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EDITORIAL

Another *Bosman* moment? The decisions of the court of justice of the European Union on 21 december 2023 and the future of transnational sports governance

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1 Introduction to this Special Issue

On 21 December 2023, the Court of Justice of the European Union (CJEU) handed down its decisions in three key sports law cases: *European Superleague Co SL v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA)* (C-333/21, ECJ, Grand Chamber) (*Superleague*); *International Skating Union v European Commission* (C-124/21 P, ECJ, Grand Chamber) (*ISU*); and *UL and SA Royal Antwerp Football Club v Union Rroyale Belge des Sociétés de Football Association ASBL (URBSFA) and UEFA* (C-680/21, ECJ, Grand Chamber) (*Royal Antwerp*). These decisions, and the ways that they are interpreted and applied by the referring courts in Spain and Belgium, and in the wider sports ecosystem, have the potential to reshape the transnational governance of sport and the role of the CJEU as a constitutional watchdog within the *lex sportiva*. To mark the importance of these decisions, this Special Issue of the International Sports Law Journal (ISLJ) brings together a series of short expert commentaries and analyses of the importance and impact of the cases on both sport and the law. The articles represent an initial critique of the decisions and the start of an academic and practical conversation about their impact, which we expect to be played out in more detail in subsequent editions of the ISLJ and many other academic journals worldwide. Our thanks go out to all of our contributors, who produced their responses over the Christmas and New Year holiday season in Europe, and for their rapid engagement with our schedule. To avoid repetition, the history, facts, and basic findings of each of the decisions can be found in this editorial.

2 A brief overview of the 21 December cases

Although the three cases of 21 December 2023 have very different origins and challenge different aspects of the internal and international governance of sport, there is also a large degree of overlap in the reasoning of the CJEU to ensure a consistency of approach to future sports law litigation. In this section, a brief overview of each case is provided to ensure that the analyses that follow are appropriately contextualised.

2.1 The Superleague case

UEFA is the governing continental federation responsible for the promotion and organisation of football in Europe, with FIFA acting as the global governing federation. UEFA had adopted rules conferring upon itself the power to approve any new inter-club football competition in Europe and to exploit any media rights associated with authorised competitions. Both FIFA and UEFA are also major players in the market for the organisation of such competitions, through the FIFA Club World Cup and UEFA Champions League, from which they generate significant profits.

On 18 April 2021, the European Superleague Co (ESLC) announced its intention to launch a new cross-border international club football competition. The Superleague was comprised of 12 founding member clubs, plus three unnamed others who would be invited to join, all of which would have permanent membership of the new competition. [1] The permanent membership would be supplemented by five additional

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[1] The 12 founding permanent members were: Arsenal, Atlético Madrid, Barcelona, Chelsea, Internazionale, Juventus, Liverpool, Manchester City, Manchester United, AC Milan, Real Madrid and Tottenham Hotspur.

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clubs that would be invited according to criteria determined by the ESLC. Both FIFA and UEFA objected to the proposed Superleague and threatened to impose sanctions on any clubs and players who played in it, including in particular participation bans from both national and international competitions.

ESLC brought a pre-emptive action against both federations in the Madrid Commercial Court, claiming that their rules requiring prior approval of any new cross-border football competitions constituted an abuse of their dominant position in the European football market and were, therefore, contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU). ESLC also requested that the Madrid Court refer a series of questions to the European Court of Justice, which it did.

