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IS THE SUPERLEAGUE DEAD? NOT YET

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ABSTRACT: The Author offers a first critical analysis of the so-called Super League case. Starting from the sports rules at stake and the Opinion of the Advocate General, he goes through the reasoning of the Court of Justice underlining the approach taken by the Court with regard to both the competition law and free movement issues at stake. He concludes that the ruling seems definitely more in line with the settled case law of the Court of justice in relation to both the initial premises and the merits of the case than the Opinion of the Advocate General. Furthermore, the fundamental role that the referring court will still have to play in the pending proceedings should not be underestimated.

L'Autore offre una prima lettura critica della pronuncia della Corte di giustizia nel c.d. caso Superlega. Muovendo dall'esame delle regole contenute negli Statuti FIFA ed UEFA e delle Conclusioni dell'Avvocato generale, l'attore analizza il ragionamento della Corte di giustizia evidenziando l'approccio di quest'ultima con riferimento sia alle norme in materia di concorrenza, sia alle norme in materia di libera prestazione dei servizi. L'Autore conclude sottolinea come la pronuncia della Corte di giustizia si presenti maggiormente in linea con la giurisprudenza della Corte di giustizia tanto in relazione alle premesse iniziali, quanto al merito della vicenda rispetto alle Conclusioni dell'Avvocato generale. Inoltre, non deve essere sottovalutato il ruolo che il giudice nazionale ancora è chiamato a svolgere nell'ambito del giudizio principale.

Keywords: *FIFA / UEFA / Super League – Prior Approval of Competitions – Economic and Commercial Rights.*

FIFA / UEFA / Superlega – Preventiva approvazione delle competizioni – Diritti Economici e Commerciali.

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1. Introduction

Long awaited and even more widely commented and discussed on the main scientific and non-scientific journals and reviews,[1] the ruling of the Court of Justice of 21 December 2023 in the *Super League* case[2] undoubtedly represents an

[1] A. Shipman, *Will we ever see a European Super League? A recap of the ESL, ISU and Royal Antwerp case pending CJEUs decisions*, 29 November 2023, Lawinsport.com; A. Orlando, *Il caso Superlega. Tra modello sportivo europea, diritto concorrenziale e specificità dello sport, in attesa della Corte di giustizia*, *Diritto pubblico comparato ed europeo*, 2023, 339; A. Cinque, *Il caso della "Superlega". Note a prima lettura*, *Riv. Dir. Sport.*, 2021, 60; R. Rapacciuolo, *The European Super League saga, the Future of the Europena Model of Sport and the Football Business in Europe*, *Riv. Dir. Ec. Sport*, Vol. 17, n. 1, 2021, 9; S. Bastianon, *La Superlega e il modello sportivo europeo*, *Riv. Dir. Sport.*, 2021, 288; Id., *From the "Dirty Dozen" to "The Good, The Bad and The Ugly". Some Preliminary remarks on the Super League Affaire in the Light of EU Competition Rules*, *Riv. Dir. Ec. Sport*, Vol. 17, n. 1, 2021, 17; A. Bozza, E. Marasà, *The European Super League under the Sword and Shield of Antitrust Rules: A baby Thrown out with the Badwater?*, *Riv. Dir. Ec. Sport*, Vol. 17, n. 1, 2021, 35; L. Nanchen, *European Super League: only the tip of the iceberg?*, 31 October 2023, Lawinsport.com; S. Van den Bogaert, *The rise and fall of the European Super League: A case for better governance in sport*, *CMLR*, 2022, 25; N. Dunbar, *A European Football Super League: The Legal and Practical Issues*, 2021, *James Cook University Law Review*, 111; J. Fu, *The Legal Implications of the European Super League*, *Harvard Undergraduate Law Review*, https://hulr.org/spring-2023; R. Houben, *The Super League case at the crossroads of law and politics. An essay on how trends in football business may influence the outcome of the Super League case*, https://medialibrary.uantwerpen.be/files/560194/5c1af3a4-24a2-449d-850b-6d92da0552c5.pdf; L. Marruzzo, *UEFA's Monopoly v the European Super League: Chronicle of An Already Written Ending?*, 2022, *European Competition Law Review* (Available at SSRN: https://ssrn.com/abstract=4088773).

[2] ECJ, Judgement of 21 December 2023, *European Superleague Company SL v. FIFA and UEFA,* C-333/21, ECLI:EU:C:2023:1011, available on line at https://curia.europa.eu/juris/document/document.jsf?text=&docid=280765&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=8006563.

important piece of the vast mosaic represented by the relationships between sporting activity and EU law and, in particular, of the legality of the monopoly power of sports federations on the market for the organization of sporting events.

Comparated to the original proposal, the project of a break away competition has changed radically, so much so that the new proposal for a European Super League seems to have severed all ties with the original one. In this regard, it is sufficient to think that the first of the ten principles underlying the new project provides that "*the European football league should be an open, multi-divisional competition with 60 to 80 teams, allowing for sustainable distribution of revenues across the pyramid. Participation should be based on annual sporting merit and there should be no permanent members. Open qualification based on domestic performance would grant rising clubs access to the competition while maintaining competitive dynamics at domestic level*".[3]

Despite that, the ruling of the Court of Justice deserves the utmost attention at least for the following reasons:

(i) for the first time the judges of the European Union are called upon to rule on the UEFA's prior approval system;
(ii) although the Super League has been declared dead several times, the project, even if radically modified, is not yet definitively archived;
(iii) today's ruling on the Super League is one of the triptych of rulings whose cumulative effects on sport will have to be carefully studied in the near future.[4]

2. The relevant provisions of FIFA and UEFA Statutes in the Super League case

According to Art. 22(3)(e) of FIFA Statutes each Confederation has the duty to ensure that international leagues or any other such groups of clubs or leagues shall not be formed without its consent and the approval of FIFA.

