MODEL COURTS OF JUSTICE 2023

European Court of Justice

Study Guide

WRITTEN BY ZEYNEP NUR YILDIRIM

SUPERVISED BY UMUT EROL

LETTER OF THE SECRETARY-GENERAL

Esteemed Participants,

It is my pleasure to welcome you all to the twelfth edition of the Model Courts of Justice as the Secretary-General. My name is Umut Erol, and I am a senior law student at Ankara University.

The participants of the Model Courts of Justice 2023 will be focusing on the fields of European Union Competition law, sports law, and the European Internal Market in the European Court of Justice. The case that will be simulated is *'European Super League Company, S.L. v. Union of European Football Associations and Fédération Internationale de Football Association'.* The judges and advocates of the Court will have a chance to elaborate on such essential and fundamental notions of European Competition law as undertakings and abuse of dominant position.

I would like to first thank Miss Zeynep Nur Yıldırım for her dedication and endless effort during the whole process. Second, I appreciate the trainee of the European Court of Justice, Miss Gülşen Demirören for her contribution to the preparation phase. Last, I would like to thank the Director-General of the Model Courts of Justice 2023 and my beloved partner, Miss Selin Özgören for enduring organizational excellence and professionalism with her wonderful organization team.

Before attending the sessions, I highly recommend all the participants read the Study Guide and Rules of Procedure and bring the printed versions of these documents with them while coming to the Conference.

If you have any questions or hesitations about the Conference, please do not hesitate to contact me at secretarygeneral@modelcj.org

Sincerely,

Umut Erol
Secretary-General of the Model Courts of Justice 2023

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LETTER OF THE UNDER-SECRETARY-GENERAL

Esteemed Participants,

I am deeply honored to extend my warmest welcome to you all as we convene for the Model Courts of Justice 2023. My name is Zeynep Nur YILDIRIM, and I am currently a senior student at Ankara University, Faculty of Law. This year, it is my utmost pleasure to serve you as the Under-Secretary-General responsible for the European Court of Justice. The Model Courts of Justice has been a remarkable event since the very beginning, renowned for its dedication and skillful teams. I consider myself fortunate to have been part of both academic and organizational teams throughout the years.

This year, the European Court of Justice will pass judgment on the case between European Super League Company v UEFA and FIFA, discussing if the UEFA and FIFA have abused their dominant position in the market for the organization of international club football competitions in Europe. The purview of this case extends beyond matters of unfair competition and the misuse of market dominance, encompassing an intricate analysis of sports and competition law, contextualized within the broader framework of European Union rules and regulations.

Before concluding my remarks, I am compelled to express my sincere appreciation to every member of our dedicated academic team. Their unwavering commitment and tireless efforts have truly transformed this challenging journey into an exceptional and unforgettable experience, I extend my deepest gratitude to Secretary-General Mr. Umut EROL for affording me the privilege of contributing to this extraordinary endeavour, bringing us all together for a common purpose. I also wish to extend my sincere gratitude to our esteemed Director-General, Ms. Selin ÖZGÖREN, and her dedicated organization team. Their dedication and hard work have undoubtedly left an indelible mark, ensuring that this one-of-a-kind conference will remain unforgettable for all participants.

Yours sincerely,
Zeynep Nur YILDIRIM
Under-Secretary-General for the European Court of Justice

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I. INTRODUCTION TO THE COMPETITION LAW

1. Introduction

Everyday life in the modern industrialized world is dominated by market transactions through many different channels such as food, clothing, entertainment, and transport. It is assumed that these markets offer different choices, yet the reality is not always as it is expected. Although it is acknowledged that markets can occasionally be non-competitive—there may be just one supplier or all the companies within the market may have agreed to supply the same product at the same price—we do not pause to think about how or why markets are competitive and what keeps them that way. Competition law introduces economics as a foundational tool of interpretation and application.

The main aim of competition law is to prevent the unreasonable restrictions of competition in a market, which are mainly caused by agreements of companies that hold substantial market power.[1] Nearly any product or service that comes to mind can be covered by competition law whilst causing large sums of money and high estimates of damage to consumers. An effective competition policy leads consumers to lower prices, promotes allocative and productive efficiency, and endorses the firms to develop new and better products to retain business.

Establishing an internal market that includes a 'system ensuring that competition is not distorted' is stated in Article 3 (3) of the Treaty on European Union and Protocol 27. However, the Treaty does not state why competition is necessary, nor does it state what the rules are intended to achieve. It is therefore an important task for competition authorities to determine the aims and the areas of application. The courts must determine whether the authorities acted by the legislation. Economic theories and political moods change rapidly; markets are dynamic. Conduct and views of its impact on competition change over time. In response to changes in political thinking and economic behaviour that have occurred around the world over the last 30 years, competition law has grown

[1] Deborah Healey, Michael Jacobs and Rhonda L Smith (eds), *Research Handbook on Methods and Models of Competition Law* (Edward Elgar Publishing 2020) <https://china.elgaronline.com/view/edcoll/9781785368646/9781785368646.xml> accessed 6 July 2023 52

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at a phenomenal rate. Therefore, it is a flexible area that changes with the developments, causing the competition authorities and the courts to be influenced by those changes.[2]

Competition law functions are highly contentious and take various approaches. Society strives to preserve the constructive dynamics of competition to enhance consumer welfare, spur innovation, and deliver efficiency. The majority approach emphasizes the necessity of enforcement of competition law against firms whose behaviours harm consumers. There are two opposing views to the majority approach. First of the opposing views is that competition law should focus on maintaining the competitive process, instead of being concerned about an outcome. The other alternative view opines that competition law can be imposed on a wider set of economic and non-economic ambitions, such as promoting national industries, safeguarding employment, and protecting national resources.[3]

2. European Union Competition Law

The modern legalisation process started at a much later time in Europe compared to the United States. The earliest European competition controls were introduced in the Treaty of Paris in 1951, which established the European Coal and Steel Community. However, the introduced rules were specialized rules that are only applied to a limited number of markets.[4] Later, the German Law Against Restraints of Competition, which was the first modern competition law in Europe, was enacted in West Germany in 1957. The German Law contained some provisions that held competition protection. The Treaty of Rome, which established the European Economic Community (the EEC), entered into force the same year. Several provisions in the Treaty served as the foundation of European competition policy, regulating competition within the European Single Market.[5] The putative European Economic Community gradually evolved into the European Union in 1993, following EU law, which is a separate supranational legal order that is applied within the European Union. Consequently, both governments and private entities,

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[2] Richard Whish and David Bailey, *Competition Law* (Tenth edition, Oxford University Press 2021) 17

[3] Damian Chalmers, Gareth Davies and Giorgio Monthi, *European Union Law* (Second edition, Cambridge University Press 2010) 910

[4] Cosmo Graham, *EU and UK Competition Law* (Second Edition, Pearson 2013) 30

[5] Ko Unoki, *Competition Laws, National Interests and International Relations* (1st edn, Routledge 2019) <https://www.taylorfrancis.com/books/9781000759273> accessed 6 July 2023 23

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including companies that operate within the European Union, must follow the legal aspects established by the EU law. Because of what is known as the teleological system of interpretation used in EU law, it is useful to be aware of the background of the Treaty, in addition to the specific provisions of competition law. To interpret any specific provision of the Treaty or EU law, the spirit of the Treaty should be considered as well as its wording. Article 3 of the Treaty on the European Union (the TEU) outlines the Union's socio-economic objectives, including establishing an internal market, promoting sustainable development, a highly competitive social market economy, full employment, social progress, and environmental protection. [6] The effects and the importance of the Article 3 of the TEU can be seen through many references to the Article in decisions of the Court of Justice of the European Union, whilst underlining the importance of the internal market and competition.[7]

One of the essential objectives for establishing the European Union was to increase the harmonization and integration through Europe. From the beginning, as can be seen in the Treaty on European Union, economic unity has been a core tenet. Indeed, the Internal Market was designated to foster interdependence among European countries. For the market to operate successfully, it would be necessary to ensure that more or less equal competitive opportunities existed throughout this 'integrated market.' As a result, competition rules were included in the Treaty to aid in the creation of a unified competitive environment, as well as to prevent private companies from re-erecting trade barriers that the Member States had dismantled. While the internal market is largely complete, there are several areas where market integration is still of relevance.

The competition provisions of the EEC Treaty, which were formerly Articles 81–89, were then enshrined in Articles 101–109 of the Treaty on the Functioning of the European Union (the TFEU) and in a series of various directives and regulations. Article 101 of the Treaty of the Functioning of the European Union prohibits cartels, collusion, and other anticompetitive practices, whilst Article 102 addresses market dominance or the prevention of abuse of a company's dominant position in a market. Articles 101 and 102 apply to undertakings. The term undertaking is not defined in the EU Treaties, but the case law of the European Union has settled that 'the concept of

[6] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 Art 3
[7] Weijer VerLoren Van Themaat and Berend Reuder, *European Competition Law* (Edward Elgar Publishing 2018) <https://www.elgaronline.com/view/9781786435460.xml> accessed 6 July 2023 6

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an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[8] National law definitions of a company are different and not suitable for the given definition of an undertaking. Rather, it is effects-based: the question is whether the entity in question has an economic impact on the market by offering goods or services while performing a specific task.[9] This broad definition includes entities offering goods or services without a profit-motive, or an economic purpose. In this line, the General Court has held in *Piau* that the practice of football-by-football clubs is an economic activity, despite the fact that some of these clubs may be purely amateur clubs.[10] Employees, however, are not undertakings,[11] nor are agents who operate on behalf of their principal and take no financial risk. Finally, the European Union Merger Regulation governs mergers.[12] According to the EU, the purpose of having competition laws is to ensure that businesses are encouraged to offer consumers goods and services at the 'most favourable terms and services,' as well as to promote efficiency and price reductions.[13]

a. Enforcement of the Competition Prohibitions

The European Union's enforcement system is divided into public and private enforcement, with public enforcement involving the application of competition rules by the European Commission, National Competition Authorities (NCAs), or courts. Public enforcement involves applications for review of Commission Decisions to the General Court (GC) and appeals to the Court of Justice of the European Union (the CJEU). [14] Private enforcement involves applying competition rules in private disputes. The EU's primary method of enforcing competition rules is through public

[8] Case C-41/90 *Héfner and Elsner v Macrotron* EU:C:1991:161, para 21
[9] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (Fourth edition, Cambridge University Press 2019) 964
[10] Case T-193/02 *Laurent Piau v Commission* [2005] ECLI:EU:T:2005:22
[11] Guidelines on vertical restraints [2000] OJ C291/1, paras 12–20
[12] COUNCIL REGULATION (EC) No 139/2004 on the control of concentrations between undertakings L:2004:024:TOC
[13] 'New Measures to Fight against Illegal Competition Practices in the Internal Market' <https://www.consilium.europa.eu/en/press/press-releases/2018/06/20/new-measures-to-fight-against-illegal-competition-practises-in-the-internal-market/> accessed 15 August 2023
[14] Graham (n 4) 40

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enforcement, with the Commission and NCA having enforcement powers that go beyond private parties' fact-gathering rights. [15]

The Commission plays a key role in ensuring the application of EU competition law principles, with Article 105(1) TFEU entrusting it with the task of ensuring compliance with Articles 101 and 102. [16] The Commission's modernization package required EU competition law to be applied to all European-related conduct, strengthening its position and role. [17]

With Regulation 1/2003, National Competition Authorities have a significant role in enforcing Articles 101 and 102 TFEU, and the Commission and NCAs form the European Competition Network. The NCAs have the power to empower the application of Articles 101 and 102 TFEU to cases in their territory, protecting citizens' rights. Despite the collaboration of the Commission and the NCAs in the ECN, the Commission has the right to give the final decision when interpreting EU competition rules in accordance with the Commission Notice. [18] The Commission has developed and implemented a policy on the application of EU competition law to damages actions before national courts and works with national courts to ensure consistent application of EU competition rules across the EU.[19]

[15] Philipp Kirst, *The Impact of the Damages Directive on the Enforcement of EU Competition Law: A Law and Economics Analysis* (Edward Elgar Publishing 2021) <https://china.elgaronline.com/view/9781800887510.xml> accessed 6 July 2023 1

[16] Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press 2013) 45

[17] Commission Report on *Modernisation of EC antitrust enforcement rules: Council Regulation (EC) No 1/2003 and the modernisation package* (2004)

[18] Commission Notice on cooperation within the network of competition authorities [2004] OJ C101/43, para 43

[19] 'Antitrust Overview' <https://competition-policy.ec.europa.eu/antitrust/antitrust-overview_en> accessed 4 August 2023

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II. THE COURT OF JUSTICE OF THE EUROPEAN UNION

1. Introduction

The European Union has taken its present form as a result of many milestones in its historical process. The conception of ‘a European family', which would provide peace, safety, and freedom to its members, was introduced mainly after the Second World War. Due to unstable conditions, which were the result of two world wars and the economic collapses that followed them, the need for a peaceful and steady Europe peaked and led to the idea of reshaping the idea of unification. Therefore, the European Coal and Steel Community (the ESCS) was established in 1950 with the Schuman Declaration, which was followed in 1952 by the signing of the Paris Treaty by the six founding members: France, Germany, Italy, and the Benelux countries (Belgium, the Netherlands, and Luxembourg).[20] In the same year, the Court of Justice of the European Coal and Steel Community was established by the Treaty of ESCS as a judicial authority to set up a judicial body that was responsible for guaranteeing the application of Community law by all the Member States.[21] After the Treaties of Rome entered into force on 7 October 1958, the court became the Court of Justice of the European Communities.[22] Additionally, the European Atomic Energy Community (the EAEC) and the European Economic Community (the EEC) were created as two communities by the Treaties of Rome. In July 2002, the court expired and became the Court of Justice of the European Union under the provisions of the Lisbon Treaty.[23]

