

## A EUROPEAN FOOTBALL SUPER LEAGUE: THE LEGAL AND PRACTICAL ISSUES

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### ABSTRACT

In 2021 football faced the possibility of a breakaway European Super League (ESL) being formed with the participation of 12 of Europe's leading clubs. While the concept was not new, the reason for its re-emergence were the financial consequences of the COVID-19 pandemic, together with a number of leading clubs having American owners who tend to adopt a profit maximisation approach to running sports clubs. The quick demise of the proposed ESL because of a supporter backlash meant that some of the potential legal issues did not eventuate. However, if the ESL had proceeded, the governing bodies of the domestic leagues could have banned the participating clubs from playing in their competitions, and the leading clubs may have experienced contractual difficulties in requiring their players to play in the ESL. Although it may not be possible for UEFA to legally prevent the formation of a rival competition, it is argued that it would not be advantageous for UEFA to operate its own ESL. Australian sport has seen the formation of similar breakaway competitions, and the situation that occurred in European football this year is a reminder to governing bodies of the need to ensure that all stakeholders remain satisfied with how the sport is conducted.

### I INTRODUCTION

Football, or soccer as it is known in Australia, is unquestionably the biggest team sport in the world, with Europe being one of its main centres. European club competitions, namely the UEFA Champions League (UCL) and the UEFA Europa League (UEL), are conducted annually by the administrative body, the Union of the European Football Associations (UEFA). These competitions receive much coverage around the world, including in Australia, particularly when Australian players such as Harry Kewell, who won a Champions League title with English club Liverpool, are involved. This long-standing control by UEFA of these club competitions was challenged in April 2021 when 12 of the most prominent clubs in European football announced they were forming a European Super League (ESL).

This paper will examine the reasons why an ESL was unveiled at this time by looking at the role and relationships of the main parties involved, and the reasons why it quickly folded. It will also examine the practical and legal issues involved in the formation of this breakaway league. It then will assess whether the concept of a European Super League could be successful if promoted and organised by UEFA itself. This assessment first requires an examination of how professional clubs can operate as either profit-making enterprises or, alternatively, as utility maximisers

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which involves focusing on winning competitions. What also needs to be examined is the governance issue – that competitions can operate as either open competitions, involving promotion and relegation, or closed competitions where the same clubs are ensured of participation each season.

## II PROFIT AND UTILITY MAXIMISATION

The normal objective in running a business is to focus on financial matters to ensure the making of a profit. Zimbalist views professional sports teams as businesses with all business owners seeking to maximise profits.<sup>1</sup> He maintains that this supported by the fact that there is little evidence that owners have ever received less than the market rate of return on their investment.<sup>2</sup> Profit maximisation therefore occurs where owners of a team maximise the profit of their team by making as much income as possible and minimising their costs. Under this approach owners make ‘decisions on players, ticket prices, and media contracts in order to maximise the difference between total revenue and cost.’<sup>3</sup> In examining profit maximisation it should be noted that the most valuable sports franchise is National Football League (NFL) club, the Dallas Cowboys,<sup>4</sup> which has an estimated value of \$5.5b. However, the club has only won 51 per cent of its matches since 2000 and has failed to win a Super Bowl title since 1996.<sup>5</sup>

Utility maximising owners, on the other hand, look to place more importance on winning competitions and consequently invest their revenue ‘to acquire better talent, improve facilities and to promote the team brand.’<sup>6</sup> The utility maximising model has been used in European football with owners like Sheikh Mansour bin Zayed al Nahyan and Roman Abramovich utilising private money to enhance the playing strength of their respective clubs, Manchester City and Chelsea.<sup>7</sup>

In that context Sloane states that:

It is quite apparent that directors and shareholders invest money in football clubs not because of expectations of pecuniary income but for such psychological reasons as the urge of power, the desire for prestige, the propensity to group identification and the related feeling of group loyalty.<sup>8</sup>

<sup>1</sup> Andrew Zimbalist, ‘Sport as Business’ (2003) 19(4) *Oxford Review of Economic Policy* 503.

<sup>2</sup> Ibid.

<sup>3</sup> John Brunkhost, ‘Profit Maximisation in the National Football League’ (online at 18 September 2021) <<https://www.digitalcebeta.coloradocollege.edu>> See also Rodney D. Fort, *Sports Economics*, (Upper Saddle River, NJ: Prentice Hall, 2003), 80-93.

<sup>4</sup> The Dallas Cowboys team play in the National Football League in the USA.

<sup>5</sup> Tim Wigmore and Jeremy Wilson, ‘The Super League stitch-up is the obvious next step in the Americanisation of European football’, *The Telegraph* (online at 20 April 2021) 3 <<https://www.telegraph.co.uk/football/2021/04/20/super-league-stitch-up-obvious-next-step-americanisation-european/>>

<sup>6</sup> Brandon Zears, ‘Profit and Utility Maximisation in Sports’ (online at 18 September 2021) <<https://www.econ-jobs.com>>

<sup>7</sup> Roman Abramovich, the owner of Chelsea, lost £88 million and £140 million in successive seasons, and Sheikh Mansour bin Zayed al Nahyan, the owner of Manchester City, spent an estimated £650 million in his first year at the club.

<sup>8</sup> Peter Sloane, ‘The Economics of Professional Football’ (1971) 18 *Scottish Journal of Political Economy* 121, 134.

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He distinguishes between profit maximisation, where financial success is the main driver, and utility maximisation, where the winning of competitions is perceived as being more crucial, supporting the view that the main interest of a football club is 'to provide entertainment in the form of a football match. The objective is not to maximize profits but to achieve playing success whilst remaining solvent'.<sup>9</sup>

Although the utility maximisation approach has been evident in European football until recently, it is acknowledged that in other parts of the world, particularly in the USA, emphasis has been placed on profit maximisation with the finances of professional team sports being viewed in the same way as other businesses.<sup>10</sup> American commentators, such as Rottenberg,<sup>11</sup> El-Hodiri and Quirk<sup>12</sup> and Fort and Quirk<sup>13</sup> use profit-maximising behaviour by teams as basic assumptions for their research.

It should be noted that, in practical terms, it is often difficult to discern whether an owner's motivation is profit-seeking or competition winning, with Cairns et al pointing out that 'there are great difficulties involved in distinguishing between the competing hypotheses'.<sup>14</sup> Furthermore, it can be argued that profit maximisation is a passport to utility maximisation, in the sense that if the club is making a good profit then it will be able to use this profit to build a winning team.<sup>15</sup> Smith and Stewart see the situation in simple terms, suggesting that 'success is a function of a strong stream of revenue'.<sup>16</sup> This is evidenced by a successful club earning prize money from doing well in competitions and increasing its revenue from developing its spectator support and sponsorship interest.

### III OPEN AND CLOSED COMPETITIONS

The other fundamental concept of professional team sports is the type of competition adopted and whether it is open or closed. A closed system occurs where the same teams

<sup>9</sup> Ibid. This view was originally recorded in the Political and Economic Planning Report on English Football, which was first published in June 1966. The Srivaddhanaprabha family (Leicester City), Tony Bloom (Brighton), Mike Ashley (Newcastle), and David Sullivan and David Gold (West Ham) are examples of this type of owner in the English Premier League.

