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Bjelinski, Filip

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UNIVERSITY OF ZAGREB
FACULTY OF LAW

FILIP BJELINSKI

WHO IS 'SAVING' FOOTBALL? CASE EUROPEAN SUPER
LEAGUE V UEFA AND FIFA IN THE CONTEXT OF
ARTICLE 101 TFEU

Mentor: izv. prof. dr. sc. Melita Carević

Zagreb, 2022

Izjava o izvornosti

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Filip Bjelinski

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1. INTRODUCTION

It took less than 72 hours for 9 of the European Super League's (hereinafter: Super League) 12 clubs to leave the newly founded competition, collapsing the project.¹ However, two and a half years later, it seems that the story of the Super League is not quite over.

While many football fans, football coaches and players raged against this newly founded competition and considered it a money grab,² the founders of the Super League argued that the league was created to 'save football'.³

According to the Federation International de Football Association (hereinafter: FIFA) Statute, it is not possible for Super League to exist without the consent and approval of FIFA.⁴ It is not unexpected that a new organiser wanted to enter the 'world' of football. Namely, "for broadcasters sport is the ideal lead-offering due to its popularity."⁵ Data collected from the Premiership indicates why the organisation of football competitions and the commercialisation of such competitions is a desirable market.⁶ Specifically, in the 1987-1988 season the Premier League rights were sold for £3.1 million. In comparison, for a period between 1996-1999 seasons, Premier League sold its rights for more than £1.1 billion.⁷

In May of 2021, a commercial court in Madrid in the dispute between Super League clubs on the one side, and FIFA and the Union of European Football Association (hereinafter: UEFA) on the other, sent a preliminary reference to the Court of Justice of the European Union (hereinafter: CJEU).⁸ The court in Madrid asked whether FIFA and

¹ 'UEFA battles Super League at EU's top court' (*Politico*, 11 July 2022) <<https://www.politico.eu/article/super-league-uefa-begin-battle-at-eus-top-court/>> accessed 21 October 2022

² 'European Super League: a history of splits over money in professional sport' (*The Conversation*, 20 April 2021) <<https://theconversation.com/european-super-league-a-history-of-splits-over-money-in-professional-sport-159312>> accessed 21 October 2022

³ European Super League created to 'save football' - Real Madrid president Florentino Perez (*BBC*, 20 April 2021) <<https://www.bbc.com/sport/football/56812151>> accessed 21 October 2022

⁴ FIFA Statutes '[2004]

<<https://digitalhub.fifa.com/m/5eb2b45e547ff39f/original/ndfxogwkoukoe4dm3uk0-pdf.pdf>> art 22(3)(e)

⁵ Richard Parrish, *Sports Law and Policy in the European Union* (Manchester University Press, 2003), p10.

⁶ See Rebecka Nordblad, 'European Super League: kicking off the match against FIFA and UEFA. Exploring C-333/21 European Super League Company v FIFA and UEFA in the light of EU competition law, and its effect on the European Model of Sports' (Master's Thesis, Lund University, 2022) p25 – 26.

⁷ *ibid*, p 11.

⁸ 'Spanish court asks for EU ruling on whether UEFA abused position over Super League' (*France 24*, 13 May 2021) <<https://www.france24.com/en/live-news/20210513-spanish-court-asks-for-eu-ruling-on-whether-uefa-abused-position-over-super-league>> accessed 21 October 2022

UEFA have violated Articles 101 and 102 of the Treaty of the Functioning of the European Union (hereinafter: TFEU).⁹ Specifically, whether FIFA and UEFA acted in accordance with competition law provisions when they forced Super League clubs to leave the project.

Taking into consideration all of the above, the aim of this master thesis is to discuss the influence which the provisions of FIFA Statutes had on foreclosing the entrance to the market of organization and commercial exploitation of football competitions. More precisely, the focus will be put on Article 101 TFEU, which is important for the control of anti-competitive conduct.¹⁰ It should be noted that Article 101 TFEU is not the only Article of TFEU that is mentioned in the preliminary reference in this case.¹¹ To be precise, the question was asked whether the behaviour of FIFA and UEFA on the relevant market should also be considered as contrary to Article 102 TFEU. Due to the complexity and comprehensiveness of this topic, the Author will only analyse Article 101 TFEU in this master thesis. The aim of this master thesis is to analyse whether provisions of FIFA Statutes, which are obligatory for every club that is a member of FIFA,¹² are compatible with competition law rules enshrined in Article 101 TFEU, as it is posed in the preliminary question to the CJEU.

The thesis, which is written in the anticipation of the CJEU judgment in case C-333/21, is structured as follows. After the first introductory chapter, in the second chapter the author will explain FIFA's and UEFA's role in the regulation of all aspects of football and the dispute with the Super League. In the third chapter, the author will point out the key CJEU case law which confirmed that competition law rules can be applied to sports cases and further explain what is needed for a conduct to be considered as prohibited under Article 101(1) TFEU. The fourth chapter will dive into possible arguments that are expected to be submitted in the proceeding before the CJEU. The last chapter will offer some concluding remarks.

⁹ Case C-333/21 *European Super League Company, S.L. v Union of European Football Associations (UEFA) and Federation Internationale de Football Association (FIFA)*

¹⁰ Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (5th edn) (Oxford University Press, 2011) p1001.

¹¹ *European Super League Company, S.L. v UEFA and FIFA* (n9)

¹² FIFA Statute '[2004]

<<https://digitalhub.fifa.com/m/5eb2b45e547ff39f/original/ndfxogwkoukoe4dm3uk0-pdf.pdf>> art 22.

2. EUROPEAN SUPER LEAGUE COMPANY CASE – THE PARTIES AND BACKGROUND OF THE DISPUTE

The Super League was a concept announced by the president of Real Madrid Florentino Perez on 18 April 2021.¹³ The Super League was formed by 12 elite clubs, six of the Premier League's biggest clubs (Arsenal, Chelsea, Liverpool, Manchester City, Manchester United and Tottenham), three Spanish clubs (Real Madrid, Barcelona and Atletico Madrid) and three Italian clubs (AC Milan, Juventus and Inter Milan).¹⁴ In his announcement of the Super League project, Mr Perez pointed out that "Super League aims to save football at this critical moment. Therefore, it is needed to form such an elite competition format since young people are no longer interested in football."¹⁵ This statement was particularly interesting because it will become one of the leading counterarguments for football fans (as well as FIFA and UEFA) that were against the creation of the Super League.

Before further analysis of the disputed provisions of FIFA Statutes that were used to stop the creation of Super League, it is important to explain the role that FIFA and UEFA have in football. UEFA is a company registered in the register of companies under the provisions of the Swiss civil code. UEFA's membership comprises of national football associations situated in Europe.¹⁶ The main purpose of this company is to regulate European football. Moreover, UEFA has the sole jurisdiction to organise or abolish international competitions in Europe in which member associations (that consist of football clubs) participate in.¹⁷ If a football club wants to participate in an international competition organized by UEFA (i.e. UEFA Champions League), it has to agree to comply with the statutes, regulations and decisions of the competent UEFA organs.¹⁸ To be precise, the organisational level of football in Europe is characterized by a monopolistic pyramid structure. Since FIFA oversees and regulates football competitions globally (and UEFA is only one of the confederations governed by FIFA), football clubs

¹³ 'European Super League' (*Wikipedia*, 21 October 2022)

<https://en.wikipedia.org/wiki/European_Super_League> accessed 21 October 2022

¹⁴ 'European Super League timeline: Game changer – football's volatile 72 hours' (*BBC*, 21 April 2021)

<<https://www.bbc.com/sport/football/56825570>> accessed 21 October 2022

¹⁵ *ibid.*

¹⁶ Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 – Joint selling of the commercial rights of the UEFA Champions League), [2003] OJ L 29, para 2.

¹⁷ Joint selling of the commercial rights of the UEFA Champions League (n 16) para 3 and 'UEFA Statutes' [2020] <https://documents.uefa.com/v/u/_CJ2HRiZAu~Wo6ytIRy1~g> art 49.

¹⁸ *ibid.* para 4.

need to comply and act in accordance with FIFA Statutes.¹⁹ Specifically, Article 22 of the FIFA Statutes requires that neither international leagues nor any other group of clubs or leagues are formed without the consent and approval of FIFA.²⁰ The mentioned Article is just one of the potential problems that any new undertaking which aims to enter the market of organization and commercial exploitation of football competitions (in this case the Super League) is faced with. Such issues will be discussed in the later parts of this thesis concerning restriction of competition by object and effect.

