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ALTERNATIVE LEAGUES IN FOOTBALL AND THE STORY OF THE EUROPEAN SUPER LEAGUE

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Abstract: In April 2021, a group of elite European clubs made an important announcement: they have left the UEFA competitions and formed their own cross-border European Super League (ESL). This announcement met with an instant opposition from all the stakeholders, while UEFA moved to prevent its formation by issuing threats against the participating clubs. The ESL launched a legal challenge to clarify, inter alia, whether UEFA's dual function as a regulator and a sole commercial operator on the relevant organisational market placed it in a conflict of interest situation that was (in)compatible with the EU law. This paper will first discuss the organisational market in European football and the methods used to block the entry of rivals by the sport federations, before turning to UEFA regulations and legal questions that were at the heart of the CJEU's decision in ESL case. The final section will address future prospects in European football.

Keywords: European Super League, breakaway leagues, UEFA, EU law

Introduction

European football is based on a pyramid structure with strict regulatory hierarchy between its various constitutive levels: Federation Internationale de Football Association (FIFA) sits on the top of the structure, Union of European Football Associations (UEFA) and other confederations are placed one level below it, national associations are further below, while the bottom of the pyramid is occupied by the clubs grouped into different professional, semi-professional and amateur leagues. The one-federation-per-territory principle grants governing bodies a monopoly over the regulation of football in their respective administrative jurisdictions (Nafziger, 2009).

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One of the defining features of this structural model of sport is that it lends itself to conflict of interests. Specifically, UEFA is not just a monopolistic regulator of European football, but it is also a sole participant on the organisational market over which it holds regulatory monopoly. This conflation of regulatory and commercial function is the main reason why UEFA has remained the only organiser of the cross-border competitions in Europe since its inception – it has created regulatory rules in its Statutes to prevent an entry of a commercial rival to the organisational market. Naturally, a market structure with a single participant raises suspicions that there might be an abuse of the dominant position at play, a practice deemed illegal in the EU competition law under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

At the end of the 1990s, a period characterised by the boom in the commercialisation of the football sector, a new trend has emerged challenging the UEFA's commercial monopoly on the organisational market. Media Partners International (a company owned by late Silvio Berlusconi) made a proposal to the richest European football clubs to leave the UEFA competitions and play in alternative European Football League instead. The clubs subject to the proposal were the biggest commercial asset for UEFA's flagship competition, and their departure would have spelled the end of the UEFA dominance on the organisational market. UEFA therefore did what it had to in order to keep those clubs within its structures, while at the same time fending off a threat from a commercial competitor. Namely, it made concessions and accommodated the objectives of the elite clubs within its structure: the Champions League was expanded with more matches and more places for the clubs from the Big Five leagues, and more money for the clubs. The access to the Champions League became easier for the clubs from high ranked countries who were granted a right to enter the competition at later stages, while the national champions from lower ranked countries had to take part in qualifying rounds before the group stages (Pijetlovic 2015).

UEFA's reaction to the threat of formation of a breakaway league gave elite clubs a clear idea of the power they hold over the governing body and provided a new tool in their strategy to gain influence in the rulemaking of the European football. Over the past 27 years, the UEFA's concessions resulting from this strategy has led to a shift in the balance of powers at the level of confederation. The rules produced by a governance structure in which the small and medium sized clubs are not properly represented, while the elite clubs, through the medium of European Clubs Association (ECA), have a significant influence on UEFA, are deeply intertwined with both the situation on the pitch and on the market (Pijetlovic, 2023).

Against this background, it was not surprising when in April 2021, the 12 elite clubs announced that they have left the ECA and UEFA competitions and formed a European

Super League (ESL). The legal battle that ensued in the *ESL* case² forms the main theme of this paper, the aim of which is to present and bring closer a complex legal topic of current interest in a format that can appeal to wider academic readership through qualitative market and legal analysis. However, before we turn to the main topic, a few preliminary points regarding the structure and access to the organisational market must be made for understanding of the basic legal issues.