<sup>10</sup> Peter Sloane, 'The economics of sport' (2006) 2 *Insights* 1, 2.

<sup>11</sup> Simon Rottenberg, 'The Baseball Players' Labour Market' (1956) 64(3) *Journal of Political Economy* 242.

<sup>12</sup> Mohamed El-Hodiri and James Quirk, 'An Economic Model of a Professional Sports League' (1971) 79(6) *Journal of Political Economy* 1302. This paper considers the economic structure of professional sports teams to determine the extent to which teams should be able to impose employment restraints on their players. The authors' model, which they use to make their determination, incorporates fundamental features of the industry including the maximisation of profits.

<sup>13</sup> Rodney Fort and James Quirk, 'Cross-Subsidization, Incentives, and Outcomes in Professional Team Sports Leagues' (1995) 33(3) *Journal of Economic Literature* 1265, 1266. This paper considers the basic economics and effects of the cross-subsidisation methods used by sporting leagues. One of the basic assumptions underlying this work is profit maximising behaviour by teams.

<sup>14</sup> J Cairns, N Jennett, and P Sloane, 'The Economics of Professional Team Sports: A Survey of Theory and Evidence' (1986) 13(1) *Journal of Economic Studies* 1, 8.

<sup>15</sup> S Szymanski and T Kuypers, (1999) *Winners and losers: The business strategy of football*. Harmondsworth, UK: Viking Press 7.

<sup>16</sup> Aaron Smith and Bob Stewart, 'The special features of sport: A critical revisit' (2010) 13(1) *Sports Management Review* 1, 5.

play in the competition during each season and changes to the composition of the competition only take place if a new franchise is admitted or one of the current teams leave.<sup>17</sup> An open system, on the other hand, allows annual changes to the sides in the competition through the promotion and relegation system.<sup>18</sup>

A noticeable difference has arisen in this area between what occurs in the USA with its use of franchise-based clubs in closed competitions and European football where open style competitions exist. As Smith and Stewart point out:

Whereas the North American leagues are closed systems where the same teams participate no matter what their league standing in the previous league, the European governance model extols the benefits of a promotion and relegation system.<sup>19</sup>

It is suggested that reasons for the differences in approach include demography and geography. Smaller European countries with denser populations encouraged the growth of many clubs in close proximity to one another, whereas larger countries like the USA and Australia, with a more widely spread population and greater distances to travel, led to the different systems arising. Davies states that:

All the Australian leagues are, and always have been, closed-system competitions, due partly to the combination of a relatively small population spread across large distances, but also because it is the only country in the world that has four professional football codes.<sup>20</sup>

Another reason for the closed system in the USA was government subsidies being used in the past to build stadiums, and owners of sporting franchises being prepared to move their teams to an area where a stadium had been built.<sup>21</sup> The provision of basic but very important infrastructure for a team, together with its availability in a ready-made catchment area for spectators and supporters, would have made it an easy decision for owners to move their team there. Cheffins suggests that governments are not so generous nowadays,<sup>22</sup> but the fact remains that the presence of the earlier subsidies for sports stadiums paved the way for the strategic placement of clubs in areas of reasonably large populations.

The added element of promotion and relegation provides extra interest to spectators in much the same way as a close encounter between equally balanced sides does. English football has recognised the importance of this issue and has in recent years increased the number of promotion and relegation places and play-off matches for some of the promotion spots.<sup>23</sup> This has had the benefit of keeping more teams competitively

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<sup>17</sup> Chris Davies, 'The financial crisis in the Premier League: is a salary cap the answer?' (2010) 31(11) *European Competition Law Review* 442, 443.

<sup>18</sup> *Ibid.*

<sup>19</sup> Smith and Stewart (n 16) 8.

<sup>20</sup> *Ibid.*

<sup>21</sup> Brian Cheffins, 'Playing the Stock Market: "Going Public" and Professional Team Sports' (1999) 24(3) *Journal of Corporation Law*, 641, 649–650.

<sup>22</sup> *Ibid.* 650.

<sup>23</sup> In the 1986/87 season, the English Football League introduced changes to the promotion and relegation system in the four main divisions of its competition. Three teams rather than two were to be relegated from Division 1. Three teams were to be promoted from Division 2 to Division 1 with the

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involved in late season matches and generating spectator excitement. The USA and Australian competitions lack the promotion and relegation option which is one reason they have incorporated measures like salary caps, draft systems and revenue sharing to encourage competitive balance.<sup>24</sup>

Thus, both types of competition provide entertainment and operate effectively and well in their different environments. This paper will now consider how the the contrasting concepts of profit and utility maximisation and open and closed competitions have impacted on the concept of the ESL but before doing so, it will examine what that proposal involved.

#### IV THE PROPOSAL FOR A EUROPEAN SUPER LEAGUE

##### A *The Proposal*

On the 18 April 2021, 12 clubs from some of the top leagues in Europe announced their intention to form a breakaway ESL competition. It was to be funded by JP Morgan Chase which was prepared to invest €3.25 billion in the venture.<sup>25</sup> They indicated that a further three clubs would join their ranks making a total of 15 with a ‘further five teams to qualify annually based on their performance earlier in the season.’<sup>26</sup>

The 12 founding clubs comprising Real Madrid, Barcelona and Atletico Madrid from Spain, Juventus, AC Milan and Inter Milan from Italy, and Liverpool, Chelsea, Manchester City, Manchester United, Arsenal and Tottenham from England, indicated a desire to work in partnership with FIFA and UEFA and to play midweek fixtures, with all participating clubs continuing to compete in their respective national leagues, ‘preserving the traditional domestic match calendar which remains at the heart of the club game’.<sup>27</sup> The start of the competition was to be August 2021 with a projected

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third team being decided by a play-off competition involving the clubs which finished third, fourth, fifth and sixth in Division 2. Three teams were to be relegated from Division 2 to Division 3. Three teams were to be promoted from Division 3 to Division 2 on the same basis as the Division 2 to Division 1 promotion. Four teams were to be relegated from Division 3 to Division 4. In Division 4, four teams were to be promoted with the fourth team being decided by a play-off competition involving the clubs which finished fourth, fifth, sixth and seventh. Two teams were to be automatically relegated to the Conference league, whereas, before the bottom sides merely had to seek reelection which they normally obtained.

<sup>24</sup> In the USA, the NFL and the NBA use a draft system, a salary cap and revenue sharing. The NBA also uses a luxury tax, which the MLB also adopts. In Australia, the AFL use a draft system, a salary cap and revenue sharing, whereas, the NRL uses a salary cap, with revenue sharing utilised for distributing broadcasting revenue equally between the clubs.

<sup>25</sup> Jasper Jolly, ‘JP Morgan ‘misjudged’ football fans over European Football League’, *The Guardian* (online at 23 April 2021) <<https://www.theguardian.com/business/2021/apr/23/jp-morgan-misjudged-football-fans-over-european-super-league>>.