The dispute between Super League clubs and UEFA began when the Super League clubs notified UEFA about their intention to launch the Super League in January 2021.²¹ Shortly after the notification, FIFA and UEFA expressed their refusal to recognize the Super League. Furthermore, UEFA used its position as the only organisation responsible for the regulation of European football competitions and clubs by threatening the players and clubs with expulsion from UEFA if they remain in the Super League.²² Shortly after, the Super League clubs publicly announced their plans. UEFA subsequently issued a new statement in which it introduced the new potential sanctions for clubs and players following the Super League's announcement. Clubs would be excluded from any other domestic or international competitions and players could be denied the opportunity to represent their national teams.²³ Both warnings made by UEFA resulted in the Super League clubs lodging an application to a Madrid commercial court claiming that the provisions of the FIFA Statutes, that allowed UEFA to undertake the mentioned measures, are incompatible with Articles 101 TFEU and 102 TFEU.

¹⁹ Adam Remetei-Filep, 'Opinion with regard to Case C-333/21 European Super League Company, S.L. v Union of European Football Associations (UEFA) and Federation Internationale de Football Association (FIFA)' (2021) <<https://plwp.eu/evfolyamok/2021/261-2021-11>> p12 para 49.

²⁰ FIFA Statutes' (n4) art 22.

²¹ Ben Church, 'European Super League back in three years with different format, new chief executive tells FT' (CNN, 19 October 2022) <<https://edition.cnn.com/2022/10/19/football/european-super-league-new-format-relaunch-spt-intl/index.html>> accessed 24 October 2022

²² *ibid.*

²³ 'Statement by UEFA, the English Football Association, the Premier League, the Royal Spanish Football Federation (RFEF), LaLiga, the Italian Football Federation (FIGC) and Lega Serie A' (UEFA, 18 April 2021) <<https://www.uefa.com/insideuefa/news/0268-12121411400e-7897186e699a-1000--statement-/>> accessed 24 October 2022

3. ARTICLE 101 TFEU AND THE APPLICATION OF COMPETITION RULES IN SPORT CASES

*“Sport is part of every man and woman’s heritage and its absence can never be compensated for” – Pierre de Coubertin.*²⁴

The importance of sport in the EU has been emphasised in the TFEU. Article 165(1) TFEU states “EU shall contribute to the promotion of European sporting issues while taking account of the specific nature of sport, its structure based on voluntary activity and its social and educational functions.”²⁵ Moreover, the Commission in the White paper on Sport underlined: sport’s social role and the ability to bring people together and to improve the health and education of European citizens.²⁶ It is important to note that the non-profit dimension of the sport was not the only one recognized by the Commission. The Commission emphasized that sport can have a huge macroeconomic impact and contribute to the Lisbon objectives of growth and job creation.²⁷ Moreover, sport is a multibillion-euro business. Data collected in 2021 showed that direct sport-related GDP in the EU was EUR 365 billion or 2.15% of total GDP.²⁸ Regarding employment, around 6.5 billion people or 2.85% of all employment in the EU was in the sports sector.²⁹ According to the UEFA financial report for the year 2020/21, from media rights, football clubs earned approximately EUR 4.4 billion, while commercial rights brought them another EUR 992 million.³⁰ Not to mention transfers of football players reached more than EUR 100 million. Having all of the abovementioned in mind, it is understandable why it is important to regulate the behaviour of undertakings in the football-related markets. This was achieved, among others, with the application of the competition rules enshrined in Articles 101 TFEU and 102 TFEU on sports cases. Before pointing out the key CJEU judgments that confirmed that competition rules apply to

²⁴ EU Commission White Paper: White Paper on Sport (Brussels, 11 July 2007) COM/2007/0391 final, p2.

²⁵ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, art 165(1).

²⁶ EU Commission White Paper: White Paper on Sport (n24), p3.

²⁷ *ibid*, p10.

²⁸ ‘*Sport in the European Union*’ [2019] European Commission <https://ec.europa.eu/assets/eac/sport/library/documents/eu-sport-factsheet_en.pdf> p1 and ‘Sport as a growth engine for EU economy’ [2014] Memo of European Commission <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_432> p1.

²⁹ Remetei-Filep, (n19) p11 para 44.

³⁰ ‘UEFA financial report 2020/2021’ [2021] UEFA <https://editorial.uefa.com/resources/0275-151e1a55c231-ef1c32b881dc-1000/en_ln_uefa_financial_report_2020-2021.pdf> p1.

sport, the main objectives of competition law and the importance of Article 101 will be discussed.

There are a few main objectives that competition law seeks to accomplish. For the purpose of this case, which concerns the dispute between UEFA and Super League clubs, the first objective that should be underlined is enhancing efficiency. Meaning that maximizing consumer welfare and achieving the optimal allocation of resources should be a priority.³¹ Furthermore, competition law aims to assure that consumers and smaller firms are protected from large accumulations of economic power, whether in a form of monopolies or through agreements in which rival firms coordinate to act as one.³² Even though both Article 101 TFEU and Article 102 TFEU can be applied to sports cases, the focus of this master's thesis will be put on Article 101 TFEU. Article 101 TFEU "prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and have the object or effect of preventing, restricting, or distorting competition in the internal market."³³ Guidelines on the applicability of Article 101 TFEU specify that this is only the first step of assessment under Article 101 TFEU.³⁴ The second step is only needed when the agreement/decision/concerted practice is found to be restrictive of competition. In this situation, Article 101(3) TFEU requires the courts to determine the pro-competitive benefits of that restriction and to assess whether those pro-competitive effects weigh the restrictive effects on competition.³⁵

According to the TFEU, sport is subject to the application of EU law.³⁶ Moreover, competition law and internal market provisions apply to sports in so far it is an economic activity.³⁷ This was confirmed by the CJEU in the *Walrave and Koch v Association Union Cycliste Internationale*.³⁸ In *Meca-Medina*,³⁹ while discussing the application of anti-doping rules on two long-distance swimmers that were banned for four years after it was

³¹ Craig and de Burca, (n10), p1001.

³² *ibid*, p1002.

³³ Article 101 TFEU

³⁴ 'Guidelines on the Definition of Relevant Market', Fair Trading Commission of Seychelles <<https://www.ftc.sc/wp-content/uploads/2018/11/FTC-Guidelines-on-Relevant-Market.pdf>> para 20.

³⁵ Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance [2011] OJ C 11, p7 para 20.

³⁶ Article 165 TFEU

³⁷ EU Commission White Paper: White Paper on Sport (n24), p13.

³⁸ Case C-36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federacion Espanola Ciclismo* ECLI:EU:C:2974:140 para 4.

³⁹ Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities*, ECLI:EU:C:2006:492

found that they had prohibited anabolic steroids in their system,⁴⁰ the CJEU came to the conclusion that differs from the views set in the White Paper on Sport and the judgement *Walrave and Koch v Association Union Cycliste Internationale*. Specifically, the CJEU stated that competition rules and the internal market rules shall be examined separately and that no conclusion can be made just on the ground that a particular rule was regarded as purely sporting one under the internal market rules.⁴¹ The last relevant CJEU judgment for the issue at hand is *Wouters and Others*, where it was pointed out that not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties falls in the prohibition laid down in Article 81(1) EC (now Article 101 TFEU).⁴² Since the *Wouters and Others* case will be analysed more in detail in section 3.3. of this thesis, concerning the possible “justifications” of the FIFA and UEFA’s restrictive decision, all of the mentioned can be summed up as follows. In sport-related cases, an assessment must be made on a case-by-case basis, meaning that all relevant circumstances should be taken into the account.⁴³ While doing that, first, it is necessary to establish whether Article 101 TFEU is breached due to the existence of a sporting rule, emanating from an agreement between/decision of undertaking or association of undertakings, which restricts competition by object or effect. Second, whether such restriction can influence the trade between MS. If the answer is affirmative, it should be examined if the *Wouters* exceptions can be applied, and if not, whether the restriction of competition can benefit from Article 101(3) TFEU.

3.1. The Super League clubs’ arguments regarding the breach of Article 101(1) TFEU

Given that both the *Wouters* exception and Article 101(3) TFEU are only relevant if there is a restriction established under Article 101(1) TFEU, this master thesis will underline key conditions that, from the wording of Article 101(1) TFEU must be cumulatively fulfilled for it to apply. First, the Super League clubs have to prove that UEFA and FIFA are undertakings or association of undertakings; second, their decision (provisions of the FIFA Statutes) must restrict/prevent or distorts competition on the relevant market by object or effect; lastly, such restrictive decision must affect trade

⁴⁰ *ibid*, para 1-16.

⁴¹ *David Meca-Medina and Igor Majcen v Commission of the European Communities* (n39), para 30-34.

⁴² *Wouters* (n38), para 97.

⁴³ Remetei-Filep (n19), p14 para 57.

between member states. It should be noted that the question of whether UEFA and FIFA fulfil requirements to be considered either undertakings or association of undertakings, as well as whether FIFA Statutes affect trade between MS are not as disputable as the question of whether there was a restriction of competition by object or effect. The reason that lies, in the Author's opinion, in the fact that they are more arguments that FIFA and UEFA can use to claim that there is no restriction of competition by object or effect. Therefore, the focus of the following paragraphs of this paper will be put on the UEFA's and Super League clubs' arguments regarding the question of whether there was a restriction/prevention or distortion of competition on the relevant market by object or effect.

