UCLA
UCLA Law & Economics Series

Title
The Emerging Battle for Control of Global Football

Permalink
https://escholarship.org/uc/item/2gq7p34c

Journal
California Western International Law Journal, 52

Author
Bank, Steven A.

Publication Date
2022

eScholarship.org Powered by the California Digital Library
University of California

UCLA School of Law

Public Law & Legal Theory Research Paper No. 22-10

The Emerging Battle for Control of Global Football

By

Steven A. Bank

Paul Hastings Professor of Business Law

Forthcoming in California Western International Law Journal (2022)

Electronic copy available at: https://ssrn.com/abstract=4038568

The Emerging Battle for Control of Global Football

Steven A. Bank*

Recently, conflicts between football clubs and the organizations that govern them have intensified. Because of concerns about control over profits and players, a group of high-profile clubs threatened to break away from the Union of European Football Association's ("UEFA") Champions League to form a closed European Super League, several foreign clubs and their leagues sought to play league matches in the U.S. over the objection of U.S. Soccer and the International Federation of Football Associations ("FIFA"), and clubs in the English Premier League and Spain's La Liga refused to release their players for World Cup qualifying matches.

While concerning, this tension between clubs and their governing bodies is not a new phenomenon. What potentially makes this quasi-rebellion different from past ones is the changing legal environment. The battle is not between good and evil or between community-minded and greedy; rather, it's a battle for control of global football. Even with sports' special status under European law, the power of sports governing bodies is not unlimited and courts have recently acknowledged that governing bodies' dual role as regulators and commercial participants in a trillion dollar industry can make their attempts to restrict competitors suspect. If football's governing bodies fail to take seriously this legal reality, they may be heading for a reckoning.

Unlike most American sports, where professional leagues are largely autonomous, soccer, or football as it is called around the world,[1] is nothing if not hierarchical. Domestic football leagues are typically governed by a country's football association, which is a member of its regional confederation, and both are subject to the oversight of the sport's international governing body – the Fédération Internationale de Football Association (FIFA), located in Switzerland.[2]

* Paul Hastings Professor of Business Law, UCLA School of Law.

[1] This article will use the term "football," rather than "soccer," both because this is written for an international law symposium that is likely to have an audience that is more internationally than domestically focused and because the main locus of the dispute between clubs and governing bodies that is the subject of the article is in Europe and elsewhere outside the U.S., even though some of the disputes are being heard in U.S. courts.

[2] Floris de Witte & Jan Zglinski, *The Idea of Europe in Football*, LSE LAW, SOCIETY, AND ECONOMY WORKING PAPERS 17/2021, at 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3973962; ALAN TOMLINSON, FIFA (FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION): THE MEN, THE MYTHS, AND THE MONEY 27, 29 (2014).

Electronic copy available at: https://ssrn.com/abstract=4038568

Even the rules of the game are primarily determined by an international body – the International Football Association Board – rather than by the individual leagues.[3]

This global governance structure has a variety of purposes within the club system. Early on, FIFA allowed for the creation of a common set of rules and principles that enabled teams from different leagues and different countries to play against each other in national and international tournaments.[4] At the national level, ceding power to a governing body with the authority to organize leagues into a pyramid within a country facilitated a promotion and relegation system for teams to move up or down the league in order to create a true domestic champion.[5] That in turn enabled the regional and global bodies to create their own competitions designed to crown the best of the best, all of which had the effect of increasing the profiles and profitability of the clubs and their leagues.[6]

[3] Tomlinson, supra note xx, at 30-32. In most cases, FIFA mandates as a condition of membership that the national association use the IFAB Laws of the Game. *See, e.g.*, BYLAWS OF THE UNITED STATES SOCCER FEDERATION, INC., Bylaw 104 (as revised and amended, effective Dec. 1, 2021) ("The "Laws of the Game" as issued by the International Football Association Board apply to soccer games.") By contrast, in American-style football, the Canadian Football League has a larger field, more players, and fewer downs than the National Football League, *see* Mark Perry, *CFL v. NFL Rules: What are the Differences?* CFL NEWS HUB, May 21, 2021, https://cflnewshub.com/cfl-news/cfl-vs-nfl-rules-what-are-the-differences/. These rule differences occur even in sports that also play in international competitions under common rules. For example, the National Basketball Association's rules differ in a number of material respects from the Federation of International Basketball Association's (FIBA) rules used in European contests and the Olympics, including the length of the game, the dimensions of the court, the location of the three point line, the size of the restricted area (or "key"), and rules regarding goaltending and zone defense. Cody Taylor, *Tokyo Olympics: The Biggest Rule Differences between FIBA and NBA*, ROOKIE WIRE, USA TODAY SPORTS, July 14, 2021, https://therookiewire.usatoday.com/lists/tokyo-olympics-nba-fiba-rule-differences/.

[4] DAVID CONN, THE FALL OF THE HOUSE OF FIFA: THE MULTI-MILLION DOLLAR CORRUPTION AT THE HEART OF GLOBAL SOCCER (2017) ("the founding principle of football's international federation was more grounded [than the International Olympics Committee]: to play the game and organise competition between countries.").

[5] Steven A. Bank, *Will U.S. Soccer be Forced to Adopt Promotion and Relegation?* 28 J. LEG. ASPECTS OF SPORT 3, 3 (2018).

[6] Mark White, *How the Champions League Copied the World Cup – Before Rivalling it as the Most Prestigious Tournament in Football*, FOURFOURTWO, Aug. 26, 2021, https://www.fourfourtwo.com/features/champions-league-draw-2021-world-cup-best-tournament-world-football.

Electronic copy available at: https://ssrn.com/abstract=4038568

FIFA's most important role may be in mediating between clubs and national teams to facilitate the staging of international tournaments among countries.[7] Most prominent of these international tournaments is the World Cup, football's biggest competition and what even the most curmudgeonly of American sportswriters concede is one of the greatest spectacles in modern sports.[8] By virtue of its governance of the club game, FIFA requires that clubs release their players for national team duty.[9] In the absence of this requirement, clubs might sensibly refuse such requests on the grounds that it would disrupt their seasons or endanger their players. In other sports, most notably hockey and baseball, American professional sports leagues often deny players the ability to participate in international competitions.[10] Moreover, as the organizer of the World Cup, FIFA has an incentive to encourage broad participation among countries, which it has done by funding initiatives to spread the sport to more countries and to aid those countries lacking infrastructure and other resources.[11] FIFA has not done this without being criticized over corruption and misconduct in its organization or the recipient nation,[12] but there's little denying

[7] *See* FIFA Statutes Art. 2(b) 12 (May 2021) (identifying as one of FIFA's objectives "to organize its own international competitions.").
[8] Norman Chad, *A Primer on Earth's Greatest Sporting Spectacle, the World Cup*, WASH. POST, June 8, 2014, https://www.washingtonpost.com/sports/a-primer-on-earths-greatest-sporting-spectacle-the-world-cup/2014/06/08/ecb6cd12-ef25-11e3-bf76-447a5df6411f_story.html.
[9] FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS (May 2021), Annexe 1, Section 1.1 ("Clubs are obliged to release their registered players to the representative teams of the country for which the player is eligible to play on the basis of his nationality if they are called up by the association concerned"), https://digitalhub.fifa.com/m/196c746445c58051/original/Regulations-on-the-Status-and-Transfer-of-Players-August-2021.pdf.
[10] *See, e.g.*, Ben Shpigel, *N.H.L. Says its Players Will Not Participate in 2018 Winter Olympics*, N.Y. TIMES, April 3, 2017, https://www.nytimes.com/2017/04/03/sports/hockey/nhl-2018-olympics-pyeongchang.html (hockey); Chris Cwik, *Don't Expect to See Players Like Mike Trout or Bryce Harper Play for Team USA at Tokyo Olympics*, YAHOO SPORTS, Feb. 28, 2020, https://www.yahoo.com/now/dont-expect-to-see-players-like-mike-trout-or-bryce-harper-play-for-team-usa-at-the-tokyo-olympics-012639144.html (baseball).
[11] *See, e,g.*, *The Impact of the FIFA Forward Programme on Uruguayan Football*, SOCCEREX, March 30, 2021, https://www.soccerex.com/insight/articles/2021/the-impact-of-the-fifa-forward-programme-on-uruguayan-football.
[12] *See, e.g.*, Michael Sheetz, *Here's Who is Getting Rich off the World Cup*, CNBC, June 14, 2018, https://www.cnbc.com/2018/06/14/the-business-of-the-world-cup--who-makes-money-and-how-much.html; Oluwashina Okeleji, *Africa Lags in FIFA Development Funding*, BBC SPORT, Dec. 1, 2018, https://www.bbc.com/sport/football/46407393.

