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## *Sport Beyond the Market? Sport, Law and Society in the European Union*

AURÉLIE VILLANUEVA\*

**D**OES EU LAW approach sport beyond market regulation? This chapter argues that in its approach to sport, EU law embraces an understanding of sport in its societal function. It is by unfolding the relationship between sport and society in the EU legal order that the chapter sheds light on the building blocks of the EU societal narrative in the field of sport.

Football is the most emblematic example of how an after-work social activity has transformed into an industry. What do such transformations entail for the relationship between sport and society? The increasing professionalisation and globalisation of sport has led to its inevitable commodification.<sup>1</sup> Guilianotti and Walsh qualify as hyper-commodification the greater professionalisation and global migration of players, the corporatisation of clubs, the proliferation of merchandising and a general redefinition of the competitive structures as ethos of the sport.<sup>2</sup> While grassroot sport activities remain important, the gap between local amateur and transnational professional sport has increased. In particular, the economic resources and capacities of amateur and professional clubs are becoming polarised.

The EU has witnessed the transformation of the sport sector all while supervising the Member States' support to clubs, distortions of competition in the sale of broadcasting rights for sport events and any restrictions of the fundamental freedoms.<sup>3</sup> While the EU covers sport activities via internal market law, its approach to sport is not limited to market law *stricto sensu*. The EU has

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<sup>1</sup> A J Walsh and R Guilianotti, 'This Sporting Mammon: A Normative Critique of the Commodification of Sport' (2001) 28 *Journal of the Philosophy of Sport* 53, 58.

<sup>2</sup> *ibid* 53.

<sup>3</sup> S Weatherill, *Principles and Practice in EU Sports Law* (Oxford University Press, 2017).

developed its sport policy and participates in discussions at the transnational level thereby positioning itself as an actor in sport governance rather than as a mere market regulator. In this capacity, the EU is developing a narrative linked to the values of sport and the role of sport for society.

The chapter does not aim to discuss what society is, what it is made up of, nor what a European society might look like.<sup>4</sup> It highlights the interconnections between the notions of society and sport in EU law and policy documents. In this context, the distinction between social and societal aspects of sport is relevant, and in the scope of this chapter, the former refers to considerations regarding employment conditions and working relations in EU law, which are attached to the sphere of the internal market.<sup>5</sup> While the latter relates to the sphere beyond the market, where society is the object that is looked at when one looks beyond the market. Although the distinction between social and societal serves to clarify the terminology relied on in the chapter, it is not claimed that the spheres of the social and societal are separate and irreconcilable. On the contrary, many social concerns are part of the societal narrative developed by the EU, and in policy documents, law and political declarations, the terms are used interchangeably.

The chapter investigates whether EU law relates to the notion of sport beyond the market and whether it connects the notion of sport to other notions such as society, cohesion or identity. However, without engaging with the substance of such concepts, the focus is on putting them in relation to each other. By highlighting the societal dimension of sport in the case law of the European Court of Justice (ECJ), policy documents and selected legal provisions, the chapter aims to show that the EU is developing a societal narrative which has the potential to counterbalance the hyper-commodification of sport.

The first section of the chapter sketches the relationship between sport and the EU, starting with the ECJ (section I), which was the first actor to deal with sport in the EU legal order. The ECJ determined when EU law applies to sport and its implications. The case law of the ECJ also sheds light on the distinctive aspects of sport, in particular sport values such as the training of young players. It shows that the ECJ recognised the societal implications of sport at an early stage.

The second part continues with the evolution of sport policy in the EU (section II). The narratives of heads of states and of the Commission illustrate an ideal where sport is inseparable from society and even becomes a tool to achieve societal objectives such as cohesion.

The third part of the chapter examines how law accommodates sport and society by relying on the provisions concerning events that are important to society contained in the EU Audiovisual Media Services Directive

<sup>4</sup>For a discussion on this see H-W Micklitz, 'Discussion Society, Private Law and Economic Constitution in the EU' in G Grégoire and X Miny (eds), *The Idea of Economic Constitution in Europe* (Brill, 2022); L Azoulai, 'The Law of European Society' (2022) 59 *CMLR* 203.

<sup>5</sup>European Commission, *White Paper on Sport* COM(2007) 391 final, 19.

(AVMSD) (section III).<sup>6</sup> It starts by reconstructing the definition of events of major importance to society which leads to the finding that the provision covers a large range of sport events, from local to international events, as well as cultural events, showing they all have a place in the legal balance found between sport and society.

Before concluding, the fourth and last part discusses the gap between, on the one hand, sport and the economy and, on the other, sport and society. It asks whether the EU can be an actor in the decommodification of sport. It concludes that that is the case to the extent that the EU is able to develop a narrative to counterbalance the economic rationale which is the basis of the commodification of sport (section IV).

