Sports Litigation Alert

EU competition law and sports – three seminal judgments of 21 December 2023 by the Court of Justice of the EU

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Taking the view that sport federations, which have or arrogate to themselves powers to regulate a sporting activity are subject to the EU's competition and internal market rules, the Grand Chamber of the Court of Justice of the EU handed down three seminal judgments on 21 December 2023. These judgments concern the rules laid down by sports federations on the organization of sporting competitions or aimed at making the creation of new competitions subject to their prior authorization.

These three rulings were handed down in different contexts, but all three converge in recalling, on the one hand, the application of EU competition and internal rules to such practices by undertakings or associations of undertakings and, on the other hand, that sports federations are required, when implementing these prerogatives, to guarantee equal opportunities and adopt transparent, objective and non-discriminatory procedures.

Judgment of the Court (Grand Chamber) of 21 December 2023, *European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA)*, C-333/21, EU:C:2023:1011, request for a preliminary ruling from the Juzgado de lo Mercantil de Madrid

Facts

The Fédération internationale de football association ("**FIFA**") is an association governed by Swiss law whose objectives include, *inter alia*, to draw up regulations and provisions governing the game of football (soccer in the US) and related matters, and to control every type of football at world level, but also to organize its own international competitions. FIFA is made up of national football associations which are members of six continental confederations recognized by it – which includes the Union of European Football Associations ("**UEFA**"), an association governed by Swiss law whose principal missions consist in monitoring and controlling the development of football in Europe. As members of FIFA and UEFA, those national associations have the obligation, *inter alia*, to cause their own members or affiliates to comply with the statutes, regulations, directives and decisions of FIFA and UEFA, and to ensure that they are observed by all stakeholders in football, in particular by the professional leagues, clubs and players.

In accordance with their respective Statutes, FIFA and UEFA have the power to approve the holding of international professional football competitions, including competitions between football clubs affiliated to a national association ("interclub football competitions"). They may also organize such competitions themselves (such as the FIFA World Cup, the UEFA Champions League, or others) and exploit the rights related thereto.

European Superleague Company SL ("**ESLC**") is a company governed by Spanish law established on the initiative of a number of professional football clubs with the objective of organizing a new European interclub football competition known as the "Super League".

Following the announcement of the creation of the Super League, FIFA and UEFA issued a joint statement on 21 January 2021, setting out their refusal to recognize that new competition and warning that any player or club taking part in that new competition would be expelled from competitions organized by FIFA and UEFA.

In those circumstances, ESLC brought an action before a Spanish court, seeking, in essence, a declaration that those announcements and conduct by FIFA and UEFA were unlawful and harmful.

According to the Madrid court, FIFA and UEFA hold a monopoly or, at least, a dominant position in the market for the organization and marketing of international interclub football competitions, and that of the exploitation of the various rights related to those competitions. In that context, the Spanish court was uncertain as to the compatibility of certain provisions of FIFA's and UEFA's Statutes with EU law, most notably Articles 101 and 102 of Treaty on the Functioning of the EU ("**TFEU**") relating to competition law., and also the provisions relating to the various fundamental freedoms. It therefore referred its question to the Court of Justice of the EU ("**CJEU**") for a preliminary ruling.[1]

By its judgment, delivered the same day as two other judgments,[2] concerning the application of EU economic law to rules adopted by international or national sporting federations, the CJEU, sitting as a Grand Chamber (reserved for particularly important and/or complex cases), stated that the conditions in which the rules put in place by FIFA and UEFA, concerning:

- on the one hand, prior approval of international interclub football competitions, the participation of football clubs and players therein, and also the sanctions provided for to accompany those rules, and,
- on the other, the exploitation of the various rights related to those competitions,

may be viewed as constituting abuse of a dominant position under Article 102 TFEU, as well as an anticompetitive agreement under Article 101 TFEU. The Court also ruled on the compatibility of those rules on prior approval, participation and sanctions with the freedom to provide services guaranteed by Article 56 TFEU.

Reasoning of the CJEU

The CJEU set out three preliminary observations.