Electronic copy available at: https://ssrn.com/abstract=4038568

that the sport has become the "World's Game," and that is in no small part to FIFA's mission to spread the game globally.[13]

Despite the advantages of global football's tight hierarchical structure, a battle has been brewing between clubs and their governing bodies on at least three fronts: (1) The authority of confederations over regional competitions, as seen most recently by the attempt by a number of well-known European clubs to create a new European Super League that would operate alongside or instead of the Union for European Football Association's (UEFA) Champions League;[14] (2) The authority of national football associations over competitions in their country, which has been challenged recently by several clubs and their match promoter, Relevent Sports, seeking to stage a foreign league match in the U.S. notwithstanding a refusal to sanction by the game by FIFA and the United States Soccer Federation ("USSF");[15] and (3) Mandatory releases of players for international competitions, which clubs have long resisted, but has come to a head most recently because of pandemic-related quarantines and extended game windows that would increase the length of time they would be gone.[16]

While concerning, these tensions are not new. In the 1980s and 1990s, for similar reasons, a group of elite European football clubs threatened to break away from UEFA's European

[13] *See* BILL MURRAY, THE WORLD'S GAME: A HISTORY OF SOCCER xiii (1998) (describing the granting of the 1994 World Cup to the United States as part of FIFA's "missionary expedition to spread sporting light into soccer's darkest corner of the globe.").

[14] Ed Aarons & Sean Ingle, *European Super League: Premier League "Big Six" Sign Up to Competition*, THE GUARDIAN, April 18, 2021, https://www.theguardian.com/football/2021/apr/18/five-english-clubs-sign-up-to-european-super-league-report-says.

[15] *Soccer Promoter Asks Judge to Revive FIFA Antitrust Suit*, COMPETITION POLICY INTERNATIONAL, August 29, 2021, https://www.competitionpolicyinternational.com/soccer-promoter-asks-judge-to-revive-fifa-antitrust-suit/.

[16] *See, e.g.*, Rohith Nair, *Soccer-World Leagues Unwilling to Release Players for Cup of Nations Until Jan. 3*, REUTERS, Dec. 23, 2021, https://www.reuters.com/article/soccer-nations-idCAKBN2J21RL; Andrew Das & Tariq Panja, *Premier League Won't Release Some Players for September World Cup Qualifiers*, N.Y. TIMES, Aug. 24, 2021, https://www.nytimes.com/2021/08/24/sports/soccer/premier-league-world-cup-qualifiers-coronavirus.html;

Electronic copy available at: https://ssrn.com/abstract=4038568

championship, which led to the creation and subsequent expansion of the Champions League,[17] a group of English clubs were dissatisfied with the English Football League's operation of the first division, which led to the creation of the Premier League,[18] and clubs long complained to FIFA about injuries suffered to its players while away on national team duty,[19] including filing lawsuits over compensation,[20] which ultimately led FIFA to provide its own insurance in 2012.[21] Although these tensions were resolved without a fundamental restructuring of the global governance system, they were done so without meaningful judicial intervention and in some respects without truly addressing the fundamental concerns of clubs.

This Article argues that part of what has allowed these familiar old tensions to resurface is the changing legal environment. In several recent cases – some in the U.S., some in Europe, some relating to football, others relating to different sports – courts have begun to address potential limits on the authority of governing bodies. This is part of a process that started, at least in football, over 25 years ago. In the famous *Bosman* case,[22] the European Court of Justice recognized that there were certain fundamental rights, such as the freedom of movement and of association, that could

---

[17] Arne Neimann & Alexander Brand, *The UEFA Champions League: A Political Myth?* 21 SOCCER & SOC'Y 329 (2020), https://www.tandfonline.com/doi/epub/10.1080/14660970.2019.1653859?needAccess=true.

[18] Andrew Murray, *How the Premier League Breakaway Happened: The First Season of 1992/93, as Told by its Heroes*, FOURFOURTWO, April 19, 2021, https://www.fourfourtwo.com/us/features/199293-premier-league-first-season-sky-sports-man-utd-champions.

[19] Associated Press, *Why Should Football Clubs the Price for Players' International Injuries?* THE NATIONAL NEWS, March 29, 2011, https://www.thenationalnews.com/sport/why-should-football-clubs-pay-the-price-for-players-international-injuries-1.459790; Jonathan Rest, *Who Pays When a Soccer Player is Hurt?*, WALL ST. J., May 13, 2010, https://www.wsj.com/articles/SB10001424052748704500104574650480019898974.

[20] Christopher Clarey, *In the Arena, Soccer's Titans Take Old Battle to Court*, N.Y. TIMES, March 24, 2006, https://www.nytimes.com/2006/03/24/sports/in-the-arena-soccers-titans-take-old-battle-to-court.html.

[21] *FIFA to Address Insurance of Injured Internationals*, BBC SPORT, March 31, 2012, https://www.bbc.com/sport/football/17572896; *European Clubs Want FIFA to Insure Players Injured in International Games*, CLAIMS JOURNAL, Sept, 10, 2010, https://www.claimsjournal.com/news/international/2010/09/10/113145.htm; *UEFA and FIFA Will Pay Clubs Player Compensation*, N.Y. TIMES, Jan. 21, 2008, https://www.nytimes.com/2008/01/21/sports/21iht-soccermoney21.9381516.html.

[22] Union Royale Belge des Sociétés de Football Association ASBL v. Bosman, 1995 E.C.R. I-4921, [1996] 1 C.M.L.R. 645 (1996).

Electronic copy available at: https://ssrn.com/abstract=4038568

not be abrogated notwithstanding the special nature of sport under the European Union treaty.[23] The Court therefore held that European footballers were free to move to a new club at the end of the contracts with their former club.[24] In recent decisions, however, the courts have more directly invoked concerns about competition law, or antitrust law as it is known in America, which strikes at the heart of sport's "special" status in both Europe and America and to what extent its governing bodies can exercise control over their sports.

This does not mean that a shift in the balance of power from governing bodies to clubs or other competitors is imminent. To the extent these disputes are being litigated, some of the cases are still pending or going through the appeals process and some of the decisions that have been issued thus far are procedural or narrow rather than sweeping in their effect. Nevertheless, as football becomes increasingly global and commercial, the line of argument that treats them like business enterprises in the eyes of the law, with all the protections and obligations that entails, becomes hard to ignore. Moreover, these disputes come at a delicate time in the relationship between clubs and FIFA, with clubs already upset that FIFA president Gianni Infantino's somewhat quixotic, if not persistent, quest for a biennial World Cup could come at the expense of player safety, league seasons, and regional competitions.[25]

This Article starts in Part I by explaining how the current sources of tension over the Super League, over the ability of a local football association to restrict play by clubs from another jurisdiction, and over mandatory releases of players for national team duty reflect the bubbling up of the unresolved aspects of the historic tensions between clubs and their governing bodies. In

[23] Id. at I-5071-72.
[24] Id. at I-5070 (par. 100).
[25] Simon Evans, *Clubs Say FIFA's Biennial World Cup Plan Would Have "Destructive Impact,"* REUTERS, Sept. 24, 2021, https://www.ctvnews.ca/sports/clubs-say-fifa-s-biennial-world-cup-plan-would-have-destructive-impact-1.5599054.