Art. 67(1) states that FIFA, its member associations 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.

Moreover, Art. 68(1) provides that FIFA, its member associations and the confederations are exclusively responsible for authorising the distribution of image and sound and other data carriers of football matches and events coming under their respective jurisdiction, without any restrictions as to content, time, place and technical and legal aspects.

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[3] See the now called "A22 Sport" principles available at https://a22sports.com/en/10principles/ (*last consulted on 21 December 2023*).

[4] The three rulings are as follows: C-333/21, *European Superleague Company*; C-124/21P, *International Skating Union v. Commission*; C-680/21, *Royal Antwerp Football Club*.

Furthermore, Art. 71(1) states that the Council shall be responsible for issuing regulations for organising international matches and competitions between representative teams and between leagues, club and/or scratch teams. No such match or competition shall take place without the prior permission of FIFA, the confederations and/or the member associations in accordance with the Regulations Governing International Matches.

According to Art. 72(1) players and teams affiliated to member associations or provisional members of the confederations may not play matches or make sporting contacts with players or teams that are not affiliated to member associations or provisional members of the confederations without the approval of FIFA.

UEFA Statutes contain similar provisions.

According to Art. 49(1) UEFA shall have the sole jurisdiction to organise or abolish international competitions in Europe in which Member Associations and/or their clubs participate; Art. 49(3) adds that 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.

According to Art. 51 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. Moreover, 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.

In light of the above, FIFA and UEFA hold a monopoly power to authorize any market football competitions in Europe. Moreover, both organisations hold the power to impose sanctions and disciplinary measures in relation to clubs and players taking part in football competitions.

3. The questions referred to the Court of Justice for a preliminary ruling

The facts behind the Super League case and the legal events that lead to the preliminary ruling are well known and are therefore purposely omitted here. On the other hand, it appears essential to recall the six preliminary questions raised by the national judge in order to allow a more precise understanding of the ruling.

1. Must Art. 102 TFEU be interpreted as meaning that that article prohibits the abuse of a dominant position consisting of the stipulation by FIFA and UEFA in their statutes (in particular, Artt. 22 and 71 to 73 of the FIFA Statutes, Artt. 49 and 51 of the UEFA Statutes, and any similar article contained in the statutes of the member associations and national leagues) that the prior approval of those entities, which have conferred on themselves the exclusive power to

organise or give permission for international club competitions in Europe, is required in order for a third-part entity to set up a new pan-European club competition like the [Super League], in particular where no regulated procedure, based on objective, transparent and non-discriminatory criteria, exists, and taking into account the possible conflict of interests affecting FIFA and UEFA?

2. Must Art. 101 TFEU be interpreted as meaning that that article prohibits FIFA and UEFA from requiring in their statutes (in particular, Artt. 22 and 71 to 73 of the FIFA Statutes, Artt. 49 and 51 of the UEFA Statutes, and any similar article contained in the statutes of the member associations and national leagues) the prior approval of those entities, which have conferred on themselves the exclusive power to organise or give permission for international competitions in Europe, in order for a third-party entity to create a new pan-European club competition like the [Super League], in particular where no regulated procedure, based on objective, transparent and non-discriminatory criteria, exists, and taking into account the possible conflict of interests affecting FIFA and UEFA?

3. Must Artt. 101 and/or 102 [TFEU] be interpreted as meaning that those articles prohibit conduct by FIFA, UEFA, their member associations and/or national leagues which consists of the threat to adopt sanctions against clubs participating in the [ESL] and/or their players, owing to the deterrent effect that those sanctions may create? If sanctions are adopted involving exclusion from competitions or a ban on participating in national team matches, would those sanctions, if they were not based on objective, transparent and non-discriminatory criteria, constitute an infringement of Artt. 101 and/or 102 [TFEU]?

4. Must Artt. 101 and/or 102 TFEU be interpreted as meaning that the provisions of Artt. 67 and 68 of the FIFA Statutes are incompatible with those articles in so far as they identify UEFA and its national member associations as "original owners of all of the rights emanating from competitions … coming under their respective jurisdiction", thereby depriving participating clubs and any organiser of an alternative competition of the original ownership of those rights and arrogating to themselves sole responsibility for the marketing of those rights?

5. If FIFA and UEFA, as entities which have conferred on themselves the exclusive power to organise and give permission for international club football competitions in Europe, were to prohibit or prevent the development of the [ESL] on the basis of the abovementioned provisions of their statutes, would Art. 101 TFEU have to be interpreted as meaning that those restrictions on competition qualify for the exception laid down therein, regard being had to the fact that production is substantially limited, the appearance on the market of products other than those offered by FIFA/UEFA is impeded, and innovation is restricted, since other formats and types are precluded, thereby eliminating potential competition on the market and limiting consumer choice? Would that restriction be covered by an objective justification which would permit the view that there is no abuse of a dominant position for the purposes of Art. 102 TFEU?

6. Must Artt. 45, 49, 56 and/or 63 TFEU be interpreted as meaning that, by requiring the prior approval of FIFA and UEFA for the establishment, by an economic operator of a Member State, of a pan-European club competition like the [ESL], a provision of the kind contained in the statutes of FIFA and UEFA (in particular, Artt. 22 and 71 to 73 of the FIFA Statutes, Artt. 49 and 51 of the UEFA Statutes, and any other similar article contained in the statutes of member associations [and] national leagues) constitutes a restriction contrary to one or more of the fundamental freedoms recognised in those articles?