Market structure and strategies to block the entry of a rival

Organisational market consists of staging sporting events – it is a market where production of the sporting contests occurs. There is no particular reason why an entity would want to stage a competition, in particular as it is a work-intensive project that involves conducting a draw procedure, approving the participants, appointing referees and match delegates, supervising and enforcing all aspects of the competition, selecting and appointing a wide range of third party service providers such as product development, sales, after-sales services and client relations with broadcasters, sponsors, suppliers, licensees and participating clubs, media services, legal services, television production services, auditing and monitoring of UEFA Champions League television programs throughout the world, research services, operational implementation of the commercial concepts, hospitality services, financial and administrative services, and statistical and information services.³ The reason why an entity would want to get engaged in this massive undertaking is because an organiser gains an access to the downstream exploitation market in which it sells media and broadcasting rights, sponsorship rights, merchandise, and tickets, among others. Upstream of the organisational market is the supply market from which an organiser obtains everything and everyone needed to stage a competition (Stix-Hackl, Egger 2002). The most important item from the supply market are the clubs' services. Top clubs are not easily substitutable by other clubs from the supply market.

Legal concerns regarding the breakaway leagues are centred principally around the access of rival organisers to the organisational market and the equality of opportunity between competing entities on that market. Due to their regulatory powers, sport governing bodies create rules and regulations that make an access of the third parties impossible, difficult or unprofitable. They do this by employing three methods. First, their regulatory provisions include the requirement for aspiring entrants to obtain a license from the governing body before their stage a rival event. In practice, such prior

² C-333/21 *European Super League Company, SL v FIFA and UEFA*, ECLI:EU:C:2023:1011.

³ Commission Decision in Case COMP/37.398 — Joint Selling of Commercial Rights (UEFA Champions League) [2003] OJ L 291/25, para 13.

authorisation is difficult to obtain which deters any potential competitor on the organisational market.

Second, because this licensing requirement is technically not enforceable against a third party that has set up an alternative competition that does not endanger any of the public interests they are mandated to protect, governing bodies fortify the licensing requirement with the rules setting out the sanctions for the players, clubs, and officials needed to stage an event. This is usually sufficient to deter them from participating in unapproved competitions and has proven effective in the *International Skating Union* and *International Swimming League* cases⁴ (albeit temporarily, due to the subsequent legal challenges). Without the access to the supply market, the rival organisers are left with no viable business opportunity, and the alternative league project is killed off already at the planning stage.

Finally, governing bodies have a number of possibilities at their disposal to block the access to the exploitation market. This was the case in *Formula One* where FIA, the governing body, threatened severe financial penalties on its contracted broadcasters and track owners if they engaged in any activity with a competitor that is considered a threat to Formula One. Without access to the top broadcasters and track owners there is no realistic chance to present a competitive threat to the events staged by a governing body (Pijetlovic 2018).

Other methods not falling under any of the three mentioned categories include the abuse of the central control of the global match calendar so as to reserve the top slots for its own competitions, while allocating space to the rival only in unpopular times of the week when viewership is poor and broadcasters are not willing to place high bids.

UEFA prior authorisation system before the European Super League case

UEFA runs a prior authorisation system. Up until June 2022, the entire regulatory framework on licensing of alternative leagues consisted of a single article in UEFA Statutes – Article 49 – that read:

UEFA shall have the sole jurisdiction to organize or abolish international competitions in Europe in which Member Associations and/or their clubs participate. [...] International matches, competitions or tournaments which are not organized by the UEFA but are played on UEFA territory shall require the prior approval of FIFA and/or UEFA and/or the relevant Member Associations

⁴ T-93/18 *International Skating Union v European Commission*, ECLI:EU:T:2020:610, and Case 3:18-cv-07394 (*ISL v FINA*) filed in the USA.

in accordance with the FIFA Regulations Governing International Matches and any additional implementing rules adopted by the UEFA Executive Committee.

