

Background to the Rulings of the Court of Justice of the European Union and Commercial Court 17 of Madrid

A. The Competition Law Case

On April 19, 2021 ESLCo and A22 filed a lawsuit under EU Competition Law in Commercial Court 17 of Madrid in which they claimed among other things that;

- I. UEFA/FIFA are monopoly operators of cross-border professional club football competitions.
- II. UEFA and FIFA passed statutes that had as their object the prevention of competition and;
- III. UEFA/FIFA used these statutes to abuse their dominant position to protect their monopoly position

The Case was referred to the Court of Justice of the European Union (“CJEU”) on [May 11 2021]. On December 21, 2023, the CJEU published its findings stating that UEFA is the monopoly operator of pan-European club competitions (as it is the only operator), that Articles 49 and 51 of the UEFA Statutes have as their object the prevention of competition, and the implementation of those regulations resulted in an abuse of dominant position, all in breach of EU competition law.

Several of the critical provisions of the CJEU Ruling and the associated ruling of Commercial Court 17 of Madrid are presented below. While the decisions are generally written in somewhat technical language, the “common sense” is straightforward. It is against the law for a monopoly operator to abuse that power to prevent new competitors from entering the market it dominates.

B. Ruling of the CJEU

In developing its ruling, the CJEU was methodologically very precise in assembling the legal foundation of the case.

I. UEFA/FIFA Are Subject to EU law

- “It must be borne in mind ... that, in so far as it constitutes an economic activity, the practice of sport is subject to the provisions of EU law...”. (para 83 CJEU) Further, “ ... such associations may not, ... limit the exercise of the rights and freedoms conferred by EU law on individuals...” (para 75 CJEU)
- “In the present case, given the subject matter of the main proceedings..., the Court finds that Articles 101 and 102 TFEU are applicable to FIFA and UEFA inasmuch as those two associations carry out a two-fold economic activity consisting ... in the organization and marketing of interclub football competitions on European Union territory...” (para 115 CJEU)

II. UEFA/FIFA as Monopoly Operators

- “... it is apparent from the statements of the referring court that it considers that each of those two entities **holds a dominant position on the market for the organization and marketing of interclub competitions on European Union territory...**”. “It is thus on the basis of that factual and legal premise, **which is, moreover, indisputable especially since FIFA and UEFA are the only associations which organize and market such competitions at world and European levels...**that answers should be given to the referring court’s questions...” (para 117 CJEU)

The ruling of Commercial Court 17 of Madrid is also relevant in this regard. The Court stated that:

- “**In the present case, the existence of a dominant position on the market is not disputed since there is currently no legal person, association or body...which organizes football competitions other than the defendants [UEFA/FIFA]**”. “As both institutions act in a geographically complementary manner, i.e. there is no competition between them, **they have a monopoly position on the relevant market.**” (page 23 CC17Madrid)

III. UEFA/FIFA Abuse of Dominant Position

- “To entrust an undertaking which exercises a given economic activity the power to determine, *de jure* or even *de facto*, which other undertakings are also authorised to engage in that activity and to determine the conditions in which that activity may be exercised, gives rise to a conflict of interests and puts that undertaking at an obvious advantage over its competitors, by enabling it to deny them entry to the market concerned or to favour its own activity ... and also, in so doing, to prevent the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation.” (para 133 CJEU)
- “... it is apparent from the statements in the order for reference that the rules about which that court has made a reference to the Court are contained in the statutes adopted by FIFA and UEFA in their capacity as associations and by virtue of the regulatory and control powers **that they have granted to themselves**, and that those rules confer on those two entities not only the power to authorise the setting up and organisation, by a third-party undertaking, of a new interclub football competition on European Union territory, **but also the power to control the participation of professional football clubs and players in such a competition, on pain of sanctions.**” (para140 CJEU)
- “In that regard, it is irrelevant that FIFA and UEFA do not enjoy a legal monopoly and that competing undertakings may, in theory, set up new competitions which would not be subject to the rules adopted and applied by those two associations. Indeed, as is apparent from the statements of the referring court, the dominant position held by FIFA and UEFA on the market for the organisation and marketing of international interclub football competitions is such that, **in practice, at the current juncture it is impossible to set up viably a competition outside their ecosystem, given the control they exercise, directly or through their member national football associations, over**

clubs, players and other types of competitions, such as those organised at national level.” (para 149 CJEU)

- “In the light of the foregoing considerations... the adoption and implementation of rules by associations which are responsible for football at world and European levels... making subject to their prior approval the setting up, on European Union territory, of a new interclub football competition by a third-party undertaking, and controlling the participation of professional football clubs and players in such a competition, on pain of sanctions, where there is no framework for those various powers providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate, **constitutes abuse of a dominant position.**” (para 152 CJEU)

IV. The Object of UEFA/FIFA “Pre-Approval Rules” is to Prevent Competition

- UEFA/FIFA “...rules confer on those entities the power to authorise, control and set the conditions of access to the market concerned for any potentially competing undertaking, and to determine both the degree of competition that may exist on that market and the conditions in which that potential competition may be exercised. Those rules thus make it possible, by their nature, if not to exclude from that market any competing undertaking, even an equally efficient one, at least to restrict the creation and marketing of alternative or new competitions in terms of their format or content. In so doing, they also completely deprive professional football clubs and players of the opportunity to participate in those competitions, even though they could, for example, offer an innovative format whilst observing all the principles, values and rules of the game underpinning the sport. Ultimately, they completely deprive spectators and television viewers of the opportunity to attend those competitions or to watch the broadcast thereof.” (para 176 CJEU)
- “For all of the foregoing reasons, the Court finds that, where there is no framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate, ... rules on prior approval, participation and sanction such as those at issue in the main proceedings reveal, by their very nature, **a sufficient degree of harm to competition and this has, as their object, the prevention thereof.**” (para 178 CJEU)
- “... the adoption and implementation, directly or through their member national football associations, of rules by associations which are responsible for football at world and European levels ... making subject to their prior approval the setting up, on European Union territory, of a new interclub football competition by a third-party undertaking, and controlling the participation of professional football clubs and players in such a competition, on pain of sanctions, where there is no framework for those various powers providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate, **constitutes a decision by an association of undertakings having as its object the prevention of competition.**” (para 179 CJEU)

V. Potential Abuse of UEFA/FIFA Sanctioning Regime

Commercial Court 17 of Madrid citing the Audiencia Provincial (appellate court) stated that;

- “The aggression to free competition is produced from the moment in which the dominant position is trying to influence, in a decisive way, by means of the threat of adopting punitive measures against it, the subject that provides the services in the relevant market (clubs and football players) so that they desist from offering them to the competitor which can strangle the competitive initiative of the latter. The problem is that the risk of the arbitrary use by FIFA and UEFA of their disciplinary power (which allows them to impose serious sanctions) is not limited to the repercussions of its effects within the competitions they engage themselves but can also be used, **as it is clear that it has been threatened to do, to discourage any intention of market operators who are tempted to enter into relations with the competitor. Thus, the initiative of the entrepreneur who wishes to enter into competition is attacked by the monopolist who does not want it and uses his power to obstruct it.**” (page 35 CC17Madrid).