Electronic copy available at: https://ssrn.com/abstract=4038568

Part II, the Article proceeds to describe the recent legal cases that have suggested growing limits on European sports governing bodies in a variety of related contexts. Part III explains how this changing legal environment could affect the outcomes of these disputes and why football's governing bodies need to take these developments seriously. The Article concludes by placing these disputes in the broader context of a battle for the control of global football.

I. Current Conflicts Between Clubs and Governing Bodies

A. European Super League

The biggest clubs in Europe have long threatened to depart from existing European tournaments or their domestic leagues to form their own competitive circuits, often using those threats as leverage to get what they wanted. In the early 1990s, top clubs threatened to depart from UEFA's European Cup, which AC Milan president Silvio Berlusconi called "a historical anachronism."[26] According to Berlusconi, who was the former prime minister of Italy, "It is economic nonsense that a club such as Milan might be eliminated in the first round. It is not modern thinking."[27] UEFA "eventually succumbed" by replacing the European Cup with a new competition in 1992 – the Champions League – which offered the top clubs larger shares of the revenues and a structure that ensured it would be easier for them to qualify and advance.[28] Around the same time, top English clubs threatened leave the top division of English football because of a

[26] Mark Doldge, *An "Infallible" FIFA Prevails in Power Struggle over World Cup Move*, THE CONVERSATION, March 25, 2015, https://theconversation.com/an-infallible-fifa-prevails-in-power-struggle-over-world-cup-move-38117.
[27] Id.
[28] Id.

Electronic copy available at: https://ssrn.com/abstract=4038568

dispute over the allocation of television revenues.[29] Eventually, the English Football Association effectively "let go of the reins" and "ceded control of the direction of English football" by permitting the top clubs to create the Premier League in 1992.[30] As with UEFA's Champions League, the new structure allowed the top clubs to retain more of the income rather than watching most of it trickle down to the lower clubs in the football pyramid.[31]

Perhaps emboldened by their previous success in the 1990s, there was another round of threats to depart Europe in 2011. The UK's *Guardian* reported that European clubs planned to "break away from Fifa and Uefa and create their own super league unless the world governing body urgently addresses their growing concerns over international fixtures and finances."[32] By departing from UEFA's Champions League, the 197 member European Clubs Association, led by a group of nine of the largest clubs – Real Madrid, AC Milan, Liverpool, Inter Milan, Manchester United, FC Barcelona, Arsenal, Chelsea, and Bayern Munich – sought to "seize control of their own affairs from the regulators."[33] Although this breakaway ultimately did not occur, the concerns about football's "unfulfilled [financial] potential" lingered.[34] As one commentator observed, "when you have every club losing money every year and the only winners [are] the players and Fifa, how can that be allowed to go on."[35] This set the stage for other short-lived attempts at a European super league over the next decade.[36]

---

[29] Paul MacInnes, *Deceit, Determination, and Murdoch's Millions: How Premier League was Born*, THE GUARDIAN, July 23, 2017, https://www.theguardian.com/football/2017/jul/23/deceit-determination-murdochs-millions-how-premier-league-was-born.

[30] Id.

[31]

[32] Matt Scott, *Top European Clubs Threaten to Break Away from Fifa and Uefa*, THE GUARDIAN, July 27, 2011, https://www.theguardian.com/football/2011/jul/27/european-clubs-breakaway-fifa-uefa.

[33] Id.

[34] Id.

[35] Id.

[36] *See, generally* KATARINA PIJETLOVIC, EU SPORTS LAW AND BREAKAWAY LEAGUES IN FOOTBALL 53-73 (2015) (describing various threats to form breakaway leagues); *Stillitano: European Super League Would Make Top Clubs Richer*,

Electronic copy available at: https://ssrn.com/abstract=4038568

In April 2021, twelve European clubs announced that they had agreed to establish a mid-week European Super League as an alternative to the current Champions League.[37] Much like in 2011, the group cited the "instability in the existing European football economic model" as a reason for the move.[38] The clubs emphasized the need for "improving the quality and intensity of existing European competitions," but appeared to focus on the need for a "sustainable commercial approach."[39]

What distinguished the 2021 Super League proposal from the 2011 version is that it was forwarded by a small group of clubs, rather than the entire European Clubs Association, and it adopted a primarily closed-league structure. As proposed, the founding clubs would automatically qualify for the tournament, with a smaller number of spots reserved for other clubs to qualify based on the prior year's results.[40] This approach would be a hybrid between the North American "Closed League" sports model for the founding clubs and the European "Open League" sports model for the other clubs.[41]

The Super League proposal was "met with widespread criticism and resistance from former players, politicians, governing bodies, pundits, and fans."[42]. What attracted the most ire was that the founding clubs would receive automatic spots and there would only be five slots reserved for clubs that qualified through open competition. This was viewed as an assault of the fundamental

---

SPORTS ILLUSTRATED, March 3, 2016, https://www.si.com/soccer/2016/03/03/champions-league-super-europe-icc-stillitano (describing meetings between Relevent Sports and top Premier League clubs about guaranteed spots in a revamped Champions League).

[37] *The Super League Announcement*, N.Y. TIMES, April 19, 2021, https://www.nytimes.com/interactive/2021/04/19/sports/soccer/super-league-announcement.html.

[38] Id.

[39] Id.

[40] Id.

[41] For a description of the two models, *see* James A.R. Nafziger, *European and North American Models of Sports Organization* in HANDBOOK ON INTERNATIONAL SPORTS LAW 88-111 (James A.R. Nafziger & Stephen F. Ross, eds., 2011).

[42] Sam Shead, *"Disgusted": Plans for a Breakaway European Super League Met With Widespread Fury*," CNBC, April 19, 2021, https://www.cnbc.com/2021/04/19/european-super-league-met-with-widespread-fury.html.

Electronic copy available at: https://ssrn.com/abstract=4038568

notion of European football,[43] leaving people "furious."[44] As one fan remarked, "the idea that everybody has to fight for five places that rotate each year and these 15 clubs are always involved is crazy . . . Kills the whole idea and spirit of competition."[45] Football pundit and former English national team player Gary Lineker called it the "anti-football pyramid scheme,"[46] while UEFA argued that "football is based on open competitions and sporting merit; it cannot be any other way."[47]

Both governments and sports governing bodies promised to fight the Super League proposal. British Prime Minister Boris Johnson declared that "we are examining every option from governance reform to competition law" to defeat the proposal.[48] UEFA, whose Champions League competition would be threatened by the Super League proposal, issued a joint statement with the national football governing bodies of England, Spain, and Italy, as well as the top leagues in each country, warning that "we will consider all measures available to us, at all levels, both judicial and sporting, in order to prevent this happening."[49] The football governing bodies even went so far as to warn that "[t]he clubs concerned will be banned from playing in any other competition at domestic, European or world level, and their players could be denied the opportunity to represent their national teams."[50] FIFA President Gianni Infantino issued his own

---

[43] Floris de Witte & Jan Zglinski, *The Idea of Europe in Football*, LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS 17, 2021, at 3-4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3973962.
[44] Id. at 5.
[45] Shead, supra.
[46] Id.
[47] Id.
[48] Mike Decourcy, *How the European Super League Unraveled in 48 Hours: What it Means for Soccer, Fans, and Teams*, SPORTING NEWS, April 21, 2021, https://www.sportingnews.com/us/soccer/news/how-the-european-super-league-unraveled-what-it-means/ry7xzfz3vvqw1bqfdpdel76i7.
[49] *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*, April 18, 2021, https://www.uefa.com/insideuefa/mediaservices/mediareleases/news/0268-12121411400e-7897186e699a-1000--joint-statement-on-super-league/.
[50] *See* Dwayne Bach, *The Super League and its Related Issues under EU Competition Law*, KLUWER COMPETITION LAW BLOG, April 22, 2021, http://competitionlawblog.kluwercompetitionlaw.com/2021/04/22/the-super-league-and-its-

Electronic copy available at: https://ssrn.com/abstract=4038568

warning, stating that the Super League clubs could not be "half in and half out."[51] This was perceived to be "a warning, mostly implied, that if clubs launched the Super League without a sanction that was not forthcoming, players for those teams might be ineligible for international competition that culminates at the World Cup."[52] According to Infantino, "If some elect to go their own way, they must live with the consequences of their choice," Infantino said. "This has to be absolutely clear."[53]

The Super League proposal was suspended within days amidst the public outroar.[54] All six of the Premier League clubs publicly renounced their participation in it under a Club Commitment Declaration they executed with UEFA.[55] Under the Declaration, the clubs agreed to collectively pay €15 million to a fund for youth and grassroots football in Europe and forfeit the equivalent of one percent of a season's revenues from participating in European competitions.[56] If they reneged on the deal and joined an unauthorized competition in the future, they would be subject to a €100 million fine and if they breached any part of the Declaration, which included a commitment to abide by UEFA rules, they would be subject to a €50 million fine.[57]

---

related-issues-under-eu-competition-law/ (This quoted passage came from the original text of the joint statement, but was apparently removed from the online version at some point later).