First, it observed that the questions submitted by the referring court concern solely a set of rules adopted by FIFA and UEFA. Accordingly, the CJEU was not called upon to rule on the very existence of FIFA and UEFA. Nor, was it called to rule upon the existence or characteristics of the Super League project itself, either in the light of the competition rules or the economic freedoms enshrined in the TFEU.

Next, the CJEU observed that, in so far as it constitutes an economic activity, the practice of sport is subject to the provisions of EU law applicable to such activity. The exception to this principle are certain specific rules which were adopted solely on non-economic grounds and which relate to questions of interest solely to sport per se. The rules at issue however, do not come within that exception, since they relate to the pursuit of football as an economic activity.

Lastly, as regards the consequences that may be inferred from Article 165 TFEU – which specifies both the objectives assigned to Union action in the field of sport and the means to contribute to the attainment of those objectives – the CJEU observed that it is not a special rule exempting sport from all or some of the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application. It further recalled that the undeniable specific characteristics of sport activity may be taken into account along with other elements and provided they are relevant in the application of the provisions of the TFEU relating to competition law and the

1 To ensure the effective and uniform application of EU legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the CJEU and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also seek the review of the validity of an act of EU law.
The CJEU's reply is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court's judgment likewise binds other national courts before which the same problem is raised.

2 Judgments of 21 December 2023, International Skating Union v Commission, C124/21, EU:C:2023:1012, and of 21 December 2023, Royal Antwerp Football Club, C680/21, EU:C:2023:1010, see below.

freedoms of movement. However, they may be so only in the context of and in compliance with the conditions and criteria of application provided for in each of those provisions.

Rules on prior approval of interclub football competitions

In the light of those observations and after having noted that FIFA and UEFA must be categorized as "undertakings" for the purposes of EU competition law in so far as they pursue economic activities such as organizing football competitions and exploiting the rights related thereto, the CJEU turned first to the question whether the adoption by FIFA and UEFA of rules on prior approval of interclub football competitions and participation therein, on pain of sanctions, may be held to be an abuse of a dominant position under Article 102 TFEU, on the one hand, and an anticompetitive agreement under Article 101 TFEU, on the other.

Abuse of a dominant position

In that regard, the CJEU observed that the specific characteristics of professional football, including its considerable social and cultural importance and the fact that it generates great media interest, together with the fact that it is based on openness and sporting merit, support a finding that it is legitimate to subject the organization and conduct of international professional football competitions to common rules intended to guarantee the homogeneity and coordination of those competitions within an overall match calendar as well as to promote the holding of sporting competitions based on equal opportunities and merit. It is also legitimate to ensure compliance with those common rules through rules such as those put in place by FIFA and UEFA on prior approval of those competitions and the participation of clubs and players therein. It follows that, in the specific context of professional football, neither the adoption of those rules nor their implementation may be categorized, in terms of their principle or generally, as an abuse of a dominant position under Article 102 TFEU. The same holds true for sanctions introduced as a means of guaranteeing the effectiveness of those rules.

However, none of those specific attributes makes it possible to consider as legitimate the adoption of rules and related sanctions , where there is no framework for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate. More specifically, it is necessary, in particular, that those criteria and those detailed rules should have been laid down in an accessible form prior to any implementation. Moreover, in order for those criteria and detailed rules to be regarded as being non-discriminatory, they must not make the organization and marketing of third-party competitions and the participation of clubs and players therein subject to requirements which are either different from those applicable to competitions organized and marketed by the decision-making entity, or are identical or similar to them but are impossible or excessively difficult to fulfil in practice for an undertaking that does not have the same status as an association or the same powers at its disposal as that entity and which, accordingly, is in a different situation to that entity. Lastly, in order for the sanctions introduced not to be discretionary, they must be governed by criteria that must not only also be transparent, objective, precise and non-discriminatory, but must also guarantee that those sanctions are determined, in each specific case, in accordance with the principle of proportionality, in the light of, inter alia, the nature, duration and seriousness of the infringement found.