The Lisbon Treaty amended the Treaty on European Union (the TEU) and the Treaty Establishing the European Community (the TEEC).[24] The TEU is a treaty that outlines the EU's guiding principles, whereas the TFEU is a detail-oriented treaty that offers organizational and functional provisions.[25] The ‘Community’ word was replaced with ‘Union’ with the Treaty of Lisbon. Thus,

[20] John Fairhurst, *Law of the European Union* (Eleventh edition, Pearson 2016)
[21] ‘Opening of the Historical Archives of the Court of Justice of the European Union • European University Institute’ <https://www.eui.eu/Research/HistoricalArchivesOfEU/News/2016/02-26-The-historical-archives-of-the-Court-of-Justice-of-the-European-Union-at-the-HAEU> accessed 4 August 2023
[22] ibid.
[23] ibid.
[24] Paul Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (Seventh edition, Oxford University Press 2020) 330
[25] ‘The Treaty of Lisbon | Fact Sheets on the European Union | European Parliament’ (31 March 2023) <https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon> accessed 4 August 2023

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The European Union replaced the European Community.[26] The abolition of the pillar system and the adoption of the new institutional framework for the Court of Justice of the European Union are major reforms facilitated by the Treaty of Lisbon. Nonetheless, the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Treaty Establishing the European Atomic Energy Community continue to shape the European Union law.[27] The Treaty of Lisbon is crucial for shaping the European Union's law, with its numerous innovative regulations. The most important reforms include renaming the entire court system to the Court of Justice of the European Union, extending jurisdiction to European Union Law unless otherwise provided by the Treaties, and committing the European Council to the Court of Justice's jurisdiction regarding its acts.[28]

Article 19 of the Treaty on the European Union defines the courts under the Court of Justice of the European Union, including the Court of Justice, General Court, and specialized courts. It ensures the law is observed in the interpretation and application of the Treaties. The Court shapes the judicial authority of the European Union through the courts of Member States while remaining a supranational court. The CJEU consists of two courts: the Court of Justice and the General Court.[29]

2. Structure

a. Court of Justice of the European Union

The Court of Justice of the European Union is composed of 27 Judges and 11 Advocates General, appointed by the Governments of the Member States through consultation with a panel.[30] Judges and Advocates General are selected from prospective candidates who meet the criteria for appointment to the highest judicial offices in their respective countries or are jurisconsults of recognized competence. [31] The official term of a judge is six years, but they can be reappointed every three years due to staggered appointments. [32] The Court elects a President and Vice-

[26] Klaus-Dieter Borchardt, *The ABC of European Union Law* (Publications Office of the European Union 2018) 18
[27] ibid 19
[28] Craig and De Búrca (n 30) 94
[29] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 Art 19
[30] 'Presentation - Court of Justice of the European Union' (*CURIA*) <http://158.167.241.123:8090/jcms/jcms/Jo2_7024/en/> accessed 4 August 2023
[31] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 Art 19(2), Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, Art 253
[32] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, Art 253

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President from among its own judges and appoints its Registrar. [33] The President presides over hearings and deliberations of the full Court or the Grand Chamber, while the Vice President assists the President if necessary. [34] The Registrar is the secretary general of the institution and manages its departments under the authority of the President of the Court. [35] The procedural selection method of an Advocate General (AG) that assists the CJEU is the same as for the CJEU Judges. According to Article 252 of the TFEU, the Advocate General's primary responsibility is '*to make, in open court, reasoned submissions on cases*. The Opinion of the Advocate General is not necessary in every case.[36]

As serving on the court, judges are not allowed to hold other political or administrative positions and can be dismissed if they are no longer fulfilling their responsibilities. [37] According to the provisions of the Statute of the Court of Justice of the European Union, the CJEU can be a full Court, a Grand Chamber composed of fifteen judges, or in Chambers. [38] The Grand Chamber is used when a case is significant or when the subject matter warrants it. Chambers consist of three or five judges, which is essential for the Court's functioning due to its increasing caseload. [39] The jurisdiction of the CJEU is specified by Treaties, with Article 19 TEU and Articles 251-281 TFEU being the main provisions. International agreements between Member States may also grant jurisdiction to the CJEU. [40]

b. General Court

The General Court, previously known as the Court of First Instance, is composed of twenty-seven judges, with at least one judge from each Member State, yet it is not confined to a single judge from each Member State. [41] The judges are appointed by the governments of the Member States through a panel that evaluates candidates' suitability for the position. The judges have a six-year term in office, which is renewable. They choose their President from among themselves to serve

[33] ibid.
[34] 'Presentation - Court of Justice of the European Union' (n 36)
[35] ibid.
[36] Protocol (No 3) On the Statute of the Court of Justice of the European Union, OJ C 202, Art 20
[37] ibid. Art 6
[38] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, Art 215
[39] ibid Art 6
[40] Craig and De Búrca (n 30) 443
[41] Chalmers, Davies and Monti (n 18) 147

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for a term of three years. They choose a Registrar for a six-year term in office, despite that, the Court uses the administrative and linguistic services of the institution for its different necessities.[42] Unlike the Court of Justice, there are not any permanent Advocates General at the General Court, in exceptional situations, a Judge carries out the task.[43]

The General Court may sit in full Court with three or five Judges if it addresses the circumstances required or due to the magnitude of the case, yet, in some cases, it can be only one judge as well.[44] When there is a legal complexity, it can also be seated as a Grand Chamber with fifteen judges. The Presidents of the Chambers of five Judges are elected from amongst the Judges for a period of three years.[45]

3. Jurisdiction

a. General Court

The General Court has jurisdiction to hear and rule on several occasions such as,

- judicial review by individuals of actions or illegal actions by EU institutions or actions for non-contractual damages against the EU institutions;[46]
- actions by the Member States against the Commission, the European Central Bank, and the European Council;[47]
- actions relating to intellectual property brought against the European Union Intellectual Property Office and against the Community Plant Variety Office;
- matters referred to the Court of Justice under an arbitration clause;[48]
- appeals from decisions of the Office for Harmonisation in the Internal Market.[49] This agency is responsible for the grant of the Community trademark, and anybody adversely affected by its decisions can appeal these to the General Court;

[42] 'Presentation - Court of Justice of the European Union' (n 36)
[43] Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (First published in paperback, Oxford University Press 2017) 7
[44] Rules of Procedure of the General Court, OJ L 105, Art 14(3)
[45] 'Presentation - Court of Justice of the European Union' (n 48)
[46] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, Arts 263(4), 265(3), 268 and 340(2)
[47] Protocol (No 3) On the Statute of the Court of Justice of the European Union, OJ C 202, Art 51
[48] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, Art 272
[49] Regulation 40/94/EC on the Community Trade Mark [2004] OJ L70/1, Art 63

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- appeals from decisions of the European Civil Service Tribunal.[50]

Jurisdiction over these matters results in the General Court being the central administrative court. As a result, it has emerged as a key player in the development of administrative due process principles. Because competition and external trade law are developed through challenges by private parties who have been affected by EU measures, it is also the central judicial institution in these fields, as well as in the field of Community trade mark, where a similar process occurs with challenges to decisions by the Office for Harmonisation of the Internal Market.[51] The decisions of the General Court may, within two months, be subject to an appeal before the Court of Justice, limited to points of law.[52]

b. Court of Justice of The European Union

1) Proceedings of the Court

Article 267 TFEU states:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

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[50] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, Art 256(2)
[51] Chalmers, Davies and Monti (n 18) 147
[52] 'Presentation - Court of Justice of the European Union' (n 36)

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> *If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.*[53]

The Court of Justice collaborates with all Member States' ordinary courts to clarify EU Law interpretations. National courts can refer to the Court to request clarification, ensuring a uniform application of EU legislation and preventing different interpretations. The reply of the Court of Justice is not an opinion, but a form of judgment or reasoned order that must be applied with the results. Other national courts are also bound by the Judgment of the Court, in case the same problem occurs. Any European citizen can thus seek clarification of EU rules through requests for preliminary rulings, and all parties, including Member States and institutions, can participate in the proceedings. Although such a referral can only be made by a national court. Several important principles of EU law have thus been established through preliminary rulings, sometimes in response to questions referred by national courts of first instance. [54]

An annulment action seeks to overturn a measure enforced by a European Union institution, body, office, or agency. The Court of Justice has exclusive jurisdiction over actions brought by a Member State against the European Parliament and/or the Council, while the General Court has first-instance jurisdiction in all other actions, particularly those brought by individuals. [55] Actions for failure to act review the lawfulness of the failure of institutions, bodies, offices, or agencies of the European Union. [56] The Court of Justice and the General Court share jurisdiction over actions for failure to act based on the same criteria as actions for annulment. [57] Appeals against General Court judgments and orders may only be brought before the Court of Justice on legal grounds. If the appeal is admissible and well-founded, the Court of Justice vacates the judgment or remands the case to the General Court, which is bound by the Court of Justice's decision.[58]

[53]Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01

[54] 'Presentation - Court of Justice of the European Union' (n 36)
[55] Arnull and Chalmers (n 49)
[56] ibid
[57] ibid
[58] ibid

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2) Procedure

Whatever the type of case, there is always a written stage and, if necessary, a public oral stage. However, there must be a distinction made between, first, requests for preliminary rulings and, second, other actions (direct actions and appeals). Commencement of proceedings before the Court and the written procedure may differ by the type of application.

In reference to preliminary rulings, the national court asks the Court of Justice questions about the interpretation or validity of a provision of European Union law, usually in the form of a judicial decision issued in accordance with national procedural rules. When the Court's translation service has translated that request into all European Union languages, the Registry notifies the parties to the national proceedings, as well as all Member States and European Union institutions. The names of the parties to the proceedings, as well as the content of the questions, are published in the Official Journal of the European Union. The parties, Member States, and Institutions have two months to submit written observations to the Court of Justice.

In direct applications and appeals, with the application addressed to the Registry, the Registrar publishes a notice in the Official Journal, setting out the claims and arguments of the applicant. The application is served on the other parties, who have two months for lodging a defense or a response. If necessary, the applicant may file a reply and the defendant may file a rejoinder under the deemed appropriate time limits.[59]

In all proceedings, once the written procedure is completed, the parties have three weeks to state whether and why they want a hearing. The Court decides whether any preparatory inquiries are needed and whether a hearing should be held for oral argument by taking into consideration the views of Advocate General. When an oral hearing is decided, the case is argued at a public hearing, before the bench and Advocate General. The Judges and the Advocate General have the authority to ask the parties any questions they deem appropriate. A few weeks later, the Advocate General delivers his or her Opinion in open court before the Court of Justice, while thoroughly examining

[59] 'Types of Institutions, Bodies and Agencies | European Union' <https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en> accessed 4 August 2023

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the legal aspects of the case and proposing to the Court of Justice the response that should be given. The Court may decide, after hearing the Advocate General, to give judgment without an Opinion.[60]

3) The Effect of Judgments on Shaping the Court

First case laws that shaped the fundamental principles of the Court can be observed under some judgments. The Court established the principle of the direct effect of Community law in the Member States in its case law (beginning with Van Gend & Loos in 1963), which now allows European citizens to rely directly on rules of European Union law before their national courts.[61] In 1964, the Costa judgment established the primacy of Community law over domestic law, which is to be uniformly applied in all Member States.[62] Since 1991, European citizens have therefore been able to bring an action for damages against a State which infringes a Community rule due to Francovich and Others held in 1991.[63]

[60] 'Presentation - Court of Justice of the European Union' (n 36)
[61] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1
[62] *Costa v Enel* [1964] ECLI:EU:C:1964:66
[63] Case C-6/90 *Francovich and Bonifaci v Italy* [1991] ECLI:EU:C:1991:428

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III. KEY CONCEPTS

1. Abuse of Dominant Position

The European Union competition law ensures that competition is not distorted within the internal market. As a requirement for the competition within markets, companies act independently of each other, whilst facing competitive pressure by other companies.[64] For undertakings to distort competition within the internal market, abuse of dominance is an effective way. Abuse of domination is a prohibition, defined in Article 102 of the Treaty on the Functioning of the European Union (the TFEU). Abuse of a dominant position within the internal market or in a substantial part of the internal market is prohibited under Article 102 of the Treaty on the Functioning of the European Union. The Article must be regarded as a cornerstone in order for the European Union (the EU) to maintain fair competition among undertakings within the internal market.[65]

To understand the abuse of dominance and the administration of Article 102, the EU legal system needs to be dawned. EU legal system is an autonomous system, meaning that it is self-governing, resulting in the legal sources of the EU are to be interpreted also with own methods of interpretation of the Union. Consisting of primary and secondary sources, the secondary sources must comply with the primary sources. The Treaty of Lisbon includes two treaties, namely, Treaty on the European Union and the TFEU, which shapes one of the primary sources of the EU. This leads to Article 102 TFEU being a primary source for the Union law. [66]

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[64] 'Antitrust' <https://competition-policy.ec.europa.eu/antitrust_en> accessed 4 August 2023
[65] Borchardt (n 47) 33
[66] Kieran Bradley, '5. Legislating in the European Union' in Kieran Bradley, *European Union Law* (Oxford University Press 2020) <https://www.oxfordlawtrove.com/view/10.1093/he/9780198855750.001.0001/he-9780198855750-chapter-5> accessed 4 August 2023 104