<sup>26</sup> Aljazeera, ‘European Super League: Breakaway football clubs launch new league’, *Aljazeera* (Web Page, 19 April 2021) <<https://www.aljazeera.com/news/2021/4/19/european-super-league-breakaway-football-clubs-launch-new-league>>.

<sup>27</sup> Ed Aarons, ‘Uefa could be forced to alter Champions League plans amid backlash’, *The Guardian* (online at 22 April 2021) <<https://www.theguardian.com/football/2021/apr/21/uefa-could-be-forced-to-alter-champions-league-plans-amid-backlash-super-league>>.

revenue of more than €4 billion per annum from broadcasting and sponsorship.<sup>28</sup> A third of this would be shared between the founding members with a similar amount distributed among the 20 participating teams. The revenue would be shared between the clubs according to performance and audience size. The clubs also promised solidarity payments of more than €10 billion over 23 years.<sup>29</sup>

It should be noted, however, that the threat of a breakaway league had existed since 2000 when 14 major European clubs set up an interest group named the G14.<sup>30</sup> The G14 group was eventually dissolved in 2008 following a Memorandum of Understanding between UEFA and the European Club Association.<sup>31</sup> However, the threat of the top clubs forming a separate competition had always remained a possibility. Therefore it was not a complete surprise to see it become a reality. The real surprise was to see it collapse so quickly because the financial lure to the top clubs seemed attractive with the winning club likely to receive a sum in the region of €400 million, an amount considerably more than the current €120 million for winning the UCL.<sup>32</sup> Initially, founding clubs were also expecting to share JP Morgan Chase's investment of €3.5 billion which was to be provided 'solely to support their infrastructure investment plans and to offset the impact of the COVID-19 pandemic.'<sup>33</sup>

Notwithstanding this apparently positive financial arrangement, the 12 clubs seemed taken aback by the criticism of their venture from many stakeholders,<sup>34</sup> and did not appear to have a media program in place to put forward their plans coherently and succinctly. The whole proposal appeared to be badly planned and ill-conceived, particularly as the founding clubs suggested that the competition would start in August 2021.<sup>35</sup> In particular there was no firm plans about how the other five clubs which were to join the competition would be selected and nor did there appear to be any defined broadcasting arrangements in place. This apparent lack of due diligence led some commentators to suggest that the clubs never intended to go ahead with the

<sup>28</sup> Ben Rumsby, 'If you hated the Super League just wait until you see the new Champions League format', *The Telegraph* (online at 23 April 2021) 4 <[www.telegraph.co.uk/football/0/champions-league-changes-new-format-reforms-how-work-2024/](http://www.telegraph.co.uk/football/0/champions-league-changes-new-format-reforms-how-work-2024/)>.

<sup>29</sup> *Ibid.*

<sup>30</sup> André Vieli, 'UEFA 60 years at the heart of football', *UEFA.com* (Web Page, 2014) 124 <[https://editorial.uefa.com/resources/021f-0f842a4ba426-22b135e36bc-1000/uefa\\_60\\_years\\_at\\_the\\_heart\\_of\\_football.pdf](https://editorial.uefa.com/resources/021f-0f842a4ba426-22b135e36bc-1000/uefa_60_years_at_the_heart_of_football.pdf)>.

<sup>31</sup> *Ibid* 136-138.

<sup>32</sup> Mike Ozanian, 'European Super League will make soccer's most valuable teams and their owners richer', *SportsMoney* (online at 19 April 2021) 2

<<https://www.forbes.com/sites/mikeozanian/2021/04/19/super-league-will-make-soccers-most-valuable-teams-and-their-owners-richer/?sh=52297df165e1>>.

<sup>33</sup> *Ibid.*

<sup>34</sup> James Boswell, 'What was behind the collapse of the European Super League?', *Aljazeera* (Web Page, 23 April 2021) 3 <<https://www.aljazeera.com/economy/2021/4/23/what-was-behind-the-collapse-of-the-european-super-league>>. There was even criticism from British Prime Minister, Boris Johnson, and from the British Royal Family through Prince William.

<sup>35</sup> Sky Sports, 'European Super League – the key questions: What is it? Who is involved? How likely?', *Sky Sports* (Web Page, 21 April 2021) 4

<<https://www.skysports.com/football/news/12040/12279788/european-super-league-the-key-questions-what-is-it-who-is-involved-how-likely>>.

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competition but merely to put pressure on UEFA to change the UCL format to provide them with more favourable financial outcomes.<sup>36</sup>

**B** *Reasons for the 2021 Re-emergence*

It should be noted that four of the 12 clubs which formed the ESL were American-owned, namely Manchester United, Liverpool, Arsenal and AC Milan.<sup>37</sup> According to Joan Laporta, president of Barcelona, Manchester United and Liverpool ‘were the real founders of the controversial European Super League’,<sup>38</sup> indicating the influence of the profit maximisation approach. The proposal restricted the clubs to spend no more than 55% of their revenue on player wages.<sup>39</sup> By limiting this major expense, club owners would have been able to increase their overall profit.<sup>40</sup> Another aspect of the ESL proposal was that it would operate as a closed competition, thus protecting the founding clubs, with an underperforming club not having to be concerned about its future as it would return to the competition the following year in any event.<sup>41</sup> The profit maximisation approach and the use of a closed competition reflect the American influence on the ESL concept.

A second significant factor which encouraged the ESL project was the financial plight of some of the clubs involved caused by the COVID-19 pandemic. Two of the rebel ESL clubs, Real Madrid and Barcelona, which are owned by their registered supporters,<sup>42</sup> revealed gross debts of €901 million and €1.2 billion respectively.<sup>43</sup> In terms of net debt Barcelona’s rose sharply to €488 million in the year to June 2020 while the figure for Real Madrid was €354.3 million.<sup>44</sup>

<sup>36</sup> Tracey Holmes, ‘The European Super League may be on hold, but it will be back?’, *ABC News* (Web Page, 24 April 2021) 4 <<https://www.abc.net.au/news/2021-04-24/european-super-league-on-hold-will-be-back/100092688>>.

<sup>37</sup> AC Milan is owned by American Company, Elliott Management Corporation.

<sup>38</sup> Anthony Chapman, ‘Man Utd and Liverpool were the ‘real founders’ of the controversial European Super League, insists Barcelona chief’ *The Sun* (online at 20 June 2021) <<https://wwwthesun.co.uk/sport/football/15340309/man-utd-liverpool-european-super-league-founders/>>

<sup>39</sup> Tom Morgan, ‘European Super League clubs agree salary cap – guaranteeing owners more profit’, *The Telegraph* (online at 20 April 2021) 2 <<https://www.telegraph.co.uk/football/2021/04/20/european-super-league-clubs-agree-salary-cap-guaranteeing-club/#:~:text=European%20Super%20League%20clubs%20agree%20salary%20cap%20%2D%20guaranteeing%20owners%20more%20profit,-Competition%20sources%20confirm&text=Competition%20sources%20confirmed%20to%20Telegraph,salaries%2C%20agent%20fees%20and%20transfers>>.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Khalid Khan, ‘Cure or Curse: Socio Club Ownerships in Spanish in Spanish La Liga’, *Bleacher Report* (Web Page, 11 June 2010) <<https://bleacherreport.com/articles/404511-cure-or-curse-socio-club-ownerships-in-spanish-la-liga>>.