[51] Decourcy, supra.

[5252] Id.

[53] Id. (quoting Infantino).

[54] Jonathan Johnson & Roger Gonzalez, *European Super League: All Six Premier League Clubs Exit as Competition Suspends Plans*, CBS SPORTS, April 21, 2021, https://www.cbssports.com/soccer/news/european-super-league-all-six-premier-league-clubs-exit-as-competition-suspends-plans/live/.

[55] Paul MacInnes, *Nine of European Super League Rebel Clubs Commit to Uefa Competitions*, THE GUARDIAN, May 7, 2021, https://www.theguardian.com/football/2021/may/07/nine-of-european-super-league-rebel-clubs-commit-to-uefa-competitions.

[56] Id.

[57] Id.

Electronic copy available at: https://ssrn.com/abstract=4038568

The three non-English clubs – Real Madrid, Barcelona, and Juventus – refused to enter into the Club Commitment Declaration, calling the pressure to end the project by UEFA "intolerable."[58] Instead, they went to court and were granted a temporary injunction in April by the Madrid Commercial Court, blocking any retaliation by FIFA or UEFA against the clubs or participants in the Super League proposal.[59] They had argued that the governing bodies were in violation of Article 102 of the EU Treaty by abusing their dominant position when they prohibited clubs from participating in an event that would compete with UEFA's own event.[60] Later that summer, the court also granted a preliminary injunction against disciplinary proceedings started against the three non-English clubs that refused to renounce the proposal and against actions to dissolve the European Super League or to punish the English clubs for signing the original commitment to the new league.[61] Opponents of the Super League scoffed at the decision, which they claim was the product of the judicial bias or the *ex parte* procedure used in deciding the motion,[62] but the

[58] Reuters, *Juventus, Real Madrid, Barcelona Slam UEFA "Threats" over Super League Exit*, ESPN, May 8, 2021, https://www.espn.com/soccer/uefa-champions-league/story/4379721/juventusreal-madridbarcelona-slam-uefa-threats-over-super-league-exit.

[59] Christina Unkel, *What is the Legal Status of the Failed European Super League and Could Europe's Big Teams Break Away Again?* CBS SPORTS, April 26, 2021, https://www.cbssports.com/soccer/news/what-is-the-legal-status-of-the-failed-european-super-league-and-could-europes-big-teams-break-away-again/.

[60] European Super League Company SL v. FIFA & UEFA, Madrid Commercial Court No. 17 (May 11, 2021) (translation on file with author).

[61] Florian Mueller, *Madrid Commercial Court Injunction against UEFA over Disciplinary Proceedings against Super League Clubs and the Club Commitment Declaration* (July 1, 2021), https://www.linkedin.com/pulse/madrid-commercial-court-injunction-against-uefa-over-super-mueller/.

[62] Reuters, *Tebas Dismisses Court Ruling Asking UEFA to Revoke Action against Super League Trio*, AS.com, July 31, 2021, https://en.as.com/en/2021/07/31/soccer/1627760636_480114.html; *Bavarian Legal Works: The Super League Strikes Back?* BAVARIAN FOOTBALL WORKS, Aug. 4, 2021, https://www.bavarianfootballworks.com/2021/8/4/22604764/bavarian-legal-works-the-super-league-uefa-bayern-munich-real-madrid-juventus-barcelona-psg-fifa. UEFA tried to get the judge recused from the case on account of bias, but their efforts were rebuffed by the court, which instead required UEFA to pay costs and a fine. Alex Kirkland and Rodrigo Faez, *European Super League: Madrid Court Rejects UEFA Appeal over Judg*e, ESPN, Jan. 27, 2022, https://www.espn.com/soccer/uefa-champions-league/story/4579929/european-super-league-madrid-court-rejects-uefa-appeal-over-judge.

Electronic copy available at: https://ssrn.com/abstract=4038568

underlying case is still pending after the Madrid court referred it to the European Commission for a ruling as to whether FIFA and UEFA's actions are consistent with competition law.[63]

B. Relevent Sports v. U.S. Soccer and FIFA

Relevent Sports, a promoter of international football matches, has for many years organized international friendly matches and tournaments in the U.S. between well-known European teams during the summer prior to the start of their league seasons. In 2018, in partnership with Spain's La Liga, which sought to grow its brand in America,[64] Relevent proposed to organize in Miami, Florida an official league match between two clubs in Spain's La Liga – Barcelona and Girona.[65]

Under FIFA rules, the national federation has sanctioning authority for all games played in its territory. Thus, Relevent and La Liga applied to the U.S. Soccer Federation for approval to organize the match in the U.S. Unsure whether an official league match would be permissible, U.S. Soccer, along with Spain's football federation, the Real Federación Española de Fútbol ("RFEF") and CONCACAF, requested guidance from the FIFA Council about the propriety of such a match. Upon consideration and after consulting with the FIFA Stakeholder Committee, the FIFA Council "emphasized the sporting principle that official league matches must be played

[63] Dennis Cukurov et al., *Sports Meets Antitrust: Does the European Sport Model Preclude Super League Ambitions?* JDSUPRA, Dec. 10, 2021, https://www.jdsupra.com/legalnews/sport-meets-antitrust-does-the-european-3673507/.

[64] Brian Straus, *La Liga's North American Project and its Hurdles in Cracking the U.S. Market*, SPORTS ILLUSTRATED, July 2, 2020, https://www.si.com/soccer/2020/07/02/la-liga-north-america-usa-market-tv-deal-barcelona-real-madrid-icc.

[65] *Girona v Barcelona 90% Likely to be Played in Miami, Says La Liga President*, THE GUARDIAN, Sept. 7, 2018, https://www.theguardian.com/football/2018/sep/07/girona-v-barcelona-miami-likely-la-liga-javier-tebas-manchester-city.

Electronic copy available at: https://ssrn.com/abstract=4038568

within the territory of the respective member association."[66] Ultimately, the matter became moot because they failed to secure sanctioning in time for the match to be moved to the U.S. Relevent tried again with two Ecuadorian teams, this time with the blessing of their national association, but U.S. Soccer denied their request for sanctioning.