For the sake of clarity, the six questions referred to the Court of Justice can be grouped into three categories:

(i) a system of prior approval, by FIFA and UEFA, of any international football competition, and therefore, *inter alia*, those by which third-party entities (unaffiliated to those federations) propose to organise and market (questions 1, 2, 5 and 6);

(ii) clauses by which those federations require their direct and indirect members (namely, respectively, the national football associations, football leagues and professional football clubs), and, ultimately, players, to take part only in international competitions organised by them or which they have authorised a third-party entity to organise, on pain of exclusion (question 3);

(iii) provisions under which FIFA (or, in certain cases, FIFA and the regional confederations, including UEFA) is (or are) the 'original' owner(s) of all sports rights related to the international football competitions coming under its (their) jurisdiction and exclusively competent to exploit those rights and to authorise the distribution (in all its forms) of those competitions (question 4).

From the very beginning the case pending before the Court of Justice has been renamed the "Super League case" and intended as a case on the compatibility of the new format competition with European law; however, from a strict legal point of view, the "Super league case" is rather about the compatibility of UEFA and FIFA's system of prior approval than the Super League as such.[5] In any case, the fact that in the preliminary referral the Spanish judge had made explicit reference to the new pan-European club competition such as the [Super League], justifies to some extent the tendency to consider this case as the final clash between the supporters of the Super League on the one hand and the detractors of the new competition on the other.

4. The Opinion of the Advocate General Rantos

In his highly debated and criticised Opinion delivered on 15 December 2022, the Advocate General proposed that the Court of Justice should rule that Artt. 101 and 102 TFEU must be interpreted as:

[5] As confirmed by the Court of justice at para. 80 of the ruling.

(i) neither precluding Articles 22 and 71 to 73 of the Statutes of the FIFA and Articles 49 and 51 of the Statutes of the UEFA which provide that the setting up of a new pan-European interclub football competition is to be subject to a prior approval scheme since, taking into account the characteristics of the planned competition, the restrictive effects arising from that scheme appear inherent in, and proportionate for achieving, the legitimate objectives pursued by UEFA and FIFA which are related to the specific nature of sport;

(ii) nor prohibiting FIFA, UEFA, their member federations or their national leagues from issuing threats of sanctions against clubs affiliated to those federations when those clubs participate in a project to set up a new pan-European interclub football competition which would risk undermining the objectives legitimately pursued by those federations of which they are members. However, the sanctions involving exclusion targeted at players who are not involved in the project in question are disproportionate, in particular as regards their exclusion from national teams.[6]

In support of his Opinion, the Advocate General relied on the following main arguments:

(a) *The fundamental (constitutional) relevance of the European Sports Model as codified by Art. 165 TFEU*

(i) Art. 165 TFEU gives expression to the 'constitutional' recognition of the European Sports Model, which is characterised by a series of elements applicable to a number of sporting disciplines on the European continent, including football: a pyramid structure with, at its base, amateur sport and, at its summit, professional sport; the promotion of open competitions, which are accessible to all by virtue of a transparent system in which promotion and relegation maintain a competitive balance and give priority to sporting merit; a financial solidarity regime, which allows the revenue generated through events and activities at the elite level to be redistributed and reinvested at the lower levels of the sport.

(ii) Sports federations play a key role in the 'European Sports Model', in particular from an organisational perspective, with a view to ensuring compliance with, and the uniform application of, the rules governing the sporting disciplines in question. For this reason, sports federations

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[6] Opinion of Advocate General Rantos, delivered on 15 December 2022, available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=268624&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7563106. K. Pijetlovic, *A Summary Of The Advocate General Opinion In The European Super League Case*, 17 December 2022, Lawinsport.com; T. van der Burg, *European Super League: Why the AG Opinion May Not Dissuade Other Breakaways (Which Could Be Problematic),* 11 January 2023, Lawinsport.com.

have been historically organised in accordance with the "one-place" principle (Ein-Platz-Prinzip), under which the federations exercise, within their geographical jurisdiction, a monopoly over the governance and the organisation of the sport.

(iii) Although the European Sports Model is not static and European sports structures and their mode of governance often evolve under the influence of other models established outside Europe so that it would be difficult to define in detail a single and unified model for the organisation of sport in Europe, the emergence of various sports models in Europe cannot call into question the principles set out in Art. 165 TFEU.[7]

(b) *The "horizontal" nature of Art. 165 TFEU and its relevance in the application of Artt. 101 and 102 TFEU*

(i) Art. 165 TFEU cannot be interpreted in isolation, disregarding the requirements laid down in Artt. 101 and 102 TFEU, which are also applicable in the field of sport.

(ii) Similarly, the application of the provisions of the FEU Treaty to the sporting field cannot be limited solely to Artt. 101 and 102 TFEU, since Art. 165 TFEU can also be used as a standard in the interpretation and the application of the abovementioned provisions of competition law. Accordingly, within its field, Art. 165 TFEU is a specific provision as compared with the general provisions of Artt. 101 and 102 TFEU, which apply to any economic activity.

