

Informative Note

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European Law and Competition and Sports Law

Competition and EU Law v Sports: Landmark Hattrick by the ECJ

Today the European Court of Justice of the (“ECJ”) made history with 3 judgements on the application of the rules of European Union (“EU”) law to sporting activities in matters such as fundamental economic freedoms (such as the free movement of workers), the application of competition rules and effective access to the courts (contained in the EU Charter of Fundamental Rights). The economic, legal, and social implications of these decisions are expected to have a significant impact including in Portugal.

The resort to the specific characteristics of sport, namely the interdependence of clubs and the need for equal opportunities and competitive balance, means that this sector is recognised for its specificities ¹, which are often used as tools to justify exceptional rules.

Simply put, the application of European Union (“EU”) law to sporting activities (given their economic dimension ²) has been reaffirmed today, notably concerning competition law. This is the reason why sports associations established by private law such as the Union of European Football

Associations (“UEFA”) and the Fédération Internationale de Football Association (“FIFA”) are subject to EU law which is, inherently, also applicable to its associates, such as the Portuguese Football Federation.

These 3 judgements relate to the compatibility of various legal provisions with EU law in the context of the following actions:

- two references for preliminary rulings from the Belgian and Spanish courts which raised the question of the compatibility of rules imposed by UEFA and FIFA with the provisions of the Treaty on the Functioning of the European Union (“TFEU”) - cases C-680/21, Royal Antwerp Football Club (“Royal Antwerp”), and C-333/21 European Superleague Company (“ESLC”).
- on appeal against a judgement of the General Court of the EU (“GCUE”) in case C-124/21, which ruled on the legality of a European Commission decision that considered certain rules of the International Skating Union (“ISU”) to be non-compliant with EU law;

¹ Article 165.º TFEU which deals with sport is inserted in TFEU’s “Title XII: education, vocational training, youth and sport”.

² See, for instance, the Walrave (C-36/74) and Bosman (C-415/93) case law, the latter the latter in which the CJEU ruled that UEFA rules relating to player transfers were incompatible with the free movement of workers.

One of the most notable issues considered by the Court is the existence of abuse of the dominant position of sports federations at national and supranational level. FIFA and UEFA, private bodies governed by Swiss law, have the main objective of promoting and organising football events at the international and European level respectively.

As it's the case with football, other sports such as ice speed skating, which is the focus of analysis in the ISU case, are subject to the rules of associations that are simultaneously regulators, organisers of sporting events and "economic entities" in the pursuit of certain activities. The judgements in question touch upon precisely on this

cross-cutting issue that is the autonomy and regulatory power exercised by sports federations, which can jeopardise EU law, particularly competition rules (such as Articles 101 and 102 of the TFEU, which apply to undertakings, associations of undertakings and abuse of a dominant position).

Preventing the creation of a new pan-European competition - European Super League or how UEFA and FIFA abuse their dominant position in the organisation of football competitions

Almost 30 years after the Bosman ruling, the ECJ has once again been called upon to rule on the world of football, raising questions about the very existence of the organisational structure of modern football.

This case has its origins in the project to create the European Super League, a new European football competition, and **the importance of this judgement is so evident that Advocate General Rantos himself stated in the first paragraphs of his Opinion that "the future of European football will turn on the answers given by the Court to problems related primarily to competition law and, secondarily, to fundamental freedoms"**.

In its judgement, the ECJ states that when a company with a dominant position (as is the case with UEFA and FIFA) has the power to determine the conditions under which potentially competing companies can access the market, given the risk of a conflict of interest that power must be subject to **appropriate criteria to ensure that their decisions are transparent, objective, non-discriminatory and proportionate**. In this regard, **the ECJ considered that since FIFA and UEFA are not subject to any of these criteria, their actions constitute an abuse of a dominant position**.

Furthermore, the ECJ considers that, given their arbitrary nature, UEFA and FIFA's rules on approval, control and sanctions must be considered unjustified

restrictions on the freedom to provide services.

In addition, the CJEU notes that **FIFA and UEFA rules on the exploitation of media rights are likely to harm European football clubs, all companies operating in the media markets and, ultimately, consumers and viewers, preventing them from enjoying new and potentially innovative or interesting competitions.**

Also in the ISU ruling, the ECJ reiterated that **a sports association like the ISU can adopt and ensure compliance with**

rules on the organisation and staging of competitions through sanctions, but they must be transparent, objective, non-discriminatory and proportionate.

If they are not, these rules could exclude competing companies from the market and restrict the organisation of new competitions. In addition, they may prevent athletes from taking part in such competitions.

The home-grown player rules

This case raises the question of whether the rules on home-grown players call into question Article 45 TFEU, which establishes the rule of free movement of workers within the EU area. The home-grown players rules are laid down in the regulations of the Royal Belgian Football Federation (“URBSFA”) and the regulations of UEFA (as well as other national associations, in broadly similar terms). Thus:

- UEFA regulations require clubs registered in its competitions to include a minimum of 8 home-grown players (i.e., players who, regardless of their nationality, have been trained by their club or another club belonging to the same national association for at least three years, between the ages of 15 and 21). At least 4 of these players must have been trained by the club in question.

- The URBSFA regulations, in a similar way to other regulations of European national football associations, provide that a club may register a maximum of 25 players, but that at least 8 must have been trained by Belgian clubs and that of these 8, at least 3 must have been affiliated to that same club for at least three seasons prior to their 21st birthday.

If, on the one hand, the provisions in question are likely to indirectly discriminate against players on the basis of their nationality, creating barriers to the free movement of labour, on the other hand the sports associations argue that these barriers are justified by different overriding reasons of general interest (Article 165 TFEU), i.e., to encourage the training and recruitment of young players, and to improve the competitive balance between teams in UEFA club competitions and national competitions.

The ECJ considers that the rules on locally trained players:

- may give rise to indirect discrimination, based on nationality, against players from other Member States, as concerns free movement of workers; and
- **are likely to have the object or effect of restricting the possibility for clubs to compete with each other by recruiting new talent, regardless of where they were trained.** The ECJ recognises that top-level football is a sector where talent and merit play an essential role.

Since this is a reference for a preliminary ruling on interpretation, it will now be up to the national courts concerned to determine whether those rules restrict competition because of their very object or because of their actual or potential effects. If that is the case, it will nevertheless remain possible for UEFA and URBSFA to demonstrate that those

rules can be justified under the conditions recalled by the Court in its judgement.

Without prejudice to what UEFA may do to defend the *raison d'être* of the rules on locally trained players, the hypothetical abolition of these rules would change the paradigm of player recruitment, particularly in markets and for clubs with greater financial capacity. It is also for this reason, that we anticipate that Portugal will maintain a firm stance demanding the registration of home-grown players.

The importance of preliminary rulings

National courts are ordinary courts of the EU legal order, and the preliminary ruling procedure is an essential tool for the dialogue between national judges and the judges of the ECJ to ensure consistency in the interpretation and application of EU law rules. The ECJ judgements are binding both on the referring court and on all courts in all EU Member States in cases where similar issues arise.

The ESLC and ISU rulings are a “yellow card” to sports federations at national and supranational level, but for now no more than that. These rulings will only force sports federations to rethink and reform their organisations, but they won't drive them out of the game.

In the case of the ESLC, the SuperLeague is not approved by this decision, nor is

it certain that it will be. The sport has evolved since the eruption of the idea in 2021 and has reformed to rebalance itself. There is now a strong movement of solidarity amongst clubs to keep the sport as it is: maintaining the primacy of domestic leagues as a manifestation of a social contract with fans and communities, open to all, and through which qualification for European competitions is achieved. 

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