In its response to the preliminary reference, the CJEU reiterated that the organisation of international club football competitions and the exploitation of the associated media rights are economic activities that must comply with EU competition law and respect the freedom of movement of workers. The Court also accepted that it can be appropriate for international sports federations (ISFs) to have regulatory and gatekeeping powers, and that they can impose punishments for any breaches of their rules. However, where an ISF with a dominant or monopoly position has the power to determine the conditions of entry by commercial competitors into the market, the exercise of those powers must be subject to criteria that are transparent, objective, non-discriminatory and proportionate. As neither FIFA's nor UEFA's eligibility criteria met these conditions, they were deemed to be a restriction by object of Article 101 TFEU. However, the CJEU left the responsibility of determining whether the rules in question could be justified under the efficiency defence provided by Article 101(3) TFEU to the referring court in Madrid. Further, the arbitrary nature of the application of these rules and sanctions was also deemed to constitute a restriction on the freedom of workers, contrary to Article 45 TFEU as they prevented the players from participating in, and earning income from, an alternative tournament. Finally, it was held that as the rules relating to the exploitation of the media rights to international club football competitions had the potential to breach EU law, the case should be returned to the Madrid court to determine whether those rules complied with Article 101 TFEU.

2.2 The ISU case

The International Skating Union (ISU) is the global federation responsible for the promotion and organisation of ice skating. It also organises international skating competitions and exploits the associated media rights on a commercial basis. Its role in ice skating is analogous to that of FIFA in football. Operating in a similar way to UEFA's and FIFA's eligibility rules in *Superleague*, the ISU requires that the organisation of international ice skating competitions requires its prior approval before any new event can be considered to be an official competition. Any athletes, coaches or officials who take part in any unauthorised competitions can be banned for a maximum period of life from participating in all ISU sanctioned competitions, including the Olympic Games. Any disputes relating to the refusal of an application for authorisation, and any appeal against sanctions imposed for competing in unauthorised events, must be brought before the exclusive jurisdiction of the Swiss-based Court of Arbitration for Sport (CAS).

In 2015, a South Korean company, Ice Derby, proposed to run a new and highly lucrative out-of-season series of speed skating races in Dubai. The ISU refused to authorise the events and threatened to ban any skaters who competed in them. Two professional skaters who intended to compete in these events, Dutch speed skaters Mark Tuitert, a world and Olympic champion, and Niels Kerstholt, a world champion, submitted a complaint to the European Commission arguing that ISU's eligibility and sanctioning rules were incompatible with EU competition law.[2] In its Decision AT.40,208 *International Skating Union's Eligibility Rules*, the Commission found that the rules on the authorisation of competitions and the punishments imposed for athletes' participation in them are unlawful and contrary to Article 101(1) TFEU. First, they allow the ISU to prevent the organisation of events that operate in competition with its own commercial events. Secondly, they deny professional skaters the opportunity of earning money from competing in such events. Further, the ISU's rules requiring the skaters to submit their disputes to the jurisdiction of CAS deprives them of an effective means of judicial review as neither CAS, nor the Swiss Federal Tribunal (to which a limited route of appeal from CAS is possible), will review the compatibility of an ISF's rules with EU law.

The CJEU confirmed the decisions of the General Court and the Commission that the ISU's rules on the authorisation of competitions and the participation in them were unlawful and contrary to Article 101(1) TFEU because they were not sufficiently transparent, objective, non-discriminatory and proportionate. Further, upholding the original Decision of the Commission and overruling the judgment of the General Court on this point, the CJEU held that the rules conferring exclusive jurisdiction on such disputes on CAS reinforced the infringement identified in the main claim by making the judicial review of ISU decisions more difficult by excluding appellants from bringing their claim before the appropriate national court or competition authority.

[2] Antoine Duval, a co-author of this Editorial, was a co-drafter of this complaint with Dr. Ben Van Rompuy.

2.3 The Royal Antwerp case

The third of the cases involved UEFA again, together with the Belgian national football association, the URBSFA. UEFA requires that in all competitions that it organises,[3] each participating football club must have a minimum of eight 'home-grown players' in their first-team squads. Of these eight, at least four players in the squad must have spent at least three years at the participating club between the ages of 15–21 (club-trained), with the remainder, up to a maximum of four, having been trained at a club that is a member of the same national governing body (association-trained). None of these home-grown players are required to play in the games for which they have to be included in the match-day squad list. The URBSFA's version of the home-grown players rule requires that each club in the Belgian Pro League must include at least eight association-trained players in their first-team squads, of which at least six must be among the starting 11 or named as substitutes for a game. A professional player and a Belgian football club, Royal Antwerp, challenged the legality of these rules before the Belgian courts, which referred a series of questions to the Court of Justice relating to their compatibility with Articles 101 and 45 TFEU.

