

# COURT OF JUSTICE ISSUES LANDMARK JUDGMENTS FOR SPORTS GOVERNANCE

On 21 December 2023, the Grand Chamber of the European Court of Justice (ECJ) handed down three watershed judgments for sports governance and international sports competitions.<sup>1</sup> The ECJ held that certain rules set by sports governing bodies including FIFA, UEFA, and the International Skating Union, breached EU competition law - confirming that the specific nature of sport cannot shield the sector from the application of antitrust rules.

In this briefing, we consider in turn the key points of interest from each judgment, before bringing together the lessons learnt from all three cases.

## THE EUROPEAN SUPER LEAGUE CASE

### Background

The most high-profile case concerned the European Super League (ESL), a project for an interclub football competition announced in April 2021 by twelve of Europe's biggest football clubs. FIFA and UEFA jointly objected to the project, with threats of sanctions for any clubs and players who took part in the ESL. The FIFA-UEFA statutes in force at the time required any proposed international football competition to obtain their prior approval and prohibited players and football clubs from participating in unauthorised competitions.

The ESL brought proceedings in Spain alleging that FIFA and UEFA's conduct and statutes were anti-competitive under Article 101 of the Treaty on the Functioning of the EU (TFEU) and an abuse of dominance under Article 102 TFEU. The Spanish court referred questions on the compatibility of the FIFA-UEFA statutes with EU competition law to the ECJ.

### ECJ judgment

In a long-anticipated ruling, the ECJ held that the FIFA-UEFA rules making any new interclub football competition subject to their prior approval, and

banning clubs and players from playing in those competitions, could be prohibited under both Article 101 and Article 102 TFEU.

As a preliminary point, the ECJ observed that the organisation of football competitions and the exploitation of the associated media rights are 'economic activities'. As a result, these activities must comply with EU antitrust rules.

Crucially, the ECJ found that, where a dominant entity also has the power to determine whether others may access the market and compete with it (as was deemed to be the case for FIFA and UEFA), that regulatory power must be subject to appropriate constraints to address the risk of abuse. This requires a framework to be in place, providing for substantive criteria and detailed procedural rules "*suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate*".

*"None of the specific attributes that characterise professional football makes it possible to consider as legitimate the adoption nor, a fortiori, the implementation of rules on prior approval and participation which are, in a general way, not subject to restrictions, obligations and review"*

The ECJ noted that, in this case, FIFA and UEFA's powers to authorise alternative competitions were discretionary in nature and, as they were not subject to any substantive and procedural framework, could be characterised as an abuse under Article 102 TFEU. Following the same reasoning, the ECJ found that arbitrary pre-authorisation rules for rival competitions could be characterised as having an anti-competitive 'object' under Article 101 TFEU.

However, the ECJ left open the possibility for rules of this type to be defensible if "*convincing arguments and evidence*" are produced to show that the restrictions are (i) objectively justified (under Article 102 TFEU) or

(ii) indispensable to achieve a legitimate objective, in addition to generating efficiencies and not eliminating competition for a substantial part of the market (under Article 101(3) TFEU). This will be a matter for the Spanish court to determine in this case. However, in finding that the UEFA-FIFA rules were liable to result in the elimination of “*any and all competition*”, the ECJ signalled that such defences are unlikely to succeed for blanket and arbitrary restrictions.

The ECJ separately noted that the rules relating to FIFA and UEFA’s exclusive exploitation of the media rights associated with football competitions may also be regarded as anti-competitive by object and an abuse of dominance. The ECJ left it to the Spanish court to determine if there was an objective justification for these rules, for example, on the basis that they are necessary to ensure a solidarity-like redistribution of the profits generated by those rights.

*“Moreover, given their arbitrary nature, their rules on approval, control and sanctions must be held to be unjustified restrictions on the freedom to provide services”*

The ECJ, in delivering its ruling, did not adjudicate on or endorse the ESL project itself. The judgment in this matter will be handed down by the referring Spanish court.