Despite the reference to “the FIFA Regulations Governing International Matches,” the key questions of how, where, when, and under which conditions are licenses to be granted was not specified in any rulebooks. Similarly, “the rules adopted by UEFA Executive Committee” mentioned in Article 49 did not exist as such rules they were never adopted. The procedure, the substantive conditions, and the outcome were left entirely to the arbitrary decision of UEFA. For many years, the mere existence of such arbitrary power was sufficient to deter any potential alternative league organiser, be it clubs themselves or an external investor. The destiny of any application for prior approval of alternative competitions did not seem promising just by looking at the wide discretion left in the hands of UEFA.

The only competition that received a formal UEFA authorisation to date remains the women’s BeNe league consisting of top clubs from the Netherlands and Belgium.⁵ BeNe league did not find commercial success it was seeking and had to be abandoned after just two seasons. Men’s alternative leagues in Europe that operated cross-border without UEFA’s approval⁶ were rather limited in territorial and temporal scope and did not pose a commercial threat to UEFA’s own club competitions. Therefore, they were tolerated. All of them were ultimately abandoned due to financial difficulties, inability to sell broadcasting rights and, in some cases, political turmoil.

The European Super League case

Background:

On 18 April 2021, 12 European top clubs⁷ have resigned from the ECA and announced the formation of the ESL, a new elite cross-border league intended to replace the UEFA competitions for these clubs. Their departure would create a rival and significantly weaken the UEFA Champions League and present a commercial competitor also for

⁵ UEFA news item ‘Best of Belgian and Dutch Unite in the BeNe League’ 23 January 2013.

⁶ For example, the Royal League played for three seasons starting in 2004 and consisting of clubs from three Scandinavian countries; the Commonwealth of Independent States Cup (CIS Cup) was played from 1994 to 2016 between the clubs from all of the former Soviet Union states, with occasional participation from Serbian and Finnish clubs; Channel One Cup played between 2006-2008 consisting of champions and runners up of Russian, Ukrainian, and later also the champions of Israeli and Serbian premier leagues; and the Baltic League held for four seasons between 2007-2010.

⁷ These included Arsenal, Chelsea, Liverpool, Manchester City, Manchester United, Tottenham Hotspur, Inter Milan, Juventus, Milan, Atlético Madrid, Barcelona, and Real Madrid.

the Big Five national leagues (England, Italy, Spain, France and Germany) in which they intended to remain as regular participants. The league was to ultimately consist of 20 clubs, 15 of which would hold a permanent place, while five others would qualify through the system of promotion and relegation with national leagues each season. A choice of design as a mostly closed format was a mistake that could have been avoided and that would later prove (virtually) fatal for the project.

The marketing idea of A22, a sports management company behind the ESL, was to create a US-style league with more emphasis on entertainment during the halftimes, cheerleaders, bigger screens, and all the other features typically seen in the US sports. The main investor, JP Morgan Chase, pledged around €4.5 billion for the creation of the ESL. Some of the benefits for the overall football ecosystem that were claimed by the ESL involve creating a more balanced competition between equal competitors able to produce a more quality product, while the fans would be able to watch top teams play each other more often.

However, the benefits were enough to outweigh the anticipated negative effects. The opposition to the ESL was swift and involved not just football stakeholders but also raised atypical interest by various politicians. Fans, European Leagues, ECA, some EU institutions, French President, and the Prime Ministers of Italy and the UK all stood firmly in defence of the European sports model based on open competitions with promotion and relegation. It was a unique response to a project that was perceived not just as a threat to European football structures and traditions due to its closed format, but also a threat to financial viability of some domestic leagues.