The CJEU made a series of clarifications for the referring court to apply at the trial. First, that the home-grown players rules appear to limit the ability of professional football clubs to choose freely the players that they wish to employ. Secondly, that these limitations are likely to have an impact on the competitions in which the clubs may engage. But that, thirdly, national governing bodies and ISFs may adopt rules that allow for the organisation of competitions, the proper functioning of those competitions, and the participation of players in them. The national governing bodies and ISFs can also regulate the conditions in which professional football clubs may pick the teams that are participating in inter-club competitions within their territorial jurisdiction. In doing this, these sporting bodies are provided with a degree of leeway because of the specific characteristics of professional football, and in particular its social, cultural and media importance, together with the fact that sport is based on openness and sporting merit. On the basis of these clarifications, the CJEU returned the case to the referring Belgian Court to determine whether the home-grown player rules had as their object, or have as their actual or potential effect, the distortion of competition and are, therefore, contrary to Article 101 TFEU.

In respect of Article 45 TFEU, the CJEU held that both sets of rules were, prima facie, restrictions of the freedom of movement for workers as they are indirectly discriminatory by requiring the preferment of players based in one Member State over those moving from another Member State. A legitimate object of having such rules could be to encourage the recruitment and training of young professional football players. However, it would be for the referring Court to determine whether the rules as currently defined were capable of, or were in fact, achieving such a legitimate objective.

[3] The Champions League, Europa League and Europa Conference League.

2.4 The papers and the authors

This Special Issue comprises 12 papers, each of which takes a different approach to its analysis of one or more of the three cases.

Prof Stephen Weatherill, the Emeritus Jacques Delors Professor of European Law at the University of Oxford and a prolific scholar on the interaction between sports and EU law, examines all three of the cases to determine their impact on the structure of EU sports law. He argues that although things have changed, the fundamentals of EU sports law, nurtured by the CJEU in case law that commenced in 1974 in *Walrave and Koch*, are untouched by the Court's latest three rulings.

Rusa Agafonova is a PhD Researcher at the University of Zurich. She identifies as the key underpinning problem of the *ISU* and *Superleague* cases that, whilst acting as regulators and gatekeepers of their sports, governing bodies tend to hinder the entrance of third-party organisers, and, by doing so, fall under competition law scrutiny. She discusses whether, after the efficiency-oriented, economic approach adopted by the CJEU in *ISU* and *Superleague*, governing bodies and ISFs will sustain the challenge of a new, efficiency-driven check on sports governance.

Carol Couse and Alice Powell, of Mills and Reeve Solicitors' Manchester office, focus specifically on the *Royal Antwerp* ruling. Their paper analyses the challenges still to be faced by the URBSFA and UEFA before the Belgian courts in relation to free movement, and the potential impact that this could have for the future of their 'home-grown player' rules and the implications that this will have for the wider football transfer system.

Dr Borja García is a Reader in Sport Policy and Governance at Loughborough University's School of Sport, Exercise and Health Sciences. He explains how the CJEU manages to endorse some of the characteristics of the European Model of Sport without explicitly referring to it. He argues that, when taken together, the three judgments assert the primacy of EU law over politics in European sport regulation, whilst also reinforcing and strengthening the supervised nature of sport autonomy in the European Union. Further, the judgments can be interpreted as a warning to the Commission, Parliament, and Council of the limits of Article 165 TFEU in the development of a European sport policy.