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a. Undertakings

Article 102 TFEU restricts conduct by undertakings that have a dominant position in the internal market or a substantial part of the market. These undertakings have a unique obligation not to impede or distort market competition. However, they are allowed to take part in market activities in the same way as their competitors. The ECJ first established the particular need for dominant undertakings not to impede or distort market competition in Michelin v. Commission.[67] In its judgment, the Court stated that a dominant position itself does not cause a violation under Article 102 unless the undertaking interferes with genuine, undistorted competition on the common market.[68]

Thus, rather than prohibiting dominance, Article 102 TFEU imposes restrictions on undertakings that do hold a dominant position. Furthermore, a dominant undertaking that strengthens its position by competing on merit does not fall within the scope of Article 102 TFEU.[69] That being said, abuse must exist for Article 102 TFEU to be violated. Similarly, it requires the undertaking to have a dominant position in the market, which means that non-dominant undertakings that engage in abusive behaviour are not covered by the Article.[70]

For conditions that are required for a violation can be identified by the first clause of Article 102, which are:

(a) dominant position by one or more undertakings within the internal market;
(b) abuse of the dominant undertaking;
(c) the abuse is within the internal market or in a substantial part of the market;
(d) the abuse may affect trade between member states.[71]

[67] Case 322/81 *Michelin v Commission* [1983] ECR 3461
[68] ibid para 57
[69] Lorenz (n 22) 189
[70] Gabriel Peric, 'EU Competition Law and Abuse of Dominance, A Deep Dive into Article 102 of the TFEU' 4
[71] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, Art 102

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The given conditions do not specify what constitutes a dominant position or an abuse. They only set the jurisdictional conditions under which an abuse of a dominating position by an undertaking becomes relevant and makes it possible to analyse it in accordance with Article 102 TFEU.[72]

When determining whether an entity is an undertaking eligible for assessment under Article 102 TFEU, it must be concluded that the ECJ seeks to investigate whether or not the activity is economic. If the entity in question engages in a variety of activities, the CJEU will evaluate each one separately. In summary, the court's test for determining whether an activity is economic or not can be summarized as follows: 'An activity is of an economic nature if it faces actual or potential competition by private companies, thus establishing a strong presumption for the economic character of any activity.'[73]

The entity in question does not need to aim for an economic purpose or profit-making intention for there to be an economic activity. Even if the entity is a non-profit organization, it is sufficient to show that it is engaging in economic activity. The entity in question does not need to have an economic goal or want to make money in order for there to be economic activity. This was used as an illustration in the UEFA case, in which the Commission highlighted that UEFA had sold the commercial rights to UEFA competitions and thus qualified as an undertaking under the rules of competition.[74] Additionally, people who practice regulated professions like custom agents, notaries, lawyers, or other professionals, even those who offer services with a public law component, can qualify as undertakings. Individuals may also be considered undertakings if their activity extends beyond their personal use.[75]

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[72] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (1st edn, Oxford University PressOxford 2011) <https://academic.oup.com/book/9648> accessed 4 August 2023 109

[73] Alexander Winterstein, 'Nailing the Jellyfish: Social Security and Competition Law' [1999] European Competition Law Review 4

[74] *UEFA's Broadcasting Regulations* (Case 37.576) Commission Decision 2001/478/EC [2001] OJ L 171, para 47

[75] Peric (n 76) 7

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b. Dominant Position

For Article 102 to apply, the undertaking under consideration must hold a dominant position in the relevant market. The concept of dominance is stated in the *United Brands* Case as:

> *'Relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.'*[76]

Furthermore, two stages must be examined for establishing a dominant position in an undertaking.[77] Firstly, it is necessary to identify the relevant market where the undertaking is anticipated to be dominant. This is accomplished by doing a thorough analysis of the group of goods that consumers view as alternative substitutes due to their traits, functions, and costs. The second step focuses more on the undertaking itself, including its market power and market share as well as the significance of entry-level market obstacles.[78]

Through several leading cases, the ECJ has stated that a dominant position of an undertaking derives from a combination of several factors, which are not necessarily determinative when considered separately.[79] Due to this conception, it is now recommended that the position of an undertaking in a market be evaluated in light of all relevant market factors. As a result, the ECJ and the Commission nearly always take the following three steps:

a) an assessment of the undertaking's market strength based on its market share
b) an assessment of barriers to entry or expansion within the relevant product market
c) an assessment of countervailing market power, meaning investigating whether competitors or purchasers may offset the undertaking's power.[80]

[76] Case 27/76 *United Brands v Commission* [1978] ECR 207, para 65
[77] Winterstein (n 79)
[78] Commission Notice on the definition of the relevant market for the purposes of Community competition law [1997] C 372/03
[79] Case 27/76 *United Brands v Commission* [1978] ECR 207, para 66
[80] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance) 2009, para 12

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Additionally, it is vital to first identify the pertinent product market in order to ascertain whether an undertaking is holding a dominant position within the internal market. The second factor is the relevant geographic market, which requires that the dominant position exist entirely or substantially within the internal market. The final factor is the level of economic influence that a dominant undertaking may possess within the market.[81]

c. Market share of the undertaking

In order to establish whether an undertaking has a dominant position or not, the assessment of the market share of the undertaking is crucial. However, it is vital to keep in mind that demonstrating a significant market share as proof of a dominant position is not a continuous factor and that its significance varies from market to market depending on how those markets are structured. Therefore, Article 102 of the TFEU should not automatically apply just because an undertaking has a large share of the market. Certain market share levels are useful as an indicator when determining the market strength of an undertaking, according to the practices of the Commission and European courts. By developing several percentage categories of an undertaking's market share through case law, European courts have clarified what these kinds of percentage levels can represent and how they can be employed.[82]

The assessment should always include at least the shares of the undertaking's competitors, primarily the larger ones, unless there is a very high percentage of market shares of the undertaking, preferably above 70%. A market share of the dominant undertaking that is greater than 70% is typically seen as proof of the existence of a dominant position. In the leading case establishing this strong indication, the Court held that 'Hilti holds a share of between 70% and 80% in the relevant market. Such a share is, in itself, a clear indication of the existence of a dominant position in the relevant market.'[83] Often, no other proof is required to show the dominance of an undertaking when its market shares are this high and it has sustained this extremely high market share for a considerable amount of time.

[81] Joseph J Norton, 'The European Court of Justice Judgement in United Brands: Extraterritorial Jurisdiction and Abuse of Dominant Position' (1979) 8 Denver Journal of International Law and Policy 397
[82] Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, para 39
[83] Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439, para 92

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When there is a substantial difference between a dominating undertaking's market share and that of other competitors, and the market share does not suggest a dominant position, Article 102 tends to apply. Even though market share alone may indicate dominance, it is important to remember that other factors also come into play when determining whether an undertaking has a dominant position or not. This affirms the Courts' and the Commission's approach to assessment, which is to consider all pertinent market circumstances.[84]

d. Barriers to entry and expansion

The power of an undertaking in a given market may not only depend on its market shares. Additionally, what is known as 'barriers to entry' and 'barriers to expansion', have been identified as factors that may have an adverse influence on the market in a competitive approach by restricting or prohibiting competitors' admission into a market. Barriers to entry are commonly defined as expenses that a firm entering a certain industry must bear but which are not incurred by firms already operating in that market. Legal barriers may take the form of government concessions, patents, and other intellectual property rights.

Economies of scale and scope are barriers because, for example, when a company manufactures on a large scale, it gains an advantage over smaller competitors who do not manufacture on a large scale because it can negotiate exclusive deals with distributors for higher investments for larger quantities, lowering the average cost per unit. Additionally, if the business has a policy to always have enough capacity to meet client demand for the particular product, this will act as a barrier to entry for competitors on any scale that is realistic.[85] If a strong reputation, specialized experience, high marketing and advertising costs, and positive relationships between suppliers and customers are necessary for effective competition, an established position of incumbent firms on the market may occasionally make it difficult for new competitors to enter the market.[86]

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[84] Peric (n 76) 14
[85] *BPB Industries plc* (Case IV/31.900) Commission Decision 89/22/EEC [1988] OJ L 10, para 120
[86] Peric (n 76) 15

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e. Consumer Power

As long as clients of a dominant undertaking can influence the terms and conditions under which they obtain goods or services from the dominant business, no dominant position of that undertaking may be established. In such a scenario, one of the criteria outlined in the *United Brands* test, the putative dominating undertaking's inability to act independently of its customers, is met.[87]

f. Abuse

The concept of abuse has been defined in the *Hoffmann-La Roche* case as followes:

> *'The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position, which is such as to influence the structure of a market, where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'*.[88]

However, the concept of abuse has been affected after the judgment in the *Hoffmann-La Roche* case, within the economic approach of the Commission to Article 102 TFEU. Originating from the Guidance paper, the Commission states that:

> *'The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of the higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.'*[89]

The concept of abuse can be separated into exploitative abuses and exclusionary abuses. Abuses that directly harm consumer welfare are typically targeted at the customers and consumers of the

[87] United Brands (n 101)
[88] Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, para 91
[89] Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/7, para 19

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dominating undertaking. Smaller competitors of the dominant undertaking are the targets of exclusionary abuses, which aim to keep them out of the market.[90]

2. Internal Market of the European Union

From the very beginning of the European integration project, building a common market has been the main purpose of the project. According to Article 26(2) of the TFEU, 'the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. Despite the definition, the importance of the internal market cannot be understood without understanding the internal frontiers.

In theory, there are three main models for setting the internal market, which are host country control, home country control, and the harmonized model. Each of these models represents a different approach and philosophy for economic integration, yet the models do not exist purely anywhere. The main difference appears in the approach of the roles, with the division of power through the European Union, Member States, and the local courts and legislatures.[91] Whilst, the host country control model fully empowers the country that the economic activity takes approach, under EU rules, by committing to an internal market, the host country rules cannot discriminate against things or people from the other Member States. The home country model foresees vice versa, giving control to the home country for the economic activities. There needs to be mutual trust and recognition between the two countries in order to achieve this model, yet it cannot be seen in the ongoing system of the EU. Instead, where mutual recognition does exist, it is tempered by exceptions that allow the host country to refuse recognition in certain circumstances. The final model, which is the harmonized model foresees one rule that must be complied with in the entire Union through the products and factors of production, with the rule being said must be created by the Union itself.[92]

Whatever the model or the paradigm of the internal market, legally two things are required: there need to be rules on free movement and a conferral of legislative power to the EU. Article 114 of

[90] Peric (n 76) 35
[91] Chalmers, Davies and Monti (n 18) 335
[92] ibid

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the TFEU, which authorizes the EU to harmonize to achieve or improve the internal market, is the key provision. This creates a foreign, yet limited power. The Court of Justice determined that it allows the EU legislature to deal with trade barriers and significant competition distortions.[93]

The wording of Article 114(1) TFEU is as follows:

'Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

The Internal Market, which succeeds the Common Market and the Single Market, is an area of shared competence according to the Article 4(2) TFEU, for the implementation of which the Union adopts legislative acts, binding for Member States which can no longer legislate unless the Union has exercised its competence or if the Union has decided to cease exercising its competence. It might seem as if the Internal Market is limited to only four fundamental freedoms; free movement of goods, persons, services, and capital, but the content has expanded to new complex areas such as standardization of goods and public procurement as well. The Internal Market is one of the primary domains addressed by the green and digital transitions, and the measures taken to accomplish this are aimed at implementing the four fundamental freedoms, and Member States are cooperating to find appropriate ways to meet European obligations.[94]

a. Free Movement

The right to the free movement of goods originating in the Member States, and of goods from third countries that are in free circulation in the Member States, is one of the fundamental principles of the Treaty according to Article 28 of the TFEU. Originally, the free movement of goods was envisioned as part of a customs union among the Member States, which would include the

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[93] ibid 363
[94] Oana-Mihaela Salomia, 'HOW DO THE EUROPEAN COMMISSION, MEMBER STATES AND CITIZENS INTERACT IN ENFORCING INTERNAL MARKET RULES?' (2022) XXIX LESIJ - Lex ET Scientia International Journal 399

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elimination of customs duties, quantitative restrictions on trade, and equivalent measures, as well as the establishment of a common external tariff for the Union. Later, the emphasis was placed on removing all remaining barriers to the free movement of goods in order to create an internal market.[95]

The freedom of movement for workers has been one of the founding cornerstones of the EU. The free movement of goods, capital, and services within the European single market is complemented by this fundamental right of employees, which is outlined in Article 45 TFEU. The free movement of workers includes the rights of movement and residence for the workers, the rights of entry and residence for their family members, and the right for working in a different Member State equally with the nationals, without facing any nationality-based discrimination.[96]

The freedom of establishment and the freedom to provide services ensure that enterprises and professionals can move around the EU. Since the full freedom to provide services is essential for the completion of the internal market, the complete implementation of the Services Directive is highly crucial. Self-employed persons and professionals or legal persons within the meaning of Article 54 TFEU who are legally operating in one Member State may: (i) carry out an economic activity in a stable and continuous way in another Member State (freedom of establishment: Article 49 TFEU); or (ii) offer and provide their services in other Member States on a temporary basis while remaining in their country of origin (freedom to provide services: Article 56 TFEU). This calls for the abolition of nationality-based discrimination and the adoption of measures to make it simpler to exercise these freedoms, such as the harmonization of national access rules or their mutual recognition if freedoms are to be used effectively.[97]

The free movement of capital is one of the four fundamental freedoms of the EU single market, based on Articles 63 to 66 of the TFEU. It is not only the most recent but also the broadest fundamental freedom due to its unique third-country dimension. Capital flow liberalization occurred gradually. Capital movement and payment restrictions, both between Member States and

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[95] 'Free Movement of Goods | Fact Sheets on the European Union | European Parliament' (31 March 2023) <https://www.europarl.europa.eu/factsheets/en/sheet/38/free-movement-of-goods> accessed 4 August 2023

[96] 'Free Movement of Workers | Fact Sheets on the European Union | European Parliament' (31 March 2023) <https://www.europarl.europa.eu/factsheets/en/sheet/41/free-movement-of-workers> accessed 4 August 2023

[97] 'Freedom of Establishment and Freedom to Provide Services | Fact Sheets on the European Union | European Parliament' (31 March 2023) <https://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services> accessed 15 August 2023

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with third countries, have been prohibited by the Maastricht Treaty since the beginning of 2004, although exceptions exist. The free movement of capital underpins the single market and supplements the other three freedoms. It also contributes to economic growth by allowing capital to be invested more efficiently and promotes the use of the euro as an international currency.[98]

3. Sports Law and Policy in the European Union

Article 5 of the Treaty on European Union promises restraints in subjecting sport to European Union law It is declared in the Treaty that; the European Union shall not act more than the authorisation provided by the Treaties. However, the situation is different in practice, as despite the EU Treaties conferring no explicit competence to act in the field of sport until 2009 and the relevant directions in Article 165 of the Treaty on the Functioning of the European Union, the EU's institutions have intervened in the field of sport since the 1970s insofar as practises affect the creation and functioning of the EU's internal market.