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[7] About the concept of European Model of Sport, it is worthy to note that in the light of the revision of the European Sports Charter seven organizations members of the EPAS Consultative Committee (namely, EOC – European Olympic Committees, UEFA – union of European Football Associations, GAISF – Global Association of International Sports Federations, ENGSO – European Non-Government Sports Organization, ISF – International School Sport Federations, EUSA – European University Sports Association and FIAS – International SAMBO Federation) have signed the position paper "Developing the European Sports Model" expressly stating that "open competitions accessible through a promotion/relegation system which maintains a competitive balance and gives priority to sporting merit" represent key-feature of the European sports model (see, https://rm.coe.int/further-developing-the-european-sports-model-european-sport-charter-pa/1680a1b1cf). In reaction to this position paper, the European Elite Athletes Association (EU Athletes) has replied that: (i) there is no one static European model of sport; (ii) sport needs to continue to adapt to modern circumstances it it is so to retain its value to society and remain attractive as a spectator sport and economic activity; (iii) although one characteristic of many sports in Europe is its reliance upon competitions with a system of promotion and relegation, "paradoxically the lobby for recognition of the European model of sport is keen to remove fair competition in the market by restricting third party event organisers and threatening to sanction the athletes" (available at https://rm.coe.int/eu-athletes-response-to-the-lobby-for-a-european-sports-model/1680a2430e). In general, see V. Zuev, I. Popova, 2018, *The European Model of Sport: Values, Rules and Interests*, *International Organisations Research Journal*, vol. 13, No. 1, 51 – 65; I. Henry, 2009, *European Models of Sport: Governance, Organisational Change and Sports Policy in the EU*, *Hitosubashi Journal of Arts and Sciences*, 50, 41 – 52.

(c) *UEFA's prior approval system does not constitute a restriction of competition by object*

(i) There is no doubt that UEFA has a discretion stemming in particular from its special position on the market concerned as football's governing body in Europe. While it is therefore incumbent on UEFA to structure the prior approval procedure so as to avoid favouring its own competitions by unjustifiably refusing events submitted for approval and proposed by third parties, only a specific analysis of the exercise of the discretion held by UEFA could establish whether its use of that discretion has been discriminatory and inappropriate in order to demonstrate anticompetitive effects.
Even if the prior approval scheme established by UEFA is not governed by a procedure subject to approval criteria that are clearly defined, transparent, non-discriminatory and reviewable, within the meaning of the case-law of the Court of Justice, the lack of such criteria cannot automatically entail classification as a 'restriction of competition by object' but rather constitutes an indication of restrictive effects which must, however, be confirmed on the basis of an in-depth analysis.

(ii) A restriction of competition can be established only in so far as prior approval were in fact to prove to be objectively necessary for the creation of an alternative competition. However, in the Super League case, UEFA's approval is not essential, and therefore any independent competition, outside the UEFA and FIFA ecosystem, can be created freely and without UEFA's intervention. In fact, nothing can prevent the clubs forming the Super League from creating their own competition outside the framework defined by UEFA.

(d) *The restrictive effects of the Super League competition*

(i) The majority of the clubs participating in the Super League see their participation guaranteed. Furthermore, the Super League's founding clubs intended to continue to take part in the open national competitions organised by the national federations and leagues under the aegis of FIFA and UEFA.

(ii) The new proposed competition would inevitably have a negative impact on the national championships by reducing the appeal of those competitions. As things currently stand, the final standing obtained at the end of each season in the national championships plays a decisive role in determining the participants in the top European competition, which (depending on the level of the national league) makes reaching the top spots in those championships particularly attractive. That

element could vanish, or at least be significantly weakened, if the results of the national leagues were largely irrelevant to participation at the top level of the pyramid, as appears to be indicated by ESLC's ambitions.

(iii) The new competition could have a negative impact on the principle of equal opportunities, which is one component of the fairness of competitions. Thanks to their guaranteed participation in the Super League, certain clubs could book significant additional revenue, whilst continuing at the same time to participate in national competitions in which they would face other clubs which would be unable to generate revenue on a comparable scale, let alone on a permanent and constant basis.

(iv) The new competition would essentially prevent the participation of teams from most European countries, since it would be limited to participants from a restricted number of countries, and this also might well run counter to the 'European' dimension of the sports model enshrined in Art. 165 TFEU.

(v) The Super League model would also risk calling into question the principle of solidarity, since the creation of that competition format could have the effect of undermining the appeal and the profitability of UEFA's competitions (in particular the Champions League) and of thus reducing the revenue from them, a percentage of which is earmarked for grassroots football.

(vi) The intention behind the Super League is not to create a 'proper' closed and independent league (a breakaway league) but to set up a rival competition to UEFA in the most lucrative segment of the market for the organisation of European football competitions, whilst continuing to be part of the UEFA ecosystem by participating in some of those competitions (and in particular in the national championships).

(vii) From the perspective of competition law, an undertaking cannot be criticised for attempting to protect its own economic interests, in particular in relation to such an 'opportunistic' project that would risk weakening it significantly.

(viii) In light of the above, the non-recognition by FIFA and UEFA of an essentially closed competition such as the Super League can be regarded as inherent in the pursuit of certain legitimate objectives in that the purpose of that non-recognition is to maintain the principles of participation based on sporting results, equal opportunities and solidarity upon which the pyramid structure of European football is founded.

(e) *UEFA and FIFA's prior approval system is not subject to the proportionality requirements established by the case law of the Court of Justice*

This is simply because such requirements can apply only in relation to independent competitions which themselves comply with the objectives recognised as legitimate that are pursued by a sports federation. It follows that, even if the criteria established by UEFA were not to satisfy the criteria of transparency and non-discrimination, this does not mean that a third-party competition running counter to legitimate sporting objectives should be authorised and that UEFA's refusal to authorise such a competition could not be justified.