At the onset, the relevant market needs to be defined. When determining the relevant market, the CJEU examines the product market and geographical market.⁴⁴ Due to the similarities with the facts of the dispute between the Super League clubs and UEFA, the General Court's judgment in the *International Skating Union v European Commission*⁴⁵ will be useful for the determination of the relevant market. This judgment concerned a Korean company that sought to organise a speed skating competition in Dubai (the "Dubai grand prix").⁴⁶ Dubai grand prix was supposed to introduce a new format of races that would take place on a special ice track on which long-track and short-track skaters would compete together.⁴⁷ Same as FIFA and UEFA, the International Skating Union (hereinafter: ISU) as the sole international sports federation⁴⁸ has the power to determine the rules of affiliation that its members (local skating clubs and associations) are required to observe.⁴⁹ ISU used its position on the market and imposed sanctions such as a 5-year ban, 10-year ban and a lifetime ban from any competition organized by the ISU for skaters that participate in unauthorized competitions in its "eligibility rules."⁵⁰ Due to the fact that the Dubai Grand Prix did not get authorization, two professional speed skaters lodged a complaint to the European Commission and claimed that rules imposed by ISU were incompatible with both Article 101 TFEU and Article 102 TFEU.⁵¹ While having the abovementioned in mind, the author of this thesis

⁴⁴ 'Guidelines on the Definition of Relevant Market' (n34), p6, paras 4.1 - 4.2.

⁴⁵ Case T-93/18 *International Skating Union v European Commission*, ECLI:EU:T:2020:610

⁴⁶ *ibid*, para 20.

⁴⁷ *ibid*.

⁴⁸ *ibid*, para 1.

⁴⁹ *ibid*, para 4.

⁵⁰ *ibid*, para 10.

⁵¹ *ibid*, para 20.

is of opinion that the same definition of the relevant market concluded by the Commission in the *International Skating Union v European Commission* can be applied to the case concerning Super League and UEFA.⁵² Specifically, the relevant market in which the provisions of the FIFA Statutes will be examined is the worldwide market for the organization and the commercial exploitation of football. Given that the Super League clubs are all based in Europe, the relevant product market can be narrowed as the market for the organization and commercial exploitation of Pan-European football competitions.⁵³ It includes rights emanating from football competitions, such as financial rights, audiovisual and radio recording, reproduction and broadcasting rights, multimedia, marketing rights, etc.⁵⁴ When determining the relevant product market, the Commission “considered that the relevant market for the organisation and commercial exploitation is limited to a single sport discipline.”⁵⁵ The reason why other sport discipline can’t be taken into consideration when determining the product market, according to the Commission lies in the fact that “demand for the organisation and commercial exploitation of sports events comes from consumers following a certain sporting competition, either by attending stadiums or watching it live.”⁵⁶ The geographic dimension of this market in Europe is due to the fact that the case concerns the rules of UEFA.⁵⁷ Another definition of the market concerns an upstream market of the organization of football competitions and a downstream market of commercial exploitation of services offered on the organisational market. This would lead us to the conclusion that the only undertaking acting on both markets is UEFA, since it organizes football competitions,⁵⁸ and is also currently the sole buyer in the downstream market. The second definition of the market will be used when discussing the problem with the exclusive supply obligation imposed by the dominant buyer on the downstream market (UEFA).

Since the relevant market was determined, in order to prove the breach of Article 101 TFEU, the Super League clubs first need to prove that UEFA and FIFA are either undertakings or associations of undertakings. Therefore, the concept of undertaking on

⁵² *ibid*, para 29

⁵³ Remetei-Filep (n19) p26 para 113.

⁵⁴ ‘FIFA Statutes ’ (n4), art 22.

⁵⁵ Commission Decision of 8.12.2017 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement, Case AT.40208 – International Skating Union’s Eligibility rules (C(2017) 8240 final), [2017] p25 para 87.

⁵⁶ *ibid*, p25 para 88.

⁵⁷ Remetei-Filep (n19), p26 para 113.

⁵⁸ Joint selling of the commercial rights of the UEFA Champions League (n16) para 3.

the market should be defined. According to the CJEU in *Wouters*, the “concept of an undertaking covers any entity engaged in economic activity, regardless of its legal status and how it is financed.”⁵⁹ “On the first glance, sport organisations are primarily concerned with regulating sporting conduct. However, sports organisations have a wider responsibility to ensure the commercial success of their sport.”⁶⁰ Concerning that, it should be pointed out that Article 67 of FIFA Statutes clearly prescribes that FIFA, its member associations and the confederations (i.e UEFA) are the original owners of all rights emanating from football competitions. Article 67 also clarifies that those rights include, among others, ‘every kind of financial rights, audio-visual and radio recording, reproduction and broadcasting and multimedia rights (...)’.⁶¹ That said, it is only left to decide whether FIFA and UEFA would be undertakings or associations of undertakings. Since both concepts are relative, a given entity may be regarded as an undertaking for one part of its activities, while the rest of its activities may fall outside the application of competition rules.⁶² The General Court applied this approach to FIFA in *Piau*.⁶³ In the said judgment, FIFA was characterized as an association of undertakings since it groups its members - national associations (formed by football clubs that are undertakings).⁶⁴ On the other hand, those national associations are under the FIFA Statutes recognised as being holders of exclusive broadcasting and transmission rights for sporting events so they also carry on economic activity in this regard. Therefore, national associations can also be undertakings within the meaning of Article 101 TFEU.⁶⁵ The final decision concerning this topic was brought by the CJEU in the *Meca-Medina* case, where the Court did not object to the treatment of the International Olympic Committee as an undertaking and as an association of international and national associations of undertakings.⁶⁶ Given that the Commission in *International Skating Union* stated that ISU should be considered the association of undertakings,⁶⁷ since it consists of undertakings

⁵⁹ Case 309/99 *J.C.J Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, intervenier: *Raad van de Balies van de Europese Gemeenschap*, ECLI:EU:C:2002:98, para 46.

⁶⁰ Parrish (n5), p117.

⁶¹ FIFA Statutes ’ (n4), art 67.

⁶² Case C-82/01 P *Aéroports de Paris v Commission of the European Communities*, ECLI:EU:C:2002:617, para 74.

⁶³ Case T-193/02 *Laurent Piau v Commission of the European Communities*, ECLI:EU:T:2005:22

⁶⁴ *ibid*, para 72.

⁶⁵ *ibid*, para 71.

⁶⁶ *David Meca-Medina and Igor Majcen v Commission of the European Communities* (n39), para 38.

⁶⁷ Commission Decision of 8.12.2017 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement, Case AT.40208 – International Skating Union’s Eligibility rules (C(2017) 8240 final), [2017] p38.

and makes itself responsible for the representing and defending their common interests⁶⁸ the Author of this master thesis will address FIFA and UEFA as an associations of undertakings.

After establishing that FIFA can be both an undertaking and an association of undertakings and as such, fulfills the first condition for Article 101 TFEU to apply, the Super League clubs need to prove that the FIFA Statutes are either agreement concluded between undertakings, concerted practice or decision by an association of undertakings.⁶⁹ “Specifically, for 101 TFEU to apply, coordination of market behaviour by two or more undertakings are needed. This means that not merely the commercial contracts between sports clubs and third parties concerning i.e broadcasting rights, or sponsors fall under the scope of competition law, but sporting rules too, meet this condition.”⁷⁰ Therefore, FIFA provisions should be considered as a decision of an association of undertakings.

Lastly, the Super League clubs need to prove that the FIFA Statutes affect trade between Member States. The CJEU in *Ordem dos Técnicos Oficiais de Contas* stated that for a decision to be capable of affecting trade between member states, it must be possible to foresee with a sufficient degree of probability that they influence on the pattern of trade between member states.⁷¹ “Agreements that only affect trade within one member state or which affect trade only outside EU are unlikely to be caught by the scope of Article 101 TFEU.”⁷² While discussing this, it should be noted that Article 72 of FIFA Statutes doesn’t allow players and teams affiliated with member associations or confederations play matches with players or teams that are not affiliated with member associations and confederations without the approval of FIFA.⁷³ Furthermore, Article 22 (3) of the FIFA Statutes prohibits the creation of international leagues or any other groups of clubs or leagues without the pre-authorization of FIFA.⁷⁴ Given that this is one of the most controversial provisions, it will be discussed in more detail in the following parts of this master thesis. To sum up, the pre-authorization requirement applies through the European Economic Area (hereinafter: EEA) and all member associations and clubs are obliged to

⁶⁸ *ibid.*

⁶⁹ Article 101 TFEU

⁷⁰ Jay Meliezer, ‘The European Super League, Super Anti-Competitive? Whether European Competition law should prohibit the new closed football league’ (Master’s Thesis, University of Amsterdam), p 25.