Article 26 of the Treaty on Functioning of the European Union defines the internal market as an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured. The main question that needs to be figured is whether EU internal market law can be applied to sports, and how the unique features of sports must be guided in the application of EU internal market law to sporting practices. The question at hand is how EU law mediates between claims of to the EU exercising authority over sporting bodies operating on its territory and the claimed legitimacy of the rules that sports bodies create (the lex sportiva). Under EU law, a model of 'conditional autonomy' emerges, sporting bodies have room to protect and preserve their special concerns if they demonstrate how and why EU law should be open to accommodating such characteristics.[99]

Article 165 of the TFEU directs that the EU shall contribute to the promotion of European sporting issues while taking into account the specific nature of the sport. EU action shall be aimed at developing the European dimension in sport, promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and protecting the physical

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[98] 'Free Movement of Capital | Fact Sheets on the European Union | European Parliament' (31 March 2023) <https://www.europarl.europa.eu/factsheets/en/sheet/39/free-movement-of-capital> accessed 15 August 2023
[99] Stephen Weatherill, *Principles and Practice in EU Sports Law* (Oxford University Press 2017) 71

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and moral integrity of sportsmen and sportswomen. Article 165 TFEU owes its very existence to sports bodies' recognition that internal market law applies to sports.[100]

Walrave and Koch, a case decided in 1974, the Court of Justice faced the first opportunity to examine how EU law interacts with the practices of sporting associations. [101] The Court rejected the claim that sport was not part of the EU's founding Treaties, stating that the scope of EU law is broad and motivated by the functional concern of achieving an economically integrated market. The goal of removing barriers to inter-state trade and merging national markets into a single market is the primary reason for covering any economic activity that aims to defeat that goal. [102]

In a formula that stands as the first statement of how and why sport is subject to EU law, it was stated that:

'Having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.'[103]

In Walrave, the ECJ recognised the horizontal direct effect of provisions concerning the free movement of workers and services against international sporting governing bodies. According to the ECJ, this prohibition on discrimination *'does not only apply to the action of public authorities, but also to rules of any other nature aimed at collectively regulating gainful employment and the provision of services.'*[104]

Advocate General asked the ECJ to rule on whether 'rules of sporting organisations designed to ensure that a national team shall consist only of nationals of the country that that team is intended to represent' are compatible with EU law.[105] According to the Court, the prohibition on discrimination based on nationality 'does not affect the composition of sports teams, in particular

[100] ibid 72
[101] Case 36/74 *Walrave and Koch v Union Cycliste International* [1974] ECR 1405
[102] Case 15/81 *Gaston Schul* [1982] ECR 1409, para 33; Case C-312/91 *Metalsa* [1993] ECR I-3751, para 15
[103] Case 36/74 *Walrave and Koch v Union Cycliste International* [1974] ECR 1405, para 4
[104] Jan Exner, *Sporting Nationality in the Context of European Union Law: Seeking a Balance between Sporting Bodies' Interests and Athletes' Rights* (1st ed. 2019, Springer International Publishing: Imprint: Springer 2019) 24
[105] Case C-36/74, Walrave and Koch v. Association Union Cycliste Internationale and Others, [1974] EU:C:1974:140, Opinion of the Advocate General Warner, 1st col., 1526

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national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity.'[106]

The Court of Justice has faced direct nationality discrimination in professional football for the first time in *Donà.*[107] The judgment of Donà resulted in a gentleman's agreement between the European Commission and UEFA, under which national associations were required to allow at least three foreign players and two players who had played in the country for an uninterrupted period of five years to play in every first division team. However, in 1995, the European Commission's '3+2' rule was challenged alongside transfer fees between clubs in the Bosman case. The claims to absolute or unconditional autonomy advanced by the football authorities and methodically rejected by the Court are structurally important in understanding how broad the reach of EU internal market law is and how, as a result, core issues tend to be settled based on their merit as a claim to protect the unique features of the sport, rather than by excluding EU law in principle. This is the core of the 'conditional autonomy' model granted to sports by EU law.[108]

In the *Bosman* decision, the ECJ confirmed the horizontal direct effect of EU law provisions concerning worker freedom of movement, arguing that the principle of non-discrimination applied to clauses contained in sporting associations' regulations that restricted players' rights to participate in football matches. The European Court of Justice stated that if EU law did not apply in this situation, what is now Article 45 of the Treaty on the Functioning of the European Union would be 'deprived of its practical effect and the fundamental right of free access to employment which the Treaty confers individually on each worker in the EU rendered nugatory.'

Any autonomy granted to sport by EU law is conditional on meeting the expectations outlined in the tests of justification recognised by EU internal market law. And it is in the shaping of the environment of justification that sport must strive to embed its claims to be 'special.' When the Court turned to justification in Bosman, it quickly accepted that sport is unique. The famous paragraph 106 of the ruling is as follows:

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[106] Case C-36/74, Walrave and Koch v. Association Union Cycliste Internationale and Others, [1974] EU:C:1974:140, para 8
[107] Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115
[108]Stephen Weatherill, *Principles and Practice in EU Sports Law* (Oxford University Press 2017) 85

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'*In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.*'[109]

The ECJ moved beyond the discriminatory model and put more of an emphasis on the idea of market access with regard to the second contentious regulation in Bosman, specifically transfer fees between teams. The ECJ ruled that because these regulations applied equally to citizens of all Member States, they were not discriminatory.[110] However, the ECJ determined that the transfer regulations could restrict workers' freedom of movement because they 'directly limit access of the participants to the labour market in other Member States.'[111] Furthermore, it granted players the right to a free move at the end of their contracts as long as the transfer was between clubs affiliated with a European Union organization. This decision appeared to indicate a shift in the court's perspective of what constituted a purely sporting matter, as well as a willingness to enforce Union law on sports, at least in terms of free movement of workers. The consequences of this ruling are that discrimination based on nationality in sports had to be eliminated and a reform of the transfer system was needed. The court's grant of free transfer to players in Bosman is still used today. Players can still transfer freely between clubs as long as their contract has not expired. This system is strikingly similar to the free agency system currently in operation in American sports, and it protects the right to free labor movement. The case of Bosman is considered to have had the most significant impact on professional European sports and the EU sports law. The court's grant of free transfer to players in Bosman is still used today. Players can still transfer freely between clubs as long as their contract has not expired. This system is strikingly similar to the free agency system currently in operation in American sports, and it protects the right to free labor movement.[112]

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[109] Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, para 103
[110] ibid
[111] Rebecka Louise Nordblad, 'European Super League: Kicking off the Match against FIFA and UEFA. Exploring C-333/21 European Super League Company v FIFA and UEFA in the Light of EU Competition Law, and Its Effect on the European Model of Sports.' <http://lup.lub.lu.se/student-papers/record/9084587> accessed 15 August 2023
[112] Lars Halgreen, *European Sports Law: A Comparative Analysis of the European and American Models of Sport* (1. upd, Forlaget Thomson 2004) 46; Stephen Weatherill, *European Sports Law: Collected Papers* (2nd ed. 2014, TMC Asser Press : Imprint: TMC Asser Press 2014) 497

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After the Bosman, the *Meca-Medina* is a highly influential case in EU sports law because it bridged the gap between free movement and competition law. The European Court of Justice decision in Meca-Medina changed the way the European courts should look at sports cases; away from a general sporting exception and towards considering the specific nature of sports and potential justifications within sports.[113] By issuing a decision in MOTOE in 2008, the CJEU confirmed their stance held in Meca-Medina[114]. The given decision eliminated the automatic exception for purely sporting rules developed in the 1970s and increased the use of competition law in the field of sports. This was also the first case before the Court of Justice that used Article 102 in the field of sports.[115]

4. The European Model of Sports

The role of modern sports has evolved significantly over the past few decades, becoming a complex phenomenon that attracts more financial resources and markets. Being the center of sports since the birth of the ancient Olympic Games, Europe has distributed and implemented the central rulings of sports organizations that spread around the world. Because of its historical leadership in sports development, the European Union has a distinctive opportunity to set the trend in the formulation and articulation of rules and management systems. The size of the European sports market ensures the EU's leadership role in shaping the regulatory foundation of sports. The sports model developed by EU institutions is critical to deepen regional integration processes, promoting European values and interests beyond the region, and transforming the EU into one of the major drivers of the global sports management system.[116]

Among many other innovations, the Lisbon Treaty on the Functioning of the European Union has extended its competence to the sphere of sports by formulating the general legal framework and articulating the main policy in this field. The extensive practise of joint management of various sports in Europe, backed up by the legal foundation of the Lisbon Treaty, forms a common sport model for the EU.

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[113] Nordblad (n 111) 18
[114] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECLI:EU:C:2008:376
[115] Nordblad (n 111) 19
[116] National Research University Higher School of Economics and others, 'The European Model of Sport: Values, Rules and Interests' (2018) 13 International Organisations Research Journal 54

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The European Model of Sports is a branch of the specificity of sports, which is included in the interests held by the EU in Article 165 TFEU. The White Paper, the first comprehensive initiative by the European Commission, defined the basic provisions on sport as a new area of EU policy, formulated main directions for the development of the European sports movement, and identified specific tools for implementing policies. The uniqueness of sports was identified in the White Paper of 2007, and it manifested in several aspects: the organization of separate competitions for men and women, the need to limit the number of participants, and the need to maintain a competitive balance between the teams participating in the competition.[117]

Besides, the White Paper states that the European Court of Justice and the European Commission should consider the uniqueness of sport in their decision-making processes. It assumes that the adoption of judicial decisions in this area is based on the precedent principle, with each case being considered separately, as in other areas of the economy. Thus, the development of legal norms in this area is confined to case law and may not even necessitate the inclusion of additional special legal norms in EU treaties. In this manner, the EU's sport management system was constructed.

The official position of the EU on the role played by sport in the process of integration development is expressed in the definition and consolidation of five main functions in the White Paper on Sport;

- Educational Function: Sports help to form a multifaceted personality, providing self-development for people of all ages.
- The Function of Maintaining the Health of Society: Exercise helps improve the health of the population, helps fight various diseases, and allows preserving the quality of life of all generations.
- Social Function: Sport is an ideal environment for creating greater social inclusion and preventing intolerance, racism, sexism, cruelty, alcohol, and drug use. Sport helps to involve different segments of the population in the labour market.

[117] Robert CR Siekmann, *Introduction to International and European Sports Law: Capita Selecta* (T M C Asser Press 2012) <http://link.springer.com/10.1007/978-90-6704-852-1> accessed 4 August 2023 76

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- Cultural Function: Sport contributes to better adaptation, helps to assimilate cultural norms, and forms a special type of identity.
- Recreational Function: Sport is the optimal and useful form of leisure for the population.[118]

The sport management system was developed using the fundamental principles of the European sports model, which cover all aspects of the given social phenomenon. They are the organisational components of European sports.

The first organisational principle is a four-level pyramidal, hierarchical management structure. Clubs are at the bottom of the pyramid, allowing anyone to join the sports movement and enjoy the benefits of sports. The most important task at the bottom level is to make sport accessible to all ('sport for all'). At the second phase of the pyramid, regional federations are made up of clubs that bring together all of the teams in a specific region or locality. Above the regional federations, national federations govern processes related to a specific sport in a given country, such as organising competitions and resolving problems. They have a monopolistic position within their country because of being the only body that regulates a specific sport. National federations are also represented in European governing bodies. The top of the pyramid is made up of European federations, which include national federations. European federations set the rules of the game because they are in charge of organising European competitions.

Figure 1: *Pyramidal Structure of European Sports Model*[119]

The promotion-relegation system is the second important principle of the European sports model. Since competitions are organised on all levels of the pyramid, the pyramidal structure implies subordination not only to the levels of regulation and management but also to all competitions.

