COMPETITION LAW "LEAVES ITS STUDS IN" ON UEFA AND FIFA

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INTRODUCTION

The Court of Justice of the European Union (CJEU) has issued two major decisions in separate cases concerning sporting organisations' ability to regulate their: (i) competitions; and (ii) members' activities which may embolden other members of sporting associations to challenge existing rules on how their sports are administered and this is certainly a space to watch. The intersection between sports rules and European Union (EU) competition law has provoked a major question as to whether sports associations' regulations can coexist with competition law principles without damaging the essence of competition within sport itself. The sporting organisations model offers a number of efficiencies such as common rules and standards for all participants but these rules can raise concerns regarding potential conflicts with EU law as exhibited in previous cases.[1]

In the European Super League case, the decision is far more nuanced than has been reported by mainstream media outlets.[2] Rather than providing a major win for the European Super League, the CJEU has ruled that FIFA and UEFA's procedures for authorisation of new leagues (including the European Super League) are not compliant with EU competition law. FIFA and UEFA effectively retain the power through their rules to prevent the emergence of a competitor, or at least competing leagues outside their associations. The CJEU has firmly criticised the process FIFA and UEFA adopted to reject the European Super League, which will certainly galvanise its owners on a purely legal basis to see if they can reignite the formation of the new league. However, wider support for the European Super League amongst fans remains low and the rejection of the European Super League remains per se legally permissible provided FIFA and UEFA's rules for rejecting any new leagues remain compliant with competition law, i.e., that they are transparent, objective, nondiscriminatory and proportionate.[3]

The CJEU has also ruled that Article 165 of the Treaty on the Functioning of the European Union (TFEU), which provides that the EU is to contribute to the promotion of European sporting issues while taking account of the specific characteristics of sport, does not provide a special exemption for sporting authorities to govern their sports as they wish and to disapply EU competition law. We consider the CJEU's decisions in turn below, including the ramifications for other sporting organisations and their participants.

EUROPEAN SUPER LEAGUE[4]

Background

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The announcement from 12 of Europe's top football clubs of their plan to form a breakaway league (the so-called European Super League) garnered much attention and generated fervent responses from many stakeholders, not least football supporters across the globe. The European Super League failed to obtain prior approval from FIFA and UEFA, the respective world and European football authorities, as per the associations' regulations, leading to the associations' threatening sanctions. These included preventing any player or football club who participated in the European Super League from competing in UEFA- or FIFA-organised competitions, such as the Champions League, FIFA World Cup, and UEFA European Championships, as established in FIFA's and UEFA's pre-authorisation rules.

The European Super League organisers brought their case to the Madrid court, arguing that UEFA and FIFA were in breach of EU competition law (specifically, Articles 101 and 102 of the TFEU). In May 2021, the Madrid court referred the case to the CJEU and asked for a decision on whether UEFA's and FIFA's rules on their prior authorisation of new competitions and associated sanctions regime are indeed in breach of EU competition law.

CJEU Ruling

The CJEU has ruled that sporting authorities or organisations remain subject to the regulations of Article 101 and 102 of the TFEU like any other entity engaged in an economic activity. In the European Super League case, the CJEU remarked that both UEFA and FIFA are involved in the “organisation and marketing of interclub football competitions on European Union territory and the exploitation of the various rights related to those competitions” and can therefore be classified as “undertakings” such that they are subject to EU competition law.[5]

The CJEU ruled that the prohibition on alternative competitions and sanctions in the context of sports governance are not problematic per se. The CJEU goes even further and states that such regulation is necessary to guarantee the homogeneity and coordination of competitions. Moreover, without an authorisation process, there cannot be a legal relationship with the sporting organisations since their governing bodies do not have public powers.

However, the CJEU did determine that the rules and sanctions of UEFA and FIFA constituted an abuse of a joint dominant position and an anti-competitive agreement between national football association members and FIFA/UEFA as they lacked “substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate.”[5]

The CJEU established that the relevant test to determine whether a sporting authority's rules and governance amounts to a violation of EU competition law is to assess whether the restrictions are subject to clear, objective, and precise substantive criteria that do not deny effective access to the sporting market. Authorities' rules on prior approval of competitions, and participation in those competitions, should ensure such a framework is in place in order to comply with EU competition law.