## I. THE SOCIETAL RECOGNITION OF SPORT IN THE LAW OF THE MARKET

The ECJ has long had to arbitrate between the autonomous organisation of sport in the transnational legal order and the economic effects of sport within the EU internal market. With the limited competence of the EU in the field of sport until the Treaty of Lisbon, sport activities could nevertheless fall within the scope of the EU's competence to police and regulate its internal market. In articulating the relationship between sport and law, the ECJ had to firstly situate the relevance of the global legal order of sport within the EU legal order.<sup>7</sup> In doing so it relied on the economic impact of such rules on the internal market and distinguished them from purely sporting rules which embody the societal function of sport.<sup>8</sup>

Sport had not yet been included in the Treaties when the ECJ dealt with the application of EU law in a sporting context for the first time in 1974. Walrave and Koch, two Dutch cyclists, challenged a rule established by the UCI, the international cyclist association, according to which the coach had to be of the same nationality as the cyclist. Asked about the compatibility of this rule with EU

<sup>6</sup> Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L202/60–70; Now Directive (EU) 2018/1808 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L303/69–92 (hereinafter referred to as AVMSD).

<sup>7</sup> The chapter refers to the global sport legal order or global sporting rules to designate the body of private law rules adopted by national and international sport bodies and which form a legal order beyond the state. See A Duval, *La Lex Sportiva Face Au Droit de l'Union Européenne: Guerre et Paix Dans l'espace Juridique Transnational* (European University Institute, 2015) 11–14.

<sup>8</sup> Case 36/74 *Walrave and Koch v Union Cycliste Internationale* ECLI:EU:C:1974:140, 8–9; Case 13/76 *Donà v Mantero* ECLI:EU:C:1976:115, 14; Case C-415/93 *Bosman* ECLI:EU:C:1995:463, 106; B García, A Vermeersch and S Weatherill, 'A New Horizon in European Sports Law: The Application of the EU State Aid Rules Meets the Specific Nature of Sport' (2017) 13 *European Competition Journal* 28, 29.

non-discrimination principles, the ECJ established that the practice of sport falls under the scope of EU law insofar as it constitutes an economic activity.<sup>9</sup> The ECJ added that the prohibition on non-discrimination on the basis of nationality ‘does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity’.<sup>10</sup> It thus established a general rule whereby sport falls under the scope of the Treaty if it has an economic impact and carved out an exception for issues of purely sporting interest.

The reference to rules of purely sporting interest relates to the claim of autonomy of transnational sport rules, also known as *lex sportiva*.<sup>11</sup> The ECJ does so without discussing conflicts of law or the legal nature of the rules enacted by international sport bodies, it relies instead on a common benchmark in EU law, the one of economic activity, to justify and limit the application of EU law to sport activities at the same time.

The ECJ later confirmed its approach and the distinction between rules of economic effects and rules relating to the purely sporting nature of the activities carried out.<sup>12</sup> It recognised that nationality conditions imposed on players can be justified by rules of purely sporting nature such as the aim to organise matches between national teams.<sup>13</sup> In the first cases, which related to nationality conditions, the ECJ implicitly recognised the specific character of sport, however, it did not yet explicitly engage with arguments linked to the societal implications of sport.

In 1995, the ECJ found in *Bosman*, a case concerning rules on the transfer of football players and nationality quotas for club competitions, that such rules are not limited to their proper objective, since they have greater implications than the transfer of individual players from one club to another.<sup>14</sup> Thereby such rules could not be relied upon to exclude the whole of a sporting activity from the scope of EU law.<sup>15</sup> The ECJ relied on its approach regarding the economic nature and economic spill over of sporting rules to define the scope of application of EU law to, in this case, the movement of professional football players.

At the hearing in the *Bosman* case, the German Government submitted that sport is not to be qualified as an economic activity. Instead, it argued that sport has similarities with culture and that the EU must respect the national and regional diversity of the culture of the Member States, in accordance with Article 167(1) of the Treaty on the Functioning of the European Union (TFEU).<sup>16</sup>

<sup>9</sup> *Warlrave and Koch*, *ibid* 4.

<sup>10</sup> *ibid* 8–9.

<sup>11</sup> Duval (n 7); R Parrish and S Miettinen, *The Sporting Exception in European Union Law* (Asser Press, 2008).

<sup>12</sup> *Donà v Mantero* (n 8).

<sup>13</sup> *ibid* 14.

<sup>14</sup> *Bosman* (n 8) 76.

<sup>15</sup> *ibid*; Weatherill (n 3) 112.

<sup>16</sup> *Bosman* (n 8) 72.

The ECJ refused to assimilate sport with culture under Article 167(1) TFEU as it argued that the question referred related to the free movement of workers and not the scope of the EU's powers under Article 167 TFEU.<sup>17</sup> Even if Article 167(1) TFEU does not act to shield cultural activities from the application of internal market law, since it also applies the criteria of economic activity, extending the scope of Article 167(1) TFEU would have been a symbolic recognition of the societal relevance of sport within the EU legal order.

In *Bosman*, the ECJ nevertheless took another route to shed light on the societal significance of sport. The ECJ noted that sporting activities have a considerable social importance and recognised the legitimate 'aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging recruitment and training of young players'.<sup>18</sup> This acknowledgement of the societal role of sport and the recognition of such legitimate objectives by the ECJ constitutes an account of sport's societal importance and locates it beyond a mere economic activity bluntly captured by EU free movement law.