[118] White Paper - White Paper on Sport {SEC(2007) 932} {SEC(2007) 934} {SEC(2007) 935} {SEC(2007) 936} 2007

[119] EU Sports Policy Going Faster, aiming higher, reaching further, European Commission <https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640168/EPRS_BRI%282019%29640168_EN.pdf> accessed 15 August 2023

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Any football club that wins the regional championship can advance to the national championship, and then to the European Championship. This situation leads to the foundation of the promotion system. However, the process also works in the opposite direction: a team that performs poorly in the national championship and finishes last, falls into the lower division, and this leads to the foundation of the relegation system. Competitions are considered to become more interesting and exciting as a result of vertical mobility between the leagues.[120]

The pyramid structure is distinguished by its use of the 'one federation per sport' principle, also known as the Ein-Platz Prinzip, which makes the system easier to manage.[121] However, this allows sports federations to maintain a monopoly in practice, which can be legally difficult to maintain. Despite this, commentators believe that the existence of multiple federations per sport would increase the probability of major conflicts. But after the commercialization of sports, the granting of monopolistic powers to sports governing bodies goes beyond what is required to ensure proper sports organisation.[122] In an age when sports are heavily commercialised, it can be difficult to distinguish between the regulations in sports and rules that form an economic purpose.[123] As a result, sport governing bodies and federations at the top of the pyramid wield considerable economic power while severely restricting market access for new leagues. This authority, if held by any other type of private commercial body, would almost certainly be considered a violation of Article 102. Simultaneously, their monopoly is justified by the notion that the pyramidal structure within the European Model of Sports is simply the most efficient way of organising sports.[124]

Formally, the EU has only minimal supporting competence in the field of sports, as described in Article 165 of the TFEU. Yet, it is clear that the actions of the European Union in sports are not limited to mere coordination and assistance. Sports organisations, such as UEFA, are subject to the full scope of European law in terms of competition policy, the single market, and freedom of movement since the EU has complete exclusive competence in these policies. As can be seen in the Bosman case, involving a Belgian football player who could not be transferred to the desired

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[120] National Research University Higher School of Economics and others (n 116) 55
[121] Halgreen (n 112) 46
[122] Stephen Weatherill, 'Is the Pyramid Compatible with EC Law?' in Stephen Weatherill, *European Sports Law* (TMC Asser Press 2014) <https://link.springer.com/10.1007/978-90-6704-939-9_12> accessed 15 August 2023 295
[123] ibid 300
[124] European Commission Consultation Document of DG X, 'The European Model of Sport' (1999) C374/56, para 3.2

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club due to the '3 + 2' rule, UEFA had relied on the decisions of the European Court of Justice.[125] Since 1995, when the European Court of Justice issued its decision in this case, all of the transfer and other rules of the UEFA have been discussed with the Commission and tested for compliance with European law. The situation is similar in another critical area, the implementation of financial fair play in football. Based on the analysis of this practice's application, it is possible to conclude that the EU is the dominant party in the process of defining Europe's legal and organisational framework for sports management. Laws of the European Union applicable to European sports federations flow down through all levels of the pyramid, from top to down, without changing, as the associations themselves forbid arbitrary interpretation of the adopted European norms. Otherwise, they will face soft pressure from the EU or even full sanctions by the Commission.[126]

In case of a violation, the costs for associations would be much higher than the benefits they receive as part of the pyramid. Due to that, the associations are commonly stuck to applying the strict implementation of European norms in their original form. Thinking as a whole system, this implementation mechanism enables the most efficient use of the formal, technical, and legal vertical integration processes, which forms the normative and legal foundation for Europeanization of the sports.[127]

5. Financing of Sport

European sport is financed based on four major sources, which are households, the central government, the local government, and the enterprises such as sponsorships and media rights. Additionally, in most European countries, partial tax exemption is available as an indirect source of finance for sports organisations that provide public utility sporting activities or for private individuals who bring funds into sports. Households such as purchasing sporting goods and services and sports betting are the most common private sector contributors, whilst the local and regional governments are the most common in the public sector.

[125] Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463
[126] National Research University Higher School of Economics and others (n 116) 57
[127] ibid 61

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From a microeconomic perspective, the line between the amateur and the professional clubs is very distinguished. Incomes of an amateur club mostly depend on membership fees, donations, subsidies, and, in the case of more developed amateur clubs with a loyal fan base, gate receipts and sponsorship, which in addition is quite a lot, compared to only funding for amateur groups being the local sources.[128]

Regarding professional clubs, there are two different models for financing. The traditional model relied on subsidies, gate receipts, and sponsorships with big corporates. With the emergence of private broadcasters in the 1990s and the increase in technology, a new financing era in football has started. In this era, TV rights have become the biggest income for the clubs, broadcasting companies started competing for the rights, and the sponsorship deals became far more valuable due to the television exposure. Merchandise was marketed more professionally, and their sales made up a significant portion of the budget.[129]

The liberalised player transfer market is the essence of good on-field performance. The salaries of the top players have increased due to excessive demand to the point where clubs frequently face financial difficulties. Therefore, a dynamic balance between spending for the wages of a club and its media earnings is crucial for the viability of the current model of funding for professional clubs. The UEFA Financial Fair Play Regulations demand the clubs to be able to operate based on their earnings, to achieve a better balance between revenue and costs, just as decreasing the burden of recurring money required from owners or other sources. The dominance of rich clubs and the repercussions of this dominance are the primary flaws in the current model of finance and governance in European football.[130]

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[128] Wladimir Andreff and Paul D Staudohar, ‘The Evolving European Model of Professional Sports Finance’ (2000) 1 Journal of Sports Economics 257

[129] Discussion Paper at the First European Conference on Sport ‘Relations between Sport and Television’, Olympia, 21 and 22 May 1999, 2

[130] Katarina Pijetlovic, *EU Sports Law and Breakaway Leagues in Football* (TMC Asser Press 2015) <https://link.springer.com/10.1007/978-94-6265-048-0> accessed 6 July 2023 44

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6. Sports Associations in Football

The Memorandum of Understanding, signed in 2007 between UEFA and the Fédération Internationale des Associations des Footballeurs Professionnels (the FIFPro)[131] confirms the commitment of these bodies to key values and recognition of solidarity, equitable wealth distribution, collective rather than individual exploitation of resources, the need for a proper balance between labour legislation and the specific characteristics of football as a sport, and the continued participation of all players and clubs to compete in the major national leagues and UEFA club competitions, the specify of sport and the career of a professional footballer, and the autonomy of federations.[132]

The Association of European Team Sports (the ETS), created in 2009, groups together six sports federations, that are volleyball, handball, basketball, rugby, ice hockey, and football. The core mission of the ETS is to ensure that the European sports model, the elemental parts of the model, namely *the specificity of sport* and *the autonomy and central role of the sports federations* more recognizable. The European Commission gives its backing to several aspects of the European sports model by endorsing the pyramidal governance structure, the autonomy of sports associations and open competitions based on sporting merit, and the principles of promotion and relegation. The Communication also promotes financial solidarity between amateur and professional sports and welcomes UEFA's Financial Fair Play Regulations.[133]

One of the values of the UEFA concerns the European sports model and the specificity of sports. Regarding the European Sports Model, the UEFA declares total commitment to the model as it shapes the characteristics of football. Another value of UEFA is the pyramid structure and subsidiarity. The pyramid at the international and European levels is seen as reflecting the

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[132] Memorandum of Understanding between UEFA and FIFPro, 11 October 2007

[133] 'ETS Supports European Commission Communication on Sport' <https://www.eurohandball.com/en/news/en/ets-supports-european-commission-communication-on-sport/> accessed 15 August 2023

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autonomy of football, while the work of UEFA with the FIFA and national associations allows it to defend the interests of football as effectively as possible.[134]

7. Alternative Leagues in European Football

The formation of alternative private leagues is viewed as the most serious structural threat to the traditional pyramidal model of football. The dissatisfaction of some of the elite clubs with FIFA/UEFA has so far been primarily related to long-standing football rules.[135] UEFA regulates the rules for the clubs which may be unsustainable in the long term.

The UEFA Statutes are well-designed to prevent the clubs from participating in alternative competitions without the prior approval of the UEFA. There are both severe financial and sporting penalties for the teams which can be seen in Article 49 (1) and (3) of the UEFA Statutes as:

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 in accordance with the FIFA Regulations Governing International Matches and any additional implementing rules adopted by the UEFA Executive Committee.[136]

Although it is a possibility, it is unlikely that any alternative establishment by the clubs would be given approval due to the ultimate impact of the respective dominion and sovereignty of the UEFA. In addition, Article 51(1) of the UEFA Statutes prohibits combinations or alliances between UEFA Member Associations or between leagues or clubs affiliated, directly or indirectly, to different UEFA Member Associations [to] be formed without the permission of UEFA.[137]

[134] Pijetlovic (n 129) 53
[135] ibid.
[136] UEFA Statutes, 2012
[137] Pijetlovic (n 129) 55

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According to the Memorandum of Understanding 2012 that governs the relationship between the clubs and UEFA, clubs undertake *'to recognise UEFA as the governing body of football at European level in accordance with its Statutes [...]; to ensure that none of its member clubs participate in any competition that is not organised or recognised by UEFA/FIFA'* and *'to ensure that its member clubs are not members of any other association or grouping involving clubs from more than one country [...]'*.[138]

[138] Memorandum of Understanding between UEFA and ECA (2012)

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IV. CASE BEFORE THE COURT (European Super League Company, S.L. v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA))

1. Overview

Over the past 70 years, the way football is organized in Europe has remained relatively constant. It is based on a pyramidal structure, with local grass-roots football and clubs at the base, semi-professional to elite-level football organized by national football associations and leagues, UEFA as the European continental federation, and then FIFA as the global football federation. The establishment of the European Super League in April 2021 upset the hierarchy logic with the most immediate target being breaking the UEFA's monopoly on the organisation of matches between clubs from different European federations. The aim of the Super League was to establish a stand-alone competition in which 20 clubs would compete and which would be organized and commercially marketed by the clubs themselves.[139]

a. International Football Association (the FIFA) and the Union of European Football Associations (the UEFA)

The International Federation of Associated Football (the FIFA) is considered an international non-governmental, non-profit organization according to the Swiss Civil Code and operates based on the Association and affiliation of member associations. FIFA has a huge political impact on domestic politics. Even domestic legislation changes are affected by its soft power, always in the entity's best interests.[140] FIFA has six regional confederations, including Union *des Associations Européennes de Football* (the UEFA) responsible for the countries of Europe. The UEFA is the governing body of European football associating 55 national football associations across Europe. The UEFA is a society that is registered in the Swiss Civil Code and the headquarters are located in Nyon, Switzerland. Its goals include, among other things, dealing with all issues concerning European football, and promoting football in a spirit of unity, solidarity, peace, understanding, and

[139] Floris De Witte and Jan Zglinski, 'The Idea of Europe in Football' (2022) 1 European Law Open 286
[140] Gabriel Nickolas Cazotto, Maurício Fronzaglia and Joaquim Racy, 'Institutional Aspects of FIFA Governance and Its Impact on International Relations' (2022) 12 American Journal of Industrial and Business Management 824-839

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fair play, without regard to politics, race, religion, gender, or any other factor, safeguarding European football values, promoting and protecting ethical standards and good governance in European football, and maintaining relationships with all stakeholders involved in European football.[141] If a football club wants to participate in an international competition organized by UEFA, such as the UEFA Champions League, it must agree to abide by the statutes, regulations, and decisions of the competent UEFA organs.[142]

b. European Super League Company

The European Super League Company (the ESLC) is a company formed under Spanish law by prestigious European football clubs with the aim of organizing the first annual European football competition known as the 'European Super League' (the ESL), which would exist independently of UEFA.

Figure 2: *The founding clubs of the European Super League*[143]

1) The Founding Clubs and Format of the ESL

On Sunday the 18th of April 2021, twelve of European leading football clubs came together and announced the idea of establishing a new 'super league' competition, called the European Super League. These founding clubs were AC Milan, Arsenal FC, Atlético de Madrid, Chelsea FC, FC Barcelona, FC Internazionale Milano, Juventus FC, Liverpool FC, Manchester City, Manchester United, Real Madrid CF, and Tottenham Hotspur. Three more clubs were going to be announced at a later date. The founding clubs cited their desire to improve the quality and intensity of existing European competitions by allowing the top clubs to compete on a regular basis in their statement.

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[141] UEFA.com, 'What UEFA Does | Inside UEFA' (*UEFA.com*, 1 March 2018) <https://www.uefa.com/insideuefa/about-uefa/what-uefa-does/> accessed 15 August 2023

[142] UEFA Statutes, Art 49

[143] Skysports.com, Champions League reforms like 'European Super League via back door' warns Premier League Network <https://www.skysports.com/football/news/20876/12588565/champions-league-reforms-like-european-super-league-via-back-door-warns-premier-league-network> accessed 15 August 2023

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Furthermore, the announcement came at a time when the COVID-19 pandemic had caused financial instability in the European football industry, prompting the European Super League to call for the adoption of a strategic vision and a long-term commercial approach.[144]

The competition format for the European Super League was shaped as it was described to have 20 participants with the 15 founding clubs as permanent participants. The remaining five clubs would qualify based on their previous season's performance. The founding clubs were aware of the potential interference with national leagues and thus committed to mid-week match schedules. The league would begin in August 2021 and would follow a traditional league structure, with a two-leg knockout format and a May final at a neutral venue. They also announced plans to launch the same league in women's football to help grow the sport. The European Super League would provide uncapped solidarity payments, which would be higher than those generated by European competitions at the time.