Having applied the test, the CJEU determined that UEFA and FIFA have been exploiting their joint monopoly powers to prevent third parties from setting up competing sporting events and leagues in Europe. The CJEU also ruled that UEFA and FIFA are restricting competition by object within the EU as a result of the arbitrary nature of the rules these bodies impose for prior approval for participation by clubs and players in other competitions outside of those run by UEFA and FIFA. Whilst the CJEU clarified that Article 165 TFEU does not provide a general exemption from competition law for the sports sector, it did acknowledge the need for football's rules to promote equality of opportunity and sporting merit to ensure the homogeneity and coordination of football's

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competitions. Whilst admonishing the current framework for rejecting new football competitions under UEFA's and FIFA's rules, the CJEU ultimately left this question open for the Madrid court to decide.

Takeaways

Interestingly, UEFA set up an updated system of authorisation in June 2022 for new competitions to presumably pre-empt the CJEU's decision in an attempt to ensure its rules were sufficiently transparent, objective, nondiscriminatory, and proportionate.[7] The European Super League's proposal would therefore have to be reassessed under UEFA's new criteria prior to being dismissed by UEFA, and such a process would need to be transparent and provide valid reasons as to why the European Super League cannot proceed with UEFA players and clubs.

Whilst at face value, the CJEU's decision appears to open the door for alternative pan-European football leagues and the possibility for the European Super League to proceed, the CJEU did acknowledge the arguments raised by FIFA and UEFA, in particular, in terms of efficiency gains from their current model and the existing regulations' protection of competitive football and equal opportunity amongst clubs competing in the governing bodies' competitions. The CJEU also acknowledged the importance of these competitions for football's pyramid structure (i.e., from amateur football all the way up to professionals playing in Champions League), as clubs competing in UEFA/FIFA-controlled leagues invest at a local level in grassroots football, not least in the training of talented young football players.

ROYAL ANTWERP FOOTBALL CLUB[8]

Background

The Brussels Court of First Instance was asked to rule on a challenge by Belgian football club Royal Antwerp of UEFA's rules that require clubs participating in cross-border European competitions to maintain a quota of home-grown players in order to be eligible for those competitions (the home-grown rule). UEFA's rules aim to encourage the local training of young players and to increase the openness and fairness of European competitions. European clubs with deep pockets are often able to stockpile the best young players from across Europe, making it easier for them to dominate national and European competitions.

UEFA's home-grown rule means clubs participating in UEFA's club competitions must have a minimum of eight home-grown players on their 25-player listed squad. UEFA defines home-grown players as those who, regardless of their nationality, have been trained by their club or by another club in the same national association for at least three years between the ages of 15 and 21.[9]

The Brussels court was faced with the issue of whether these UEFA rules are anti-competitive within the meaning of Article 101 TFEU and an infringement of the freedom of movement of EU workers under Article 45 TFEU. The court referred the case to the CJEU for a preliminary ruling.

CJEU Ruling

Similar to the European Super League case, the CJEU ruled that Article 101 of the TFEU applies to UEFA as the association maintains members (football clubs) that can be classified as undertakings that are engaged in economic activities. In its consideration of whether the home-grown rule infringed Article 101 of the TFEU, the CJEU noted the considerable case law.[10] The case law denotes that agreements aimed at partitioning markets

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according to national borders or restoring the partitioning of national markets (or making the interpenetration of national markets more difficult) will be viewed as a restriction of EU competition law.

The CJEU also noted that UEFA's home-grown rule did essentially limit or control the key parameters of competition in professional football, namely the recruitment of talented players and, therefore, their ability to effectively compete in UEFA competitions. The rule would therefore have a negative impact on the upstream market for the recruitment of players but also on the downstream market of interclub football competitions.[11]

However, the CJEU ultimately left open the question of whether the home-grown rule prevents the “access of professional football clubs to the 'resources' essential to their success”[12] to the detriment of cross-border competition within the EU for the Belgian referring court to determine. Interestingly, the CJEU did not stop there and noted that the economic and legal context of the home-grown rule would also need to be assessed; the specific features of football mean that it may be legitimate for associations such as UEFA to more closely regulate the conditions under which professional clubs can put together their teams participating in interclub competitions.

The CJEU also found that Article 45 was infringed by the home-grown rule, as it would give rise to indirect discrimination at the expense of players from another EU member state. However, similar to the anti-competitive infringement, the CJEU acknowledged that there could be a justification for this rule given the social and educational function of sport, including the recruitment and training of young professional football players.