### THE INTERNATIONAL SKATING UNION CASE

The second case before the ECJ concerned the International (Ice) Skating Union (ISU). The ISU is the sport’s governing body and organiser of skating competitions. Under the ISU rules, the ISU had discretion to authorise non-ISU events and to sanction speed skaters who participate in non-ISU competitions, with penalties ranging from a warning to a lifetime ban.

In December 2017, the European Commission found that the ISU rules restricted competition under Article 101 TFEU as they could prevent potential organisers of speed skating events from entering the market. After an unsuccessful appeal before the European General Court, the ISU appealed the decision before the ECJ.

Following the same reasoning as in the Super League case, the ECJ found that the ISU rules were arbitrary in nature. In the absence of any transparent, objective, non-discriminatory and proportionate framework in place for the exercise of the ISU’s pre-approval powers, both substantively and procedurally, the rules were liable to unduly exclude potential competitors and

adversely affect athletes, spectators and broadcast audiences. The ISU rules were therefore anti-competitive by object and infringed Article 101 TFEU.

The ECJ was also critical of the ISU rules on dispute resolution. The rules provided that the Court of Arbitration for Sport, a Swiss arbitration court, had jurisdiction to hear ISU disputes. While the ECJ accepted the use of an arbitration mechanism, it took issue with the fact that the ultimate review of arbitral awards and the last-instance review of ISU decisions fell within the jurisdiction of the court of a third State, namely the Federal Supreme Court of Switzerland. The ECJ agreed with the Commission’s conclusion that this limited athletes’ ability to assert their rights under EU law - reinforcing the infringement.

### THE ROYAL ANTWERP CASE

The third case before the ECJ concerned the UEFA rules on ‘homegrown’ players. Under these rules, clubs participating in UEFA competitions were required to fill their teams with a minimum number of locally trained players. The Royal Antwerp club challenged the implementation of the UEFA rules before a Belgian court, which then referred questions on the compatibility of these rules with EU law to the ECJ.

In its judgment, the ECJ ruled that the UEFA rules on homegrown talent could have “*as their object or their effect the restriction of competition between professional football clubs*” as regards the recruitment of talented players, and may therefore infringe Article 101 TFEU. However, the ECJ left it to the Belgian court to determine whether the rules restrict competition as their very object or because of their actual or potential effects. In addition, the ECJ found that the rules could be an illegal restriction on the free movement of workers within the EU.

The ECJ noted that it will remain open to UEFA to show that the rules are justified by and proportionate to the objective of promoting the recruitment and training of players.

### COMMENT

The judgments acknowledge and tacitly endorse the legitimate role that sports governing bodies can play in regulating their respective sports. The ECJ has also strongly signalled that prior approval and eligibility rules, when properly designed, can be legitimate in the specific context of professional sports. Such rules “*[are not], in terms of their principle or generally, an abuse of dominant position*”. FIFA, UEFA, the ISU and other

sports governing bodies will therefore retain some room for manoeuvre.

The ECJ has also left open the possibility for sports governing bodies to demonstrate that there is an objective justification for their conduct, or that their rules are indispensable to pursue a legitimate objective and produce efficiencies. While the ECJ suggested that a blanket ban on rival competitions or arbitrary pre-authorisation powers were unlikely to meet the criteria for either defence, this nevertheless provides a path for sports governing bodies to argue. It remains to be seen how the national courts that will adjudicate the Super League case and the Royal Antwerp case will interpret these points in their respective cases.

In the meantime, sports governing bodies are likely to be reviewing their rules, and the manner in which they are enforced in light of the ECJ judgments. This is likely to consider any rules on the authorisation of rival events and sanctioning athletes, as well as any rules on media rights exploitation and player recruitment.

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<sup>1</sup> Cases [C-333/21](#) European Superleague Company SL v FIFA and UEFA, [C-124/21 P](#) International Skating Union v Commission, and [C-680/21 SA](#) Royal Antwerp Football Club v URBSFA and UEFA.

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