2) The Response by the Public and the Football Governing Bodies

When the announcement of the European Super League was made, within one day, European newspapers had described the league as a war declaration and 'la guerre des riches' (war of the rich),[145] and prominent ex-footballers such as Gary Neville described the league as a 'criminal act against fans'.[146] Football fans protested the formation of the new league and demanded that it be dissolved, as predicted by the media. The outrage stemmed from fears that the closed nature of the league and financial gains would obstruct the competitive incentive that makes football appealing to spectators. Within a week, AC Milan, Atlético Madrid, Internazionale Milan, and all English clubs had drawn out of the project, and the European Super League had collapsed.[147]

As the representative of national football associations in Europe, UEFA made a statement regarding the formation of the European Super League, together with various national football

[144] 'The Super League - Press Release' <https://thesuperleague.com/press.html> accessed 15 August 2023
[145] Emma Kemp and Helen Sullivan, '"It's War": What the Papers Say about the European Super League' *The Guardian* (19 April 2021) <https://www.theguardian.com/football/2021/apr/19/its-war-what-the-papers-say-about-the-european-super-league> accessed 15 August 2023
[146] Luke McLaughlin, '"Pure Greed": Gary Neville Takes Aim at Clubs in European Super League' *The Guardian* (18 April 2021) <https://www.theguardian.com/football/2021/apr/18/gary-neville-premier-league-clubs-super-league-european-liverpool-manchester-united> accessed 15 August 2023
[147] Neil Dunbar, 'A European Football Super League: The Legal and Practical Issues' (2021) 27 James Cook University Law Review 111

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associations. The statement was formulated in a passionate manner with the view to criticise the European Super League by describing the project as '*a spit in the face of all football lovers and our society*' and '*cynical plans that are completely against what football should be*'.[148] They emphasized the importance of maintaining a pyramid structure in football, as well as the fact that football has grown to be so great because of its open competition, integrity, and sporting merit. According to the statement, the European Super League was purely about money and dismissed the important charitable aspect of football, which includes funding grassroots, women's football, and youth football. In their statement, UEFA also stated that anyone playing for the European Super League would be barred from competing in the Euros and World Cup, which are organized by UEFA and its global counterpart, FIFA. This type of statement was echoed by European football stakeholders such as the Deutscher Fußball-Bund and the Premier League. However, due to the range of authority held by UEFA and FIFA, being the sole organizer.

3) Procedure Before the National Courts

In April 2021, The European Super League Company initiated legal action against FIFA and UEFA and filed an ex parte interim suit for interim relief before Commercial Court No. 17 in Madrid. They demanded that FIFA and UEFA refrain from adopting any additional actions that might directly or indirectly obstruct the formation of the European Super League, pointing out that the two organizations had abused their dominant position. Additionally, demanded a restraining order preventing FIFA, UEFA, or any associate members from implementing punitive actions against the players in the European Super League. The European Super League Company also demanded that FIFA and UEFA eliminate any anticompetitive effects that might have arisen during or before to the proceedings.[149] During the course of the proceedings, the Madrid Commercial Court granted the temporary measures and referred the case for a preliminary judgment in accordance with Article 267 TFEU. The court in Madrid referred the case to the CJEU for a preliminary ruling with six questions, five of which directly involve Articles 101 and 102 TFEU. [150]

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[148] 'UEFA Reacts to European Super League - Full Statement | Reuters' <https://www.reuters.com/lifestyle/sports/uefa-reacts-european-super-league-full-statement-2021-04-19/> accessed 15 August 2023

[149] AJM M 747/2021 *European Super League Company SL v FIFA UEFA* (11 May 2021) ECLI:ES:JMM:2021:747A

[150] Nordblad (n 119) 12

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2. Background of the Case

While each national organization oversees leagues and club competitions within their boundaries, UEFA is in charge of club competition at the European level, most notably with the Champions League, one of the world's most prominent club competitions. To compete in UEFA-sanctioned competitions like the Champions League, a club must first be licensed by UEFA, which compels clubs to comply with UEFA regulations and grants UEFA a lot of authority over the club. While becoming licensed is not a requirement for clubs, it is required if the club aspires to compete in UEFA-sanctioned tournaments. Because of the monetary benefits attainable to competitors, the risk of being excluded from those competitions is substantial.[151] Real Madrid was given $22.69 million for winning the championship in 2022, while runner-up Liverpool received $17.59 million. A minimum of $17.74 million was also paid to clubs for simply being one among the 32 clubs who qualified for the group stage, with an extra $3.17 million awarded for each group stage win and $1.05 million awarded for each draw. Real Madrid finished the competition with total prize money of around $94.42 million.[152]

These are substantial quantities of money that would be extremely beneficial to any club, particularly one that is not already a powerhouse. This arrangement allows UEFA to exert control over the clubs and effectively rule European soccer by making it fiscally irrational for a club not to be licensed to compete for the prizes.

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[151] Jesse Kalashyan, ‘The Game behind the Game: UEFA’s Financial Fair Play Regulations and the Need to Field a Substitute’ (2022) 18 European Competition Journal 21

[152] ‘Champions League Prize Money Breakdown 2022: How Much Do the Winners Get?’ (18 February 2022) <https://www.sportingnews.com/us/soccer/news/champions-league-prize-money-breakdown-2022-how-much-winners/alyjzqvtjjhxk311oivierzn> accessed 15 August 2023

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a. Background on Financial Fair Play Regulations of the UEFA

In 2010, UEFA introduced its Financial Fair Play Regulations (FFP) to combat ‘excessive spending by wealthy club owners that was deemed to be creating an unfair playing field.’[153] The main aim that UEFA claimed was that the FFP is about the improvement of the overall financial health of club soccer in Europe. The Financial Fair Play Regulations not only allow UEFA to manage the finances of clubs that currently hold a UEFA license, but they also allow UEFA to regulate the finances of clubs that have not obtained a UEFA license but are interested in participating. The regulations were enacted on the notion that clubs compete only based on their financial resources, and that doing so will promote financial fairness as well as the clubs' long-term stability and viability.[154] The FFP Regulations include a break-even requirement, which means that clubs are not allowed to spend more money than they earn over a three-year period. If a club does have a loss, it can be covered in its entirety by a direct contribution from the club owner(s) or a related party. The Club Financial Control Body (the CFCB), an independent body, is responsible for monitoring compliance with the break-even requirement. If the CFCB finds that a club is not in compliance, it can impose sanctions, such as fines or a ban from UEFA competitions.[155]

The break-even requirement has been criticized by some clubs and fans, who argue that the requirement stifles competition and prevents clubs from investing in their teams by violating Articles 101 and 102 of the Treaty on the Functioning of the European Union. However, UEFA argues that the break-even requirement is necessary to protect the long-term financial health of European football.[156]

One argument that has been made is that the FFP restricts competition by limiting the ability of clubs to spend money on players. This could make it more difficult for smaller clubs to compete

[153] ‘UEFA Approves New Financial Regulations to Replace FFP — New “Squad Cost Rule” of 70 per Cent of Revenue - The Athletic’ <https://theathletic.com/4180418/2022/04/07/uefa-approves-new-financial-regulations-to-replace-ffp-new-squad-cost-rule-of-70-per-cent-of-revenue/> accessed 15 August 2023

[154] UEFA.com, ‘Financial Fair Play: All You Need to Know’ (UEFA.com, 30 June 2015) <https://www.uefa.com/news/0253-0d7f34cc6783-5ebf120a4764-1000--financial-fair-play-all-you-need-to-know/> accessed 15 August 2023

[155] John Martin, ‘An Analysis of European Competition Law as Applied to UEFA 9

[156] ibid

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with larger clubs, which could ultimately lead to a less competitive market. This argument is based on the idea that a more competitive market is one in which all clubs have a chance to succeed, regardless of their size or resources. If FFP limits the ability of smaller clubs to spend money on players, it could make it more difficult for them to compete with larger clubs, which could ultimately lead to a less competitive market. It is argued that FFP 'has as its object or effect the prevention, restriction, or distortion of competition' by making it more difficult for smaller clubs to compete with larger clubs.[157]

Another argument that has been made is that FFP is an abuse of UEFA's dominant position in the European soccer market. UEFA is the governing body of European soccer, and there are no real alternatives to its competitions. This means that clubs have no choice but to comply with the FFP if they want to participate in UEFA competitions. This argument is based on the idea that UEFA has a monopoly on European soccer and that the FFP is a way for UEFA to maintain its monopoly power. If UEFA can use the FFP to prevent smaller clubs from competing, it could ultimately lead to a less competitive market.[158]

In May 2013, a complaint with the European Commission was filed by Daniel Striani, seeking that the Commission investigate UEFA and the Financial Fair Play restrictions. It was claimed that the FFP's break-even requirement violated Articles 101 and 102 TFEU. Striani also filed a lawsuit in Brussels' Court of First Instance, alleging the same claims. Striani's complaint was denied by the Commission. Due to limited resources, the Commission stated in their answer that they are 'unable to pursue every alleged infringement of EU competition law which is brought to its attention.' Rather than pursuing EU competition law in sporting issues, the Commission chose to encourage complainants to proceed to national courts.[159] The Belgian Court referred Striani's case to the Court of Justice, requesting a preliminary ruling. [160] However, the Court dismissed the request for

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[157] Johan Lindholm, The Problem with Salary Caps Under European Union Law: The Case Against Financial Fair Play, 12 Tex. Rev. Ent. & Sports L. 189, 200 (2011)
[158] Stefano Bastianon, The Financial Fair Play Regulations: A Legal Analysis, 36 Eur. Sport & Soc'y 42, 48 (2019)
[159] Commission Decision of 24 October 2014 (AT.40105 - UEFA Financial Fair Play Rules)
[160] Case C-299/15, *Daniel Striani and Others v. Union europeenne des Societes de Football Association (UEFA) and Union Royale Belge des Societes de Football Association* (URBSFA), OJ C 270

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a preliminary ruling on May 29, 2015, holding that it was 'manifestly inadmissible', resulting in a true competition law analyze of the Financial Fair Play Regulations never being completed.[161]

b. The Legal Challenges of the Super League

On April 18, 2021, Florentino Perez, the President of Real Madrid, announced that twelve of Europe's top soccer clubs were joining together to establish a European Super League.[162] The twelve original clubs involved in the potential Super League constituted a majority of the richest and most influential corporate entities in World football. The league would include twenty participating clubs, fifteen of which would be founding clubs that would be mainstays in the league, and a qualifying system for the remaining five teams. The league would be structured in a way to rule out any possibility that any of the twelve founder clubs would or could ever be relegated from the Super League. The matches would be played midweek and the plan was to have all participating clubs continue competing in their normal national leagues.[163]

The clubs that were members of the ESLC were not satisfied with the financial arrangements of the UEFA. UEFA sells television rights to broadcasters and keeps a certain percentage of the revenue. While distributing the remaining revenue to clubs, both those that participate in UEFA competitions but also the smaller clubs through solidarity payments. The ESLC clubs decided to organize their own Super League competition instead of participating in the UEFA Champions League. The plan was for ESLC members to continue to participate in their national championships but not to participate in the Champions League. The other UEFA competitions, namely the Europa League and Europa Conference League, would not be affected.[164]

The projected Super League would have included 20 clubs, 15 of which would have been 'permanent' founding members and the remaining 5 invited. The clubs would have been divided into two groups of ten, with each team playing 18 home and away matches against the other teams in their group. The top three teams from each group would have advanced to a new group of eight and played knock-out matches until a winner was chosen. The participating clubs would have kept

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[161] Martin (n 153)
[162] 'The Super League - Press Release' (n 142)
[163] John Welsh, *The European Super League debacle: why regulation of corporate football is essential*, Soccer and Society, 24:2, 172, 173
[164] Petros C Mavroidis and Damien J Neven, 'Eyes on the Ball. The Super-League Litigation before the CJEU' [2023] SSRN Electronic Journal <https://www.ssrn.com/abstract=4461465> accessed 4 August 2023 8

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their gate and sponsorship earnings and divided the television rights revenue as follows: The founding clubs would have received 32.5% of the proceeds, whilst 32.5% would have been distributed evenly among the 20 participating clubs. 20% would have been distributed based on club performance, while 15% would have been distributed based on broadcast revenue. The Super League claimed that this income-sharing arrangement would have allowed it to distribute €400 million in solidarity payments to weaker clubs. This sum would have been four times the amount currently distributed by UEFA for the same purpose.[165]

This league, even though participants were expected to remain in their national leagues, would have been in direct competition with UEFA. On April 18, 2021, UEFA published a statement condemning the Super League, declaring that the clubs involved would be banned from competing in any future domestic, European, or worldwide competition, and their players would be denied the opportunity to represent their national teams. [166] This was a significant setback for the Super League, as clubs and players stood to lose a significant amount of potential revenue as a result of being prevented from competing at the national and European levels. The fantasy of a new Super League appeared to be dead after 48 hours. The six English clubs, led by Manchester United, were the first to withdraw due to 'outside pressure' from fans and within the clubs. Despite the overwhelming migration of teams, the dream of a European Super League did not perish as expected.[167]

