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Legality of UEFA's prior authorisation system in C-333/21 *European Super League*

Katarina Pijetlovic

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Katarina Pijetlovic[*]

Abstract

The organisational market for cross-border football competitions is dominated by UEFA as a sole commercial operator. Because UEFA also occupies a regulatory monopoly on all European football matters enabling it to control the access to the organisational market via prior authorisation system, UEFA is in a conflict of interest situation. With reference to the Court of Justice decision in the *European Super League* (ESL) case, this article addresses the legality of the prior authorisation system ran by UEFA. In particular, the article makes a difference between the Court's emphasis on the lack of formal procedural framework within which UEFA's decision on prior authorisation of ESL took place, and the substance of UEFA's decision had it been adopted within proper procedural framework. The article will also address the issues of both the new UEFA Authorisation Rules Governing International Club Competitions and a new proposed format for the ESL competition under the guidelines issued by the Court.

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The applicable analytical framework for restrictions of competition emanating from the rules of regulatory monopolies, such as football governing bodies, is set out in para. 42 of C-519/04 *Meca-Medina*.[1] Accordingly, not every restriction on competition is illegal, but assessment must be carried out against overall context in which the decision was taken or produces its effects, particularly its objectives. The restrictions also must be inherent in the pursuit of those objectives and proportionate to them. The *Meca-Medina* test reserved for *prima facie* restrictive regulatory rules was carried out under Art 101(1) TFEU, but the same test applies in Art 102 TFEU. Rules and decisions by sports governing bodies that satisfy this test constitute ancillary restraints that do not breach TFEU competition provisions. This enables sports federations to adopt rules pursuing legitimate public interest objectives that are inherent in proper organisation of competitions and enforce them by means of proportionate sanctions necessary to ensure compliance. The *Meca-Medina* test essentially reproduces the objective justification test from the internal market (such as under C-55/94 *Gebhard*[2]) and when both sets of provisions apply to the case, the convergence of outcome is inevitable.

In April 2021, European Super League (ESL) proposed a new, virtually closed, cross-border football competition consisting of the top 20 elite European clubs to rival Champions League, the flagship competition organised by the European football governing body (UEFA). UEFA reacted by threatening the participating clubs with sanctions and exclusion from their domestic leagues from which the clubs derive most of their revenues. As a result of the threats, the Super League project was brought to a standstill. The agreement between elite clubs to form a closed league raises the suspicion of Art. 101 TFEU infringement in so far as it forecloses the most lucrative part of the market for other participants and acts as a detriment for financial viability of domestic leagues. Furthermore, according to Advocate General in para. 285 of C-415/93 *Bosman*[3], football clubs in a professional league are united by such economic links that they can constitute collectively dominant undertakings and are therefore not immune from violating Art. 102 TFEU either. However, in para. 80 of the *ESL* case, the Court of Justice specifically pointed out that the Super League project was not on

[1] Judgment available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A62004CJ0519.
[2] Judgment available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CJ0055.
[3] Opinion available at https://eur-lex.europa.eu/legal-content/GA/ALL/?uri=CELEX:61993CC0415.

trial. Instead, one of the key questions referred to it by the Madrid Commercial Court, in which ESL instituted legal challenge, related to legality of Art. 49 of the UEFA Statutes and threatened sanctions. Art. 49 conferred onto UEFA the status of the exclusive organiser of cross-border competitions and required third parties to obtain UEFA's prior approval should they wish to organise competition involving clubs from two or more UEFA associations. The criteria to obtain such approval were never specified. One of the objectives of the ESL lawsuit was to remove the regulatory authority of the football governing bodies to act as gatekeepers controlling the access to the market for organisation of cross-border club competitions. This is the relevant product market on which UEFA not only performs the gatekeeping function, but also holds a commercial monopoly. Despite the glaring conflict of interest, the conflation of the regulatory and commercial functions in a single sports federation and the legality of prior authorisation systems *per se* were never seriously questioned by the Court of Justice. In cases such as C-49/07 *MOTOE*[4], T-93/18 *ISU*[5], and C-1/12 *OTOC*[6], the existence of prior control mechanisms was not an issue and instead the focus was on examining the way that the monopolistic regulatory powers were exercised. According to *MOTOE*, the regulatory power of prior authorisation must be made subject to 'restrictions, obligations and review' to prevent arbitrary application and the distortion of competition by favouring own events. *MOTOE* also emphasised the obligation on the regulator to secure equality of opportunity between economic operators on the organisational market, including the access of prospective operators. There can be no discrimination in the demands placed on UEFA's own club competitions and those planned by the third parties. Citing para. 99 of the judgment in *OTOC*, the General Court in *ISU* outlined the criteria that a system of prior authorisation for alternative competitions must fulfil. It said that any such system must rest on non-discriminatory, objective, transparent, verifiable, reviewable and proportionate requirements that are capable of ensuring effective access to the relevant market for the organisers of alternative events. On appeal, the Court of Justice in C-124/21 *ISU*[7] confirmed these principles.