Ten years later, in *Meca-Medina*, two swimmers banned from competition because they had failed drug tests submitted a complaint to the Commission arguing that the ban imposed by the international swimming federation breached EU competition law.<sup>19</sup> In its assessment, the Commission distinguished purely sporting rules and economic activity deriving from sports, in other words between 'the sporting activity which fulfils a social, integrating and cultural role that must be preserved' and therefore shielded from the application of competition law and 'a series of economic activities generated by the sporting activity' triggering the application of the Treaty provisions.<sup>20</sup> This distinction was rejected by the ECJ, establishing that 'rules of sporting organisation which have economic effects are subject to review and that their legality under competition law can be decided only on a case-by-case basis'.<sup>21</sup> The ECJ thereby refined its reasoning towards rules of sporting nature and established that it shall not provide a general exemption but be determined according to the specific effects of the rules or policies concerned.

The *Bernard* case concerned compatibility with the free movement of workers of the rule requiring young players to pay damages to the club that has trained them when joining another club after the training scheme.<sup>22</sup> In its scrutiny, the ECJ referred to Article 165 TFEU and the relevance of considering the 'specific characteristics of sport in general, and football in particular and of their social

<sup>17</sup> *ibid* 78.

<sup>18</sup> *Bosman* (n 8) 106.

<sup>19</sup> Case C-519/04 P *Meca-Medina v Commission* ECLI:EU:C:2006:492. For a detailed account of sport in competition law, see Weatherill (n 3) 104–23.

<sup>20</sup> K Lefever, *New Media and Sport: International Legal Aspects* (TMC Asser Press, 2012) 33.

<sup>21</sup> García, Vermeersch and Weatherill (n 8) 29.

<sup>22</sup> Case C-325/08 *Bernard* ECLI:EU:C:2010:143; Lefever (n 20) 46.

and educational function'.<sup>23</sup> Article 165 TFEU had been introduced in the Treaty of Lisbon and although it is argued that it did not change the legal status quo,<sup>24</sup> it does represent a symbolic recognition of sport in the EU legal order.

In *Bernard*, the ECJ recalled what it had established in *Bosman* that 'the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate'.<sup>25</sup> It echoes the ideals depicted by the European Commission and the heads of state in policy documents and political declarations which will be explored in the second part of this chapter.<sup>26</sup>

Through its jurisprudence, the ECJ has included global sporting rules within the scope of EU internal market law. Accordingly, the two legal orders become intertwined rather than independent, reflecting a complex relationship between EU law and sport. Yet, in this legal relationship, sport is always linked to society. Hence, the ECJ has contributed to an institutional narrative recognising the preminent role of sport in society also set out in policy documents and the political declarations of the other EU institutions.

## II. THE IDEAL OF SPORT IN EUROPEAN SOCIETY

While the ECJ interacted with sport from the 1970s through free movement law, the EU as a whole was not equipped with a competence in the field of sport until the Treaty of Lisbon. It was thereby from that moment onwards that the EU was legitimised in developing sport policies and that an ideal of sport and society became identifiable in policy documents.

The Treaty of Lisbon introduced a supporting competence in Article 6(e) of the TFEU and Article 165 TFEU which establishes in its first and most emblematic paragraph 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'. The provision highlights the link between sport and society as well as a European dimension for sport with the wording 'European' sporting issues, supporting the new competence of the EU in the field of sport. The Lisbon Treaty represents a symbolic step in the relationship between sport and law since it formalises its integration in the EU Treaties. Today, it is the Directorate General for Youth, Sport, Education and Culture (DG EAC) that coordinates the Commission's actions in the field of sport. According to its website, DG EAC is 'responsible for the development of evidence-based policy in the field of sport, as well as

<sup>23</sup> *Bernard* (n 22) 40.

<sup>24</sup> Duval (n 7) 219–20.

<sup>25</sup> *Bernard* (n 22) 39.

<sup>26</sup> White Paper on Sport (n 5) 2; Treaty of Amsterdam amending the Treaty on European Union, Declaration on sport [1997] OJ C340/136.



fostering cooperation, and managing initiatives in support of physical activity and sport across Europe, notably through the Erasmus+ programme'.<sup>27</sup> Following the 2011 Communication on Sport, the Commission adopts three-year-long Work Plans.<sup>28</sup> The Council then adopts a Resolution on each new Work Plan.<sup>29</sup> According to the 2017–2020 Work Plan and 2017 Council Resolution, the key priorities for the Member States and the European Commission are: the integrity of sport (good governance, the fight against doping, the specificity of sport); the economic dimension of sport (innovation and the Digital Single Market); and sport and society (social inclusion, education, health, media).<sup>30</sup> The specificity of sport, which includes the scope of application of EU law, remains a priority. The latest Work Plan follows the same objectives and adds the strengthening of the recovery and the crisis resilience of the sport sector during and in the aftermath of the COVID-19 pandemic.<sup>31</sup>

One of the more emblematic policy documents in the field of sport is the Commission White Paper on Sports published in 2007, where the Commission writes the following:

Sport is a growing social and economic phenomenon which makes an important contribution to the European Union's strategic objectives of solidarity and prosperity. The Olympic ideal of developing sport to promote peace and understanding among nations and cultures as well as the education of young people was born in Europe and has been fostered by the International Olympic Committee and the European Olympic Committees.<sup>32</sup>

The reference to the Olympic ideal sends a strong message regarding the Member States' common cultural heritage in the field of sport. It places sport and its traditions at the heart of society but also highlights its role as an institution with fundamental functions and values such as education, peace and inter-cultural dialogue. At the same time, the passage does not overlook the economic importance of sport, especially its role for (economic) prosperity, nor the international dimension of sport governance. It provides a clear picture of sport in the EU and the intermingling between sport and society.