It follows that the adoption and implementation of rules on prior approval, participation and sanctions, where there is no framework for those rules providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate, constitute abuse of a dominant position under Article 102 TFEU.

An anticompetitive agreement

As regards the application of Article 101 TFEU to those rules, the Court observed that, although the stated reasons for the adoption of rules on prior approval for interclub football competitions may include the pursuit of legitimate objectives, such as ensuring observance of the principles, values and rules of the game underpinning professional football, they do confer on FIFA and UEFA the power to authorize, control and set the conditions of access to the market concerned for any potentially competing undertaking. Therefore, they determine both the degree and the conditions in which competition may be exercised.

Moreover, the rules on the participation of clubs and players in those competitions are liable to reinforce the anticompetitive object inherent in any prior approval mechanism that is not subject to restrictions, obligations and review suitable for ensuring that it is transparent, objective, precise and non-discriminatory. This would happen by preventing any undertaking organizing a potentially competing competition from calling,

in a meaningful way, on the resources available in the market, namely clubs and players. The latter are vulnerable – if they participate in a competition that has not had the prior approval of FIFA and UEFA – to sanctions for which, as explained above, there is no framework ensuring that they are transparent, objective, precise, non-discriminatory and proportionate.

It follows that, where there is no framework providing for such substantive criteria or detailed procedural rules, the rules at issue reveal, by their very nature, a sufficient degree of harm to competition and have as their object the prevention thereof. They accordingly come within the scope of the prohibition laid down in Article 101(1) TFEU, without its being necessary to examine their actual or potential effects.

Possible exemptions or justifications

In the second place, the CJEU turns to the question whether the rules on prior approval, participation and sanctions at issue may benefit from an exemption or be held to be justified. In that regard, the CJEU recalled, first, that certain specific conduct, such as ethical or principled rules adopted by an association, are liable to fall outside the scope of the prohibition laid down in Article 101(1) TFEU. Even if they have an inherent effect of restricting competition, they can be justified by the pursuit of legitimate objectives in the public interest which are not per se anticompetitive in nature, if the specific means used are genuinely necessary and proportionate for that purpose. It states, however, that that case-law does not apply in situations involving conduct that by its very nature infringes Article 102 TFEU or reveals a sufficient degree of harm as to justify a finding that it has as its "object" the restriction of competition within the meaning of Article 101 TFEU.

Second, as regards the exemption provided for in Article 101(3) TFEU, it is for the party relying on such an exemption to demonstrate that all four of the cumulative conditions required for the exemption are satisfied. Thus, the conduct being examined must, with a sufficient degree of probability, make it possible to achieve efficiency gains, whilst reserving for the users an equitable share of the profits generated by those gains and without imposing restrictions which are not indispensable for the achievement of those gains and without eliminating all effective competition for a substantial part of the products or services concerned.

It will be for the referring Spanish court to determine, on the basis of the evidence adduced by the parties to the main proceedings, whether those conditions are satisfied in the specific case. Concerning the maintenance of effective competition, the CJEU observed that the referring court will have to take account of the fact explained above, i.e. that there is no framework for the rules on prior approval, participation and sanctions ensuring that they are transparent, objective, precise and non-discriminatory, and that such a situation is liable to enable entities having adopted those rules to prevent any and all competition on the market for the organization and marketing of interclub football competitions on European Union territory.

Consistently with the CJEU's case-law on Article 102 TFEU, abusive conduct by an undertaking holding a dominant position may escape the prohibition laid down in that provision if the undertaking concerned establishes that its conduct was either objectively justified by circumstances extraneous to the undertaking and proportionate to that justification, or counterbalanced or outweighed by "efficiencies" which also benefit the consumer.

In the present case, as regards, first, possible objective justification, the rules put in place by FIFA and UEFA have the aim of reserving the organization of any such competition to those entities, at the risk of eliminating any and all competition from third-party undertakings, meaning that such conduct constitutes an abuse of a dominant position prohibited by Article 102 TFEUnot justified by technical and commercial necessities. Second, as regards the advantages in terms of efficiency, it will be for those two sporting associations to demonstrate, before the referring court, that efficiency gains can be achieved through their conduct, that those efficiency gains counteract the likely harmful effects of that conduct on competition and consumer welfare on the markets concerned, that that conduct is necessary for the achievement of such gains in efficiency, and that it does not eliminate effective competition by removing all or most existing sources of actual or potential competition.