<sup>43</sup> Ryan Sidle, ‘Real Madrid reveal gross debt is up to €901 million’, *SportBible* (online at 28 January 2021) <<https://www.sportbible.com/football/fails-real-madrid-reveal-gross-debt-is-up-to-901-million-20210128>>.

<sup>44</sup> John-Paul Ford Rojas, ‘The rich revenues and huge debts behind the Super League’, *Sky News* (online at 21 April 2021) 11 <<https://news.sky.com/story/the-rich-revenues-and-huge-debts-behind-the-super-league-dozen-12281465>>.



It was hardly surprising that Real Madrid president, Florentino Perez, supported the formation of the ESL.<sup>45</sup> In the summer of 2020, rather than boosting its squad to try to retain its League title, Real Madrid had to sell players like Hakimi, Reguilon and Oscar Rodriguez, with James Rodriguez being allowed to leave for no payment and Bale and Mayoral being loaned out.<sup>46</sup> Barcelona meanwhile made a loss of over €100 million. It was unable to pay its players' wages in January 2021 with payment being deferred to February.<sup>47</sup> A similar situation arose in Italy where the main protagonist was Juventus' owner, Andrea Agnelli, who, like Perez, felt European football was unsustainable in its current form.<sup>48</sup> Juventus 'made a record loss of €89.7million for the year, the third consecutive annual deficit and one which was 125% higher than their loss of €39.9million in 2018-19.'<sup>49</sup> The club has also released players like Higuain and Matuidi to ease its financial burden.

Interestingly, German clubs, Bayern Munich and Borussia Dortmund did not join the ESL. In Germany, football is based on a more utility maximisation objective and the members of each Bundesliga club are required to hold a controlling majority of 50% plus 1.<sup>50</sup> This appears to have played a major part in their decision not to become involved in the ESL.<sup>51</sup> French club Paris St-Germain (PSG) also declined to join though it is suggested that this was for political reasons<sup>52</sup> since Qatar Sports Investments own the club and it has strong links with both FIFA and UEFA. These links include Qatar hosting the 2022 World Cup and its BeIN Sports Company holding TV rights to the UCL.<sup>53</sup>

In summary, the US-owned clubs adopted a profit maximisation approach and entered into a convenient partnership with European-owned clubs struggling to meet their debts, to provide the catalyst for the ESL proposal. Moreover, for clubs like Arsenal and Tottenham the decision to join was probably straight-forward because they had

<sup>45</sup> Guillem Balague, 'Florentino Perez: Inside the mind of European Super League architect', *BBC Sport* (Web Page, (26 April 2021) <<https://www.bbc.com/sport/football/56873046>>.

<sup>46</sup> Sidle (n 45) 2.

<sup>47</sup> Barnaby Lane, 'A Spanish newspaper claim FC Barcelona is on the 'verge of bankruptcy' after it reported a \$117m loss and failed to pay players' *Insider* (online at 28 January 2021) <[https://www.insider.com/fc-barcelona-financial-results-lionel-messi-loss-debt-2021-1-1](https://www.insider.com/fc-barcelona-financial-results-lionel-messi-loss-debt-2021-1-)>

<sup>48</sup> Nicky Bandini, 'Sassuolo's sweet revenge at San Siro leads Italy's Super League backlash' *The Guardian* (online at 22 April 2021) 3 <<https://www.theguardian.com/football/2021/apr/22/sassuolo-milan-juventus-agnelli-san-siro-serie-a-super-league>>.

<sup>49</sup> Neil Fredrik Jensen, 'Juventus financial performance – the bubble starts to deflate' *Game of the People* (online at 24 September 2020) <<https://gameofthepeople.com/2020/09/24/juventus-financial-performance-the-bubble-starts-to-deflate/>>

<sup>50</sup> Oliver Budzinski, 'Football and Regulation: Why German Teams Might Win in the End', *Play the Game* (Web Page, 2 April 2018) 10 <[https://www.playthegame.org/fileadmin/image/knowledgebank/Challengesforfootball\\_pdf/Oliver\\_Budzinski.pdf](https://www.playthegame.org/fileadmin/image/knowledgebank/Challengesforfootball_pdf/Oliver_Budzinski.pdf)>. There are two exceptions to this rule, Wolfsburg (owned by Volkswagen) and Bayer Leverkusen (owned by chemical company Bayer). These exceptions are allowed because the clubs were established in the Bundesliga before the rule was introduced.

<sup>51</sup> Pablo Polo, 'Why aren't PSG and Bayern in the European Super League?', *Marca* (Web Page 19 April 2021) 3 <<https://www.marca.com/en/football/international-football/2021/04/19/607daf046163fdb268b456a.html>>.

<sup>52</sup> *Ibid* 1.

<sup>53</sup> *Ibid*.



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not been performing as well recently as in previous seasons and were not going to qualify for the UCL for 2021-22 in any event. An offer of a permanent position in the ESL would have been far too good for them to refuse.

While the 2021 version of the ESL quickly folded, the fact that it could have eventuated 20 years earlier indicates that it remains an ongoing possibility for European football. The next section of this paper will examine the legal aspects of an ESL re-emergence.

### V THE LEGAL ISSUES

#### A *Player and Club Contracts*

A potential legal issue that may have arisen had the launch of the ESL been successful was whether the clubs involved could have held the players to their existing contracts. From the players' perspective it is arguable that one of the reasons they had signed a contract with a particular club was to play in the domestic league in which it competed, and depending on qualification, to also play in UEFA's competitions. Thus, these contracts were not signed to play in the ESL. While it is unlikely that any player contract contained an express clause stating that the contract was to play in a particular league, an implied term to that effect could have been argued by the players if their club was banned from competing in its domestic league because of its participation in the proposed ESL.

The governing bodies of the various leagues had stated that they would not be allowing any of the ESL clubs to compete in their domestic leagues for the 2022 and, potentially, following seasons. This raises the issue as to whether these governing bodies could have legally banned the clubs. The question as to the contractual relationship between the leagues and the clubs was examined, in Australia, in *News Ltd v Australian Rugby League*<sup>54</sup> which involved a similar breakaway Super League competition. In that case it was held that an implied one-year term existed between the leagues and the club which meant that, effectively, the clubs were invited to compete on a yearly basis for the next season's competition.<sup>55</sup> Thus, the governing bodies had the legal means to exclude clubs from their domestic competitions. If this had happened, it is likely that the players could have terminated their contracts, if they so wished.

#### B *Could UEFA Legally Prevent Formation of an ESL?*

The sudden collapse of the ESL was followed by immediate and absolute contrition by nine of the 12 clubs which 'submitted to UEFA a 'Club Commitment Declaration' setting out the position of the Clubs including their commitment to UEFA Club Competitions as well as national club competitions.'<sup>56</sup> This outcome, however, did not

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<sup>54</sup> *News Ltd v Australian Rugby League* (1996) 64 FCR 410.