(f) *Imposing sanctions on players who were not parties to the decision to set up the Super League seems disproportionate*

Sanctions on players who were not parties to the decision of the Super League, in particular as regards their participation in national teams, seem to be disproportionate. Accordingly, a decision that consists in punishing players who do not appear to have engaged in any misconduct vis-à-vis the UEFA rules and whose involvement in the creation of the Super League does not seem to have been established would indicate a wrongful and excessive application of those rules. Furthermore, depriving the national teams concerned of some of their players would amount to sanctioning them indirectly too, a situation which likewise appears disproportionate. By contrast, the sanctions targeted at football clubs affiliated to UEFA, in the event of participation in an international competition such as the Super League, may appear proportionate given, in particular, the role played by those clubs in the organisation and the creation of a competition which do not appear to comply with the fundamental principles structuring how European football is organised and operates.

5. The ruling of the Court of Justice: two fundamental premises

Before starting to analyse the merits of the ruling, it is important to focus on two fundamental premises pointed out by the Court of Justice.

Firstly, at para. 80 the Court of Justice clearly states that the referring court is not asking the Court about the interpretation of Artt. 45, 49, 56, 63, 101 and 102 TFEU with a view to ruling, one way or another, on the compatibility of the Super League project itself with those articles of the FEU Treaty. Accordingly, the ruling of the Court of Justice is not a ruling on the Super League, but rather on the UEFA and FIFA's prior approval system. Such conclusion marks a first, but significant difference compared to the Opinion of Advocate General.

Secondly, at paras 100 and 101 the Court of Justice clearly underlines that, as it is also apparent from the context of which Art. 165 TFEU forms a part, in particular from its insertion in Part Three of the FEU Treaty, devoted to 'Union policies and internal actions', and not in Part One of that treaty, which contains provisions of principle, including, under Title II, 'provisions having general application', relating, inter alia, to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against any discrimination, environmental protection and consumer protection", Art. 165 TFEU "*is not a cross-cutting provision having general application*". It follows that, although the competent Union institutions must take account of the different elements and objectives listed in Art. 165 TFEU when they adopt, on the basis of that article and in accordance with the conditions fixed therein, incentive measures or recommendations in the area of sport, those different elements and objectives, as well as those incentive measures and recommendations need not be integrated or taken into account in a binding manner in the application of the rules on the interpretation of which the referring court is seeking guidance from the Court, irrespective of whether they concern the freedom of movement of persons, services and capital (Artt. 45, 49, 56 and 63 TFEU) or the competition rules (Artt. 101 and 102 TFEU).

More to the point, Art. 165 TFEU is not a special rule exempting sport from all or some of the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application.

Apart from the clear distancing from the Opinion of the Advocate General on Art. 165 TFEU, it is important to note that the Court of Justice refers to this provision only in paragraphs 95 to 107 under heading "A Preliminary observations". By contrast, no reference to Art. 165 TFEU is contained in part B of the ruling relating to the preliminary questions asked by the referring court.

Such conclusion marks a second but even more relevant difference of legal interpretation compared to the Opinion of Advocate General.

6. The ruling of the Court: the merits

The Court of Justices focuses on the following aspects:

a) the rules on the prior approval of interclubs football competition and on the participation of clubs and of sportspersons in those competitions according to Art. 102 TFUE;

b) the provisions on the prior approval of interclubs football competition and on the participation of clubs and of sportspersons in those competitions according to Art. 101, para. 1 TFUE and, in particular, as a decision of an association of undertakings having as its object the restriction of competition;

c) the existence of possible justification for rules on the prior approval of interclubs football competition and on the participation of clubs and of sportspersons in those competitions according to Artt. 101, para. 1, 101, para. 3 and 102 TFEU;

d) the provisions on economic and commercial rights related to sporting competitions in the light of Artt. 101 and 102 TFEU;
e) the rules on the prior approval of interclubs football competition and on the participation of clubs and of sportspersons in those competitions according to Art. 56 TFEU.

6.1 The prior approval system and Art. 102 TFEU

According to the Court of Justice, none of the specific attributes that characterise professional football makes it possible to consider as legitimate the adoption nor, *a fortiori*, the implementation of rules on prior approval and participation which are, in a general way, not subject to restrictions, obligations and review that are capable of eliminating the risk of abuse of a dominant position and, more specifically, where there is no framework for substantive criteria and detailed procedural rules for ensuring that they are transparent, objective, precise and non-discriminatory, when they confer on the entity called on to implement them the power to deny any competing undertaking access to the market.

In other words, the Court of Justice argues that "*in the absence of substantive criteria and detailed procedural rules ensuring that the sanctions introduced as an adjunct to those rules are transparent, objective, precise, non-discriminatory and proportionate, such sanctions must, by their very nature, be held to infringe Art. 102 TFEU inasmuch as they are discretionary in nature. Indeed, such a situation makes it impossible to verify, in a transparent and objective manner, whether their implementation on a case-by-case basis is justified and proportionate in view of the specific characteristics of the international interclub competition project concerned*".[8] Moreover, contrary to Advocate General's opinion, the Court of justice states that "*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, 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*".[9]

Accordingly, the Court of Justice concludes that "*Art. 102 TFEU must be interpreted as meaning that the adoption and implementation of rules by associations which are responsible for football at world and European levels and which pursue in parallel various economic activities related to the*

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[8] ECJ, *European Superleague Company SL v. FIFA and UEFA*, para. 148.
[9] *Idem*, para. 149.

organisation of competitions, 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".[10]

6.2 The prior approval system and Art. 101, para. 1 TFEU

The Court of Justice does not dispute that the reasons for the adoption of the contested rules on prior approval may include the pursuit of legitimate objectives, such as ensuring observance of the principles, values and rules of the game underpinning professional football. However, the Court of Justice finds that those rules "*make subject to the power of prior approval and the power to impose sanctions held by the entities that adopted them, in their capacity as associations of undertakings, the organisation and marketing of any international football competition other than those organised in parallel by those two entities, as part of their pursuit of an economic activity. In so doing, those 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*".[11]

In other words, "*those rules 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*".