⁷¹ Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, ECLI:EU:C:2013:127, para 65.

⁷² Parrish (n5), p113.

⁷³ ‘FIFA Statutes’ (n4), art 72.

⁷⁴ ‘The European Super League: An overview of legal challenges’ (*CMS Law Now*, 29 April 2021) <https://www.cms-lawnow.com/ealerts/2021/04/the-european-super-league-an-overview-of-legal-challenges?cc_lang=en>

act in accordance with previously mentioned provisions of FIFA Statutes. Therefore, FIFA's and UEFA's pre-authorization measure, enshrined in FIFA Statutes, has the potential to eliminate competitors and limit the commercial exploitation of rights emanating from football competitions.

3.1.1. Restriction of competition by object

The last condition from Article 101 TFEU that needs to be proven by the Super League clubs is whether certain FIFA Statutes provisions have a restrictive object or effect on the market of organization and commercial exploitation of rights emanating from football competitions.

In *ING Pensii*,⁷⁵ the CJEU stated that the “concept of restriction of competition by object can be applied only to those agreements between undertakings that cause a sufficient degree of harm to the proper functioning of normal competition”.⁷⁶ “To determine whether a requirement for pre-authorisation causes a sufficient degree of harm that it may be considered as a restriction of competition by object, regard must be had to the content of its provisions, its objectives, and the economic and legal context of which it forms part”.⁷⁷ Having that in mind, it can be claimed that pre-authorization and sanctions imposed on clubs and players are restrictive by object. Namely, they prevent third parties, such as Super League clubs, from entering the market of organisation and commercial exploitation of rights emanating from football competitions. Specifically, pre-authorization itself is designed to harm competition as FIFA and UEFA have not established transparent conditions that third parties must fulfil in order to enter the market. Therefore, the pre-authorisation requirement combined with sanctions allow FIFA and UEFA to prevent the organisation of football competitions outside of their framework, which consequently benefits them financially. Additionally, from the fact that FIFA and UEFA have been the only undertakings on the global market of organising and commercialising football competitions for decades, it can be seen that pre-authorisation sufficiently harms competition on the market of organisation and commercial exploitation of rights emanating from football competitions.

⁷⁵ Case C-172/14 *ING Pensii*, *Societate de Administrare a unui Fond de Pensii Administrat Privat SA v Consiliul Concurentei*, ECLI:EU:C:2015:484

⁷⁶ *ibid*, para 31

⁷⁷ *ibid*, para 33

3.1.2. Restriction of competition by effect

Even though there is a possibility that the FIFA Statutes restricted competition on the relevant market by object, it is much more likely that the restriction of competition on the market of organisation and commercial exploitation of football competition occurred. To better explain this statement, it should be mentioned that there are two types of measures relevant to this case. First, some measures are economic in nature. “Such measures aim to increase organisation’s profit (for instance, the sale of media rights)”.⁷⁸ “The application of competition rules on this category is not controversial”.⁷⁹ Moreover, the General Court in the *International Skating Union* ruled that ‘eligibility rules’ “that had a non-compete clause, were driven by the increase of profit and therefore are restrictive by object”.⁸⁰ Therefore, there is no reason to doubt that economic types of measures can be restrictive by object.

There is also another category of measures, ones that are non-economic in nature. Such are measures that support solidarity; protect players’ health, etc. Mentioned category of measures cannot be found as restrictive by object under Article 101 TFEU.⁸¹ In other words, provisions of FIFA’s and UEFA’s Statutes are more likely to be restrictive by object, if the CJEU decides that they aim to increase profit. On the contrary, if the CJEU finds that they seek to preserve athletes’ health or solidarity, those provisions can only be restrictive by effect.⁸²

Moreover, if an analysis of the FIFA Statutes provisions does not reveal the effect on the competition to be sufficiently dangerous (for it to be considered as restrictive by object), the consequences of an agreement or decision should then be considered.⁸³ To simplify, where anti-competitive quality is not evident from its object, it is necessary to consider the effect on the competition.⁸⁴ To establish whether pre-authorisation is restrictive by effect, the CJEU in *Wouters* considered the consequences of competitors entering the market.⁸⁵

Before further analysis of the disputed provisions, it should be noted that there are three “types of decisions” enshrined in the provisions of FIFA Statutes which should,

⁷⁸ Pablo Ibanez Colomo, ‘Competition Law and Sports Governance: Disentangling a Complex Relationship’ (2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130043> p16.

⁷⁹ *ibid*, p14.

⁸⁰ *ibid*, p16.

⁸¹ *ibid*, p18.

⁸² *ibid*.

⁸³ Craig and de Burca, (n10) p1016.

⁸⁴ *ibid*, p1019.

⁸⁵ *Wouters* (n38), paras 86-88.

when examined together, be considered as restrictive by effect. First, Article 22 of the FIFA Statutes⁸⁶ allowed FIFA and UEFA to decide whether they will allow the creation of new football competitions on the market. Furthermore, Article 71(4) of the FIFA Statutes confirmed that FIFA has the final decision on the authorisation of any international match or competition.⁸⁷ By giving them the possibility to grant pre-authorisation, FIFA and UEFA were able to remain the only undertakings on the market of organisation and commercial exploitation of football competition. An example of FIFA's pre-authorisation 'power' could be seen in 1998, when an Italian media conglomerate aimed to start the "European Football League".⁸⁸ Similar to the Super League concept, after FIFA threatened with the sanction of suspension of any participating club from domestic football competitions organised by FIFA, the idea of a "European Football League" project was abandoned.⁸⁹ This was not the only attempt to create an alternative to football competitions organised by FIFA. One of the failed attempts was when in 2001 clubs from Scotland, the Netherlands, Portugal, Belgium, Sweden and Denmark tried to form an "Atlantic League".⁹⁰ In 2003, there were plans to establish the "European Golden Cup",⁹¹ while in 2011, few football clubs wanted to form a "European Super League".⁹² All of the mentioned projects failed mostly due to the fear of sanctions imposed by FIFA, the most often one being the permanent exclusion of participating clubs from football competitions organised by FIFA and UEFA.⁹³ On the other hand, there were a few successful attempts regarding the creation of international football club competitions. The reason why successful attempts should not be considered relevant is because they were either geographically restricted (i.e the "Royal League" including only clubs from Norway, Sweden and Denmark) or allowed only for a limited period.⁹⁴ Therefore, they did not represent a real competitor for either FIFA or UEFA on

⁸⁶ 'FIFA Statutes' (n4) art 22.

⁸⁷ *ibid*, art 71.

⁸⁸ Robert O'Connor, 'What if a European Super League had launched in 1998? Projecting an Alternate (Dystopian) Reality' (*Bleach Report*, 24 May 2016) <<https://thelab.bleacherreport.com/what-if-a-european-super-league-had-launched-in-1998/>> accessed 21 October 2022

⁸⁹ Stephen Dobson and John Goddard, *The Economics of Football* (Cambridge University Press, 2004) p425.

⁹⁰ Mark Tallentire, 'EUFA moves to head off Atlantic league' (*The Guardian*, 8 February 2022) <<https://www.theguardian.com/football/2001/feb/08/newsstory.sport3>> accessed 21 October 2022

⁹¹ 'UEFA go to war over Golden Cup' (*The Guardian*, 6 February 2003) <<https://www.theguardian.com/football/2003/feb/06/newsstory.sport1>> accessed 21 October 2022

⁹² Matt Scott, 'Top European clubs threaten to break away FIFA and UEFA' (*The Guardian*, 27 July 2011) <<https://www.theguardian.com/football/2011/jul/27/european-clubs-breakaway-fifa-uefa>> accessed 21 October 2022

⁹³ Remetei-Filep (n19), p24 para 106.

⁹⁴ *ibid*, p24 para 107.

the worldwide market or even on the European market of organisation and commercial exploitation of football competitions. In other words, a third-party football competition would always need pre-authorization from UEFA, which is at the same time a direct competitor (and only competitor) on the same market.⁹⁵ Moreover, given that there was no successful attempt at entry on the market, it is disputable whether the pre-authorisation would ever be given. Especially since the FIFA Statutes have not established transparent conditions that third parties must fulfil in order to get the pre-authorisation. Rather, FIFA Statutes only prescribe that pre-authorisation may be given if some criteria are satisfied, without listing any criteria for eligibility.⁹⁶ As a result of such huge regulatory power granted to FIFA and UEFA by their Statutes, it is not a surprise that there is no real competitive threat for FIFA and UEFA on the market.