The European Super League Company is a business entity registered in Spain, thus, it has filed a lawsuit in this state against UEFA and FIFA in the Juzgado de lo Mercantil n.o 17 de Madrid (the Commercial Court), claiming that their actions were 'anticompetitive' and violated Articles 101 and 102 TFEU.[168] On 20 April 2021, the Commercial Court with jurisdiction in Madrid published a 'medida cautelarísima' (urgent precautionary measure) with legal and enforceable force in the European Union under the 2007 Lugano Convention.[169] This policy prohibits UEFA and FIFA,

[165] ibid 9
[166] UEFA.com, 'Statement by UEFA, the English Football Association, the Premier League, the Royal Spanish Football Federation (RFEF), LaLiga, the Italian Football Federation (FIGC) and Lega Serie A | Inside UEFA' (*UEFA.com*, 18 April 2021) <https://www.uefa.com/insideuefa/news/0268-12121411400e-7897186e699a-1000--statement-by-uefa-the-english-football-association-the-premi/> accessed 15 August 2023
[167] Mavroidis and Neven (n 162) 9
[168] Opinion of Advocate General Rantos, European Super League Company SL v. Union de Federaciones Europeas de Futbol (UEFA), Federation international de football association (FIFA), Case C- 333/21, 2022, para 17
[169] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial

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both based in Switzerland, as well as any other affiliated football body or league directly or indirectly associated with them, from issuing press releases against the Super League project and the founding clubs. Further, UEFA may not obstruct the launch of the Super League or penalise any of its founding clubs, management staff, or players. This preventive measure is based on Articles 45, 49, 56, and 63 of the Treaty on the Functioning of the European Union. This measure shall remain in force until the case has been fully considered by the Court.[170]

On 27 May 2021, Spanish Commercial Court No. 17 referred to the CJEU a question for a preliminary ruling on UEFA's and FIFA's violation of Articles 101 and 102 TFEU, while also challenging UEFA's monopolistic position as the sole governing, regulating, and disciplinary body in football, which the court considers is incompatible with European Union competition law. The case was registered under number C-333/21. The Madrid court sent the matter to the CJEU for a preliminary judgement with six questions, five of which relate directly to Articles 101 and 102 of the Treaty of the European Union.[171] The Court also condemned UEFA's abuse of its dominant position over clubs by opposing the Super League concept and threatening other entities with sanctions.[172] UEFA has threatened nine clubs (Arsenal FC, Atletico Madrid, Chelsea FC, FC Internazionale, Liverpool FC, Manchester City, Manchester United, AC Milan, and Tottenham Hotspur) with exclusion from all competitions for two years, and three clubs (FC Barcelona, Juventus, and Real Madrid) with exclusion for three years. In formulating these threats, UEFA ignored the precautionary measure ordered by the Spanish court, alleging that it was irrelevant to an entity registered in Switzerland. However, on 7 June 2021, the Swiss Federal Department of Justice and Police notified UEFA of the precautionary measure and ordered those sanctions against clubs not to be enforced.[173]

Matters, OJ L 339

[170] Mieszko Rakiewicz, 'Super League, FIFA and UEFA in Front of the Court of Justice of the European Union. A Case That Can Change the Future of Football and Soft Power in Europe' (2023) I Kwartalnik Prawa Międzynarodowego 185

[171] Juzgado de lo Mercantil No. 17 de Madrid, Request for a preliminary ruling, European Superleague Company, S.L. v Union of European Football Associations (UEFA) and Fédération internationale de football association (FIFA), OJ C 382

[172] ibid 10

[173] Aritz Gabilondo, 'UEFA Cannot Sanction Real Madrid, Barcelona, Juventus over Super League' (*Diario AS*, 7 June 2021) <https://en.as.com/en/2021/06/07/soccer/1623085068_184176.html> accessed 15 August 2023

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The CJEU held hearings on the case in July 2022, before the Advocate General issued his opinion. Representatives from the Super League, UEFA, FIFA, the European Commission, 21 Member States, and the Spanish Football Federation appeared before the CJEU judges on July 11 and 12, 2022. In the Court, the majority of the 21 Member States supported UEFA's position, while only the delegate of the Czech Republic remained conciliatory among those present. The Super League project was described as a cartel by the remaining Member States, who referred to the 'closed league' project. Faced with this argumentation, the Super League representative highlighted the point that de facto, in sports terms, UEFA also excluded teams from 20 member states. Indeed, it must be stressed that the current operating model of UEFA favors teams from five EU Member States: Spain, Italy, Germany, France, and Portugal. It should be noted that England is also favored in European events, despite the fact that the UK is already outside of the relevant.[174]

In October 2022, UEFA renewed its agreement with the European Commission to collaborate closely on the promotion of shared values and the protection of the European Sports Model.[175] This agreement presents significant support for UEFA and is a continuation of a previous agreement signed in 2014. The new document, which is valid until 2025, clearly identifies UEFA-organized events as an essential vehicle for the values that the European Commission intends to promote through football.[176]

On December 15, 2022, although the CJEU has not yet released an opinion on the preliminary ruling, Advocate General Athanasios Rantos (AG Rantos) released an opinion on the case. The AG concentrates on two issues in his opinion: whether the UEFA regulation requiring prior approval is a restriction by the object under Article 101 TFEU, and whether the exclusion of a rival competitor is reasonable and proportionate in attaining a legitimate goal. [177]AG Rantos found that the prior authorization and participation rules established by UEFA are compatible with Articles 101 and 102 TFEU. He reasoned that these rules are necessary to protect the European Sports Model, therefore expressly covered by primary EU law. The Advocate General later analyzed the 'European Sports Model' and the specific 'social and educational' function of sports provided by

[174] Rakiewicz (n 168)
[175] 'European Commission and UEFA Strengthen Partnership' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/AC_22_6010> accessed 15 August 2023
[176] Rakiewicz (n 168)
[177] Mavroidis and Neven (n 168) 4

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Article 165 of the Treaty on European Union, further acknowledging that the European Sports Model is not detailed in Article 165 of TFEU (§93), and thus sought to delineate it. Whilst emphasizing the 'pyramid structure' of European sport, with amateur sports at the bottom and professional sports at the top, he also mentions that the fundamental goal of the sports model is to promote open competitions that are accessible by everyone in a 'transparent system in which promotion and relegation maintain a competitive balance and give priority to sporting merit, which is also a key feature of the model.'[178] He also points out that FIFA and UEFA's refusal to allow their clubs to compete in the Super League was inherent in their objective. Concerning FIFA and UEFA's claimed abuse of a dominating position, AG Rantos stated that UEFA's dual role as a regulator and an organizer at the same time is not an abuse of a dominant position, and hence is not a violation of EU law. In his conclusion, AG Rantos provided four answers to the questions cited by the Madrid court.[179]

Following the announcement of the opinion of the AG, UEFA issued a statement saying, 'UEFA warmly welcomes today's unequivocal Opinion recommending a CJEU ruling in support of our central mission to govern European football, protect the pyramid, and develop the game across Europe.'[180] The ruling was also welcomed by UEFA as reinforcing their responsibility to 'protecting the sport, upholding fundamental principles of sporting merit, and open access across our members.'[181]

While the Super League case is ongoing at the Court of Justice, the European Super League, and their parent company A22 made an unexpected statement in February 2023 that plans for a new league had been resurrected. The new Super League installment would be based on merit rather than 'ringfenced financial gains for a few founding members.' Instead of a single league, the league would consist of 60-80 teams divided into various divisions with a promotion and relegation system. League competition would be based only on performance, with no permanent members.[182]

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[178] Martin (n 159) 20

[179] Opinion of Advocate General Rantos, European Super League Company SL v. Union de Federaciones Europeas de Futbol (UEFA), Federation international de football association (FIFA), Case C- 333/21, 2022, para 17

[180] 'Super League Hopes Fade after EU Court Ruling' (ESPN.com, 15 December 2022) <https://www.espn.com/soccer/story/_/id/37634845/eu-court-rejects-super-league-claim-illegal-uefa-monopoly> accessed 15 August 2023

[181] ibid

[182] 'Super League Latest News: ESL's New Plan for Football Sparks Anger and Derision | The Independent' <https://www.independent.co.uk/sport/football/super-league-esl-a22-live-news-b2278866.html> accessed 15 August 2023

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While the Super League's compatibility with Article 165 TFEU in its initial form as a closed league has been debated, the current new proposal presented by the entity overseeing the Super League project offers a far more open league and fits within the framework established by the Treaty. The Super League is conforming to the 'European Sports Model' established under Article 165 TFEU by abolishing the permanent membership status and implementing a promotion and relegation system in the open league format, which AG Rantos discussed in his opinion.[183] However, the issue of club membership would persist. UEFA has stated clearly that clubs and players who participate in the Super League will face sanctions, including being 'banned from playing in any other domestic, European, or global competition, and their players may be denied the opportunity to represent their national teams.' The risk of financial loss that clubs and players face if they are prevented from competing in UEFA-sanctioned events is likely to be too significant unless the Super League can secure strong financial backing.[184]

3. Claims of the Parties

a. Claims of the ESLC

- The applicant claims that the scope of the authority of UEFA to permit third parties to organize events creates an insurmountable barrier to the entry of new competitors into the relevant market.[185]

- The applicant party alleges that prior authorization systems have been recognized as being compliant with competition law if they incorporate objective, transparent, and non-discriminatory criteria, yet, no such criteria have been met, so undermining the general principle of legal certainty and imposing a severe restriction on competition law.

- The applicant party alleges that, the direct conflict of interest that occurs because of UEFA's prior authorization mechanism jeopardizes the procedure's transparency and objectivity. As a result, prior authorization systems must be subject to obligations and

[183] Opinion of Advocate General Rantos, European Super League Company SL v. Union de Federaciones Europeas de Futbol (UEFA), Federation international de football association (FIFA), Case C- 333/21, para 27
[184] Martin (n 159) 23
[185] European Super League Summary of Request for Preliminary Ruling (n 169), para 24

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evaluation to ensure that parties are not unfairly denied market access in order to favor the regulator's events.

- The applicant party claims that, in compliance with Article 101 TFEU, the agreement between FIFA and UEFA as individual associations of undertakings amounts to an agreement with the goal of restricting competition.[186]

- The applicant party alleges that the self-granted power of prior authorization is an abuse of dominance, regarding the Article 102 TFEU, as it is behavior that differs from normal competition.[187]

b. Claims of the UEFA and the FIFA

- The defendant party claims that the plaintiff has not suffered any damages as a result of the actions of the defendant party, considering that the applicant party, ESLC has not even started its proposed competition yet, so it is difficult to see how it could have suffered any damages.

- The defendant party alleges that the plaintiff's lawsuit is frivolous and should be dismissed. The actions of ESLC before the Court is a mere attempt of trying to get around and undermine the rules that UEFA and FIFA have in place, which are designed to protect the integrity of European football.

- The defendant claims that the proposed competition of the ESLC would be harmful to European football. The ESLC's proposed competition would create a closed market for the richest clubs in Europe, and it would leave out the vast majority of clubs. Both the competition and the spectators would be harmed by the ESLC competition.

[186] ibid, para 27
[187] ibid, para 16

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- The defendant party alleges that UEFA and FIFA have a legitimate interest in protecting the integrity of European football, with a long history of organizing and regulating European football and holding the responsibility to ensure that the sport remains fair and competitive. The ESLC's proposed competition would undermine that responsibility, and therefore UEFA and FIFA are justified in preventing it from happening.

4. Established Agenda of the Court

The Court shall decide:

1- Whether the prior authorisation system and the sanctions threatened to be imposed by FIFA and UEFA on ESCL are deemed to be anti-competitive;

2- Whether the proposed competition of ESCL would violate the principle of fair competition among the European Union;

3- Whether the UEFA statutes, namely Articles 49 and 51, violate Articles 101 and 102 TFEU by requiring prior approval to establish a new pan-European competition without the defined criteria;

4- Whether the alternative ESLC league, that is intended to be established in parallel with the functioning of the UEFA, would constitute an obstacle to the preservation of the integrity of European football;

5- Whether the agreement between FIFA and UEFA, as individual associations of undertakings, amounts to a restriction of competition in violation of Article 101 TFEU;

6- Whether the sanctions enforced on participating players for the proposed competition of ESCL violate Articles 101 and 102 TFEU and their freedom of movement;

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Additionally, the Court may decide;

1- Whether the alternative leagues in football be subjected as a threat under European competition law, shaping against the European Sports Model;
2- Whether the European Sports Model is a suitable model for football leagues in Europe, whether it causes any rights violations or difficulties for the parties;
3- Whether a Super League organized alongside the UEFA competition would lead to more unbalance in the representation of countries;
4- Whether the implementation of UEFA regulations authorizing alternative competitions would result in fair competition conditions under European football.
5- Whether the Super League poses a threat to the European Sports Model due to its limited implementation of the sports principle based on the promotion and relegation system outlined in Article 165 TFEU.

II. APPLICABLE LAW

1. Treaty on the Functioning of the European Union (TFEU)

a. Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

b. Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

c. Article 165

1. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

2. Union action shall be aimed at:

- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,

- encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,

- promoting cooperation between educational establishments,

- developing exchanges of information and experience on issues common to the education systems of the Member States,

- encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe,

- encouraging the development of distance education,

- developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by

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protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.