<sup>27</sup> See [https://ec.europa.eu/sport/policy\\_en](https://ec.europa.eu/sport/policy_en).

<sup>28</sup> Commission Communication, *Developing the European Dimension in Sport* COM(2011) 0012 Final. At the time of writing, there have been four Work Plans: 2011–2014, 2014–2017, 2017–2020 and 2021–2024.

<sup>29</sup> Resolution of the Council on a European Union Work Plan for Sport for 2011–2014 [2011] OJ C162/1–6. Resolution of the Council on the European Union Work Plan for Sport (2014–2017) [2014] OJ C183/12–17.

<sup>30</sup> Resolution of the Council on the European Union Work Plan for Sport (1 July 2017–31 December 2020) [2017] OJ C189/5–14, 12.

<sup>31</sup> Resolution of the Council on the European Union Work Plan for Sport (1 January 2021–30 June 2024) [2020] OJ C419/1–11, 9.

<sup>32</sup> White Paper on Sport (n 5) 2. See on this S Weatherill, 'The White Paper on Sport as an Exercise in "Better Regulation"' in S Weatherill (ed), *European Sports Law: Collected Papers*, 2nd edn (TMC Asser Press, 2014). See also Commission Communication *Developing the European Dimension in Sport* (n 28).

The Commission policy documents have elaborated different roles for sport in society: A health promotion function, since sport contributes to good health and helps fight a number of diseases;<sup>33</sup> an educational function, transmitting skills and values such as teamwork and fair play; a social function as a tool to combat racism and discrimination, and to foster inclusion; a recreational role, for the active and passive participants in sports activities; and a cultural role, as it creates a sense of belonging and identity. From such categories, it is clear that sport is not portrayed as disconnected from society, on the contrary, it is said to contribute to its functioning, development and the good health of citizens.<sup>34</sup>

As highlighted in the 2007 White Paper, sport serves a cohesive and identity-building function. The organisation of sport and competitions at the national level is considered part of

the historical and cultural background of the European approach to sport and corresponds to the wishes of European citizens. In particular, national teams play an essential role not only in terms of identity but also to secure solidarity with grassroots sport.<sup>35</sup>

This statement suggests a European dimension for sports engaging European citizens and based on the common cultural heritage of the Member States. The ideal pictured is one where the European approach to sport and national sports coexist and are mutually reinforcing. In addition, solidarity between professional and amateur sport is underlined. De Witte and Zglinski identify financial solidarity as a particularity of the European model of football.<sup>36</sup>

Furthermore, in its cohesive function, sport is an instrument for the integration of non-nationals, such as migrants, and supports inter-cultural dialogue.<sup>37</sup> The role of sport as a force for integration and identity was already recognised in the context of the 1995 revision of the Treaty on European Union through the Amsterdam Treaty where the Amsterdam Declaration on Sport was annexed to the Treaty, stating: ‘The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together.’<sup>38</sup> It is undeniable that the EU sport policy attributes an important societal role to sport and celebrates the values attached to it.

The ideal of sport that is depicted in the policy documents goes beyond the territory of the EU as the White Paper mentions the role for sport in the EU’s external relations where sport is depicted as a tool to promote education, health, inter-cultural dialogue, development and peace.<sup>39</sup> The external dimension of

<sup>33</sup> White Paper on Sport (n 5) 3.

<sup>34</sup> *ibid*; Commission Communication Developing the European Dimension in Sport (n 28) 4.

<sup>35</sup> White Paper on Sport (n 5) 14.

<sup>36</sup> F de Witte and J Zglinski, ‘The Idea of Europe in Football’ (2021) 17 *LSE Law, Society and Economy Working Papers* 19.

<sup>37</sup> White Paper on Sport (n 5) 7.

<sup>38</sup> Treaty of Amsterdam amending the Treaty on European Union, Declaration on sport [1997] OJ C340/136.

<sup>39</sup> White Paper on Sport (n 5) 9.

sport in the EU is also concrete where the Commission refers to its commitment towards a multi-level structured dialogue with different actors such as European sports federations, Olympic Committees or international organisations.<sup>40</sup> The EU thereby demonstrates its determination to collaborate and participate at the international level in sport governance. Sport is also embraced as a diplomatic instrument in its external relations with third countries, as the Erasmus+ sport programme shows.