Second, even if there were enough football clubs that did decide to form a new football competition without any pre-authorization, the creation of such a football competition would face new obstacles. At the onset, it is interesting to note that only two European countries are not members of FIFA (Vatican City and Monaco).⁹⁷ Meaning that all other football clubs in Europe are members of FIFA and obliged to comply with the FIFA Statutes. According to Article 72(1) of FIFA Statutes, players and teams affiliated with member associations are prohibited from playing matches with players or teams that are not affiliated with member associations without the approval of FIFA.⁹⁸ This Article should be read in conjunction with Article 6(2) of the UEFA Disciplinary Code, which allows UEFA to impose disciplinary measures that include (among others): fines, disqualification from competitions in progress or future football competitions, withdrawal of licence or ban on taking part in football-related activities.⁹⁹ Together, the mentioned Articles allowed UEFA to impose sanctions on clubs and to threaten the football players of those clubs.¹⁰⁰ Concerning the sanctions for the clubs that wanted to join the Super League, UEFA threatened clubs with fines of approximately EUR 100 million.¹⁰¹ It should also be noted that 9 clubs that withdrew their participation from the Super League were offered a reintegration measure called “Clubs Commitment Declaration”. This

⁹⁵ *ibid*, p23 para 102.

⁹⁶ ‘FIFA Statutes’ (n4).

⁹⁷ Collins Nwokolo, ‘8 Countries that are not Members of FIFA’ (*Top Soccer Blog*, 23 September 2022) <<https://topsoccerblog.com/countries-that-are-not-fifa-members/>> accessed 21 October 2022

⁹⁸ ‘FIFA Statutes’ (n4), art 72.

⁹⁹ See e.g. ‘UEFA Disciplinary Regulations’ [2022] <<https://documents.uefa.com/v/u/r7fXo9v2XH9Uhi4VzO57qw>> art 6(2)(f)

¹⁰⁰ Nordblad (n6), p7.

¹⁰¹ Remetei-Filep (n19), p44 para 189.

measure resulted in a EUR 15 million donation from those 9 reintegrated clubs, as well as a 5% withholding of the revenue for one season.¹⁰² Lastly, the “Clubs Commitment Declarations” introduced a new fine in case of a possible future breach of the Declaration of an amount of EUR 50 million for every breach.¹⁰³ While having in mind the income that could be generated from the creation of football competitions consisting only of elite clubs with huge fan bases around the world, it is clear that the sanctions imposed on clubs were just a part of the reason why those clubs decided not to participate in the Super League. UEFA didn’t plan to introduce only fines to clubs. Therefore, UEFA publicly warned football clubs that they will be excluded from any domestic, European and world-level football competitions.¹⁰⁴

Third, even if the Super League clubs were to decide to form a football competition regardless of the lack of pre-authorization (or was successful to get pre-authorization), financial fines and sanctions imposed on clubs and players, create additional problems. Article 67 of the FIFA Statutes states that FIFA, its member associations and confederations are the original owners of all rights emanating from competitions under their jurisdiction.¹⁰⁵ Those rights include, among others, every kind of financial rights, audiovisual, reproduction and broadcasting rights, as well as multimedia, marketing and promotional rights.¹⁰⁶ Furthermore, Article 68 of the FIFA Statutes underlines that FIFA, its member associations and the confederations are exclusively responsible for authorising the distribution of images and sound and other data of football matches under their jurisdiction.¹⁰⁷ The most problematic part of the mentioned Articles lies in situations where a new undertaking applies for pre-authorization to organise a new football competition. While examining this scenario, it should be borne in mind, as mentioned in the previous paragraphs, that UEFA can influence the input (football players) necessary for the creation of any football competition. This puts UEFA in a position where they can make it conditional upon new undertaking to accept relevant provisions of FIFA Statutes (among which are Articles 67 and 68). If the new undertaking agrees, in that case, they will also agree on giving the UEFA rights to commercially benefit from football matches played in that new football competition. Consequently, if the Super League clubs gained pre-authorization, that could result in them financing their

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*, p6 para 23.

¹⁰⁵ ‘FIFA Statutes’ (n4), art 67.

¹⁰⁶ *ibid.*, art 67.

¹⁰⁷ *ibid.*, art 68.

direct (and only) competitor on the same market. Therefore, it is clear that these circumstances are hardly making it appealing for anyone to enter the market.

This is not the first time that the Commission examined these issues. In 2003, UEFA adopted the *Joint selling of the commercial rights of the Champions League* (hereinafter: *Joint selling*).¹⁰⁸ Article 118 of the *Joint selling* states that two participating clubs may claim ownership of the commercial rights for individual matches played between them in the UEFA Champions League.¹⁰⁹ Moreover, the *Joint selling* emphasises UEFA's intellectual efforts and organisational responsibilities invested in the creation a football league with its own brand.¹¹⁰ Regarding the above-mentioned, the Commission found that UEFA should be considered as a co-owner of rights emanating from its football competitions.¹¹¹ Additionally, it was found that UEFA was (and still is) using its position on the market by being the only undertaking on that market, while at the same time regulating the entrance to the said market. By forcing new undertakings, i.e. the Super League clubs, to cede all their rights, UEFA is reducing the entrant's ability to compete against UEFA.¹¹² As a result, UEFA is able to eliminate competition on the market due to its ability to make it financially unappealing. Therefore, UEFA's decisions enshrined in the FIFA and UEFA Statutes should be considered as in breach of Article 101 TFEU.

Lastly, one more thing needs to be pointed out concerning already mentioned Articles 67 and 68 of the FIFA Statutes. Except for giving FIFA and UEFA co-ownership of rights emanating from matches played between clubs that are members of FIFA, these Articles represent an outright ban for suppliers to sell to competitors. To specify, partners in a vertical relationship (football clubs that are playing matches on the upstream market of organisation of football competitions) undertake not to sell their products and services (rights from matches) to competitors of UEFA.¹¹³ This is putting UEFA in a position of being the only buyer of such rights. Namely, as a dominant buyer, UEFA is imposing exclusive supply obligations on its suppliers (football clubs).¹¹⁴ The possibility to exempt such an exclusive under Vertical Block Exemption Regulation (hereinafter: VBER) will be discussed in the later parts of this master thesis.

¹⁰⁸ Joint selling of the commercial rights of the UEFA Champions League (n16), paras 25–55.

¹⁰⁹ *ibid.*, para 118.

¹¹⁰ *ibid.*, para 120.

¹¹¹ *ibid.*, para 122.

¹¹² Remetei-Filep (n19), p54 para 234.

¹¹³ Remetei-Filep (n19), p29 para 128.

¹¹⁴ *ibid.*

3.1.3. Conclusion concerning restriction of competition by effect

While deciding whether there is a restriction of competition on the relevant market, the CJEU, apart from the consequences of a potential competitor entering the market, examines whether there are negative effects on prices, output, innovation or quality or variety of goods and services.¹¹⁵ If there was no requirement for pre-authorisation (combined with sanctions and hardening of the possibility to make a profit for new competitors), football clubs would be able to form new football associations and leagues, thereby creating additional competition both in terms of organisation and exploitation of rights emanating from those competitions. This would lead to the overall improvement of the sport as it would lead to an increase in the variety and quality on the internal market. Specifically, the Super League's entry on the market would have been successful without all the previously explained 'levels' of restriction of competition. If the Super League project entered the market, consumers would be able to watch and support 'their' clubs in other competitions, which would further increase the variety of matches and new formats in football organisation. In addition, football clubs would not be deprived of an additional source of earnings from commercially exploiting rights from that 'new' football project. Lastly, pre-authorisation allows FIFA and UEFA to prevent organisation of football competition outside of their framework and consequently prevents new undertaking from entering the market. This results in "a complete lack of competition on the downstream market which would increase prices, limit the choice of available products, lower the quality and hinder innovation".¹¹⁶ Therefore, provisions of the FIFA Statutes have a negative effect on output, consumer welfare and competition on the market of organisation and commercial exploitation of rights emanating from football competitions and should be regarded as restrictive by effect.

Having in mind the obstacles explained, the question arises whether it is possible to leave FIFA, and if yes, what are the consequences of such actions for football clubs? Even though the sport seems to be an economic activity, it has some special characteristics. For a better understanding, it needs to be underlined what is the product or service when we talk about the topic of this master thesis. To organise a new football competition it is essential to have enough football clubs participating in it. The reason why lies in the fact that, football matches as a product, cannot be created by a single club

¹¹⁵ Alison Jones and Christopher, 'Competition Law' in Chatherine Bernard and Steve Peers (eds), *European Union Law* (Oxford University Press 2020), p 562

¹¹⁶ Remetei-Filep (n19), p32 para 137.

or athlete. On the other hand, if some new undertaking wants to create a whole competition, there also needs to be a level of cooperation between clubs.¹¹⁷ Additionally, projects such as the Super League need to involve some level of uncertainty as to the outcome, otherwise, football fans would lose interest.¹¹⁸ When we talk about this hypothetical situation where a few clubs decide to form the Super League and leave FIFA and UEFA, Articles 72 and 73 of FIFA Statutes create additional problems. Article 72 would forbid players and clubs affiliated in FIFA to play matches against Super League clubs without FIFA's approval, while Article 73 would require from clubs that are still members of FIFA, to have FIFA's approval to join the Super League competition.¹¹⁹ Together, they make it impossible for clubs that did not leave FIFA to become an input for the creation of any football competition outside of the FIFA framework. Having in mind all obstacles that both football clubs and players would face, it is hard to believe that there will ever be enough clubs that would leave the current competitions to join the Super League or any other similar project.