Rules relating to the rights emanating from professional interclub football competitions

As regards the FIFA and UEFA rules relating to the rights emanating from professional interclub football competitions organized by those entities, the CJEU observed that those rules are liable not only to prevent any and all competition between the professional football clubs affiliated to the national football associations in the marketing of the various rights related to the matches in which they participate. The rules may also affect the functioning of competition, to the detriment of third-party undertakings operating across a range of

media markets for services situated downstream from that marketing, to the detriment of consumers and television viewers.

It follows that such rules have as their "object" the prevention or restriction of competition on the different markets concerned within the meaning of Article 101(1) TFEU, and constitute an abuse of a dominant position within the meaning of Article 102 TFEU, unless it can be proven that they are justified, inter alia in the light of the achievement of efficiency gains and the profit reserved for users. Thus, it will be for the referring court to determine:

- first, whether the negotiation for the purchase of those rights with two exclusive vendors enables actual and potential buyers to bring down their transaction costs and reduce the uncertainty they would face if they had to negotiate on a case-by-case basis with the participating clubs and,
- second, whether the profit derived from the centralized sale of those rights demonstrably enables a certain form of "solidarity redistribution" within football for the benefit of all users.

An obstacle to the freedom to provide services

Finally, the CJEU held that the rules on prior approval, participation and sanctions constitute an obstacle to the freedom to provide services enshrined in Article 56 TFEU. By enabling FIFA and UEFA to exercise discretionary control over the possibility for any third-party undertaking to organize and market interclub football competitions on European Union territory, the possibility for any professional football club to participate in those competitions as well as, by way of corollary, the possibility for any other undertaking to provide services related to the organization or marketing of those competitions, those rules prevent them outright, by limiting access for any newcomer. Moreover, the absence of a framework for those rules containing objective, non-discriminatory criteria known in advance does not enable a finding that their adoption is justified by a legitimate objective in the public interest.

Analysis

While there can be little doubt that this ruling is a harsh defeat for FIFA and UEFA, which will have to thoroughly review the rules governing the creation of new club competitions by third parties within the EU, it is important to note that the CJEU has not validated the Super League project, on which it has not ruled. FIFA and UEFA will now need to assess whether, on the basis of their rules they will need to review to ensure their compatibility with EU law, whether to approve this project.

Moreover, the Madrid court will now have to decide whether the relevant provisions of FIFA's rules are justified under the competition law exemptions available to it under Article 101(3) TFEU, although the wording of the CJEU's judgments makes this unlikely.

The Grand Chamber of the CJEU applied the above principles to the two other cases on which it ruled on the same day.

Judgment of the Court (Grand Chamber) of 21 December 2023, *International Skating Union v Commission*, C-124/21 P, EU:C:2023:1012

Facts

International Skating Union ('ISU') is the sole international sports federation recognized by the IOC as responsible for globally regulating and administering ice skating. Hendrik Tuitert and Niels Kerstholt, two ice skaters, had lodged a complaint with the European Commission in 2014, alleging that ISU's set of rules prevented them from participating in an ice skating event in Dubai organized by a third party not authorized by ISU. These rules indeed foresaw a lifetime ban for athletes competing in unauthorized competitions, which could only be challenged before the Court of Arbitration for Sport ("**CAS**"), based in Lausanne (Switzerland).

After taking up the complaint, the Commission concluded that ISU's rules infringed Art. 101 TFEU. ISU challenged this decision before the General Court of the EU ("**GCEU**") and secured a partial annulment. While the GCEU upheld the findings that the eligibility rules were anticompetitive, it considered the arbitration clause justified.

All parties appealed this judgment. The CJEU now sided fully with the Commission, quashing the prior annulation by the GCEU and dismissing the remainder of ISU's action.