[4] Judgment available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CJ0049.
[5] Judgment available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A62018TJ0093.
[6] Judgment available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A62012CJ0001.
[7] Judgment available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62021CJ0124.

Echoing its previous jurisprudence, the Court of Justice in *ESL* confirmed the authority of UEFA to regulate access of third parties to organisational market but found its system of prior control incompatible with the competition provisions (and Art. 56 TFEU). It is important to emphasise that this finding was due to the lack of a framework for prior approval and sanctioning powers providing for substantive criteria and detailed procedural rules capable of ensuring that they are transparent, objective, precise, non-discriminatory, and proportionate. These safeguards would eliminate the risk of abuse of dominant position and arbitrary decisions. The Court of Justice did not object to, or directly deal with the substance of the UEFA's decision to issue threats of sanctions.

The judgment in *ESL* did not imply that the Super League project was legal. In fact, it is apparent from para. 144 that the closed format of the ESL competition would be found incompatible if tested under EU law. According to the same paragraph, the specific characteristics of sport support a finding that it is legitimate for UEFA to promote 'the holding of sporting competitions based on equal opportunities and merit' via prior control of competitions. The *substance* of UEFA's decision to issue threats to a closed Super League was therefore very likely compatible with the legal requirements, had it been taken within the proper framework. On the day when the Court of Justice delivered its *ESL* judgment, A22 (the management agency for ESL) published its new proposed format for the ESL competition[8]. It involved 64 clubs split into three league tiers. Only 20 clubs from the third tier are subject to promotion and relegation with the domestic leagues, representing about 31% of the 'fluid places' in the league in contrast to the widely criticised and rejected initial proposal where 25% (5 out of 20) places in the league were 'fluid'. In this sense, there is not much difference between the new and the rejected ESL format.

While the judgment in *ESL* did not bring any groundbreaking legal novelties, the Court made an important adjustment in approach and reversed the order in which it carried out its assessment, which resulted in limiting the scope of *Meca-Medina* justification framework. The adjusted analytical approach removed the benefit of recourse to *Meca-Medina* framework for the 'by object' restrictions under Art 101 TFEU and rules which or 'by their very nature' breach Art. 102 TFEU. This is the category where the Court placed UEFA's prior authorisation system enforced by sanctions.

[8] See https://a22sports.com/en/competition/.

After *ESL*, it appears that 'by object' restrictions can only be exempted under Art. 101(3) TFEU and the equivalent economic efficiency under Art. 102 TFEU. It will be interesting to observe whether in the future the approach in internal market law will follow this pattern. In C-415/93 *Bosman*[9], a case decided under Art. 45 TFEU, the directly discriminatory rule benefited from open list of justifications, contrary to general jurisprudence that grants such benefit only to indirectly discriminatory measures. Direct discrimination for national representative teams will certainly remain justified, but if narrowing of the scope of justification in *ESL* is followed, other types of directly discriminatory measures might be confined to TFEU-based derogations (public policy, public security and public health).

In anticipation of the Court's criticism of its prior authorisation system, in June 2022 UEFA has quietly issued Authorisation Rules Governing International Club Competitions[10]. It supplied the detailed requirements and procedure implementing Art. 49 of UEFA Statutes, as well as applicable sanctions. Although it is clear which information must be submitted, there is no clarity for the applicants regarding the expected substantive value of some requirements. For example, Art. 4(1)(d) of the Authorisation Rules makes it clear that the aspiring organiser must submit the details of the proposed solidarity payments. The percentage of the revenues that will be accepted as adequate to comply with this condition is not specified and the requirement not precise enough. However, based on the now well-established legal parameters, it is safe to assume that solidarity contributions matching those made by equivalent UEFA's competitions, will fulfil the solidarity criteria. The requirement in Art. 7(4) of the Authorisation Rules is more controversial as it reserves certain top clubs for UEFA's competitions, including the winners of top domestic leagues and titleholders of UEFA Champions League and Europa League. The listed justifications for this rule include protecting the sporting merit of UEFA club competitions, the good functioning of the international calendar, and the health and safety of players. Whether these rules will be contested and whether the new ESL proposed format will be approved by UEFA Executive Council remains to be seen.

[9] Judgment available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0415.

[10] See https://documents.uefa.com/v/u/_rmtminDpysQUj1VGB01HA.