<sup>55</sup> *Ibid* 282.

<sup>56</sup> UEFA, 'UEFA approves reintegration measures for nine clubs involved in the so-called 'Super League', *UEFA* (Web Page 7 May 2021)

take into account the position of the three remaining clubs, Real Madrid, Barcelona and Juventus. On 20 April 2021 these three clubs, through the legal entity known as European Super League Company SL, took ex parte proceedings in the Madrid Commercial Court seeking an order preventing UEFA taking any action against the breakaway clubs pending its application to establish its right to set up the ESL.<sup>57</sup> The injunction was granted, and UEFA was forced to suspend its disciplinary proceedings against the three clubs.<sup>58</sup>

The matter returned to the Madrid Court on 1 July 2021 and Judge Ruiz de Lara confirmed his earlier ex parte injunction.<sup>59</sup> The Judge also ruled that ‘the sanctions’ imposed on the nine other clubs, under ‘the euphemism of the Club Commitment Declaration’ was in breach of his initial order.<sup>60</sup> He ordered that ‘the sanctions’ against the nine repentant clubs should be cancelled. In the case of the English clubs this included ‘the sanctions’ agreed by those clubs with the English Premier League.<sup>61</sup>

The Spanish Court also referred the matter to the European Court of Justice (ECJ) asking whether FIFA and UEFA were breaching ‘EU competition law by preventing the clubs from creating a breakaway European Super League.’<sup>62</sup> The Court also asked the ECJ whether FIFA and UEFA were able ‘to impose restrictions or penalties on clubs which remain part of the planned competition.’<sup>63</sup>

The ECJ will assess the situation using the following three-step test:

- 1 Is the undertaking’s objective legitimate?
- 2 Is the restriction inherent/necessary to achieve its objective?
- 3 Is the restriction proportionate/reasonable?<sup>64</sup>

This test provides a potential ancillary restraint exemption which is sometimes referred to as the *Wouters* exemption, because that case established this potential line of defence to Articles 101(1) and 102 of the Treaty on the Functioning of Europe (TFEU).<sup>65</sup> The exemption can arise in situations where the agreement restrains trade but the Court deems that the rule is proportionate and aimed at achieving a legitimate

<https://www.uefa.com/insideuefa/mediaservices/mediareleases/news/0269-123871bd86ca-d9571aa78f72-1000--uefa-approves-reintegration-measures-for-nine-clubs-involved-in/>.

<sup>57</sup> UEFA, ‘Disciplinary proceedings against FC Barcelona, Juventus FC and Real Madrid CF temporarily suspended’, *UEFA* (Web Page, 9 June 2021)

<https://www.uefa.com/insideuefa/mediaservices/mediareleases/news/026a-127ac8d9a2a5-ae10445760c4-1000--disciplinary-proceedings-against-barcelona-juventus-madrid-temp/>

<sup>58</sup> *Ibid.*

<sup>59</sup> Inside World Football, ‘Spanish court orders UEFA to stop penalising rebel ESL clubs’, *Inside World Football* (Web Page 2 July 2021) <http://www.insideworldfootball.com/2021/07/02/spanish-court-orders-uefa-stop-penalising-rebel-esl-clubs/>

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> Reuters, ‘UEFA suspends disciplinary proceedings against Real, Barca and Juve’ *Reuters* (Web Page, 10 June 2021) <https://www.reuters.com/article/uk-soccer-uefa-superleague-idINKCN2DL256>

<sup>63</sup> *Ibid.*

<sup>64</sup> Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (2002) ECR I-1577.

<sup>65</sup> *Ibid.*

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and necessary objective of the body adopting the rule.<sup>66</sup> The *Wouters* exemption was subsequently used in the sports case of *Meca-Medina*<sup>67</sup> in 2004, where two long-distance swimmers sought to contest their two-year bans for taking performance-enhancing drugs. The ECJ applied the three conditions, finding that there was no breach of European Union competition law as the enforcement of anti-doping rules was justified as a legitimate objective to protect the integrity of the sport and the restrictions imposed by the rules were limited to what was necessary and proportionate.<sup>68</sup>

However, in the European Commission's consideration of the Eligibility Rules of the International Skating Union (ISU), which penalised athletes by effectively banning them for life<sup>69</sup> for engaging in events not organised by the ISU,<sup>70</sup> the Commission held that the Eligibility Rules did 'not serve purely legitimate objectives but also other interests of the ISU including its economic interests' and were 'neither inherent in the pursuit of legitimate objectives nor proportionate to achieve legitimate objectives'.<sup>71</sup> The European Commission's decision was endorsed by the General Court of the European Union in December 2020.<sup>72</sup>

A similar outcome occurred in the recent case between rival wrestling groups comprising the German Wrestling League (DRL) on the one hand and the German Wrestling Federation (DRB) and the United World Wrestling (UWW) on the other.<sup>73</sup> In this case the DRL and five of its teams successfully appealed against the decisions of the DRB and the UWW 'to ban athletes from their competitions because they had participated in DRL events.'<sup>74</sup> The matter was heard in the Nuremberg Court of Appeals.

The court did not decide whether the objectives for evoking the bans were legitimate but did determine that the measures taken were neither necessary nor proportionate to obtain them. It was held the DRB and the UWW had not substantiated their claim that the introduction of an alternative league 'would have a negative effect on the cohesion

<sup>66</sup> Valerie Kaplan, 'UEFA Financial Fairplay Regulations and European Union Antitrust Law Complications' (2015) 29(4) *Emory International Law Review* 799, 837.

<sup>67</sup> Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] ECR II-3291.

<sup>68</sup> Philip Kienapfel and Andreas Stein, 'The application of Articles 81 and 82 EC in the sport sector' (2007) 3 *European Commission Competition Policy Newsletter* 6, 8.

<sup>69</sup> The Rules provided for skaters to become ineligible for ISU competitions if they competed in unauthorised events with the athlete not being able to apply for reinstatement. This in essence meant being banned for life.

<sup>70</sup> Summary of Commission Decision (Case AT 40208 – *International Skating Union's Eligibility Rules*) [2018] OJ C 148, 9–12 ('*International Skating Union*'), <[https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52018XC0427\(02\)](https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52018XC0427(02))>.

<sup>71</sup> *Ibid* at [21].

<sup>72</sup> Case T-93/18 *International Skating Union v Commission* (2020) ECLI:EU:T:2020:610.

<sup>73</sup> Sinziana Ianc, Tobias Rump, and Colin Sroka, 'German Court ends the Anti-Trust Fight between rival Wrestling Federations' *LawInSport* (Web Page, 16 July 2021) 2

<<https://www.lawinsport.com/topics/item/german-court-ends-the-anti-trust-fight-between-rival-wrestling-federations>>

<sup>74</sup> *Ibid*.

between grassroots and competitive sports.’<sup>75</sup> Further, the court held that ‘[a]t the time of the bans, both Federations lacked proper approval processes and statutory rules governing participation in their events that were sufficiently precise, transparent, comprehensive and non-discriminatory.’<sup>76</sup>

Although the case lends weight to the view that a group of teams has the right to establish its own competition to rival an existing sports federation it does provide some indication as to what sports federations need to do to obtain court approval.<sup>77</sup> It is apparent that a federation needs to have a clearly defined set of rules which are necessary and proportionate to achieve a legitimate objective.<sup>78</sup> Careful planning and preparation are therefore key ingredients in being able to prevent a rival competition from forming successfully.