4. In order to contribute to the achievement of the objectives referred to in this Article:

- the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,

- the Council, on a proposal from the Commission, shall adopt recommendations.

d. Article 45 - Freedom of Movement for Workers

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

1. *(a) to accept offers of employment actually made;*
2. *(b) to move freely within the territory of Member States for this purpose;*
3. *(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or adminis trative action;*

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4. *(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.*
5. *The provisions of this Article shall not apply to employment in the public service.*

e. Article 56 - Freedom to Provide Services

1. Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

f. Article 63

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

2. FIFA Statutes

a. Article 22 - Congress

1. A Congress may be an Ordinary or an Extraordinary Congress.

2. The Ordinary Congress shall be held every year. The Executive Committee shall fix the place and date. The Members shall be notified in writing at least three months in advance. The formal convocation shall be made in writing at least one month before the date of the Congress. This

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convocation shall contain the agenda, the President's report, the financial statements and the auditors' report.

3. The Executive Committee may convene an Extraordinary Congress at any time.

4. The Executive Committee shall convene an Extraordinary Congress if one-fifth of the Members make such a request in writing. The request shall specify the items for the agenda. An Extraordinary Congress shall be held within three months of receipt of the request.

5. The Members shall be notified of the place, date and agenda at least two months before the date of an Extraordinary Congress. The agenda of an Extraordinary Congress may not be altered.

b. Article 71 - Rights

1. FIFA, its Members and the Confederations are the original owners of all of the rights emanating from competitions and other events coming under their respective jurisdiction, without any restrictions as to content, time, place and law. These rights include, among others, every kind of financial rights, audiovisual and radio recording, reproduction and broadcasting rights, multimedia rights, marketing and promotional rights and incorporeal rights such as emblems and rights arising under copyright law.

2. The Executive Committee shall decide how and to what extent these rights are utilised and draw up special regulations to this end. The Executive Committee shall alone decide whether these rights shall be utilised exclusively, or jointly with a third party or entirely through a third party.

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3. UEFA Statutes

a. Article 49- Competitions

1.UEFA shall have the sole jurisdiction to organise or abolish international competitions in Europe in which Member Associations and/or their clubs participate. FIFA competitions shall not be affected by this provision.

2. The current UEFA competitions shall be:

a) For representative teams:

…

b) For club teams:

…

c) The Executive Committee shall decide whether to create or take over other competitions, as well as whether to abolish current competitions.

International matches, competitions or tournaments which are not organised by UEFA but are played on UEFA's territory shall require the prior approval of FIFA and/or UEFA and/or the relevant Member Associations in accordance with the FIFA Regulations Governing International Matches and any additional implementing rules adopted by the UEFA Executive Committee.

b. Article 50- Competition Regulations

1. The Executive Committee shall draw up regulations governing the conditions of participation in and the staging of UEFA competitions. These regulations shall set out a clear and transparent bidding procedure for all UEFA competitions, including competition finals.

1bis. The Executive Committee shall define a club licensing system and in particular:

a) the minimum criteria to be fulfilled by clubs in order to be admitted to UEFA competitions;

b) the licensing process (including the minimum requirements for the licensing bodies);

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c) the minimum requirements to be observed by the licensors.

2. It shall be a condition of entry into competition that each Member Association and/or club affiliated to a Member Association agrees to comply with the Statutes, and regulations and decisions of competent Organs made under them.

3. The admission to a UEFA competition of a Member Association or club directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level can be refused with immediate effect, without prejudice to any possible disciplinary measures.

c. Article 51-Prohibited Relations

1. No combinations or alliances between UEFA Member Associations or between leagues or clubs affiliated, directly or indirectly, to different UEFA Member Associations may be formed without the permission of UEFA.

2. A Member Association, or its affiliated leagues and clubs, may neither play nor organise matches outside its own territory without the permission of the relevant Member Associations.

Article 51bis- Principle of Promotion and Relegation

1. A club's entitlement to take part in a domestic league championship shall depend principally on sporting merit. A club shall qualify for a domestic league championship by remaining in a certain division or by being promoted or relegated to another at the end of a season.

2. In addition to qualification on sporting merit, a club's participation in a domestic league championship may be subject to other criteria within the scope of the licensing procedure, whereby the emphasis is on sporting, infrastructural, administrative, legal, and financial considerations. Licensing decisions must be able to be examined by the Member Association's body of appeal.

3. Altering the legal form or company structure of a club to facilitate its qualification on sporting merit and/or its receipt of a licence for a domestic league championship, to the detriment of the integrity of a sports competition, is prohibited. This includes, for example, changing the

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headquarters, changing the name, or transferring stake holdings between different clubs. Prohibitive decisions must be able to be examined by the Member Association's body of appeal.

4. Concerning the application of this article, each Member Association is responsible for deciding national issues, which may not be delegated to the leagues. UEFA is responsible for deciding issues involving more than one Member Association concerning its own territory. FIFA is responsible for deciding international issues involving more than one Confederation.

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III. CASE LAW

To comprehend the context in which the European Super League case operates, outlining and analyzing the jurisprudence of the CJEU in the area of sports is essential. In this perspective, some of the most significant cases concerning sports and competition law shall be examined, considering their chronological order.

1. David Meca-Medina and Igor Majcen v. Commission

In 2006, there was a significant shift in the application, or lack thereof, of EU law to sports. Distance swimmers David Meca-Medina and Igor Majcen from Spain and Slovenia, respectively, were suspended for doping violations in the 1999 World Championships in long-distance swimming. During the competition, the swimmers tested positive for the banned doping drug nandrolone. The International Swimming Federation (FINA) suspended the two competitors for four years based on its doping control standards and the International Olympic Committee's (IOC) anti-doping code. The ban was confirmed by the CAS. In the early 2000s, scientific tests revealed that nandrolone can be created endogenously by the human body from the ingestion of certain foods at amounts that surpass the allowed tolerance limit under the rules that underpinned the restrictions. The ban was later reduced by the CAS after it was appealed again. In the meantime, on May 30, 2001, the athletes filed a complaint with the EU Commission alleging that the anti-doping rules adopted by the International Olympic Committee (IOC) and the Fédération Internationale De Natation (International Swimming Federation, FINA) violated Articles 81 and 82 of the European Communities Treaty (now Articles 101 and 102 of the Treaty on European Union). The complaint was dismissed by the Commission on August 1, 2002, determining that doping was a sporting issue rather than an economic one, and hence fell beyond the scope of the EC Treaty and was not subject to competition regulations. The athletes subsequently filed an action for annulment against the Commission's decision with the European Court of Justice. The Court of Justice ruled on appeal that the doping requirement was not a simply sporting rule problem and hence was subject to EC legislation. [188] The Court applied the Wouters test[189] as a possibility to

[188] Niko Haug, *Grenzen Einer Privaten Super-Liga Im Europäischen Spitzenfußball*, vol 64 (Nomos 2023) 91
[189] Case C-309/99 *Wouters and Others* [2002] ECLI:EU:C:2002:98, para 97

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justify anti-competitive behaviour under Article 101, which is a proportionality-based test derived from free movement law. The case of *Meca-Medina* is monumental in EU sports law as it created a bridge between free movement and competition law.

2. Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio

By issuing its decision in MOTOE in 2008, the CJEU confirmed its position in Meca-Medina.[190] The Court in MOTOE was dealing with the Automobile and Touring Club of Greece (ELPA'), which was both a regulator and an entrepreneur in the motorcycle racing industry. ELPA was considering whether competitors in its competitions could also compete in competitions hosted by others, resulting in holding a dominant position as defined under Article 102 TFEU. The CJEU ruled that the Greek sport regulating body in charge of organizing motorsports in Greece misused its dominant position under Article 102 TFEU by restricting companies attempting to organize motorsports competitions as a legal avenue for appeal or review. MOTOE increased accountability for sports governing organizations even further by subjecting a regulatory authority that simultaneously participates in economic activity to competition law. This decision, together with Meca-Medina, eliminated the automatic exception for purely sporting rules adopted in the 1970s and strengthened the use of competition law in the realm of sports. The MOTOE case was also the first ever case that the CJEU has used Article 102 in the field of sports. Together with the Meca-Medina ruling, the MOTOE judgment destroyed the notion that ‘purely sporting rules’ have an automatic exemption from the scope of EU competition law. However, some ambiguity in the relationship between sport and competition was left open. The judgment confirms that the specific features of sport should be considered in assessing the compatibility of organisational sporting rules with EU competition law.[191]

[190] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECLI:EU:C:2008:376
[191] Erika Szyszczak, ‘Competition and Sport: No Longer So Special?’ (2018) 9 Journal of European Competition Law & Practice 192

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3. Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC

In December 2009, the Lisbon Treaty amendments gave ‘complementary’ competence to the Union in the area of sport and introduced the concept of ‘specificity of sport’ in Article 165(1) TFEU. The ruling of the Grand Chamber of the Court in Bernard case is the first to refer to Article 165 TFEU.

In 1997, French football club Olympique Lyonnais (Lyon) and 17-year-old Olivier Bernard entered into a three-year training contract under the Charte du Football Professionne (the Professional Football Charter) which regulated football player employment at the time. The Charter allowed the club to demand a professional contract from a trainee after the training period. Bernard refused a one-year professional contract from Lyon and joined Newcastle United FC instead. Lyon sued for compensation under the French Employment Code, but the case raised questions about whether this provision contradicted the freedom of movement under EU law (Article 39 EC, now Article 45 TFEU) and if encouraging young players' recruitment could justify such restrictions. The Cour d'appel initially quashed the damages judgment against Bernard and Newcastle United FC, leading to the Court of Justice referring the case to address these legal concerns.[192] The CJEU stated that when assessing potential justifications, *‘account must be taken (…) of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU’*[193]

The French rules governing *joueurs espoir* , promising player, did not include reimbursement for actual training costs incurred but rather damages for breach of contractual obligations calculated concerning the club's overall loss. The Court ruled that this went above and above what was required to stimulate and support the recruitment and training of young players, resulting in a violation of EU legislation.[194]

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[192] Pijetlovic (n 135) 124
[193] Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECLI:EU:C:2010:143., para 40
[194]Weatherill, *European Sports Law* (n 118) 489

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4. International Skating Union v Commission

The General Court judgement in the matter of International Skating Union from 2020 is the most recent development in the European Court's jurisprudence within EU sports law.[195] The case included two international speed skaters who complained to the Commission regarding the International Skating Union's (the ISU) eligibility requirements and their compliance with Article 101 TFEU. The ISU is the exclusive regulator and administrator of speed skating and figure skating, and competitors who compete in contests that are not authorized by the ISU face severe penalties. As a result, the ISU was accused of prohibiting other organizers from entering the market. The General Court emphasized that the ISU had a special responsibility to maintain undistorted market competition and that while the ISU did pursue legitimate objectives, the rules were disproportionate to those goals, due to the ISU having significant discretion over competition authorisation, enforcing penalties that were manifestly disproportionate in comparison to the athlete's career length, and failing to impose pre-authorisation criteria that were 'clearly defined, transparent, non-discriminatory, verifiable, and capable of guaranteeing effective access to the market for competing event organisers'. As a result, the ISU rules were deemed to be in violation of Article 101 TFEU. The General Court also confirmed that the use of pre-authorisation is not illegal, but they must still impose clear, transparent, and non-discriminatory rules while avoiding advancing their commercial interests to the detriment of competitors in order to avoid market foreclosure or conflict of interest.[196] The General Court also endorsed CAS's role as the primary body for adjudicating sports-related issues, therefore protecting the arbitration function held by various sports associations. The ruling in International Skating Union illustrates the EU's current cautious stance regarding granting sports governing bodies a wide margin that has a negative impact on competition law.

Although along with the relevance in the *European Super League* case, there is an ongoing International Skating Union appeals procedure, which includes two pleas attempting to overturn the General Court's judgement by finding that the 'by object' Article 101 assessment was faulty

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[195] Case T-93/18 *International Skating Union v Commission* [2020] ECLI:EU:T:2020:610

[196] Andrea Cattaneo, '*International Skating Union v Commission* : Pre-Authorisation Rules and Competition Law' (2021) 12 Journal of European Competition Law & Practice 320

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and that the judgement had failed to consider the legitimate objective sought by the ISU rules and the ethical concerns that arise about betting that is connected to the specific third-party organized skating competition.[197] The outcome of this appeal has the potential to drastically shake up EU sports law by potentially allowing a considerable margin of discretion in terms of pre-authorisation powers.[198]

[197] Case C-124/21 P *International Skating Union v Commission*, appeal brought on 26 February 2021
[198] Nordblad (n 119) 23

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IV. CONCLUSION

The case between European Super League Company v UEFA and FIFA is currently on the scope of the Court of Justice of the European Union. Case C-333/21 is not only a question of the legal relationship between the new entrant, the Super League, and the current regulator and operator for Europe, UEFA, in terms of the organization of football tournaments. There is an issue that extends deeper and involves political actors in the same way that football officials and enforcement of the law are involved. It is a clear fact that the competition law shapes sports governance, and therefore, the CJEU will need to address the discretion awarded to sports governing bodies, something which has been widely considered a key issue.

There is no doubt that the transnational governance of sports remains in critical need of institutional reforms. The case could also lead to reforms in the way sports are governed at the transnational level. These reforms could include making UEFA more open and transparent, giving federations, clubs, and players a greater say in decision-making, and redistributing financial revenue more fairly. The CJEU will need to decide whether the rules adopted by FIFA and UEFA to prevent the creation of the European Super League are justified. If the CJEU finds that the rules are not justified, it can dramatically change the perspective on the European Sports Model.

In conclusion, the European Super League case is a reminder that innovation is essential for the long-term economic sustainability and appeal of sport. However, it is also a reminder that sports governing bodies must operate within the bounds of competition law. The outcome of the case will have a significant impact on the future of European football, and it could also lead to reforms in the way sports are governed at the transnational level.

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