Moreover, the Court of Justice notes that, "*in so far as the rules on prior approval for international interclub football competitions contain rules on the participation of professional football clubs and players in those competitions, and the sanctions to which that participation is liable to give rise, it should be added that they appear, prima facie, liable to reinforce the anticompetitive object inherent in any prior approval mechanism that is not subject to restrictions, obligations and review suitable for ensuring that it is*

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[10] *Idem*, para. 152.

[11] *Idem*, para. 176.

transparent, objective, precise and non-discriminatory.[12] *Indeed, they reinforce the barrier to entry resulting from such a mechanism, by preventing any undertaking organising a potentially competing competition from calling, in a meaningful way, on the resources available in the market, namely clubs and players, the latter being vulnerable – if they participate in a competition that has not had the prior approval of FIFA and UEFA – to sanctions for which there is no framework providing for substantive criteria or detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate*".[13]

In light of the above, the Court of Justice concludes 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 sanctions such as those at issue in the main proceedings reveal, by their very nature, a sufficient degree of harm to competition and thus have as their object the prevention thereof.*[14] *They accordingly come within the scope of the prohibition laid down in Art. 101, para. 1 TFEU, without its being necessary to examine their actual or potential effects*".[15]

6.3 The existence of possible justification for rules on the prior approval of interclubs football competition and on the participation of clubs and of sportspersons in those competitions according to Artt. 101, para. 1, 101, para. 3 and 102 TFEU

As regard the existence of possible justifications under Art. 101, para. 1 TFEU, the Court of Justice, argues that the so-called *Wouters* test does not apply in situations involving conduct which, far from merely having the inherent 'effect' of restricting competition, at least potentially, by limiting the freedom of action of certain undertakings, reveals a degree of harm in relation to that competition that justifies a finding that it has as its very 'object' the prevention, restriction or distortion of competition.

In other words, as regards conduct having as its object the prevention, restriction or distortion of competition, the benefit of an exemption from the prohibition laid down in Art. 101(1) TFEU can be granted only if Art. 101(3) TFEU applies and all of the conditions provided for in that provision are observed.[16]

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[12] *Idem*, para. 177.
[13] *Idem*, para 177.
[14] On the notion of restrictive conducts "by object," see 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, para. 78; 30 January 2020, Generics (UK) and Others, C-307/18, EU:C:2020:52, para. 67.
[15] Idem, para 178.
[16] ECJ, *European Superleague Company SL v. FIFA and UEFA*, para. 185.

To substantiate its argument, the Court of Justice notes that:

a) the case-law concerning the *Wouters* test[17] "*does not apply in situations involving conduct which, irrespective of whether or not it originates from such an association and irrespective of which legitimate objectives in the public interest might be relied on in support thereof, by its very nature infringes Art. 102 TFEU*",[18] as already confirmed by the *MOTOE* case;[19]

b) "*the absence of a subjective intention to prevent, restrict or distort competition and the pursuit of potentially legitimate objectives are not decisive either for the purposes of application of Art. 101(1) TFEU*"[20] and, moreover, Artt. 101 and 102 TFEU must be interpreted consistently.

Then, the EU judges move on to examine the existence of possible justifications under Artt. 102 and 101, para 3 TFEU.

As regard Art. 101, para. 3 TFEU, according to the settled case law of the Court of Justice the exemption is subject to four cumulative conditions.[21]

First, it must be demonstrated with a sufficient degree of probability that the agreement, decision by an association of undertakings or concerted practice in question makes it possible to achieve efficiency gains, by contributing either to improving the production or distribution of the products or services concerned, or to promoting technical or economic progress.

Second, it must be demonstrated, to the same degree of probability, that an equitable part of the profit resulting from those efficiency gains is reserved for the users.

Third, the agreement, decision or practice in question must not impose on the participating undertakings restrictions which are not indispensable for achieving such efficiency gains.

Fourth, that agreement, decision or practice must not give the participating undertakings the opportunity to eliminate all effective competition for a substantial part of the products or services concerned. That said, although it is for the referring court to assess the applicability of Art. 101, para. 3 TFEU in the case at issue, the Court of Justice argues that:

i) "*in a situation where the conduct infringing Art. 101(1) TFEU is anticompetitive by object, and is such as to affect different categories of users or consumers, it must be determined whether and, if so, to*

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[17] 19 February 2002, *Wouters and Others*, C 309/99, EU:C:2002:98, para. 97; of 18 July 2006, *Meca-Medina and Majcen v Commission*, C 519/04 P, EU:C:2006:492, paras 42 to 48; and of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C 1/12, EU:C:2013:127, paras. 93, 96 and 97.

[18] ECJ, *European Superleague Company SL v. FIFA and UEFA*, para. 185.

[19] 1 July 2008, *MOTOE*, C 49/07, EU:C:2008:376, para. 53.

[20] ECJ, *European Superleague Company SL v. FIFA and UEFA*, para. 186.