Whether UEFA can legally prevent the establishment of an ESL is debateable. Under Article 49(1) of its Statutes UEFA has ‘the sole jurisdiction to organise or abolish competitions in Europe in which Member Associations and/or their clubs participate.’<sup>79</sup> Article 49(3) requires competitions not organised by UEFA but played on UEFA territory to have prior approval from FIFA and/or UEFA and/or the relevant Member Associations.<sup>80</sup> Disciplinary measures are referred to in Article 52 and cover contravention of UEFA’s Statutes.<sup>81</sup> Penalties for offences are listed in Article 53<sup>82</sup> and they include the possibilities of disqualification from competitions in progress and/or exclusion from future competitions.<sup>83</sup>

UEFA’s position appears similar to that of the DRB and UWW in that it does not appear to have a clear set of rules that are necessary and proportionate. UEFA’s argument would be similar to that of the DRB and the UWW, maintaining that its function is to look after all levels of European football including grassroots. However, it is doubtful whether UEFA has provided sufficient information as to when and in what circumstances permission would be granted to individual clubs to run independent competitions and there is also no advice provided as to what penalties clubs might expect to receive for breaching the rules in this particular way. This

<sup>75</sup> *Ibid.*

<sup>76</sup> Tobias Rump and Colin Sroka, ‘Wrestling: Court ends the (antitrust) fight between Sports Federations’ *Linklaters* (Web page, viewed 1 August 2021) 2 <<https://www.linklaters.com/de-de/insights/blogs/sportinglinks/2021/march/dominance-in-wrestling-court-ends-the-fight-between-sports-federations>>

<sup>77</sup> *Ianc, Rump and Sroka* (n 74) 5.

<sup>78</sup> *Ibid.*

<sup>79</sup> *UEFA Statutes (Edition 2021)* art 49(1). See also Chris Anderson and Tom Murray, ‘Doomed to fail? An Analysis of European Super League and the complex web of football governance, regulations and laws’ *LawInSport* (Web Page, 14 May 2021) <[https://www.lawinsport.com/topics/item/an-analysis-of-the-legal-and-regulatory-hurdles-facing-the-european-super-league?utm\\_campaign=Football%20Updates&utm\\_medium=email&\\_hsmi=127214865&\\_hsenc=p2ANqtz-8kXtpSsNHwMQprV\\_ljl1qM8Ly9Kv6jV1Zx718Mn2UuFx8VHQV3io76i2HePRbJ\\_lq5gCfc5uW4oZJVv2WEWsbMnr5yg&utm\\_content=127214865&utm\\_source=hs\\_email](https://www.lawinsport.com/topics/item/an-analysis-of-the-legal-and-regulatory-hurdles-facing-the-european-super-league?utm_campaign=Football%20Updates&utm_medium=email&_hsmi=127214865&_hsenc=p2ANqtz-8kXtpSsNHwMQprV_ljl1qM8Ly9Kv6jV1Zx718Mn2UuFx8VHQV3io76i2HePRbJ_lq5gCfc5uW4oZJVv2WEWsbMnr5yg&utm_content=127214865&utm_source=hs_email)>

<sup>80</sup> *Ibid* art 49(3).

<sup>81</sup> *Ibid* art 52.

<sup>82</sup> *Ibid* art 53(1).

<sup>83</sup> *Ibid* art 53(1)(n).

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suggests that the ECJ may hold UEFA's rules to lack necessity and proportionality to achieve a legitimate objective.

Van der Burg acknowledges that 'the foundation of a new sporting competition is not objectionable in itself' but points out that problems can arise with 'the specific nature of the newly established structure.'<sup>84</sup> Some commentators have argued a closed Super League with no promotion or relegation may be incompatible with arts 101(1) and 102 of the TFEU, as it forecloses the market to aspiring entrants.<sup>85</sup> In Van der Burg's view, however, even an open Super League would be incompatible with art 101(1) as many of the football markets are national ones, and they would be seriously affected by the introduction of a Super League, whether it is open or closed.<sup>86</sup>

Despite these pertinent views it is suggested that, on the evidence of recent sports-related cases, the ECJ could determine in favour of an ESL. This raises the question of whether the best option for UEFA is for it to run its own ESL-type competition. An ESL controlled by UEFA is the only type of ESL that it could realistically support, having realised since the G-14 group was initially formed that the large clubs are crucial to its objective of protecting and promoting the interests of all levels of European football, including the grassroots. The wealthy clubs have the talented players, who attract public interest and hence broadcasting, marketing and sponsorship support. These clubs make European football a financially viable product, which can help sustain the lower levels of the game. Without them UEFA's main objective would be extremely difficult to achieve. In these circumstances, what needs to be examined is whether an ESL organised and controlled by UEFA could be a feasible and effectively-run option.

## VI A UEFA CONTROLLED ESL

Despite the failure of the breakaway ESL there is still the potential for UEFA to create its own ESL. There have already been suggestions about how this could be structured. Vrooman, for instance, suggests that 30 of the top-revenue clubs be divided into three 10 team regional conferences with each team playing 'the customary 38-game schedule',<sup>87</sup> and recommends that 'the season would conclude with an eight-team knockout championship tournament with the top two clubs from each conference and two wild cards teams'.<sup>88</sup> He also advises that 'the fragmented national league base be integrated into an association of international leagues'.<sup>89</sup> Vrooman's ESL also involves

<sup>84</sup> Tsjalle van der Burg, 'EU competition law, football and national markets' (2020) *Managing Sport and Leisure* 11 <<https://www.tandfonline.com/doi/full/10.1080/23750472.2020.1863851>>.

<sup>85</sup> Katarina Pijetlovic, *EU sports law and breakaway leagues in football* (TMC Asser Press, The Hague The Netherlands, 2015). See also Richard Parrish and Samuli Miettinen, *The sporting exception in European Union law* (TMC Asser Press, The Hague The Netherlands, 2008). See also Jens Van den Brink, 'EU competition law and the regulation of football: Part II' (2000) 21(9) *European Competition Law Review*, 420-427.

<sup>86</sup> Van der Burg (n 85) 11.

<sup>87</sup> John Vrooman, 'Theory of the Beautiful Game: The Unification of European Football' (2007) 54(3) *Scottish Journal of Political Economy* 314, 350.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* 351.