Both La Liga and Relevent brought lawsuits against the respective sports governing bodies, with La Liga suing RFEF in 2018 and Relevent suing FIFA and U.S. Soccer in 2019.[67] In the Spanish case brought before the provincial court in Madrid, the lower court ruled against La Liga and the appellate court affirmed in December 2021.[68] The lower court reportedly had maintained that holding a match in another country had to be "carried out in coordination" with RFEF, as required by the decisions in other disputes between La Liga and RFEF.[69] Although RFEF does not consider this a "definitive ruling on the issue of playing games abroad," with the possibility of appealing the case to the Spanish Supreme Court,[70] the likelihood of success appears slim.[71]

Relevent Sports met with a similar result in its case in the U.S. courts. Relevent claimed that FIFA and its national associations like U.S. Soccer were in an unlawful vertical agreement to divide the market among leagues and teams through the adoption of the FIFA policy and the

[66] FIFA, *FIFA Council Makes Key Decisions for Future of Football Development* (Oct. 26, 2018), https://www.fifa.com/tournaments/mens/futsalworldcup/lithuania2021/media-releases/fifa-council-makes-key-decisions-for-the-future-of-football-development.
[67] Straus, supra note xx.
[68] *Madrid Court Backs Federation in Ban of League Match in U.S.*, MARCA, Dec. 2, 2021, https://www.marca.com/en/football/spanish-football/2021/12/02/61a8eb7f22601d90218b45c4.html.
[69] Paul Nicholson, *La Liga Loses Court Appeal Over Staging League Match in US, but Vows to Fight On*, INSIDE WORLD FOOTBALL, March 6, 2020, https://www.insideworldfootball.com/2020/03/06/laliga-loses-court-appeal-staging-league-match-us-match-vows-fight/.
[70] Adriana Garcia, *La Liga Plan for Miami Regular-Season Match Suffers New Setback in Madrid Court*, ESPN, Dec. 2, 2021, https://www.espn.com/soccer/spanish-laliga/story/4537067/laliga-plan-for-miami-regular-season-match-suffers-new-setback-in-madrid-court.
[71] Jamie Kemble, *Spanish Court Rules Against La Liga Staging Games Outside Spain Amid Miami Plans*, FOOTBALL-ESPANA, Dec. 2. 2021, https://www.football-espana.net/2021/12/02/spanish-court-la-liga-miami.

Electronic copy available at: https://ssrn.com/abstract=4038568

leagues and teams were in an unlawful horizontal agreement to adhere to the policy.[72] The District Court, however, noted that "allegations of parallel conduct alone are insufficient to allege the existence of a conspiracy."[73] It noted that U.S. Soccer's "compliance with the Policy, without additional factual allegations, is insufficient to constitute direct evidence of an unlawful agreement."[74] According to the District Court, Relevent needed to plead facts to suggest an agreement was actually made.[75] Since it found that Relevent failed to do so, it granted the defendants' motion to dismiss.[76]

Despite the result, Relevent Sports does have reason to be optimistic on appeal. As part of Relevent's appeal of the dismissal, the U.S. Department of Justice ("DOJ") filed an amicus brief.[77] Although not in support of either party, the filing does reflect the government's interest in the standards for antitrust cases involving member associations like U.S. Soccer and FIFA. The DOJ argued that the defendants' claim that Relevent had to not only allege that the members voted on the policy to establish concerted action for purposes of an antitrust claim, but it also had to allege that the members agreed ahead of time "to vote a particular way on a rule or policy" was incorrect under the law.[78] According to the DOJ, this "sets the bar too high . . . [and] could improperly shield many anticompetitive association rules from Section 1 scrutiny."[79]

[72] Opinion and Order, Relevent Sports LLC v. Federation Internationale de Football Associations and United States Soccer Federation, Inc., 19-cv-8359 at 5 (S.D.N.Y, 2021).
[73] Id. at 7.
[74] Id. at 10.
[75] Id. at 11.
[76] Id. at 21.
[77] Brief for the United States of America as Amicus Curiae in Support of Neither Party, Relevent Sports, LLC v. United States Soccer Federation, Inc. and Federation Internationale de Football Association, No. 21-2088, on appeal from the U.S. Dist. Ct. for the S.D.N.Y. (2d Cir. 2021), https://www.justice.gov/atr/case-document/file/1442196/download. ("DOJ Brief")
[78] DOH Brief, supra note xx, at 3, 5.
[79] Id. at 5-6.

Electronic copy available at: https://ssrn.com/abstract=4038568

C. International Windows

In the disputes over the Super League or the staging of domestic league matches in foreign locations, the clubs or leagues involved are arguably trying to encroach on the traditional roles of governing bodies to expand their own power and influence. By contrast, in the disputes over the release of players for international games arguably the opposite is taking place. Clubs sign and pay players to perform a service for them. Mandatory releases for international duty deprive the clubs of those players services, and even leagues of some of their seasons in the case of major events. Moreover, if the players are injured while away playing for their national teams in international tournaments, they may be unavailable even upon their return. Historically, clubs resented being asked to release their players, especially for tournaments in which the governing bodies, not the clubs, are profiting from players that the clubs, rather than the governing bodies, pay the vast amount of their salaries[80]. In 1999, the top clubs formed what was called the Group of 14 (the "G-14") to air their grievances collectively and eventually several of those clubs sued FIFA and UEFA for compensation.

In 2008, in settlement of the lawsuits then pending, FIFA and UEFA agreed to start compensating clubs whose players competed in the European Championships and the World Cup.[81] UEFA president Michel Platini, in announcing the settlement, noted that "Clubs who provide UEFA and FIFA with certain amounts of money through these players should get some compensation and share in these profits."[82] Under the original arrangement, FIFA agreed to pay $110 million in the aggregate to clubs whose players participated in the 2010 World Cup in South

[80] Ryan Kelly, *Can Football Clubs Prevent Players from Playing in International Matches?* GOAL, Oct. 26, 2019, https://www.goal.com/en/news/can-football-clubs-prevent-players-from-playing/eksoltaiss191hjygdwoch6u8.
[81] *UEFA and FIFA Will Pay Clubs Player Compensation*, N.Y. TIMES, Jan. 21, 2008, https://www.nytimes.com/2008/01/21/sports/21iht-soccermoney21.9381516.html.
[82] Id.

Electronic copy available at: https://ssrn.com/abstract=4038568

Africa and UEFA agreed to pay clubs in the aggregate $63 million for the 2008 Euros and $79 million for the 2012 Euros.[83] The president of Chelsea football club called it a "historic day," while the director of AC Milan welcomed the "direct dialogue and direct influence" clubs would now have with UEFA through the creation of the European Club Association, which represented all clubs in Europe and replaced the G-14 that was disbanded as a sign of goodwill in the wake of the settlements.[84]

To this day, FIFA's Club Benefit Programme,[85] and UEFA's version for European clubs participating in its competitions,[86] continue to provide compensation to clubs for the use of their players. For the 2018 World Cup in Russia, FIFA paid in the aggregate $209 million, amounting to $8,530 per day per player,[87] while UEFA agreed to pay a little under $230 million for clubs with players participating in the 2020 Euros, including the qualifiers, as well as the UEFA Nations League.[88] Creation of the benefits programs was soon followed by the creation of a similar programs to compensate clubs for injuries suffered by their players while away on international duty. Under the Club Protection Programme, which was originally funded by UEFA for clubs competing in Euro 2012 and then extended by FIFA in 2012 to cover clubs worldwide,[89] FIFA effectively provides insurance to deal with the financial consequences of those injuries.[90]

---

[83] Id.
[84] Id.
[85] FIFA Club Benefit Programme, https://www.fifa.com/about-fifa/legal/football-regulatory/stakeholders/fifa-club-benefit-programme.
[86] UEFA Euro Club Benefits, https://www.ecaeurope.com/about-eca/main-achievements/club-benefits/.
[87] 2018 World Cup, Russia, FIFA Club Benefits Programme, https://digitalhub.fifa.com/m/63651247df9b8ba2/original/bxkl7wgkjygv0ar7scko-pdf.pdf.
[88] Press Release, UEFA Euro 2020 Club Benefits Paid in Advance, April 23, 2020, https://digitalhub.fifa.com/m/63651247df9b8ba2/original/bxkl7wgkjygv0ar7scko-pdf.pdf.
[89] European Club Association, *Club Protection Programme*, https://www.ecaeurope.com/about-eca/main-achievements/club-protection-programme/.
[90] Lloyd Thomas & Rose Duckworth, *Your Guide to FIFA's Club Protection Programme*, LAWINSPORT, July 25, 2014, https://www.lawinsport.com/topics/sports/football/item/your-guide-to-fifa-s-club-protection-programme.