Erasmus+ is traditionally known to cover education but today its priorities are education, training, youth and sport. Erasmus+ supports the objectives of the Work Plan for Sport and the development of the European dimension in sport. The programme has three key actions: learning mobility of individuals, cooperation among organisations and institutions and support to policy development and cooperation. One of the programme's specific objectives is to 'promote learning mobility of sport staff, as well as cooperation, quality, inclusion, creativity and innovation at the level of sport organisations and sport policies'.<sup>41</sup> Aside from mobility, the programme covers two actions in the field of sport aimed at capacity building and support for non-profit events.

Capacity-building projects in the field of sport aim to support international cooperation projects based on multilateral partnerships between sport organisations in EU Member States as well as third countries which are either part of or not part of the Erasmus+ programme. The participation of third countries not part of the programme is a specific objective of this action and is meant to support sport activities and policies as a 'vehicle to promote values as well as an education tool to promote the personal and social development of individuals and build more cohesive communities'.<sup>42</sup> The action has specific aims such as raising the capacity of grassroots sport organisations; promoting social inclusion through sport; promoting positive values through sport; and fostering cooperation across different regions of the world through joint initiatives.<sup>43</sup>

Non-profit sport events support the organisation of sport events with a European dimension in fields such as volunteering in sport, social inclusion through sport, the fight against discrimination in sport, encouraging participation in sport and physical activity.<sup>44</sup> The objective is to increase the visibility of the Erasmus+ sport actions as well as to raise awareness on the role of sport in promoting social inclusion, equal opportunities and health-enhancing physical activities.<sup>45</sup>

EU sport policy through funding policies such as Erasmus+ highlights the importance given to grassroot initiatives and community building, not only

<sup>40</sup> *ibid* 18.

<sup>41</sup> Commission, Erasmus+ Programme Guide 2022 (Version 2) 6.

<sup>42</sup> *ibid* 16.

<sup>43</sup> *ibid* 325.

<sup>44</sup> *ibid* 332.

<sup>45</sup> *ibid* 16.

mobility. It also illustrates the internationalisation of sport policy with the possibility of building international consortia to take part in actions under the programme. Sport is presented as a way to foster a sense of European society and promote the values of sport from the local to the supra-national level.

The ideal of sport depicted in the EU's policy documents is one where sport plays a key role in society at different levels. Sport is portrayed as a living practice involving actors at a multiplicity of levels and therefore subjected to multi-level governance. It is also seen as connected to national identity, and as reinforcing the sense of belonging, and as such it becomes a tool to integrate foreigners. It is based on this understanding, which involves a national outlook, that the EU can claim that sport can have the same cohesive function outside the EU. The coordination of such a function, and of sports in general at the international level, is how the EU justifies the involvement of the Commission through supporting actions and policy initiatives.

### III. THE SOCIETAL ROLE OF SPORT IN THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

In the previous sections, I have demonstrated that there is a common narrative in the approach to sport and society in the EU's policy documents and to the approach to the application of EU law to sport in the case law of the ECJ. The intersection between EU law and societal interests in the sporting context is further illustrated by a close analysis of the Audiovisual Media Services Directive (AVMSD).

Article 14 of the AVMSD leaves to the

Member States the prerogative to prohibit the exclusive broadcasting of events which they deem to be of major importance for society, where such broadcasts would deprive a substantial proportion of the public of the possibility to follow those events on free-to-air television.<sup>46</sup>

The provision on events of major importance for society was introduced in the 1997 amendment of the AVMSD in the context of the rise of pay TV. The concern that triggered the amendment at that time was that events of societal relevance traditionally broadcast on free television would be broadcast on pay TV instead and thereby exclude the part of the population unable to afford a subscription.<sup>47</sup>

The Member States took their national concerns to the European fora and mobilised for an EU level regulation of the audiovisual sector that would cover

<sup>46</sup> AVMSD Art 14(1).

<sup>47</sup> J. Weinand, *Implementing the EU Audiovisual Media Services Directive: Selected Issues in the Regulation of AVMS by National Media Authorities of France, Germany and the UK* (Nomos, 2018) 90.

this issue.<sup>48</sup> Accordingly, the Member States' societal concerns were reflected in the EU Directive.

The text does not define events of major importance for society. Recital 49 mentions as examples the Olympic Games, the football World Cup and the European football championship. This leaves considerable discretion to the Member States. The Recitals in the Directive indicate four criteria considered to be reliable indicators of the importance of events for society:

- (i) a special general resonance within the Member State, and not simply a significance to those who ordinarily follow the sport or activity concerned;
- (ii) a generally recognised, distinct cultural importance for the population in the Member State, in particular as a catalyst of cultural identity;
- (iii) involvement of the national team in the event concerned in the context of a competition or tournament of international importance; and
- (iv) the fact that the event has traditionally been broadcast on free television and has commanded large television audiences.<sup>49</sup>

The criteria refer to several key notions such as society, sport, culture, identity and tradition. Reference to identity, culture and tradition echoes the societal role of sport recognised in policy documents published by the EU institutions. There is also a considerable connection to the state in the reference to the cohesive and identity-building function of sport. In short, the understanding of sport and society laid down in the Recitals in the Directive resonates with a societal ideal of sport.