[21] 11 July 1985, *Remia and Others v Commission*, 42/84, EU:C:1985:327, para. 38; 11 September 2014, *MasterCard and Others v Commission*, C 382/12 P, EU:C:2014:2201, para. 230.

what extent, that conduct, notwithstanding its harmfulness, has a favourable impact on each of them";[22]

ii) accordingly, the referring court shall "*examine whether the rules on prior approval, participation and sanctions at issue in the main proceedings are such as to have a favourable impact on the various categories of 'users', comprising, inter alia, national football associations, professional or amateur clubs, professional or amateur players, young players and, more broadly, consumers, be they spectators or television viewers*";[23]

iii) moreover, "*although such rules may appear to be legitimate, in terms of their principle, by contributing to guaranteeing observance of the principles, values and rules of the game underpinning professional football, in particular the open, meritocratic nature of the competitions concerned, and ensuring a certain form of 'solidarity redistribution' within football, the existence of such objectives, however laudable they may be, do not release the associations that have adopted those rules from their obligation to establish, before the national court, that the pursuit of those objectives translates into genuine, quantifiable efficiency gains, on the one hand, and that they compensate for the disadvantages caused in competition terms by the rules at issue in the main proceedings, on the other*";[24]

iv) lastly, in order to determine whether the fourth condition is satisfied, "*the referring court must take into account the fact that there is no framework for the rules on prior approval, participation and sanctions at issue in the main proceedings providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise and non-discriminatory. In fact, it is the Court of Justice's opinion that such a situation is liable to enable entities having adopted those rules to prevent any and all competition on the market for the organisation and marketing of interclub football competitions on European Union territory*".[25]

Turning to Art. 102 TFEU, the Court of Justice focuses on both the objective justifications defence and the efficiency defence.[26]

As regard the objective justification defence, the Court of Justice argues that "*the establishment, by FIFA and UEFA, of discretionary rules on prior approval of international interclub football competitions, control of participation by clubs and players in those competitions and sanctions,*

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[22] ECJ, *European Superleague Company SL v. FIFA and UEFA*, para. 194.
[23] *Idem*, para. 195.
[24] *Idem*, para. 196.
[25] *Idem*, para 199.
[26] 27 March 2012, *Post Danmark*, C 209/10, EU:C:2012:172, para. 41; 12 May 2022, *Servizio Elettrico Nazionale and Others*, C 377/20, EU:C:2022:379, paras. 46 and 86.

precisely because of their discretionary nature, can in no way be regarded as being objectively justified by technical or commercial necessities, unlike what could be the case if there was a framework for those rules providing for substantive criteria and detailed procedural rules meeting the requirements of transparency, clarity, precision, neutrality and proportionality which are imperative in this field".[27]

As regard the efficiency defence, the Court of Justice recognizes that such defence is based on conditions very similar to the conditions listed in Art. 101, para. 3 TFEU and that it is for the referring court to rule on whether the FIFA and UEFA's rules at issue satisfy all of the conditions enabling them to be regarded as justified under Art. 102 TFEU. However, the Court of Justice also finds that, "*regarding the fourth of those conditions, given the nature of those rules – which make the organisation and marketing of any interclub football competition on European Union territory subject to prior approval by FIFA and UEFA, without that power being subject to appropriate substantive criteria and detailed procedural rules – and the dominant, even monopolistic, position which is held by those two entities on the market concerned, those rules afford those entities the opportunity to prevent any and all competition on that market*".[28]

6.4 The rules on commercial rights related to sporting competitions in the light of Artt. 101 and 102 TFEU

As regard the question concerning the FIFA's rules on the commercial exploitation of the rights emanating from professional interclubs football competitions organised by FIFA and UEFA, the Court of Justice argues that those rules "*may be regarded as having as their 'object' the prevention or restriction of competition on the different markets concerned within the meaning of Art. 101(1) TFEU, and as constituting 'abuse' of a dominant position within the meaning of Art. 102 TFEU, unless it can be proven that they are justified, given that they substitute, imperatively and completely, an arrangement for the exclusive exploitation of all of the rights emanating from the professional interclub football competitions organised by FIFA and UEFA for any other mode of exploitation that might, in their absence, be freely chosen*".[29]

As regard the existence of possible justifications, the Court of Justice recognises that it is for the referring court to assess the existence of the conditions which must be fulfilled for there to be an exemption under Art. 101, para. 3 TFEU and to be considered justified under Art. 102 TFEU. However, the Court of Justice does not hesitate to point out that:

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[27] ECJ, *European Superleague Company SL v. FIFA and UEFA*, para. 203.
[28] *Idem*, para. 207.
[29] *Idem*, para. 230.

i) "*before the Court, the defendants in the main proceedings, a number of governments and the Commission have argued that those rules enable efficiency gains to be made by helping to improve both production and distribution. By allowing actual or potential buyers to negotiate for the purchase of rights with two exclusive vendors prior to each of the international or European competitions organised by those vendors, the rules bring down their transaction costs significantly and reduce the uncertainty they would face if they had to negotiate on a case-by-case basis with the participating clubs, who would be liable to have divergent respective positions and interests in relation to the marketing of those rights. Accordingly, it is for the national court to determine, in the light of the arguments and evidence to be adduced by the parties to the main proceedings, the extent of those efficiency gains and, in the event that their actual existence and extent have been established, to rule on whether any such efficiency gains would be such as to compensate for the disadvantages in terms of competition resulting from the rules at issue in the main proceedings*";[30]

ii) "*the defendants in the main proceedings, a number of governments and the Commission have argued that a fair share of the profit that appears to result from the efficiency gains achieved through the rules at issue in the main proceedings is reserved for users. Thus, a large share of the profit derived from the centralised sale of the various rights related to the interclub football competitions organised by FIFA and UEFA is allocated to financing or projects intended to ensure some form of 'solidarity redistribution' within football, to the benefit not only of professional football clubs participating in those competitions, but also those not participating, amateur clubs, professional players, women's football, young players and other categories of stakeholders in football. Similarly, improvements in production and distribution resulting from the centralised sale and the 'solidarity redistribution' of the profit generated thereby ultimately benefit supporters, consumers, that is to say, television viewers, and, more broadly, all EU citizens involved in amateur football*";[31]

iii) in such a case, the Court of Justice admits that "*those arguments appear prima facie to be convincing, given the essential characteristics of the interclub football competitions organised at world or European level. Indeed, the proper functioning, sustainability and success of those competitions depend on maintaining a balance and on preserving a certain equality of opportunity as between the participating professional football clubs, given the interdependence that binds them*