Electronic copy available at: https://ssrn.com/abstract=4038568

This spirit of cooperation between clubs and governing bodies in the aftermath of the creation of the compensation programs was short-lived. In 2015, a decision that left clubs and other stakeholders "angry," FIFA changed the Men's World Cup from a summer tournament to a winter tournament for 2022 in Qatar.[91] As the *New York Times* observed when the decision to move the dates was announced in 2015, "the switch to winter will disrupt not only league competitions in Europe and elsewhere, but also the lucrative UEFA Champions League, and it will require starting seasons earlier or finishing them later, or both."[92] This is true not only at the regional level, but also in individual domestic leagues. The President of France's first division Ligue 1 confirmed this, lamenting that "players will not play, the clubs will not make any money, the fans will be deprived of national competitions and television companies will be furious."[93] The frustration was even higher in some of the lower leagues, as clubs in England's second division Championship have complained that they have to "shoehorn" games into a "farcical fixture" schedule as a result of the move, threatening the safety and well-being of their players.[94]

Clubs and their leagues threatened to sue for additional compensation if the move of the 2022 World Cup to winter was finalized, arguing that it would cause significant schedule disruption and loss of revenue.[95] FIFA, however, quickly rejected this argument.[96] Ironically, FIFA's justification for rejecting the claim for compensation was based in the Club Benefits

---

[91] Sam Borden, *FIFA Confirms Winter World Cup in 2022*, N.Y. TIMES, March 9, 2015, https://www.nytimes.com/2015/03/20/sports/soccer/fifa-confirms-winter-world-cup-for-2022.html.
[92] Id.
[93] *Ligue 1 President: Holding Winter World Cup is the "Worst Solution,"* SPORTS ILLUSTRATED, Feb. 25, 2015, https://www.si.com/soccer/2015/02/25/2022-winter-world-cup-opposition.
[94] Ricky Charlesworth, *EFL Championship Sides Furious with Farcical Fixture Plans for Next Season due to Qatar World Cup*, DAILY MAIL, Sept. 17, 2021, https://www.mirror.co.uk/sport/football/news/efl-sides-furious-world-cup-25006472.
[95] John Cross, *2022 Winter World Cup Plan Faces Lawsuit from European Football's Top Leagues*, THE MIRROR, Feb. 24, 2015, https://www.mirror.co.uk/sport/football/news/2022-winter-world-cup-plan-5223760.
[96] *FIFA Confirms Clubs Will Not be Compensated for Winter 2022 World Cup*, THE GUARDIAN, Feb. 25, 2015, https://www.theguardian.com/football/2015/feb/25/2022-world-cup-fifa-uefa-no-compensation.

Electronic copy available at: https://ssrn.com/abstract=4038568

Programme. As FIFA's former general secretary Jerome Valcke said at the time, "why are we talking about compensation? . . . We have had an agreement with the clubs that they are part of the beneficiaries. It was $40m dollars (£25.8m) in 2010 and $70m (£45m) in 2014."[97]

Recently, the covid pandemic has caused another flashpoint for club tension over international windows. Part of this was because of national quarantine requirements for persons traveling from another country that had an elevated rate of transmission of the virus. In the summer of 2021, the Premier League voted to not release players if their national teams were scheduled to play in these so-called "red list" countries.[98] Under UK rules, individuals entering from the red list countries were subject to a 10 day quarantine, meaning those players would not only miss games required by the mandatory release for the window under FIFA rules, they would also miss games and training while stuck in quarantine upon their return, possibly for almost a month.[99] Spain's La Liga made a similar announcement for its players from South America, where FIFA had extended the international window by three days in the first two windows in the Fall of 2021 to make up for games canceled during the pandemic.[100] During the winter, the Premier League renewed its stance with regard to releasing players, this time for the African Cup of Nations, which had been moved because of Covid and weather conditions, before FIFA relented and allowed players to come after their games during the holiday period.[101]

---

[97] Id.

[98] Gabriele Marcotti, *Premier League Can't Be Allowed to Undermine World Cup Qualifiers – and They Probably Won't*, ESPN, Aug. 25, 2021, https://www.espn.com/soccer/blog-marcottis-musings/story/4461746/premier-league-cant-be-allowed-to-undermine-world-cup-qualifiers-and-they-probably-wont.

[99] Id.

[100] Simon Borg, *Players Not Released for FIFA World Cup Qualifiers: Explaining the Moves by Premier League, La Liga*, SPORTING NEWS, Aug. 26, 2021, https://www.sportingnews.com/us/soccer/news/players-release-fifa-world-cup-qualifier-premier-league-liga/1tsqa5gif72ns1ub0f3zbwltjc.

[101] Matt Slater, *Premier League Clubs will not have to Release Players for AFCON Until January 3*, THE ATHLETIC, Dec. 26, 2021, https://theathletic.com/news/premier-league-clubs-will-not-have-to-release-players-for-afcon-until-january-3/DLxdNbgK2Fla/.

Electronic copy available at: https://ssrn.com/abstract=4038568

II. Changing Legal Environment

A. The Conditional Autonomy of Sports Governing Bodies

For many years, international sports organizations have enjoyed a unique status in Europe. Under Article 165 of the Treaty of Lisbon, which created the European Union, "the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function."[102] This "specific nature of sport" language has been interpreted to effectively allow sports organizations wide latitude in complying with European Union requirements,[103] including Article 101 of the EU Treaty, which prohibits "agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."[104]

This wide latitude to operate according to the specific needs of the sport allows for some actions to be taken that ordinarily would not be permitted for normal commercial enterprises. At its most basic level, professional sports clubs agree to play the game using common rules, over a specific time period called a season, and against other teams in a league as dictated by the schedule created by the league organizers. Each of these aspects of a normal professional sports league

---

[102] Consolidated version of the Treaty on the Functioning of the European, Art. 165, 115 OFFICIAL JOURNAL 120–21 (2008), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E165. ("EU Treaty")
[103] European Commission, *Developing the European Dimension in Sport*, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, 4.2, pp. 12-13 (2011), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:en:PDF ("European Dimension in Sport")
[104] EU Treaty, Art. 101, supra note xx, at 88-89, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML.

Electronic copy available at: https://ssrn.com/abstract=4038568

could be questioned under competition or antitrust laws if manufacturers got together and made similar agreements, especially if they controlled enough of the market to effectively limit consumer choices. In European football, this latitude helps to explain why a single organization is allowed to establish a system of promotion and relegation within a pyramid of leagues in which teams are required to start at the bottom and move their way up, but leagues can never move up or down the pyramid no matter how successful they are in staging high quality matches, attracting fans, and generating revenue.[105]

Notwithstanding this special treatment, sport's autonomy to operate in a way that makes sense given the nature of the activity is not unlimited. As the European Commission wrote in its 2007 White Paper on Sport, "[s]port activity is subject to the application of EU law," including, as an economic activity, competition law.[106] The Commission concluded "[i]n line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law."[107] This is known as the conditional autonomy of sport in Europe.

The question is what conditions are imposed in determining whether a sports organization, which occupies a dominant position and/or has market power under the conventional tests under

[105] *See* European Dimension of Sport, *supra* note xx, at 13 ("The concept of the specific nature of sport is taken into account when assessing whether sporting rules comply with the requirements of EU law (fundamental rights, free movement, prohibition of discrimination, competition, etc.)").

In the U.S., by contrast, leagues operate as independent business. Although one could establish a system of promotion and relegation among its own teams, a system in which the main competitors got together and decided that no new leagues could ever be established except with the permission of the competitors, and even then could only exist at the bottom would likely be challenged under antitrust laws. Indeed, the North American Soccer League has sued the U.S. Soccer Federation on the grounds that a licensing system that classified leagues into tiers violated antitrust laws even though the classification system did not actually limit what clubs could play in which leagues like a promotion-relegation system. *See North Am. Soccer League, LLC v. USSF*, 883 F.3d 32 (2d Cir. 2018) (upholding the denial of a preliminary injunction, while noting that although the plaintiffs had sufficiently alleged that the professional league standards had an adverse effect on competition, there was sufficient evidence of its procompetitive benefits).

[106] Commission of the European Community, WHITE PAPER ON SPORT, Art. 4.1 at 13 (2007), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52007DC0391. ("White Paper")

[107] White Paper, supra note xx, at 13.

