, although it might have been desired more concrete proposals in this respect. The football family, and indeed any sports organisation, needs to understand that they have to earn their specificity, and this can only be done through the highest standards of democracy, representation, management and governance. In the same way that the Commission demands high standards of internal democracy of NGOs, similar criteria have to be applied to sports governing bodies; more so when it is claimed that these bodies should be given a large margin of regulatory independence, thus working in a role similar to regulatory agencies. The IESR is accurate both in identifying the problems of good governance of football (most 21

of them linked to the management of economic resources) and demanding solutions. It is regrettable, however, that the Review has not volunteered more concrete proposals as to how should governance be improved. In this respect, Lord Burns' Review of the English FA is a better blueprint.

22 Despite all the good work and good intentions, the IESR has quite a hurdle to jump if it is to be taken seriously. It is the very nature of the Review that casts a shadow over it, for while the initiative was that of European sports ministers the Review was 'commissioned by UEFA' and it is asked to take into account UEFA's very own strategic document Vision Europe (Independent European Sports Review, 2006). Moreover, UEFA has provided a major part of the infrastructure for the Review, as well as economic support. Can the IESR be totally impartial from the body that has commissioned it? There is, at least, room for a healthy degree of scepticism in this respect (Miettinen, 2006). This feeling is further enhanced by the imbalance in the recommendations made and the readiness which UEFA's thesis on the governance structure of European football (UEFA, 2005; 2006) seem to be accepted by the review without apparent analysis of alternatives. Therefore, it is not surprising that the recommendations have been welcomed by UEFA (Chaplin, 2006) and some other sports governing bodies (FIBA, 2006), whilst some professional football clubs are not happy with the proposals (Scudamore, 2006; Culf, 2006). Yet, the fact that different actors are more or less happy with the content of the Review is not necessarily a symptom of the lack of independence, as of course these positions will be motivated by each actor's differing objectives. In complete fairness to Mr. Arnaut and his team, they have certainly remained as independent as the Terms of Reference allowed then, or even slightly more. If impartial witnesses are to be believed, the components of the Review have tried (or at least said they were trying) to balance their analysis, but the end result, unfortunately, is not as balanced as could have been hoped.

23 Notwithstanding the ongoing discussion, it is in the legal department where the IESR will undoubtedly be challenged (see for example Miettinen, 2006). The Review devotes many pages to defining what constitutes 'sporting rules and those other rules that fall within EU law, albeit subject to the need to take the specificity of sport into account' (Arnaut 2006, p. 26), with the argument that such rules may fall within the 'sporting exception' as recognised by the ECJ in Walrave, Donà and Bosman. However, the latest case law of the ECJ may well rend this analysis invalid. In Meca-Medina v. Commission (judgment of 18 July 2006, Case C-

519/04), the ECJ held that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down' (Meca-Medina, paragraph 27). Moreover, 'the rules which govern that activity [sport] must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition' (Meca-Medina, paragraph 28).

Indeed, it has been suggested that the ECJ in Meca-Medina may have killed the so-called sporting exception (Weatherill, 2006). If this is the case, then the assessment of the specificity of sport undertaken by the IESR will need to be revisited, especially those provisions in relation to EC Competition Law, as the ECJ suggests in Meca-Medina that the tests to apply to consider the legality under competition law of rules laid down by sports governing bodies are those designed in Wouters (Case C-309/99 [2002] ECR I-1577). If the reasoning of the ECJ is to be followed, then a more robust analysis is needed to see if the rules in question are inherent to the activity (the organisation of sport) and if they remain appropriate to the objective stated. 24

Having said that, this does not mean the Review is wrong regarding all the rules which are considered as part of the specificity of sport. Certainly, there may be a case for rules aimed at promoting the training of local youth talent (e.g. the home-grown players initiative); another case is the release of players for international duty (providing a wide, inclusive, transparent and democratic consultation process is set up to decide on the international fixture list); the central selling of TV rights may also be acceptable, and even salary caps if properly defined and justified. But a more refined legal analysis that can contemplate alternative solutions is needed. Moreover, the legality of any of these measures vis-à-vis EU law will not be on the concept itself, but on the way it is implemented, as it was the case with the international transfer system, when the ECJ in Bosman argued that transfer rules are needed, but the ones enforced by FIFA and UEFA at that time went beyond their objectives and were discriminatory. 25

Finally, there may be questions about the IESR's desire to give governing bodies a large degree of independence without clear supervision. In any governance system, checks and balances are essential to ensure legitimacy and even legal certainty. In a democracy, the fact that a constitutional court can review a Parliament's decision does not mean that the Parliament is not 26

independent. This is also true for sporting organisations. It is submitted here that sport governing bodies may have a case for their independence. It is appropriate that fit-for-purpose governing bodies take care of sport as a whole, from the amateur to the professional, thus preserving the very special features of sport as a social, cultural and physical activity. However, independence has to come with serious responsibilities. Democracy is the first one. It may be a good idea to treat sport governing bodies (UEFA in the case of football if it is considered the best interlocutor) as independent regulatory agencies that do take care of sport, if sport is considered a priority by public authorities. However, Majone (1994) points out that one of the reasons why regulatory agencies are suitable for their jobs is because they are subject to judicial oversight, so their decisions can be reviewed. Therefore, in the case of sport, if the decision is for governing bodies to be independent from public authorities, it is necessary at least to consider different options and to debate the degree of autonomy (Foster 2000).

To sum up, the glass of the IESR could be considered almost half full, but for this it would be desirable a more robust analysis, together with more detailed recommendations on the improvement of internal governance for sports organisations. The report seems to focus too much on UEFA and national associations' independence as governing bodies, but it does forget at times that the Nice Declaration on Sport, whilst recognising its support for 'the independence of sports organisations and their right to organise themselves', it also stresses the need for a 'democratic and transparent method of operation' and 'participatory democracy' in the governance of sport (European Council, 2000). Sometimes the IESR seems to be too happy to accept governing bodies' arguments, rather than proposing different alternatives for a dialogue among all the stakeholders involved in the governance of sport. It is now time to debate how the shortcomings of the IESR can be addressed.

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*The author wishes to acknowledge the contribution