Ruling

In line with the Super League ruling, the CJEU first reiterated that the sports sector, while displaying specific characteristics which need to be taken into account, is not exempt from the application of competition law. After laying out the general framework of the legal test, the CJEU noted that private associations such as ISU, which have a de facto power to regulate their sports discipline and to authorize events, may find themselves in a conflict of interests when they also organize events

themselves.

The CJEU held that only where these powers are transparent, clear, precise and non-discriminatory, and sanctions proportionate, they are compliant with competition law, mirroring the findings in the Super League ruling. The CJEU then observed that the ISU statutes left broad discretion to ISU to authorize events or not, without possibility for meaningful review. Furthermore, the CJEU considered ISU's penalty system disproportionate and unpredictable. Consequently, the CJEU ruled that the GCEU rightly had dismissed ISU's challenge in that regard.

Regarding the cross-appeal concerning CAS' exclusive jurisdiction over any disputes involving ISU's statutes, the CJEU criticized that its arbitral award could only be reviewed by the Swiss Federal Court. That court cannot, however, refer questions related to EU competition law to the CJEU due to its location outside the EU. In the CJEU's view, this is a fatal flaw since associations such as ISU must not deprive individuals from their EU rights and freedoms, which include competition law rules. Consequently, the CJEU quashed the GCEU's partial annulment and reinstated the original Commission decision in its entirety.

Analysis

In line with the Super League judgment, the ruling severely restricts the gatekeeping function of international sports associations insofar as they hold a dual role in rule-making/authorization and organization of commercial competitions themselves. Third parties trying to establish innovative new formats will cherish the judgment.

An even greater impact may be felt in Lausanne, at the CAS' headquarters. The CJEU's insistence that arbitral awards must be reviewable by a EU court casts doubt on the future of the centralized arbitration system (even though the CJEU limited its ruling on disputes in EU territory).

The current ruling adds another layer of pressure on the current sports arbitration system which is already under strain. The German Federal Constitutional Court had, for instance, ruled in Summer 2022 (Order of 3 June 2022, 1 BvR 2103/16) that the CAS lacked judicial standards, and could not be considered a true court of arbitration. Consequently, an arbitration clause in an agreement between a sports federation and an athlete would be null and void.

Judgment of the Court (Grand Chamber) of 21 December 2023, Royal Antwerp Football Club, C-680/21, EU:C:2023:1010

Facts

Europe's football governing body, UEFA, requires clubs competing in its international club competitions to include on their team sheets at least eight players trained as a youth at a club located in the participating club's home country, and four trained at that very club. The Belgian footballs association' ("**URBSFA**") rules provide for very similar conditions applicable to competitions within Belgium.

Royal Antwerp ("**RAFC**") challenged these rules in 2020 before the Belgian Court of Arbitration for Sport, contending that they are in breach of EU competition law and the free movement of workers. The arbitrators rejected the action, and Royal Antwerp appealed to the Brussels Court of First Instance, claiming that the arbitral award infringed public policy. That court referred questions on the compatibility with EU law to the CJEU.

Ruling

The CJEU noted that the home-grown players rules directly impact both the possibilities of employment for players and competition between football clubs . Consequently, the CJEU reiterated that the rule-making activity from organizations having de facto governing powers (such as UEFA and URBSFA) must comply with both EU competition law and the internal market freedoms. The specific characteristics of sporting activity must be taken into account, but cannot exempt that sector from fundamental EU law provisions. Still, the CJEU considered it legitimate in principle that bodies such as UEFA and URBSFA regulate sporting competitions based on merit and equal opportunity, including the composition of teams, provided that they respect EU law.

The CJEU then held that the assessment of that compatibility must, in the present case, consider to what extent the home-grown player rules limit clubs access to an important 'resource' (namely players), and whether they may amount to illegal market partitioning. The CJEU did not make a definitive conclusion regarding an infringement of EU competition law by object (i.e. irrespective of actual or potential effects), but left this up for the Belgian court to determine.