Electronic copy available at: https://ssrn.com/abstract=4038568

EU competition law, has exceeded the limits of its autonomy. The European Court of Justice in *Meca-Medina v. Commission* is the leading case in this area.[108] It addressed whether the anti-doping rules established by the International Olympics Committee and the Fédération Internationale de Natation ("FINA"), the international governing body of swimming, constituted an unlawful agreement under competition laws. The Court dismissed the notion that sports was beyond the review of competition laws: "the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty, the conditions for engaging in the activity governed by that rule or the body which has laid it down."[109] The Court instead evaluated the question using a balancing test that compared the threat to competition with the legitimacy of the objectives of the sporting organizations:

> Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives … and are proportionate to them.[110]

According to the Court, even if the anti-doping regulations constituted an agreement among undertakings that limited the swimmers' freedom of action, it does not "necessarily constitute a restriction of competition incompatible with the common market" because the anti-doping regulations "are justified by a legitimate objective. . . . [in the] proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes."[111]

---

[108] *Meca-Medina v. Commission*, Case C-519/04 P, Eur. Court Rep. 1-06991 (2006), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CJ0519.
[109] Id. at par. 27.
[110] Id at par. 42.
[111] Id. at par. 45.

Electronic copy available at: https://ssrn.com/abstract=4038568

In the wake of *Meca-Medina*, the European Commission adopted and summarized the basic standards in understanding the limits imposed on sporting organizations. According to the Commission

> In order to assess the compatibility of sporting rules with EU law, the Commission considers the legitimacy of the objectives pursued by the rules, whether any restrictive effects of those rules are inherent in the pursuit of the objectives and whether they are proportionate to them.[112]

These three factors – (1) the legitimacy of the objectives, (2) whether any actions that restrict rights under EU law are inherently necessary in the pursuit of those objectives, and (3) whether those actions are proportionate to the objectives sought – form the basis for the conditional autonomy of sport under European law.

B. Recent limits on sports governing bodies outside of football

Several cases are still pending on some of the disputes involving football clubs or leagues and their governing bodies, but there are several relatively recent decisions in European and U.S. courts that could have an impact on the future power of sports governing bodies more generally.

1. European courts

Although *Meca-Medina* acknowledged the limits on the autonomy of sports organizations under European competition laws, it did so in the context of a decision that permitted the governing body to require participants to comply with anti-doping testing protocols. By contrast, in recent years European courts have cited competition and other laws to strike down the actions of sports governing bodies in a variety of contexts. These decisions are consistent with *Meca-Medina*, but

[112] European Dimension of Sport, supra note xx. at 13.

Electronic copy available at: https://ssrn.com/abstract=4038568

they suggest a somewhat more conservative view of what objectives and measures are legitimate and proportionate.

The most prominent recent European case to overturn the actions of a sports governing body is *International Skating Union v. Commission*.[113] In that case, two professional speed skaters – Mark Jan Hendrik Tuitert and Niels Kerstholt – sought to compete in a series of special speed skating events organized in 2014 in Dubai by a third-party organizer, Icederby International. This so-called Dubai Grand Prix offered higher prize money than was typically offered by the International Skating Union ("ISU"),[114] which operated as both a regulator as the governing body of the sport and a commercial participant as the organizer of its own series of speed skating events, including the European and World Championships.[115]

The problem for Tuitert and Kerstholt was that the Dubai Grand Prix was not an ISU authorized event and, under ISU rules, athletes competing in a non-authorized event were subject to penalties up to and including a lifetime ban from ISU competitions.[116] Tuitert and Kerstholt complained to the European Commission, arguing that ISU's actions violated Articles 101 and 102 of the EU Treaty, which bars decisions of associations of undertakings that restrict competition within the internal market and the abuse of an undertaking that has a dominant position in the market.[117] The Commission agreed that the eligibility rules, which would penalize the speedskaters participation in an unauthorized event by restricting them from ISU competitions, would improperly restrict competition in the market by "depriving potential organisers of

[113] *International Skating Union v Commission*, T-93/18 (2020), https://curia.europa.eu/juris/document/document.jsf;jsessionid=BD5C09B5840737CFE211001A23FD3F80?text=&docid=235666&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=827544 (ISU v. Commission)
[114] Andrea Cattaneo, *International Skating Union v. Commission: Pre-Authorisation Rules and Competition Law*, 12 J. EUR. COMP. L & PRACTICE 318, 318 (2021), https://academic.oup.com/jeclap/article/12/4/318/6188470.
[115] ISU v. Commission, *supra* note xx, at par. 1-3.
[116] Id. at 318.
[117] EU Treaty Art. 101, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A12008E101, & Art. 102, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E102.

Electronic copy available at: https://ssrn.com/abstract=4038568

competing events of the services of the athletes which are necessary in order to organise those events."[118]

In the decision of the General Court of the European Union upholding the Commission's decision against the ISU's eligibility rules, the Court noted the inherent conflict in ISU's role as both a gatekeeper and a participant in event organization:

> [W]hen a rule entrusts a legal person, which itself, organises and commercially operates competitions, with the task of designating the persons authorised to organise those competitions and to determine the conditions under which they are organised, it grants that entity an obvious advantage over its competitors. Such a right may therefore lead the undertaking making use of it to prevent access by other operators to the market concerned. The exercise of that regulatory function should therefore be made subject to restrictions, obligations and review, so that the legal person entrusted with giving that consent may not distort competition by favouring events which it organises or those in whose organisation it participates.[119]

As the Court later explained, "in view of its role as an organiser of events and holder of the power to authorise events organised by third parties, the applicant is required to ensure undistorted competition between economic operators"[120] The Court did acknowledge that ISU's authority to sanction speed skating competitions was not a delegated power from a public authority, but noted that "it exercises, as the sole international sports federation recognised by the IOC for the disciplines in question, a regulatory" power.[121]

After finding that the ISU's eligibility rules were not sufficiently connected to any legitimate objective and were disproportionately restrictive, the Court concluded that its system of sanctioning or authorizing events in which athletes could enter without being restricted from its own events was anti-competitive. "[T]he applicant's pre-authorisation system allows it to distort competition on the relevant market by favouring its own events to the detriment of events offered

[118] ISU v. Commission, supra note xx, at par. 32.
[119] Id. at par. 70.
[120] Id. at par. 114.
[121] Id. at par. 73.

Electronic copy available at: https://ssrn.com/abstract=4038568

by third parties and that, therefore, those rules do not ensure effective access to that market."[122] As a result, the court upheld the Commission's decision that the ISU's eligibility rules "reveal a sufficient degree of harm to be regarded as restricting competition by object within the meaning of" the EU Treaty.[123] There have been earlier European cases to uphold the rights of third-party competitors to operate in the sports space,[124] but the ISU case is probably most similar to the recent disputes.

There have also been decisions at the country level in Europe that have used competition law to strike down sports federation actions against third party organizers. In a similar case to *International Skating Union* – this time in wrestling – a German court also decided in favor of the upstart independent league and against the international sports federation. This case was brought by the Deutsch Ringer-Liga (the German Wresting League), an independent league founded in 2016 because of disputes with the Deutscher Ringer-Bund (the German Wrestling Federation), which ran its own league and was a member of United World Wrestling, the international governing body of the sport.[125] To "prevent wrestlers and teams from participating in the new 'maverick league,'[126] the German Wrestling Federation banned nine athletes that had been competing in the upstart league from participating in the 2017 German wrestling championships organized by the federation and the United World Wrestling banned some of the same wrestlers and a few more from competing in all international competitions under its auspices in 2018.[127]

---

[122] Id. at par. 119.
[123] Id. at par. 120.
[124] *See* Witte & Zglinkski, *supra* note xx, at 27 (citing Formula One racecar driving, motorcycling in Greece, basketball, bodybuilding, and equestrian sports).
[125] Sinziana Ianc, et al., *German Court Ends the Anti-Trust Fight Between Rival Wrestling Federations*, LAW IN SPORT, July 16, 2021, at 2, https://www.lawinsport.com/topics/item/german-court-ends-the-anti-trust-fight-between-rival-wrestling-federations.
[126] Id.
[127] Id. at 2-3.