3.3. The *Wouters* exception

As was discussed in the previous chapter, provisions of FIFA' and UEFA's Statutes, which require prior approval to enter the market of organization of football competitions, combined with foreclosing the entrance on the market by sanctioning the players (input needed for the organization of football competitions), should be considered as a breach of Article 101 TFEU. Thus a question arises whether provisions of FIFA Statutes, with restrictive effect, can be justified in accordance with competition rules. To answer this question, this chapter will focus on key arguments that could be presented by UEFA to satisfy the *Wouters* exception and consequently fall outside the scope of Article 101(1) TFEU. After that, the focus will be put on conditions from Article 101(3) TFEU, to see if UEFA's restrictive decisions can benefit competition.

For any sporting rule to escape the general prohibitions enshrined in Article 101 TFEU, it needs to show one of two scenarios. "The first is that one of the requirements needed for the Article 101 TFEU to apply is missing, while the second is that the restriction of competition has a legitimate goal and is inherent and proportionate in the light of the objectives being pursued."¹²⁰ Since previous chapters of this master thesis

¹¹⁷ *ibid*, p12 para 48.

¹¹⁸ *ibid*.

¹¹⁹ 'FIFA Statutes' (n4), art 72-73.

¹²⁰ Remetei-Filep (n19), p14 para 58.

indicate that all conditions needed for Article 101 TFEU to apply are satisfied, it is up to FIFA and UEFA to prove the second scenario.

In the case *International Skating Union v Commission*, the General Court examined if a decision by an association of undertakings fulfils two cumulative conditions, in order to escape the prohibition of Article 101 TFEU. Specifically, is the restriction to competition inherent in the pursuit of legitimate objectives and is it proportionate to those objectives?¹²¹ These conditions were established by the Court in *Wouters*¹²² (the *Wouters* exception) and have been confirmed in the *Meca-Medina*¹²³ judgment for sports cases.¹²⁴ In *Wouters*, the Court examined the influence that the Bar association has on the market of legal services when it prohibited multi-disciplinary partnerships.¹²⁵ However, it should be noted that the proportionality part of the test seems to be increasingly more difficult to justify compared to the legitimate goal part of the test. This issue can be seen in *International Skating Union v Commission*, where the General Court found that - even though it acknowledged the protection of the integrity of speed skating from the risks associated with gambling as a legitimate objective¹²⁶ - the measure imposed was not inherent in the pursuit of the abovementioned objective, since there was no direct link to the legitimate objectives invoked by the International Skating Union.¹²⁷ Regarding the UEFA's decisions enshrined in the provisions of FIFA and UEFA Statutes, first, the part of the *Wouters* exception test, which requires restrictive measures to have a legitimate objective, will be discussed, and second, it will be examined if the pre-authorization combined with sanctioning of players and clubs can be inherent in the pursuit of those legitimate objectives.

3.3.1. Legitimate goal

In my opinion, there are a few possible legitimate goals that UEFA's decisions could try to protect. For example, UEFA could claim that the aim of the disputed provisions of the FIFA and UEFA Statutes is to preserve solidarity. This was underlined as UEFA's initial goal in 1954 (year when UEFA was established). Specifically, UEFA

¹²¹*International Skating Union v European Commission* (n45), para 65.

¹²²*Wouters* (n38), para 97.

¹²³*David Meca-Medina and Igor Majcen v Commission of the European Communities* (n39), para 42

¹²⁴Remetei-Filep (n19), p 36

¹²⁵*Wouters* (n38).

¹²⁶*International Skating Union v European Commission* (n45), para 80

¹²⁷*ibid*, para 89

aimed to foster and develop unity and solidarity among the European clubs.¹²⁸ Furthermore, UEFA claimed that they want to ensure that even the grassroots of football will benefit from commercial exploitation of football matches due to UEFA's obligation to redistribute financial resources. In the *Joint Selling of commercial rights of the UEFA Champions League*, UEFA argued that this financial solidarity system would result in the development of football in smaller countries as well as a more competitive base, in the future, since smaller clubs will not be left out from the revenue gained from the UEFA competitions.¹²⁹ Furthermore, 'maintaining the balance between clubs by preserving a certain degree of equality and uncertainty' was recognised by the Court in *Bosman*¹³⁰ as a legitimate objective.¹³¹ Even the Commission in the White paper on sport recognised the importance of an equitable redistribution of income between clubs, including the smallest ones.¹³² While this goal could seem like a valid one, the problem lies in the fact that the Super League plans also include solidarity payments, which are multiple times bigger than UEFA's solidarity payments.¹³³ The Author is of the opinion that, in the present circumstances, pre-authorisation, combined with the threats of sanctions for clubs that join the Super League, could not be considered as inherent to preserve the balance between clubs or to ensure a better solidarity system. To put it differently, even though the solidarity is generally a legitimate goal, FIFA and UEFA are not protecting it since they are foreclosing the entrance of an organisation that is protecting solidarity even more.

Another possible legitimate objective could lay in the protection of athletes' health. It is a well-known fact that football players are constantly under huge pressure due to the number of matches played. Moreover, cases of young professional athletes collapsing from heart attacks or other medical conditions are not as rare as before. Therefore, by allowing clubs to play in additional competitions, number of matches that would have to be played by Super League clubs will significantly increase. Result would be that those clubs are risking the health of their players in order to increase their

¹²⁸ Katarina Pijetlović, 'EU Sports Law and Breakaway Leagues in Football' in Ben Van Rompuy and Antoine Duval (eds), *ASSER International Sports Law Series* (2015) p269-270.

¹²⁹ Joint Selling of commercial rights of the UEFA Champions League (n16).

¹³⁰ Case 415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liegeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, ECLI:EU:C:1995:463.

¹³¹ *ibid*, para 106.

¹³² EU Commission White Paper: White Paper on Sport (n24), p17.

¹³³ Remetei-Filep (n19), p41 para 176 and see also 'Format' (*The Super League*) <https://thesuperleague.com/#who_we_are> accessed 11 July 2022.

profit. Also, athletes would be deprived of ability to divide their energy between different football matches through the season and having time to rest.¹³⁴ Even though the Super League (or any other third party which aims to organise additional football competitions) could not be blamed for the impact professional sports have on athletes' health, the question remains if it is safe for football players to increase the number of matches that would be played when clubs compete in multiple competitions. Given that the protection of athletes' health can be considered a legitimate objective, it needs to be assessed whether the exclusion of potential competitors by foreclosing the necessary input (football players) is inherent in the pursuit of the protection of athletes' health and is it possible to achieve the same results with less coercive measures.

3.3.2. Inherent nature of the restriction and proportionality

Considering the application of the *Wouters* exception “creates the exception from the general prohibitions laid down in competition law rules, *Wouters* exception has to be interpreted narrowly keeping in mind the goal of undistorted competition”.¹³⁵ Additionally, the burden of proof to show that provision of the FIFA and UEFA Statutes are inherent and proportional to preserve athlete's health, lies on UEFA.¹³⁶ Meaning that, UEFA will have to prove that it is necessary to foreclose the entrance of the market for new competitors (such as the Super League) in order to protect the football player's health.¹³⁷

The second part of this requirement (the proportionality test) makes a specifically big problem for UEFA. While discussing proportionality, UEFA will need to prove the following. First, the pre-authorization that allowed UEFA to foreclose the entrance, is necessary because every new and additional competition on the market will effect negatively on football players' health. If UEFA was to succeed in the justification of the pre-authorization, it will still have to show that there is no less coercive measure than sanctioning the clubs and players to preserve the athlete's health.

Regarding the pre-authorization measure, two scenarios should be analysed. The first one where the solidarity is accepted as a legitimate goal, and the second one where the CJEU only agrees with the protection of health of football players as a legitimate

¹³⁴ Robby Houben, Jan Blockx and Steve Nuyts, ‘*UEFA and the Super League: who is calling who a cartel?*’ [2021] International Sports Law Journal <<https://doi.org/10.1007/s40318-021-00201-2>> p7.

¹³⁵ Remetei-Filep (n19), p35 para 153.