[30] *Idem*, para. 232.
[31] *Idem*, para. 234.

together (...). Moreover, there is a trickle-down effect from those competitions into smaller professional football clubs and amateur football clubs which, whilst not participating therein, invest at local level in the recruitment and training of young, talented players, some of whom will turn professional and aspire to join a participating club. Lastly, the solidarity role of football, as long as it is genuine, serves to bolster its educational and social function within the European Union";[32]

iv) however, the Court of Justice point out that "*the alleged profit generated by centralised sales of the rights related to interclub football competitions for each category of user – including not only professional and amateur clubs and other stakeholders in football, but also spectators and television viewers – must be proven to be 'real and concrete'*";[33]

v) lastly, the Court of Justice underlines the need for the referring court "*to determine, in the light of the evidence to be adduced by the parties to the main proceedings, whether the rules at issue in the main proceedings are indispensable for achieving the efficiency gains referred to above and for ensuring the 'solidarity redistribution' of a fair share of the profit generated thereby to all users, be they professional or amateur football stakeholders, spectators or television viewers*".[34]

6.5 The rules on the prior approval of interclubs football competition and on the participation of clubs and of sportspersons in those competitions according to Art. 56 TFEU

The last question addressed by the Court of Justice refers to the compatibility of the rules on the prior approval of interclubs football competition and on the participation of clubs and of sportspersons in those competitions with Art. 56 TFEU. For the sake of completeness, the Court of justice recognises that the referring court has made reference to various provisions of the TFEU relating to the freedom of movement of workers, freedom of establishment, freedom to provide services and freedom of movement of capital.

However, "*the rules on which that court has been called on to rule in the dispute in the main proceedings have as their predominant object to make the organisation and marketing of any new interclub football competition on European Union territory subject to prior approval by FIFA and UEFA, and thus to make any undertaking wishing to carry on such an economic activity in any Member State whatsoever dependent on the grant of such approval. Although it is true that those rules on prior approval are*

[32] *Idem*, para. 235.
[33] *Idem*, para. 236.
[34] *Idem*, para. 239.

accompanied by rules controlling the participation of professional football clubs and players in those competitions, for the purposes of the answer to be given to the present question, the latter may be considered as secondary to the former, inasmuch as they are ancillary thereto".[35] For this reason, the Court of Justice has decided to focus exclusively on Art. 56 TFEU.[36]

That said, the judges argue that, since "*there is no framework providing for substantive criteria and detailed rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate, those rules enable FIFA and UEFA to exercise discretionary control over the possibility for any third-party undertaking to organise and market interclub football competitions on European Union territory, the possibility for any professional football club to participate in those competitions as well as, by way of corollary, the possibility for any other undertaking to provide services related to the organisation or marketing of those competitions*".[37] Accordingly, in so doing, "*those rules tend not only to impede or make less attractive the various economic activities concerned, but to prevent them outright, by limiting access for any newcomer*".[38]

As regard the existence of possible justifications, the Court of Justice recalls its case law according to which measures of non-State origin may be permitted even though they impede a freedom of movement enshrined in the FEU Treaty, if it is proven, first, that their adoption is justified by a legitimate objective in the public interest which is other than of a purely economic nature and, second, that they observe the principle of proportionality, which entails that they are suitable for ensuring the achievement of that objective and do not go beyond what is necessary for that purpose.[39]

In this context, the judges find that "*the adoption of rules on prior approval of interclub football competitions and on the participation of professional football clubs and players in those competitions may be justified, in terms of its very principle, by public interest objectives consisting in ensuring, prior to the organisation of such competitions, that they will be organised in observance of the principles, values and rules of the game underpinning professional football, in particular the values of openness, merit and solidarity, but also that those competitions will, in a substantively homogeneous and temporally coordinated manner, integrate into the 'organised system' of national, European and international competitions characterising that sport. Nevertheless, those objectives are not capable of*

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[35] *Idem*, para. 244.
[36] 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International*, C-42/07, EU:C:2009:519, para. 47; 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638, paras. 50 and 51.
[37] ECJ, *European Superleague Company SL v. FIFA and UEFA*, para. 248.
[38] *Idem*, para. 249.
[39] *Idem*, para. 251.

justifying the adoption of such rules where they do not include substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise and non-discriminatory".[40]

7. What is next now?

Just one day after the sentence it is neither possible nor appropriate to jump to conclusions.

Compared to the Advocate General's Opinion, the ruling is definitely more in line with the settled case law of the Court of justice in relation to both the initial premises and the merits of the case.

Furthermore, the fundamental role that the referring court will still have to play in the pending proceedings should not be underestimated.

In this still fluid context, one thing appears rather clear. Just as all those who, on several occasions and at various times, wanted to celebrate the death of the Super League were wrong, so those who wanted to see in the Court's ruling a legitimation of the original Super League project would now be equally wrong.

Only time and the future ruling of the Spanish judge will be able to dispel the many unknowns that still remain, especially with reference to the real and concrete effects of the ruling of the Court of justice.

[40] *Idem*, para. 253-254.