UEFA's reaction was the most impactful. As soon as the ESL was announced, UEFA issued threats to the participating clubs to sanction and expel them from their national leagues if they proceeded with the implementation phase of the project. At this point, it is useful to point out that the UEFA competitions, Champions League in particular, contribute towards competitive gap between clubs in the domestic leagues, and between domestic leagues belonging to different national associations. The top clubs have often dictated the content of the UEFA rules governing its competitions, and managed to secure a privileged access to competitions, redistribution of revenues which heavily favours big clubs due to the emphasis on markets that these clubs come from and their historical coefficients, formal representation in the governance, etc. These privileges translate into a guaranteed on-pitch success. The precondition for the functioning system of open competitions with promotion and relegation is equality of opportunities and a healthy degree of competitive balance between participating clubs that has, however, been heavily eroded in the European football. In other words, UEFA's own competitions are neither as open nor as based on principles of meritocracy, as they claim to be.

On 21 April 2021, under the immense public and political pressure, but mostly due to the UEFA threats, the ESL project was abandoned. Initially it was the six English clubs that announced their withdrawal, and four other clubs joined them later – the last one was Juventus on 1 June 2024. Real Madrid and Barcelona have never withdrawn and have not rejoined the ECA to date.

Legal challenge and the decision of the Court of Justice of the European Union (CJEU) in C-333/21 ESL case:

The ELS launched a legal challenge against UEFA under the EU competition law provisions (Articles 101 and 102 TFEU on cartels and abuses of dominant position, respectively). The main legal questions related to:

1. the legality under Articles 101 and 102 TFEU of UEFA running a system of prior approval for third-party pan-European competitions, in particular where no regulated procedure exists, and taking into account the possible conflict of interests affecting UEFA; and
2. the legality under Articles 101 and 102 TFEU of threatening ESL clubs with sanctions by UEFA and their member associations as a deterrent, in particular where those sanction were not based on objective, transparent and non-discriminatory criteria.

The first question was the most significant and essentially asked for legal evaluation on whether the system of prior authorisation constituted a cartel under Article 101 TFEU (a decision or a rule by UEFA that illegally distorts, prevents or restricts competition on the market), or abuse of the dominant position by UEFA under Article 102 TFEU. It directly confronted Article 49 of UEFA Statutes and the UEFA's power to regulate the access to organisational market, especially in the situation of conflict of interest resulting from the conflation of its regulatory and commercial functions, where no procedural framework for prior authorisation existed. Throughout its previous jurisprudence, such as in C-49/07 *MOTOE* and T-93/18 *ISU*, the CJEU has never objected to the mere existence of the conflict of interest in sports federations or the legality of prior control mechanisms *per se*. Instead, the emphasis was on evaluating the way that the monopolistic regulatory powers were exercised. According to *MOTOE*, the power of prior authorisation must be made subject to 'restrictions, obligations and review' to prevent arbitrary application and the distortion of competition by favouring own events. Another important rule that came out of *MOTOE* was the obligation on the regulator to secure equality in access and treatment between economic operators on the organisational market. The demands that UEFA places on third party organisers cannot be discriminatory in relation to UEFA's own club competitions. Furthermore, the *ISU* case set out the criteria that a system of prior authorisation must fulfil which specified that it must rest on non-discriminatory, objective, transparent, verifiable,

reviewable and proportionate requirements that are capable of ensuring effective access to the relevant market for the organisers of alternative events.⁸ The CJEU in the *ESL* followed its former jurisprudence.

Regarding the second question on legality of threatened sanctions, the CJEU simply noted that sanctions were a part of the system of prior control that had no procedural framework and leaving them to the arbitrary determination was unacceptable. The Court of Justice did not object to, or directly deal with the substance of the UEFA's decision to issue threats of sanctions.

So, the UEFA's authority to control the access to the organisational market via prior control mechanisms survived the legal scrutiny. However, the design of its system of prior control was found incompatible with the EU competition law provisions. The sole reason for such finding was due to the lack of a procedural framework and sanctioning powers providing for substantive criteria and detailed procedural rules capable of ensuring that they are transparent, objective, precise, non-discriminatory, and proportionate. These safeguards would eliminate the risk of abuse of dominant position and arbitrary decisions.