¹³⁶ Case T-201/04 *Microsoft Corp. v Commission of the European Communities*, ECLI:EU:T:2007:289, para 688.

¹³⁷ Remetei-Filep (n19), p40 para 170.

objective, which UEFA seeks to protect. In the first scenario, UEFA could argue that the pre-authorization requirement aims to preserve competition on the market of commercial exploitation of rights emanating from football. Namely, pre-authorization prevents the Super League's "elite clubs" from organising football competitions without all other clubs. Since those "closed" football competitions would prevent non-elite clubs from the commercialisation of rights emanating from such competitions, pre-authorization allows non-elite clubs to compete on that downstream market. While discussing this, it should be noted that FIFA and UEFA share the commercial exploitation of rights emanating from football competitions with its confederations and individual member associations.¹³⁸ Meaning that FIFA and UEFA are competing with their members on the mentioned market. Without the pre-authorization "elite clubs" would be able to create football competitions (such as the Super League) and be the only one who economically benefits from such competitions. This would offer them a significant income advantage over the other football clubs. Moreover, due to a higher risk of player's injuries and the greater amount of matches having to be played, it is reasonable to expect that "elite clubs" would withdraw their participation from other competitions that provide them with lower income. In that case, UEFA would play the role of the protector of football clubs that are not allowed to participate in the Super League project.

As to the proportionality of pre-authorization, UEFA could try to underline the fact that there are no less restrictive measures and that it was necessary for FIFA to be granted with ability to decide the pre-authorization approval. Specifically, allowing the creation of the Super League would not protect smaller clubs that wouldn't be invited to participate in the newly founded competition. In addition, the number of matches would significantly increase, as previously mentioned, so it is reasonable to expect that the 'elite clubs' would leave some competitions organised by UEFA. Since non-elite clubs have a smaller fan base and cannot separately influence the market of commercial exploitation of rights emanating from football competitions to the same extent as the Super League clubs. Therefore, to prevent the exclusion of non-elite clubs and to preserve their financial stability alongside the solidarity system, it is necessary to give a mechanism such as the pre-authorization system to FIFA.

Even if we accept solidarity as a legitimate goal and the previously discussed argumentation on behalf of UEFA, in which they are protecting excluded clubs, problems

¹³⁸ 'FIFA Statutes' (n4) art 67.

concerning the possibility of less restrictive measure arise. Meaning that the same results could be achieved with a less coercive measure. For example, provisions of the FIFA Statutes could include the requirement to comply with already existing FIFA calendar or to prescribe a maximum number of games that could be played in a week. Moreover, the requirement for entering the organisational market could impose the obligation on clubs not to leave competitions organised by FIFA. Even if the CJEU was to accept athlete's health as a legitimate objective (which is more likely to happen), the requirement of a maximum amount of matches played or forming a new organisation consisting of health experts that would decide on granting of pre-authorization, should be considered as less restrictive. That way there would still be the possibility of entering the market for new undertakings and the goals such as the protection of health (or solidarity) would be preserved.

An even bigger issue occurs when we talk about sanctions of exclusion of football players from all competitions organised by FIFA (i.e playing for national team or in domestic leagues). Mentioned sanctions can be imposed based on various provisions of the FIFA Statutes, without any transparent or non-discriminatory criteria.¹³⁹ Moreover, FIFA and UEFA are the only ones that can decide on sanctions, which opens an opportunity for UEFA to threaten others in situations where it wants to foreclose the entrance on the market. Lastly, it should be held in mind that "FIFA's and UEFA's reaction was made in response to the announcement of the Super League".¹⁴⁰ This brings us to the conclusion that UEFA will use this fear of sanctions every time a new potential competitor appears. It is also clear that there is no link between player's behaviour and the sanctions. In fact, football players were used as a tool to punish potential competitors by depriving off the most important input.¹⁴¹ Given that football players are the input needed for the creation of new football competition, UEFA will, consequently, be able to preserve its position as the only undertaking. Therefore, the provisions of FIFA Statutes that are allowing FIFA and UEFA to impose or give threats, in present circumstances, should be considered disproportionate.

To sum up, both the pre-authorization measure and sanctions imposed on players could be considered as disproportionate. As such, they would not satisfy the second part of test need for the *Wouters* exception to apply. Even if the pre-authorization could be exempted

¹³⁹ Remetei-Filep (n19), p43 para 185.

¹⁴⁰ *ibid*, p43 para 186.

¹⁴¹ *ibid*, p43 para 187.

with the *Wouters* exception, there is no indications that sanctioning the input without any reason, could be exempted from the application of Article 101 TFEU. Therefore, the provision of FIFA Statutes and their application in the present case, should be considered as in breach of Article 101(1) TFEU.

3.4. Article 101(3) TFEU

As previously shown, the *Wouters* exception cannot apply on the FIFA and UEFA decisions because they fail to satisfy the proportionality part of the test. Meaning that the pre-authorization and sanctioning the players do not fall outside of scope of Article 101 TFEU. Consequently, it should be examined whether this restriction of competition can benefit from exception provided in Article 101(3) TFEU.

For a decision to fall in the scope of Article 101(3) “it must fulfil four conditions: (a) decision must promote technical or economic progress (b) decision must allow consumers a fair share of the resulting benefit (c) decision cannot impose on the undertakings restrictions that are not necessary for the realisation of these objectives (d) decision cannot afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”¹⁴² As recognised in *Ordem dos Technicos Officiais de Contas*,¹⁴³ those four conditions are cumulative. In other words, UEFA needs to prove each of the above mentioned conditions. If UEFA succeeds, that would mean that “besides the restrictive effects, the decision in question also produce pro-competitive effects, which outweigh the the former.”¹⁴⁴ In regards to the condition required in Article 101(3), the following paragraphs of this master thesis will underline key possible arguments that UEFA could have and the Author’s opinion on whether they could be accepted by the CJEU. It should be underlined that the lack of only one of the mentioned requirements results in the non-application of Article 101(3) TFEU.

3.4.1. The first condition of Article 101(3) TFEU – efficiency gains

First, UEFA’s pre-authorization and sanctions imposed on players need to benefit competition regarding technical and economic progress (hereinafter: efficiency gains). At the onset, it should be noted that efficiency gains can be either cost efficiencies or qualitative efficiencies.¹⁴⁵ For example, “maintenance of uncertainty of results or

¹⁴² Article 101(3) TFEU

¹⁴³ *Ordem dos Technicos Officiais de Contas v Autoridade da Concorrencia* (n71), para 102.

¹⁴⁴ Remetei-Filep (n19), p45 para 196.

¹⁴⁵ *ibid*, p49 para 210.

preserving a certain equality between clubs can improve quality and considered as economically improving the product.”¹⁴⁶ UEFA could argue that both measures promote economical progress. Namely, those measures allow non-elite clubs to compete on the market of commercial exploitation of rights with elite clubs and thereby expand the basis of economic activity. According to the White paper on sports, sports are a ‘dynamic and fast-growing sector’,¹⁴⁷ with football being one of the most economically prosperous sports in the world. Therefore, FIFA and UEFA aim to encourage the development of football and its access in every member state, which would allow non-elite clubs to participate in football competitions and as such would benefit the economic progress of the sport.

Concerning this line of argumentation, the CJEU would probably conclude that “most of the efficiency gains would not be relevant, as uncertainty or equality between clubs should be looked at one league or tournament and cannot justify the elimination of competition between different leagues or tournaments.”¹⁴⁸ Instead, efficiencies directly related to the exclusive requirement not to sell rights to FIFA’s competitors, as well as not sharing the input needed for the organization of additional competition, should be analysed. Those restrictive exclusive requirements can be justified only if they either solve “free rider problem” or “hold-up problems”.¹⁴⁹ The free-rider problem, in this case, occurs when the undertaking is safeguarding their investments and efforts put in the organisation of football competitions to prevent that undertakings which did not invest from attracting their consumers.¹⁵⁰ To acknowledge it, there needs to be a real free-riding issue. Even though it is possible to accept this argumentation, it is up to the referring court to conduct a specific assessment.¹⁵¹ Therefore, in my opinion, there is a possibility that UEFA will succeed in proving that there is an economic benefit for competition.

¹⁴⁶ *ibid.*, p49 para 211.

¹⁴⁷ EU Commission White Paper: White Paper on Sports (n24), para 3

¹⁴⁸ Remetei-Filep (n19), p50 para 213.

¹⁴⁹ Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance (n34)

¹⁵⁰ *ibid.*

¹⁵¹ Remetei-Filep (n19), p50 para 213.

3.4.2. The second condition of Article 101(3) – fair share to consumers

“The concept of a fair share implies that the pass on benefits must at least compensate consumers for any actual or likely negative effect caused by the restriction of competition.”¹⁵² The ‘consumers’ in this case would be spectators of football matches.