Takeaways

The CJEU's recognition of the importance of UEFA's rule in ensuring fair and open competition amongst European clubs is intriguing, in particular that UEFA may be able to demonstrate that its restrictions on home-grown talent are justified due to investments in local amateur football and due to delivering wider social and educational benefits from participation in football. Whilst a restriction on a club's ability to select its own squad and the ability of young players to choose where they play can appear anti-competitive, the issue is not clear cut. UEFA's rules arguably provide for healthier interclub competition by encouraging smaller clubs to retain their young talent that can help those clubs improve rather than cashing in and sending their young talent to the same oligopoly of clubs that continuously dominate European football.

CONCLUSION

The two decisions of the CJEU have certainly provided a challenge to the longstanding “untouchable” status of UEFA and FIFA in the sports world. Despite recognising the importance of Article 165 TFEU, which states that the specific characteristics of sport should be considered at all times, the CJEU has affirmed this does not provide a safe harbour for sporting associations to act with disregard for EU competition laws. In particular, the rulings clarify that sporting associations must at all times strike a balance between preserving the integrity of sport whilst ensuring effective competition within their market. Therefore, these judgements may lead other sports associations to carry out an assessment of their own rules. It will be advisable for sports associations to reassess their existing rules by identifying the key principles governing their sport and assess whether these are compliant with the criteria listed in the European Super League case.

Sporting associations cannot arbitrarily dismiss the establishment of alternative competitions and participation by members in such competitions without having in place due process that is framed within the boundaries of competition law. Similarly, any decision by an association that may restrict competition in the relevant market

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must have significant economic justification for the functioning of competition within the sport in order to be justified. The rulings may provide more grounds for members of sporting associations to challenge existing rules on how their sports are conducted. However, associations may still be able to defend such challenges, but their decision-making will need to be more fulsome and be based on a set of clear, nondiscriminatory, and proportionate rules.

The European Super League ruling may well mean we will see the European Super League owners repackage their proposed competition into a new format once the Commercial Court of Madrid's decision is reached.[13] One that: (i) appeals more to fans (e.g., by offering the opportunity for relegation and integrating the competition more into football's existing pyramid structure); and (ii) makes it more difficult for FIFA and UEFA to reject it (e.g. by introducing careful scheduling around the existing football calendar and/or framing the league as an extension of the Champions League).

We have substantial experience relating to competition law issues in sport, and should any readers have further questions on these decisions and how they may impact their own sporting associations, we would be happy to answer them.

FOOTNOTES

[1] Judgement of the CJEU of 18 July 2006 Meca Medina v CCE (Case C-519/04) and Judgement of the CJEU of 16 December 2020 paragraphs 73 of International Skating Union v EU Commission (Case T-93/18)

[2] https://www.politico.eu/article/footballs-uefa-and-fifa-lose-eu-court-bid-to-halt-breakaway-super-league/

[3] Judgment of the CJEU of 21 December 2023 paragraph 203 of *European Superleague Company SL v Fédération internationale de football association (FIFA), Union of European Football Associations (UEFA)* (C-333/21)

[4] Judgment of the CJEU of 21 December 2023 *European Superleague Company SL v Fédération internationale de football association (FIFA), Union of European Football Associations (UEFA)* (C-333/21)

[5] Judgment of the CJEU of 21 December 2023 paragraphs 112 and 115 of *European Superleague Company SL v Fédération internationale de football association (FIFA), Union of European Football Associations (UEFA)* (C-333/21)

[6] Judgment of the CJEU of 21 December 2023 paragraph 203 of *European Superleague Company SL v Fédération internationale de football association (FIFA), Union of European Football Associations (UEFA)* (C-333/21)

[7] https://www.uefa.com/insideuefa/news/0288-19bf06a5cd26-1e0545be457d-1000--uefa-statement-on-the-european-super-league-case/

[8] Judgment of the CJEU of 21 December 2023 *SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL (URBSFA)* (C-680/21)

[9] https://www.uefa.com/insideuefa/protecting-the-game/protection-young-players/

[10] Judgments of the CJEU paragraph 65 of 16 September 2008 *Sot. Lélos kai Sia and Others* (C 468/06 to C 478/06) and the case-law cited, and paragraph 139 of 4 October 2011, *Football Association Premier League and*

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Others, C 403/08 and C 429/08.

[11] Judgment of the CJEU paragraph 107 of 21 December 2023 *SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL (URBSFA)* (C-680/21)

[12] Judgment of the CJEU paragraph 109 of 21 December 2023 *SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL (URBSFA)* (C-680/21)

[13] This has been scheduled for March 2024 subject to any delays.

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