The judgment in the *ESL* did not deal with the legality of the Super League project (because the *ESL* was not on trial), but the CJEU hinted in para. 144 of the judgement when it implied that the closed format of competition would be found incompatible if tested under the EU law. The specific characteristics of sport support a finding that it is legitimate for UEFA to promote "the holding of sporting competitions based on equal opportunities and merit" via prior control of competitions. Given that the *ESL* was virtually closed and not based on equal opportunities and sporting merit but on permanent places for 15 clubs, there is a good chance that the UEFA's decision to issue threats of sanctions and expulsion would be found legitimate had it been taken within the properly designed administrative framework.

Already in June 2022, anticipating the CJEU criticism, UEFA modified its rules and published the first edition of its Authorisation Rules Governing International Club Competitions. The second edition of June 2024 ironed out some of the remaining legal concerns.

Future prospects

The *ESL* precedent has paved a way for the emergence of both the elite and smaller regional alternative leagues in the future. The legal environment has been clarified and the regulatory framework in football has been made legally compliant as a direct result

⁸ On appeal, the Court of Justice in C-124/21 *ISU* confirmed these principles.

of the legal challenge. This is important for investors that seek new opportunities on the market: while they are able to calculate and undertake reasonable business risks, they are unwilling to dive into muddy legal waters and engage in legal battles with hostile governing body that can take years.

Evidently, the powerful ESL financial supporters were of a different mindset as they saw the discussed legal challenge as a part of the investment. Theirs was not a project that would fail if and when it would materialise – an alternative league played by the very best European clubs throughout the season in lieu of the UEFA Champions League is likely destined for commercial success despite the initial opposition from many stakeholders. The ELS is not dead. Its shareholder's agreement is still in force and clubs are waiting for "the stars to align", i.e. the moment when the political and commercial landscape becomes ripe for its revival. In the meanwhile, the project re-invented itself with the adoption of a new competition format that reflects the CJEU language of open competitions, and an engagement of a new CEO to change the PR approach, build bridges with stakeholders, and emphasise the ESL's deep care for the values of European football.

A lot of emphasis in the media and academic discussions is placed on the top-tier football, but smaller regional leagues that are well-designed from the legal point of view and that fulfil UEFA licensing criteria may become a part of the future trend. It is a fact that many national leagues struggle with the financial survival, and UEFA has always been more open to non-elite alternatives for two reasons. First, they do not endanger UEFA's revenues. Secondly, while elite breakaway clubs would leave the UEFA competitions and continue playing in their national leagues, small to medium sized clubs⁹ constituting regional leagues would, by contrast, leave their national leagues and continue playing in the UEFA competitions. Joining forces with others in the region to create a new cross-border league – a league that would be attractive to local broadcasters and the consumers alike – might ensure their financial survival in the increasingly unequal football ecosystem.

While creation of a new competition may be a ticket for the participating clubs to become more successful on and off the field, play in a more balanced league, and earn extra revenues, the clubs left behind would struggle as the value of the national leagues' commercial contracts would plummet with the departure of the best clubs. Top sponsors and broadcasters would suddenly have a new pet league to enter their best bids. That is why ensuring a strong financial solidarity mechanisms with the non-participating clubs, the one that can make the system of promotion and relegation between national leagues and the new cross-border league meaningful and effective, is

⁹ Small and medium sized in European context – these would be some of the top clubs in their national leagues.

of utmost importance. It is not just important for the economic reasons, but the law would not look kindly upon any project that would endanger the viability of the national leagues. Football is a part of national identity and culture that is protected under the EU Treaties and will always be taken into account in the implementation of the economic provisions. After all, the balance between the commercial freedoms on the one hand, and public interest objectives of the sport or economic efficiencies and benefits for the overall market including consumers on the other, is at the heart of the EU sports law.

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