‘equal revenue sharing of all television rights fees, and a hard payroll cap of 64% of league revenue with a minimum payroll of 75% of the cap’.<sup>90</sup> He proposes that the league be ‘self-governed’.<sup>91</sup> Ramchandani et al meanwhile maintain that ‘a breakaway European Super League (by removing the ‘top’ teams in the respective leagues) may bring about a more balanced league comprising of the other clubs left behind in their own domestic leagues’.<sup>92</sup>

The authors’ suggestion is that the ESL should comprise the top 20 clubs in Europe which would play in a League format with a total of 38 home and away matches taking place. The winners of the competition would be the clubs scoring the most points from the 38 games with three points being awarded for each win and one point for each draw. However, unlike the proposed breakaway ESL, it would not be a closed competition. There would be relegation from the ESL with the two clubs accruing the least points being relegated back to the premier division of their national leagues. UEFA’s current competitions would form the levels below the ESL. Thus, the winner and runner-up in the UCL would take the place of the two relegated clubs from the ESL. The UCL, the UEL and UEFA Europa Conference League (UECL) would continue in their present format with the winner in each being awarded an automatic place in the next higher European competition for the following season. Other entrants into the UCL, UEL and UECL would be awarded places in accordance with where the clubs finish in their national leagues, as is currently the case. With the departure of the 20 clubs from the UCL to the ESL, their places in the UCL would be available to accommodate new entrants from the national leagues. This arrangement should also apply to the UEL and UECL, thus allowing more national clubs to participate in these European competitions than previously.

In essence, the proposed ESL would simply be an additional top league placed above UEFA’s other competitions, with the better teams from the national leagues making up this Super League. There is little doubt that the new ESL would immediately become the main drawcard of European soccer, attracting the bulk of the media, sponsorship and public interest. Conversely, interest in the other competitions, the UCL, UEL and UECL, would decline. The ESL would become the main source of income for European football, so it is essential that UEFA controls the financial arrangements of the ESL. If UEFA is to protect and promote the interests of European football at all levels it would need to ensure that a reasonable percentage of the revenue from the proposed ESL goes into the solidarity fund.

Another useful variation to Vrooman’s proposal would be promotion to and relegation from the ESL so it would not be an isolated competition but form part of UEFA’s suite of competitions. This would provide the current second tier teams with an opportunity to improve and progress to the ESL and also provide additional excitement to both the

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<sup>90</sup> Ibid 348.

<sup>91</sup> Ibid 349.

<sup>92</sup> Girish Ramchandani, Daniel Plumley, Sophie Boyes and Rob Wilson, ‘A longitudinal and comparative analysis of competitive balance in five European football leagues’ (2018) 24(5/6) *Team Performance Management* 265, 278.

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ESL, UCL and UECL competitions. This arrangement contrasts with Vrooman's US style model of a closed competition with a salary cap and revenue sharing to ensure competitive balance.<sup>93</sup> Promotion to the ESL should not cause difficulties with the winners and runners-up of the UCL being the teams to join the ESL. However, relegation is perhaps not as straightforward as there would be two relegated teams to accommodate in their respective national leagues. The simplest way to deal with this situation would be to increase the size of the national league(s) to accommodate the relegated club(s).<sup>94</sup>

A further variation on Vrooman's model is in the number of teams in the ESL. His model allows for 30 teams whereas the model proposed here is for 20 teams. This number has been chosen so that the teams in the ESL can play in the one competition rather than have three divisions and a knockout competition to decide the winner.<sup>95</sup> The competition is also constructed so that each side can play all the others at home and away which is preferable to Vrooman's model because it is a fairer test of the teams' abilities.

The selection of the initial clubs to join the ESL would need to be handled with fairness and transparency. Vrooman based his selections on the main criterion of club revenue.<sup>96</sup> However, the model proposed here would be based on merit and would take into account each club's performances in recent UEFA competitions. The only proviso would be the need to consider the competitive balance of the clubs in each national league. This means, for instance, that it would be inappropriate to offer a place in the ESL to Scottish side Celtic if Rangers was not also offered a place, because the Scottish Premier League would be left grossly unbalanced if Rangers remained in that competition without Celtic. If there are two sides vastly better than the others, there is at least a competitive edge between them which brings some interest to the national competition.

From both an administrative and practical point of view, the restructure would seem to be feasible. It is also suggested that another outcome of such an ESL would be to bring competitive balance to the main national leagues in European football by removing the clearly superior performing teams from the national competitions whilst, at the same time, providing a competitive tournament for those teams in Europe. Currently there appears to be competitive imbalance between the clubs in the main European national leagues with teams like Real Madrid, Barcelona, Bayern Munich, PSG, Juventus, and Manchester City tending to dominate their respective leagues.

The other main advantage of an ESL is that it is likely to reduce threat that the top clubs might form their own competition. If they are participating in an ESL under

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<sup>93</sup> Vrooman (n 88) 348.

<sup>94</sup> Two issues would potentially arise from this solution. First, the national leagues would have a slightly increased fixture list. Secondly, the relegation process may lead to an odd number of teams in the national league which would create the need for each club to have a 'bye' round on a rotational basis.

<sup>95</sup> Vrooman (n 88) 349.

<sup>96</sup> *Ibid.*



UEFA's management there is less likelihood of them organising their own competition unless, of course, they came to the view that they could fare better under their own control.

The main weakness of the proposal would be lack of stakeholder support. A major change in the structure of European football would cause concern to those stakeholder groups which would have their status reduced in the new arrangement. This would certainly be the case for the five main national leagues as their prominent status would be eroded by the establishment of a new ESL. Further, the national associations which would vote on an ESL proposal may also have reservations about the matter. The national associations of the five main European Leagues could be concerned about weakening the standard of football in their national leagues and the other national associations could be concerned about the potential increase in the financial gap between clubs in the ESL and the clubs in their respective countries. There is clearly a risk that by healing competitive balance in the national leagues, a larger gulf could be created between the playing talent in the ESL clubs and the other European teams.

The other stakeholders that are unlikely to support the concept of an ESL are the supporters. The recent ESL attempt by the top clubs caused a huge reaction from football fans, particularly those belonging to the six Premier League sides which were involved. Immediately after the announcement of the proposal there were protests by Chelsea fans before their club's game with Arsenal on 20 April. The Chelsea Supporters' Trust denounced the proposed move as the 'ultimate betrayal' and 'unforgivable'.<sup>97</sup> Violent protests by some Manchester United fans before their club's game with Liverpool took place on Sunday 2 May caused the match to be postponed for safety reasons.<sup>98</sup> This strong reaction from fans was a major factor in the top clubs withdrawing from the proposal and it is suggested that there is likely to be a similar reaction even if a future ESL was orchestrated through UEFA.

A further concern would be the financial ramifications of an ESL. The proposed new league would become the main focus of attention and the national leagues would be seen and treated as at a level below the ESL. Broadcasting and sponsorship for national leagues would likely diminish, with the media and sponsors focussing their attention on the ESL. The clubs remaining in the national leagues would suffer a severe impact on their revenues as their incomes from broadcasting and sponsorship would almost certainly decline. Many of the national leagues could find themselves more competitively balanced but that is likely at the risk of delivering a less important product, and the remaining clubs within their leagues could suffer considerable

<sup>97</sup> Louise Taylor, 'Chelsea fans protest against Super league as supporters unite in anger' *The Guardian* (online at 21 April 2021) <<https://www.theguardian.com/football/2021/apr/20/chelsea-fans-protest-against-super-league-as-supporters-unite-in-anger>>.