Prof Johan Lindholm, one of our former Editors in Chief, is based at Umeå University's Department of Law. He examines how the *Superleague* and *ISU* cases enhance both substantive and procedural good governance, before exploring who benefits, and more importantly who does not benefit, from these good governance requirements. While there is some ambiguity in the judgments regarding the scope of the good governance requirements, he argues that they both can and ought to be applied broadly to all who enjoy rights under EU law.

Dr Aurélie Villanueva is an Assistant Professor in the Faculty of Law at the University of Groningen. Aurélie begins by analysing how the CJEU adopted a strict reading of Article 165 TFEU that does not shield the sport sector from the application of EU law. She explains that, nevertheless, the CJEU guides and encourages the referring Courts to pay careful attention to the specific content of the rules and the context in which they are implemented. In her view, this approach follows the traditional assessment of a contested measure and its context under EU substantive law while devoting attention to the specific characteristics of the sport sector in its substantive analysis.

Prof Richard Parrish is Professor of Sports Law at Edge Hill University's Department of Law, Criminology & Policing; Luka Živić is Counsellor for Education, Youth and Sport at the Permanent Representation of Slovenia to the EU. Their paper considers the implications of *Royal Antwerp* on the use of home-grown player rules in European football, the effect on international sports governance more widely, and how the judgment has altered the course of EU sports law and policy.

Dr Tsjalle van der Burg is Assistant Professor in Sports Economics at the University of Twente. He proposes that, in the light of the *Superleague* case, UEFA should adopt three new eligibility criteria for the approval of competitions: that the new competition improve overall welfare; that eligibility decisions reflect the preferences of the consumers (football fans); and that they are compatible with competition law. He concludes that if UEFA improves its own competitions in line with these criteria, it should be able to outcompete the organisers of any proposed alternative competitions.

Dr Leanne O'Leary is a Reader in Law at the Department of Law, Criminology & Policing at Edge Hill University. She analyses the interaction between EU competition law, free movement, and collective labour relations generally. She highlights the potential effects of the CJEU decisions for employment relations and the broader trade union movement in sport.

Dr Antoine Duval is the Senior Researcher at the Asser International Sports Law Centre and the Guest Editor of the Special Issue. In his article, he draws on his experiences as one of the co-drafters of the original complaint in the *ISU* case to explore the impact of the CJEU's comments on the role of CAS, and the Swiss Federal Tribunal, in the determination of cases that have at their heart issues of EU competition law.

Prof Miguel Maduro is Dean and Chair in Digital Governance at the Católica Global School of Law and School of Transnational Governance, European University Institute, and an expert on the intersection between EU competition law and the governance of sport. His paper reflects on whether the impact of *Superleague* will improve the transnational governance of football and whether the CJEU has left open two intriguing possibilities: that alternatives to UEFA's current competitions will now have to be licensed if they meet the threshold criteria, and that UEFA could choose to divest itself of its ability to organise events and focus on being a regulator of the game.

Dr Jan Zglinski is Assistant Professor of Law at the London School of Economics' Law School. He argues that the new legal framework identifiable in the three cases paves the way for a more active use of competition law to regulate sport. Although this is likely to have some positive effects on the quality of sports governance, it also carries the risk of exposing the field to an ill-fitting set of rules that follow a predominantly economic and de-regulatory rationale, which he sees as a poor substitute for sports regulation through legislative means.

3 Final thoughts

The impact and importance of these cases cannot be overstated. They are likely to set the scene for the CJEU's approach to sport for many years to come and, more importantly in practice, to become the go-to references for national courts grappling with EU law challenges against ISFs and SGBs. With further sports law cases due before the CJEU in the coming months, plus the application of the referring courts of the legal principles outlined by the Grand Chamber, this Special Issue marks the start of a new round of discussions on the future of the transnational governance of international sport. As the cases conclude and the decisions are handed down, we will welcome more detailed analyses of the decisions of 21 December 2023.