UEFA could argue that the majority of end-consumers primarily support their local member state clubs. Therefore, measures imposed by UEFA allow them to watch those local non-elite clubs in international football competitions. Thus, pre-authorisation takes into account interests of a wider fan base of football supporters and allows them a fair share of resulting benefits.

The problem with that argumentation is the fact that if we have only one undertaking that can influence on the prices of, i.e broadcasting rights, UEFA could increase prices which would negatively influence on the end-consumers. Also, due to the lack of competitors, UEFA does not have an incentive to improve their services in order to compete for the consumers. Therefore, additional competition on the market, would result in benefits for the end-consumers. Consequently, in the Author’s opinion, UEFA is unlikely to prove that this condition is fulfilled.

3.4.3. The third condition of Article 101(3) TFEU – indispensability

“Under this condition, it is required that a restrictive decision must be reasonably necessary to achieve efficiencies mentioned in the first condition.”¹⁵³ Meaning that there are no less coercive measures that are available for the same result.

UEFA could argue that it is necessary to preserve the football pyramid that promotes equality between clubs and uncertainty of results. Thus, the pre-authorisation and sanctions requirements are necessary to protect (a) access for all interested in the game, (b) the development of new talent as the size of the talent pool would decrease, and (c) the growth of the basis of economic activity.

Even if we accept that the protection of the mentioned efficiency gains is needed, the problem lies in the existence of the less restrictive measure that could achieve the same result. Specifically, as explained in the paragraphs concerning the proportionality of *Wouters* exception, a less restrictive measure would be authorising the Super League competition, but also imposing restrictions on them. Specifically, FIFA and UEFA could require that the clubs participating in the Super League must stay in competitions

¹⁵² *ibid*, p47 para 203.

¹⁵³ Communication from the Commission – Guidelines on the application of Article 81 of the Treaty [2004] OJ C 101/97, para. 33.

organised by FIFA and that the maximum number of their matches is prescribed. Consequently, the goals set by UEFA would be respected and clubs from Super League would be able to compete on the market of commercial exploitation of rights emanating from football competitions. Therefore, it should be considered that the UEFA will fail to satisfy this condition.

3.4.4. The fourth condition of Article 101(3) TFEU – no elimination of competition

At the onset, it should be noted that “this condition gives priority to the protection of rivalry and the competitive process over potentially pro-competitive gains.”¹⁵⁴ This condition also recognised that “rivalry between undertaking is an essential driver of economic efficiency, including dynamic efficiencies of innovation.”¹⁵⁵ Therefore, satisfying the fourth condition for the UEFA, in a situation where FIFA and UEFA limited the input needed for every new competitor, seems unlikely. Namely, The CJEU stated in *Ordem dos Technicos Officiais de Contas* that rules which grant a legal person the power to rule unilaterally on applications for registration or approval, without that power being made subject to limitations, obligations or a review, could lead to distortion of competition.¹⁵⁶ Even in case where we examine only pre-authorization measure, it should be noted that FIFA and UEFA can arbitrarily allow or deny entrance on the relevant market. Meaning that there is no independent and impartial body reviewing their decisions. Lastly, the mere fact they are only undertakings on the market proves that the FIFA and UEFA are both eliminating competition on a substantial part of the market and foreclosing the entrance on the whole market for other undertakings.

4. CONCLUSION

Sport is an economic activity in which every year a huge amount of money is spent on transfers of football players, marketing, organization of football competitions etc. On the other hand, organisations such as FIFA and UEFA financially benefit from the organisation and commercial exploitation of rights emanating from football competitions. Therefore, it was not a surprise when both FIFA and UEFA wanted to stay the only undertakings operating on that market. Even though there were many unsuccessful

¹⁵⁴ *ibid*, para. 105.

¹⁵⁵ Remetei-Filep (n19), p46 para 199.

¹⁵⁶ *Ordem dos Technicos Officiais de Contas v Autoridade da Concorrenca* (n71), para 91.

attempts for entering the market, with sanctions imposed on clubs and players, as well as with pre-authorization measure, FIFA and UEFA succeeded to foreclose the entrance. Since both measures were enshrined in the provisions of FIFA Statutes, the focus of this master thesis was put on the question whether FIFA statutes should be considered as a decision of an undertaking or association of undertaking which is contrary to Article 101(1) TFEU, and if yes, can this restriction be exempted under *Wouters* exception or under Article 101(3) TFEU. The Author aimed to prove that FIFA's and UEFA's behaviour on the market should be considered as contrary to competition law rules.

In regards to the stated, first, it was proven that provisions of FIFA Statutes that allowed FIFA and UEFA to impose mentioned sanctions fulfil requirements needed for Article 101(1) TFEU to apply. Namely, they are a decision of an association of undertaking that is restrictive by effect and influence trade between member states. After it was proven that Article 101(1) TFEU applies, in this master thesis it was discussed if *Wouters* exception can apply in order for this restriction of competition to fall outside of the scope of Article 101 TFEU. While conducting the analysis, it was shown that provisions of FIFA Statutes fail to satisfy the proportionality part of the test since there are less restrictive measures that can achieve the protection of the same goals. Additionally, sanctions imposed on players, such as a ban from playing for national teams are not just too restrictive, but also unconnected to the players' behaviour. Lastly, given that *Wouters* exception could not apply, Article 101(3) TFEU was examined to see if the restriction can benefit the competition. In order to prove that benefits of this restriction are greater than the negative effects, FIFA and UEFA need to prove all conditions required under Article 101(3) TFEU. Since at least 3 out of 4 conditions were not fulfilled (especially the condition that requires that there is no elimination of competition on the substantial part of the market), it was concluded that Article 101(3) cannot be applied on the present case.

Consequently, this master thesis indicates that, when deciding about the breach of Article 101 TFEU, the CJEU is likely to rule in favour of the Super League clubs.

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6. SUMMARY

Filip Bjelinski

WHO IS 'SAVING' FOOTBALL? CASE EUROPEAN SUPER LEAGUE V UEFA
AND FIFA IN THE CONTEXT OF ARTICLE 101 TFEU

The dispute between the Super League clubs and UEFA began when the Super League clubs notified UEFA about their intention to launch the Super League in January 2021. This was followed by the response from FIFA and UEFA, in which they threatened to impose sanctions both on football clubs and players. FIFA's and UEFA's response also created rift in football world between supporters of "elite clubs" and supporters of the football pyramid where promotion and relegation are based on merit.

This master thesis has been written while the dispute between the Super League clubs and FIFA and UEFA was pending before the CJEU. The aim of this master thesis is to analyse the CJEU cases and possible arguments of both parties of the dispute. First, the case will be shortly introduced. After that, elements of Article 101 TFEU will be discussed. Lastly, it will be examined whether it is possible to apply the so-called "*Wouters* exception" or Article 101(3) TFEU. The Author considers that provisions of FIFA and UEFA Statutes are in breach of Article 101 TFEU and, as such, that they made it possible for FIFA and UEFA to foreclose the market of organisation and commercial exploitation of rights emanating from football competitions.

Key words: competition law, Article 101 TFEU, Super League, FIFA, UEFA

SAŽETAK

Filip Bjelinski

TKO 'SPAŠAVA' NOGOMET? PREDMET SUPERLIGA PROTIV UEFA-e I FIFA-e
U KONTEKSTU ČLANKA 101 TFEU

Spor između klubova Superlige i UEFA-e započeo je u siječnju 2021. kad su klubovi Superlige obavijestili UEFA-u o svojoj namjeri osnivanja Superlige. Neposredno nakon obavijesti o osnivanju Superlige, FIFA-a i UEFA-a zaprijetili su sankcijama klubovima i igračima. Odgovor FIFA-e i UEFA-e također je stvorio raskol u nogometnom svijetu između navijača "elitnih klubova" i navijača koji se zalažu za sustav takozvane "nogometne piramide" gdje se napredovanje i ispadanje temelji na zaslugama.

Ovaj rad nastao je u trenutku iščekivanja odluke Suda EU u sporu između klubova Superlige i UEFA-e. Cilj ovog rada je analizirati praksu Suda EU i moguću argumentaciju stranaka u sporu između Superlige i UEFA-e. Rad je strukturiran tako da će se prvo ukratko predstaviti slučaj pred Sudom EU. Nakon toga će se analizirati elementi članka 101 UFEU-a. Zatim će se ispitati postoji li mogućnost primjene "Wouters iznimke" ili članka 101(3) UFEU-a.

Autor smatra da su odredbe statuta FIFA-e i UEFA-e u suprotnosti s člankom 101 UFEU-a te da su omogućile FIFA-i i UEFA-i da zatvore pristup tržištu organizacije nogometnih natjecanja i komercijalnog iskorištavanja prava.

Ključne riječi: *Pravo tržišnog natjecanja, Članak 101 UFEU-a, Superliga, FIFA, UEFA*