<sup>98</sup> Simon Stone, 'Manchester United protests: Emotions have been simmering for 16 years', *BBC Sport* (Web Page, (2 May 2021) <<https://www.bbc.com/sport/football/56966096>>. Many Manchester United's supporters have disliked the Glazer family (the owners of Manchester United) from the time they acquired the club in 2005. The purchase was a leveraged buyout with the interest payments on the loan being paid by the club. Many fans felt that these loan repayments should have been repaid from the owners' private funds rather than from the club's resources.

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financial loss. Consequently, if an ESL were to proceed, some monetary compensation would need to be made to the national leagues for their losses.

The financial issue is not only important from the perspective of major stakeholders but is also crucial for the well-being of European football. There is a real danger that if the proposed ESL were to be introduced, the vast majority of European football's income would then come from the ESL and, if the proceeds were simply passed on to the clubs competing in the ESL, the gulf between the ESL clubs and the other clubs would increase. That would, in turn, lead to a huge discrepancy between the playing talent of the ESL clubs and the other European football teams. This would create a situation which is not in the best interests of European football. It would be ironic if the ESL created better competitive balance within some of the main national leagues, but at the same time caused a massive competitive imbalance between the clubs that played in the ESL competition and those that did not. This needs to be avoided at all costs. If a reasonable agreement could be reached, then European football could benefit but stakeholders need to be prepared to consider the requirements of the sport generally and not just their own vested interests. The popularity of European football might reach even greater heights but the income that the potential additional popularity could provide would need to be divided carefully, wisely and fairly.

Solidarity payments would need to be considered prudently because they would be one means whereby some redress could be obtained by those directly or indirectly affected by the introduction of the proposed ESL. Currently, solidarity payments are set at 7% of UEFA's competition revenue but this percentage appears low and there are some suggestions that it should be increased to 20%. Perhaps the percentage should be even higher if the competition arrangements were considered from an ESL perspective. A figure in the region of 40% might be more appropriate bearing in mind the likely large financial success of the ESL and the deleterious effect it is likely to have on the other UEFA competitions and clubs. There would be a limit to what the top 20 clubs would be prepared to concede by way of a solidarity payment percentage and this must be taken into consideration. Trying to push for a solidarity payment that is too high could prompt the top clubs to consider breaking away from UEFA and running the competition themselves. However, if the top 20 clubs could share 60% of the competition income and 40% was shared between the remaining clubs under UEFA's control, those top 20 clubs would remain in a very privileged position and maintain their financial edge over clubs not in the ESL.

What Australian sport can learn from what has happened in European football, and what European football can learn from what has happened from the formation of rival leagues in countries like Australia will now be examined.

## VII THE SIGNIFICANCE FOR AUSTRALIAN SPORT

The emergence of rival leagues has been happening over many years, particularly in the United States (US) which has seen many leagues form, and subsequently fold, in its main team sports of baseball, basketball and football. It should also be noted that in

these sports the leagues that survived eventually merged to form the one competition, namely Major League Baseball (MLB), the National Basketball Association (NBA) and the National Football League (NFL).

Australia has, likewise, seen a number of rival leagues or competitions emerge. The Victorian Football Association (VFA) was formed in 1877, but in 1897 the leading clubs left to form the Victorian Football League (VFL), the forerunner of today's Australian Football League (AFL). The VFA did survive as a secondary competition in Victoria until 1999 when it formally merged with the reserve teams of the Melbourne-based AFL clubs to form a new VFL.<sup>99</sup> It was the then Australian Cricket Board (ACB)'s refusal to grant television right to Kerry Packer's Channel Nine that led to the emergence of World Series Cricket (WSC). Packer signed up individual players, rather than actual teams, with the contracted players then forming three teams: Australia, West Indies and the Rest of the World. Both the WSC-run and the ACB-organised competitions struggled financially, because the ACB did not have the players, and WSC did not have the tradition. Eventually, after just two years, a compromise was negotiated which returned the control of the game to the ASB and gave Packer the television rights he had sought.<sup>100</sup> It was a similar quest for broadcasting rights in the form of the pay television rights to the Australian Rugby League (ARL) competition that led to News Ltd forming its rival Super League competition. Crowds, however, were low for both competitions and again after just two seasons, negotiations resulted in a merged competition, the National Rugby League (NRL).<sup>101</sup>

If the ESL had not folded and had competed in 2022 there is no doubt that UEFA would have continued with its club competitions, meaning its Champions League would have been directly competing with the ESL for spectators and perhaps, most significantly, television audiences. While it is possible both competitions could have had good game-day attendances and television audiences, it is also possible both competitions would have struggled for similar reasons to that of WSC and the ACB: with the ESL having the majority of the good players, and UEFA having the tradition. If this had been the scenario it is likely that negotiations would have commenced regarding a merger to form an entity almost certainly run by UEFA. If, on the other hand, both competitions were successful then there would still be the question of which club was the best in Europe in any particular year. In that scenario, there may have been a need for a final match between the winners of both competitions to decide which club was actually the best.

Currently the emergence of a rival league does not look likely for the foreseeable future in Australia. However, what has recently happened in European football should be a warning to the governing bodies of Australian professional team sports of the need to ensure all stakeholders are satisfied with how the sport is being run. Like WSC and

<sup>99</sup> Chris Davies, 'News Ltd v ARL, South Sydney v News Ltd- and the Question of Authorisation Under s 88 of the Trade Practices Act' (2002) 10 *Trade Practices Law Journal* 215, 215-16.

<sup>100</sup> *Ibid.*, 216.

<sup>101</sup> *Ibid.*, 217.

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Super League, the ESL has shown there is always potential for other parties to raise the necessary finance to form a breakaway competition or league, if enough clubs and/or players are dissatisfied with the present competition. It is therefore important that governing bodies ensure that both clubs and players are adequately funded and remunerated respectively. It should also be acknowledged that it was a backlash from supporters which saw the majority of the clubs quickly withdraw from the ESL, highlighting that the views of supporters are also an important consideration.

VIII CONCLUSION

Although the threat of a rival ESL has, at least presently, receded UEFA cannot rule out the possibility of an ESL being established in the future as the ECJ may yet provide approval for that to occur. However, a rival ESL would still face being banned from domestic competitions as these leagues would appear to have the legal right to do that. Unless player contracts contain express clauses binding the players to play for a club in a breakaway ESL, it is arguable they would have a right to terminate their contracts if that occurred. UEFA meanwhile is currently unlikely to introduce its own ESL due to concerns regarding the lack of unity and consensus among its stakeholders for such a proposal. However, UEFA does need to maintain the allegiance of the top clubs as their presence in its competitions provides lucrative sponsorship and broadcasting income, which allows UEFA to meet its main objective of protecting and promoting the interests of all levels of European football. Ironically, it may be that the recent abortive attempt to set up an ESL will assist it, because the leading clubs may be unwilling to risk the further wrath of their supporters in pursuing a concept they have clearly rejected.