Nonetheless, the CJEU also provided some guidance on a potential justification. It noted that the home-grown player rules may indeed incentivize clubs to invest into training of young players and thereby in-

tensify competition. The Belgian court is still tasked to assess to what extent these effects materialize in reality . The CJEU also stressed that the impact not only on clubs or players, but also spectators or TV viewers must be taken into account, and ascertain that all these affected stakeholders benefit equally. Furthermore, the CJEU notes that potential alternative mechanisms must be explored, such as financial compensations for training young players. Furthermore, the Belgian court will have to assess whether the current minimum number of home-grown players is set appropriately .

Lastly, the CJEU noted that the home-grown player rules constitute an indirect discrimination based on nationality insofar as they make it easier for a player having a connection to a specific country to be recruited by a football club established in that. This infringement of the free movement of workers guaranteed by Art. 45 TFEU may be justified by the legitimate objective to encourage the training of young players, though. The CJEU still expressed certain doubts regarding the suitability of the current home-grown player rules to achieve these objectives, noting that the requirements can partially be fulfilled by recruiting players trained at a different club from the same country (i.e. the possibility to 'outsource' the costly and time-consuming process of recruitment and training of young players). A definitive assessment will, however, again be made by the Belgian court.

Analysis

The CJEU had struck down restrictive rules concerning football players recruitment established by football governing bodies in the past already on several occasions. In the spectacular ruling in *Bosman* (C-415/93), it invalidated UEFA's then system foreseeing a mandatory transfer fee, and in *Olympique Lyonnais* (C-325/08), it struck down French rules obliging young players to sign their first professional contract with the club that had trained them. It is established case-law since those judgments that Art. 45 TFEU, which normally only addresses EU Member States, may also apply to non-State governing bodies with a de facto rule-making power.

In that respect, the RAFC ruling is not breaking new ground. The CJEU's ruling that Art. 165 TFEU does not have any bearing on the application of competition and internal market law, and the CJEU's repeated insistence that any rules set by UEFA and others must respect the principles of equal opportunity, will restrict the leeway these governing bodies have. Together with the requirement that any justification for competition restrictions must also take into account the interests of spectators, the current ruling may offer smaller clubs more leverage to ensure that UEFA's rules are not geared towards big-name clubs.

The fate of the home-grown player rules is not sealed yet, though. It will be up to the Belgian courts to determine whether they are justified. Yet, the CJEU's guidance for this assessment makes clear that it is (at least partially) doubtful that they indeed are.

Conclusion

Almost three decades after the *Bosman* ruling which put an end to foreign player quotas in European clubs and revolutionized the movement of footballers in Europe, the CJEU may have just initiated a new era on the basis of competition law. However, it does not rule on the Super League project. It simply reminded UEFA and FIFA that their powers are not above the rules, and that they must, in particular, respect competition law. But the CJEU's ruling leave some margin of maneuver to FIFA, UEFA, the ISU and sports federations in general to "protect" their sport, though this will likely require a thorough revision of their rules.

As with the *Bosman* ruling, the scope of the rulings will probably not be limited to football (or ice skating). All professional and semi-professional sporting disciplines will be affected. All national and international federations will now have to introduce precise material criteria and procedural arrangements to ensure that their rules on the organization of competitions are transparent, objective, precise, non-discriminatory and proportionate.

On its purely legal aspects, the authors note in particular two key takeaways.

First, for the CJEU, where undertakings have a dual role as regulators and economic stakeholders, Articles 101 and 102 TFEU must be read in conjunction with Article 106 TFEU, which imposes obligations on Member States, such as the respect of the principle of equal opportunities and the duty to adopt rules that are transparent, objective, non-discriminatory and reviewable. This point could be relevant beyond the sport sector, for example in relation to digital platforms.

Second, the CJEU has aligned the interpretation of Articles 101 and 102 TFEU, especially, concerning the safeguards that must be in place for sports federations statutes to be compliant with EU law. The alignment also concerned the conditions for justifying a behavior that would otherwise infringe Article 102 TFEU, or exempt it from the prohibition of Article 101(1) TFEU under Article 101(3) TFEU.