The Directive provides no further guidance as regards the nature of events (sporting or non-sporting) and refers to 'international, European and national events', thereby the provision leaves a wide scope for the definition of events of major importance for society to the Member States. Five out of 11 Member States, including the UK, that have notified a list to the Commission have included a definition of events of major importance for society in their notification, such definitions, however, all follow the criteria of the Commission.<sup>50</sup> Nevertheless, the definitions differ as regards the scope of the event, namely if it only covers sporting events or also includes other events. Denmark makes explicit that the article only refers to sporting events while Italy refers to events of a sporting and non-sporting nature and Austria, Belgium and the UK refer only to events. A closer look at the content of the Member States' lists illustrates what the respective Member States consider as events of major importance.

Two events are listed by all the Member States that have notified a list, namely, the summer and winter Olympic Games (bar Ireland that excludes the summer

<sup>48</sup> BJ Drijber, 'The Revised Television Without Frontiers Directive: Is It Fit for the next Century?' (1999) 36 *CMLR* 87, 89–91.

<sup>49</sup> AVMSD Recitals 49 and 52.

<sup>50</sup> The lists of major events for society published by the Member States can be consulted at <https://ec.europa.eu/digital-single-market/en/avmsd-list-major-events>.

Olympics) and football (11 Member States list the *Fédération internationale de football association* (FIFA) World Cup and seven of them matches of their national championships). Athletics, in particular the World Championships but also European and national competitions, are listed by five out of 11 Member States. Events in rugby, handball and tennis are listed by four Member States. Skiing, cycling and cultural events are listed by three Member States and basketball, horse-riding, volleyball and water polo events are listed by two Member States. Finally, some events are only listed by one Member State such as ice hockey by Finland, moto GP by Italy, cricket, golf and the Commonwealth Games (multisport) by the UK, camogie and hurling by Ireland and swimming events by Hungary.

What is striking is that only three Member States list non-sporting events that are of a cultural nature, namely, in the Italian list we find the Sanremo Italian Music Festival; the New Year concert at La Fenice in Venice and the opening night of the opera season at La Scala in Milan. The Austrian authorities list the Vienna Philharmonic Orchestra's New Year Concert and the Vienna Opera Ball and the UK lists the final of the Queen Elizabeth Music Competition.

The list of major events that have been notified include both large scale international competitions and events relevant mostly at the national level, reflecting the specific national culture and identity of the countries concerned. This illustrates well the duality of sport's impact today, turned towards the international and based largely on global competitions while at the same time remaining close to local societies. Including both international and local events in the lists is significant as they might not have the same impact for broadcasters. It is a sign that the Member States consider them to be equally relevant for their societies.

The provision on events of major importance for society sends a message as to the balance between sport, society and law in the internal market. Considerable leeway is given to the Member States in implementing Article 14 AVMSD. When the provision was designed, the sale of broadcasting rights was already a great source of revenue for sport federations, and it is even more so today. The provision strikes a delicate balance between the freedom of owners of pay TV channels, sport governing bodies as rights-holders, and the overriding interest in ensuring the general public adequate access to major sporting events.<sup>51</sup> Accordingly, due to its economic implications for the rights-holders, the interpretation of Article 14 AVMSD was brought before the ECJ.

Two actions were brought by FIFA and the Union of European Football Associations (UEFA) concerning the decisions of the European Commission finding compatible with the internal market the list of events of major importance notified by Belgium and the UK.<sup>52</sup> In the decision, the Commission accepted the inclusion by Belgium of all the matches of the final stages of the World Cup as

<sup>51</sup>Drijber (n 48) 117.

<sup>52</sup>Case C-204/11 P *FIFA* and Case C-205/11 P *FIFA*. C-204/11 P *FIFA v Commission* ECLI:EU:C:2013:477 appeal of T-385/04 *FIFA v Commission* ECLI:EU:T:2011:42; Case C-205/11P *FIFA v Commission* ECLI:EU:C:2013:478 appeal of T-68/08 *FIFA v Commission* ECLI:EU:T:2011:44;

being of major importance in the sense of the Directive. FIFA argued that the Member States could list only 'prime' or 'gala' matches, namely the final, the semi-finals and the matches involving the Belgian national team. Accordingly, FIFA claimed the list should not have included the other matches of the World Cup (non-gala matches).<sup>53</sup> Similarly, the dispute in *UEFA v Commission* revolved around the UK's list of events which included the UEFA EURO tournament in its entirety.<sup>54</sup> The ECJ examined the different grounds and rejected the appeals brought by FIFA and UEFA.

The ECJ established that the free movement restrictions occurring as a result of Article 14 AVMSD are justified by the objective of protecting the right to information and ensuring wide public access to television coverage of those events.<sup>55</sup> Further, the Court concluded that Member States have a broad discretion in determining the events which are of major importance.<sup>56</sup> It argued that the Directive did not aim to achieve a harmonised European list of events, but instead was mindful of the 'social and cultural differences that exist within the European Union in so far as concerns their importance for the general public', which is why each Member State can draw up its own list according to its own criteria.<sup>57</sup>

The ECJ highlighted the need to respect the different traditions of the Member States, which may involve a different interpretation and application of the Directive. In this regard, the role of the ECJ was to preserve the margin of appreciation given to the Member States by the Directive to ensure that they can implement the provisions for events of major importance in accordance with their national culture and identity. When faced with cases on the interpretation of the Directive, the ECJ followed the intent of the law and deferred to the compromise between market and societal interests reached by the Member States. In the relationship between market and society that emerges out of the provision on events of major importance for society, the Member States' societal concerns were consolidated into EU law.

