

The Court of Justice of the European Union adjudicates the ‘Super League’ dispute (case C-333/21).

1. Background to the Dispute.

The Court of Justice of the EU (CJEU) has issued today its much awaited Judgement in response to a preliminary ruling by a Spanish court on the legality of the restrictions inherent to the existing organization in the world of football (or soccer) competition.

The case originated back in April 2021 when twelve European football clubs¹ signed a framework agreement to form the European Super League (ESL). The ESL was announced as a major European football tournament in competition with the UEFA Champions League. According to the Real Madrid president and one of the main sponsors of ESL, the ESL was essential for the continuity of football, since it would allow a significant increase in revenues for the whole business.² UEFA took action against the ESL members who risked their exclusion from FIFA, UEFA and national competitions (organized under the national federations who, in turn, are member federations of UEFA). One of the first steps of the ESL was therefore to file a lawsuit against UEFA and FIFA (for breach of Articles 101 and 102 TFEU), and a request for interim measures, which were granted few days after, on 20 April 2021 by the Commercial Court n°17 of Madrid. The interim measures, in essence, ordered UEFA and FIFA to refrain from any measures preventing the development of the ESL.³

Afterwards, the national court referred to the CJEU several questions for a preliminary ruling (case C-333/21). The questions posed refer to whether the course of conduct adopted by UEFA and FIFA is contrary to Articles 101 and 102 TFEU, and whether those same activities would unlawfully restrict Articles 45, 49, 56 and/or 63 TFEU. The counts of conduct connected with the request for a preliminary ruling included in particular (i) the need for prior authorisation by UEFA and FIFA (to participate in UEFA and FIFA competitions) to clubs wishing to (simultaneously) organize alternative competitions, given the lack of an objective, transparent and non-discriminatory procedure for approval, including the related power to open disciplinary proceedings against ESL clubs and players; and (ii) the assumption by UEFA and FIFA of the original rights of the competitions, depriving the clubs of such ownership and the derived marketing rights.

The root of the dispute lies in the refusal of FIFA and UEFA to allow the ESL's sponsoring clubs to participate in FIFA and UEFA competitions. For the ESL, the dispute is about an attempt by UEFA and FIFA to preserve their monopoly in the organization and management of football competitions by trying to exclude competition from a new product such as the ESL. For UEFA and FIFA, on the contrary, this is a matter of protecting the European football model and its values, in the face of an entity such as the ESL, which is focused on profit and is capable of threatening the aforementioned sporting model.

2. The hearing and the Conclusions of the Advocate General Rantos of 15 December 2022.

The oral hearing took place on the 11 and 12 July 2022 and was characterized informally by some ‘referendaire’ at the CJEU as ‘the hearing of the year’ as it was an expression of the high stakes and political interest surrounding the organization of football competitions, with virtually all Member States being heard as well as the parties, and great media attention.

Advocate General Rantos issued his Conclusions a year ago (15 December 2022). In essence, the Advocate General sided with the arguments put forward by the advocates of the existing sports model, UEFA, FIFA, national federations and Member States. The starting point of the debate concerns the existence of certain

¹ AC Milan, Atlético de Madrid, Arsenal, Chelsea, FC Barcelona, Internazionale Milano, Juventus FC, Liverpool FC, Manchester City FC, Manchester United FC, Real Madrid CF and Tottenham Hotspur. Most clubs withdrew from the project under considerable media and political pressure, with the notable exceptions of Real Madrid and Barcelona.

² <https://english.elpais.com/usa/2021-04-21/real-madrid-president-we-are-creating-a-european-super-league-to-save-soccer-the-situation-is-dire.html>

³ One year later, after hearing the parties in connection with the interim relief, the first instance court lifted the injunction, on the grounds that there was no evidence that the threat of sanctions by UEFA and FIFA could derail the ESL project (which had independent financing). However, in January 2023 the Provincial Court of Madrid upheld the appeal of the ESL, reinstating the injunction.

sporting values which could provide a legitimate justification for the alleged restrictions on free competition by UEFA and FIFA. According to the Advocate General, Article 165 TFEU would recognize the existence of such a European sports model endowed with a number of values such as solidarity, openness or equality of opportunity. The Advocate General refers to UEFA's conflict of interest recalling that the fact that an entity such as UEFA simultaneously regulates professional football and organizes competitions is not illegal *per se*. In this line, UEFA's refusal to allow the clubs promoting the ESL to participate in UEFA competitions (national Leagues, Champion's League) was justified according to the Advocate General precisely by the need to safeguard the legitimate objectives deriving from the safeguarding of the values of the football competition referred to above.

3. The Judgment.

The Judgment has been issued on 21 December 2023. The Judgement acknowledges (at point 142) that *associations which are responsible for a sporting discipline, such as FIFA and UEFA, are able to adopt, implement and ensure compliance with rules relating not only generally to the organization and conduct of international competitions in that discipline, in this case professional football, but also, more specifically, prior approval and participation by professional football clubs and players therein*. Yet, in order for the adoption and implementation of prior approval powers to be compatible with competition law, such powers must be subject to a framework of substantive criteria and detailed procedural rules ensuring the powers are transparent, objective, precise and non-discriminatory (point 147 of the Judgment, *a contrario*); and such rules must be known beforehand. Crucially, the Court does not generally consider that the powers of organizing the sports competition and authorizing participation cannot legitimately be vested simultaneously on the same organization (discussion at points 141 and following). These statements may weigh into the debate around the possibility of 'breaking out' monopolies.

The Judgement is Solomonic in that, while generally accepting that UEFA and FIFA's authorization powers are not *per se* forbidden, it subjects them to strict requirements; and goes further than the Advocate General's Conclusions by (surprisingly) inserting some criticism of UEFA and FIFA's past conduct, going beyond merely setting out general legal principles as one would generally expect in a preliminary ruling context.

The Judgement makes an interesting parallel with Article 106 TFEU, a provision which is not applicable to the dispute because no act of the State is at the source of UEFA/FIFA's monopoly – yet, the parallel with that case law is clear in an economic sense because UEFA and FIFA have monopoly power to authorize access to market of competing entities or competitions such as the ESL. The Court stresses that (even if such Article 106 TFEU case law does not apply) the principles are the same, so that a monopolist cannot be put in a position to ban access to a market where it is present unless subject to procedures preventing arbitrary exclusion or discrimination (points 132 and following).

The rationale for the Court's application of Article 101.1 TFEU is similar: FIFA and UEFA's authorization powers must be regarded as a restriction by object (so no effects analysis required) *where there is no framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate*. (Point 178). In the absence thereof, the Article 101.3 TFEU and Article 102 legitimate justification exceptions could apply, subject to evidencing the requirements of such provisions and applicable case law. Finally, the Court applies a similar analytical framework under Articles 45, 49, 56 and 63 TFEU on fundamental EU economic freedoms.

The Judgment seems to open the door to questioning the existing systems of centralized sales of media rights related to football events, though the Court itself suggests that such centralized system may well be justified in terms of efficiency gains and fairness (points 234 and following).

The Judgement does not dwell on the merit or demerit of the ESL. In conclusion, ESL members would still require authorization from FIFA, UEFA and the national associations to which they belong to participate in UEFA/FIFA competitions if they want to do so simultaneously to the ESL – provided of course FIFA/UEFA's authorization powers are designed in compliance with the principles set out in the Judgement to guarantee free competition.