#### IV. THE DECOMMODIFICATION OF SPORT THROUGH THE SOCIETAL NARRATIVE

Sport is a multidimensional phenomenon. It lies at the heart of the lives of children practising in school and afterschool, amateurs, semi-professionals devoting their free time to it and professionals who can make a profitable living out of it.

Case C-201/11 P *UEFA v Commission* ECLI:EU:C:2013:519 appeal of Case T-55/08 *UEFA v Commission* ECLI:EU:T:2011:43.

<sup>53</sup> Case C-204/11 P *FIFA* (n 52) 7.

<sup>54</sup> Case C-201/11 P *UEFA* (n 52); Case T-55/08 *UEFA* (n 52).

<sup>55</sup> Case C-204/11 P *FIFA* (n 52) 11.

<sup>56</sup> *ibid* 13.

<sup>57</sup> Case C-204/11 P *FIFA* (n 52) 14–15.

Yet, sport is also put under pressure by professionalisation and commodification which impact the dynamic between sport and society.

The professionalisation of sport, which entails the creation of a dedicated, paid pool of players and other stakeholders such as teams, coaches management, referees, sponsorship and so forth, revolves around the economic relationship between the stakeholders.<sup>58</sup> Guilianotti and Walsh qualify as hyper-commodification the greater professionalisation and global migration of players, the corporatisation of clubs, the proliferation of merchandise and a general redefinition of the competitive structures as ethos of the sport.<sup>59</sup> While grassroot sport activities remain important, the gap between local amateur and transnational professional sport has increased.

The pressure of commodification in the sport sector does not only concern those who actively participate in sport, but also those who participate passively, by watching sport. With technological changes, it is not only possible to watch a game at a stadium, but a game can also be watched at home or at the pub through live broadcasting, as well as in the car or on public transport on any digital device connected to the Internet. Yet, the audiovisual sector is managed by market forces relying on the willingness of sports fans to pay subscriptions to have access to live sport events. As Weatherill explains, wealth maximisation is not the main concern of sport which plays an important and valuable social, educational and cultural role.<sup>60</sup> How can the recognition of the societal function of sport work as a counterbalance to the commodification of sport in the EU?

EU law grasps sports through its competence to regulate markets but also participates in de-commodifying sport by recognising its societal role. The ECJ acknowledges the organic character of sport when identifying rules and practices of purely sporting interest and legitimate objectives for sporting regulation, such as sporting integrity or the training of young players. This duality reflects the recognition of the societal implications of sport whereby it is not only a commodity but is attributed a societal role. Sport as a social activity is of importance for society generally and contributes to collective identity building.<sup>61</sup> The pressure put on sport by professionalisation, commodification and globalisation has increased the tension between sport and society. The fact that sport is increasingly transnational justifies the regulatory intervention of the EU and points to the EU as a suitable actor in the decommodification of sport.

<sup>58</sup> S Archer, 'Commodification and Juridification in Football: Reflections on the Study of Law and Society' (2014) 21 *Southwestern Journal of International Law* 9, 12.

<sup>59</sup> Walsh and Guilianotti (n 1) 53.

<sup>60</sup> S Weatherill, 'Sport as Culture in EC Law' in R Craufurd Smith (ed), *Culture and European Union Law* (Oxford University Press, 2004) 151.

<sup>61</sup> N Blain, 'Beyond "Media Culture": Sport as a Dispersed Symbolic Activity' in A Bernstein and N Blain (eds), *Sport, Media, Culture: Global and Local Dimensions* (Taylor & Francis Group, 2002) 233; See also L Crolley and D Hand, *Football and European Identity: Historical Narratives through the Press* (Routledge, 2006).



A clear example of the recognition of the societal importance of sport currently running counter to commodification is embodied in the provisions on major events for society. Not only does this materialise in the AVMSD, but the objectives of the provisions also benefit from the support granted by the case law of the ECJ. EU sport policy also seems to be heading in this direction since it attributes several non-economic roles to sport and openly develops an EU sport model based on a number of societal non-economic values.<sup>62</sup> In particular, the role of sport for cohesion and culture ties it intimately to society. In the same vein, the Erasmus+ programme encourages mobility and exchanges to catalyse the societal benefits of sport by supporting grassroots initiatives and capacity building. Solidarity and redistributive mechanisms within sport are also promoted as pillars of the European sports model.<sup>63</sup>

What can also be taken into account in the discussion regarding whether the recognition of the societal function of sport in EU law and policy documents can play a role towards the decommodification of sport is the case of the European Super League. When the project was announced in April 2021, public officials reacted strongly. Margaritis Schinas, Vice-President of the European Commission, tweeted on 19 April 2021:

We must defend a values-driven European model of sport based on diversity and inclusion. There is no scope for reserving it for the few rich and powerful clubs who want to sever links with everything associations stand for: national leagues, promotion and relegation and support to grassroots amateur football. Universality, inclusion and diversity are key elements of European sport and our European way of life.<sup>64</sup>

On the same day, the twitter account of the Italian Government expressed its support for the football associations opposing the European Super League arguing for the preservation of national competitions, meritocratic values and the social function of sport.<sup>65</sup> Boris Johnson and Emmanuel Macron also positioned themselves against the European Super League.<sup>66</sup> After much debate in the news and social media, the European Super League was challenged at the Commercial Court of Madrid which referred questions to the ECJ regarding the validity of the European Super League in light of EU competition law.<sup>67</sup>

At the hearing at the ECJ, which was retransmitted online, many of the Member States intervening referred to the Commission policy documents on the European dimension in sport. They identified a number of principles such

<sup>62</sup> White Paper on Sport (n 5) 3; Commission Communication Developing the European Dimension in Sport (n 28) 4.

<sup>63</sup> de Witte and Zgliniski (n 36) 19.

<sup>64</sup> See <https://twitter.com/margschinas/status/1383908874101530625>.

<sup>65</sup> See [https://twitter.com/Palazzo\\_Chigi/status/1384159234468716548?ref\\_src=twsrc%5Etfw](https://twitter.com/Palazzo_Chigi/status/1384159234468716548?ref_src=twsrc%5Etfw).

<sup>66</sup> See [https://sport.sky.it/calcio/2021/04/19/mario-draghi-superlega-europea-calcio?social=twitter\\_skysport\\_link\\_null](https://sport.sky.it/calcio/2021/04/19/mario-draghi-superlega-europea-calcio?social=twitter_skysport_link_null).

<sup>67</sup> Case C-333/21 *European Super League Company SL v UEFA and FIFA*, case lodged on 27 May 2021, pending in front of the ECJ.

as the pyramidal structure of football, the openness of competition, financial solidarity and redistribution, as fundamental parts of the European sports model. The Member States thereby relied on a common conception of the European sports model which enshrines non-economic values. The European Super Leagues is a relevant example of the commodification of football and how both professionalisation and commodification result in wealth concentration for a few elite clubs which can cause deep unease for supporters, commentators, amateurs, smaller clubs and other excluded stakeholders.<sup>68</sup> The fact that the case was referred to the ECJ and that legal arguments were grounded on EU law supports the view that the EU could play a role in the decommodification of sport.

From the arguments presented at the hearing and the Opinion of Advocate General Rantos, it becomes clear that both EU competition law and the European sport model were used as legal tools to try to counter the commodification of football in Europe in the European Super League case. In particular, the Advocate General noted that Article 165 is a horizontal provision that is to be accounted for in the application of EU law, especially competition law.<sup>69</sup> He also explained that the rationale behind the introduction of Article 165 is rooted jointly in the fact that sport is a significant economic activity and in the special social character of that economic activity.<sup>70</sup> The first part of the Opinion regarding Article 165 TFEU, the European Sport Model and the challenge to the European Sport Model highlights the economic and societal duality explored in this chapter.<sup>71</sup> Irrespective of the outcome of the case, it is significant that in a case before the ECJ the social function of sport and the societal implication of such activities are discussed and contrasted based on the economic rationale and wealth concentration that illustrates the commodification of football.

This section has shown how EU law emphasises the societal functions of sport, distancing it from a purely market rationale thereby ensuring a balance between the non-economic and the economic aspects of sport. It seems that the EU has the potential to contribute to the decommodification of sport. This could go as far as the EU committing itself to new societal mechanisms linked to sport and reshaping the relationship between sport and society beyond the national level.

## V. CONCLUSION

Does EU law approach sport beyond the market? Yes, there is a societal dimension to sport in EU law. It is found in policy documents, political declarations

<sup>68</sup> Archer (n 58) 21.

<sup>69</sup> Case C-333/21 *European Superleague Company SL v FIFA and UEFA* Opinion of Advocate General Rantos ECLI:EU:C:2022:993, 35.

<sup>70</sup> *ibid* 34.

<sup>71</sup> *ibid* 27–38.

and Treaty provisions. Even the ECJ's case law has progressively embraced sport in its societal dimension. The EU's approach to sport has different facets, which appear through the exploration of the relationship between sport and society in legal and policy documents of the EU.

The relationship between sport and society, as promoted by the European Commission in policy documents and supported by heads of states in political declarations and Treaty amendments, reflects an ideal of sport which emphasises its societal relevance. The EU's sport policy is focused primarily on the role of sport in fulfilling fundamental societal objectives such as cohesion or education. In striking a balance between the EU legal order and global sports law, the ECJ has insisted on sport's societal role. This is especially true where the ECJ identifies sector-specific legitimate objectives justifying restrictions of economic freedoms, be it under free movement or competition rules. In other contexts, Member States' societal concerns are transposed directly into EU legislation, as is the case regarding the rules on major events for society in the AVMSD. This demonstrates once again, and contrary to what is often thought, that the EU has been rather willing to strengthen the societal dimension of sport and to contribute to its societal impact.