Electronic copy available at: https://ssrn.com/abstract=4038568

The German Wrestling League claimed that the "suspensions and sanctions are just an obvious try to sabotage the finals of the German Wrestling League," citing the *International Skating Union* decision in support of its position.[128] In a letter to the United World Wrestling, the German Wrestling League argued that not only did the suspensions impair the wrestlers' freedom, but United World Wrestling "misuses its monoplised position in that she prohibits the GWL from organizing their own ring events."[129]

In a 2019 decision by the Nuremberg-Furth Regional Court, which was upheld on appeal by the Nuremberg Higher Regional Court on January 26, 2021, the German courts struck down the bans on the wrestlers.[130] The appellate court noted that although a sports organization could protect its own economic interests, it agreed with the lower court that the sanctions unfairly hindered the German Wrestling League and were not founded in any legitimate objective or any specific licensing regulation of the federation.[131]

A Swedish case from several years ago raised a different, but related, question of a maverick federation. In *Svenska Bilsportforbundet v. Konkurrensverket* ("SBF v. KKV"),[132] a disgruntled member of the Svenska Bilsportforbundet (the "Swedish Automobile Sports Federation" or "SBF"), which was the official Swedish representative of the sport's international governing body, the Federation Internationale de l'Automobile ("FIA"), decided to create a competing organization for motorsports in Sweden – the Svenska Motorsport Alliansen (the

[128] Statement by the German Wrestling League, *World Association to Finally Acknowledge Straight Forward Legal Status*, Feb. 5, 2018, https://www.ringerliga.de/2018/02/05/weltverband-soll-die-eindeutige-rechtslage-endlich-anerkennen-erklaerung-der-deutschen-ringerliga-2/.
[129] Id. (quoting from the letter from the German Wrestling League's attorneys to United World Wrestling).
[130] Higher Regional Court Nuremberg, final judgment v. 01/26/2021 - 3 U 894/19, https://www.gesetze-bayern.de/Content/Document/Y-300-Z-GRURRS-B-2021-N-34724.
[131] Press Release 5, Nuremberg Higher Regional Court Upholds Ruling in "Wrestling Dispute," Jan. 29, 2021, https://www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/nuernberg/presse/2021/5.php.
[132] Case A 5/11 (Swedish Market Court, 2012).

Electronic copy available at: https://ssrn.com/abstract=4038568

"Swedish Motorsports Alliance" or "SMA").[133] The problem was that SBF's rules forbade its participants from participating in non-sanctioned events through so-called Solidarity or Loyalty Clauses and SMA had difficulty attracting drivers and staff for its races.[134]

The Konkurrensverket ("Swedish Competition Authority" or "KKV") agreed with SMA that the Solidarity Clauses were a violation of competition law.[135] A subsequent appeal of this decision to the Swedish Market Court upheld the decision without seeking a preliminary ruling from the European Court of Justice.[136] According to the English-language reports of the decision, the Court applied the *Meca-Medina* test in concluding that the Solidarity Clauses are anti-competitive.[137] It reportedly "did not consider the Solidarity Clauses to be proportional restrictions on competition for the purpose of achieving" the objectives of protecting the sport's social, cultural, and educational values and protecting the safety and access of the events.[138] This was true even if competition with another federation or event organizer would reduce the resources available for the growth of the sport.

2. U.S. courts

Legal disputes over the actions of sports governing bodies to hinder so-called "maverick" leagues are not limited to Europe. In a case that originated in Europe, but spilled over to the United States, Konstantin Grigorishin, a Russian billionaire from the Ukraine, funded the creation of the International Swimming League (ISL), an upstart league that promised to pay higher prize money for its events that that offered by swimming's international governing body – the Fédération

[133] Johan Lindholm, *The Impact of SBF v. KKV on Sport: Swedish Fender-Bender or European Pileup?* 34 EUR. COMP. L. REV. 367, 367 (2013).
[134] Id. at 367.
[135] Id. at 368.
[136] Id.
[137] Id. at 369.
[138] Id.

Electronic copy available at: https://ssrn.com/abstract=4038568

Internationale de Natation (FINA).[139] Much like in skating and wrestling, the sports governing body was both a regulator of the sport and a commercial participant. Responding similarly to its counterparts in the other sports, FINA threatened to ban participants from competing in FINA-sanctioned events, including the Olympics.[140]

The International Swimming League and the swimmers who were threatened with suspension sued FINA in federal court in the United States, basing jurisdiction on allegations of FINA's ties to the U.S. and that FINA's threats against USA Swimming caused it to withdraw its support of ISL and ultimately led to the cancellation of an event planned for Las Vegas.[141] The primary allegation was that FINA colluded to unreasonably restrict competition in violation of the Sherman Antitrust Act., According to ISL's complaint, FINA's internal documents discuss how ISL could be "very dangerous" to FINA and concluded that "ISL cannot exist" alongside FINA, with FINA Vice President Dale Neuberger writing that "[w]e must win, we will win."[142]

The legal case is still pending, but ISL and the swimmers won in the first round as the court denied FINA's motion to dismiss both suits.[143] The defendant's first argument for dismissal was a lack of personal jurisdiction.[144] In rejecting this, the court noted that FINA's "purposeful direction of its anticompetitive conduct at the United States," which ranged from general reminders

[139] Tariq Panja, *A Familiar Rebellion Spreads to International Swimming*, N.Y. TIMES, Dec. 20, 2018, https://www.nytimes.com/2018/12/20/sports/swimming-fina.html.
[140] Id.
[141] First Amended Complaint, International Swimming League, Ltd. V. Fédération Internationale de Natation, Case No. 3 :18-cv-7394-JSC (N.D. CA. 2018) ("ISL Complaint") & Thomas A. Shields et al. v. Fédération Internationale de Natation, Case No. 18-cv-07393-JSC (N.D. Cal, 2018) (brought as a class action on behalf of all affected swimmers).
[142] ISL Complaint, supra note xx, at 20, par. 68.
[143] Order Re: Defendant's Motions to Dismiss Following Supplemental Briefing on Personal Jurisdiction, Thomas A. Shields et al., v. Fédération Internationale de Natation International Swimming League, Ltd. v. Fédération Internationale de Natation, Cases No. 18-cv-07393-JSC, No. 18-cv-07394-JSC (N.D. CA. 2019) ("Order on Motion to Dismiss"); Dan Harrington & Eric Solomon, *Swimming in Hot Water: FINA Loses First Round in U.S. Competition Law Complaint Filed by Organiser of "Unofficial" League*, LEVEL, Jan. 20, 2020, https://level.law/news/swimming-in-hot-water-fina-loses-first-round-in-us-competition-law-complaint-filed-by-organiser-of-unofficial-league.
[144] Order on Motion to Dismiss, supra note xx, at 9.

Electronic copy available at: https://ssrn.com/abstract=4038568

to all federations that "the competitions of the 'International Swimming League' are not FINA sanctioned nor FINA approved . . .[and that] No affiliated Member shall have any kind of relationship with a non-affiliated or suspended body" to direct communication between FINA and USA Swimming regarding the ISL event.[145]

The court distinguished this case from *Mehr v. Federation Internationale de Football Association*,[146] where the court dismissed FIFA from a lawsuit for lack of personal jurisdiction because "FIFA's commercial contacts with California (the relevant forum) had nothing to do with the plaintiff's claim" that it failed to adopt adequate guidelines for concussions.[147] According to the court in the ISL case, "the record supports an inference that 'but for' the conduct ISL would have hosted an event with USA Swimming in the United States.[148]

The defendant's second argument for dismissal was that the complaint failed to allege sufficient facts to state a claim under Rule 12(b)(6).[149] The defendant's most substantively relevant argument on this point was that FINA was incapable of conspiring to restrain trade because "FINA and its member federations are not distinct entities," but instead "share a complete unity of economic interest."[150] The court rejected this argument, noting that the members of FINA are "at least *potential* competitors . . . capable of conspiring under Section 1."[151] As the court continued, the distinction between FINA's own competitions where member federations merely participate and member-federation events" organized and conducted by the individual member-federations themselves – and where the member federations 'reap all (or most) of the financial benefit' – is

[145] Order on Motion to Dismiss, supra note xx, at 15.
[146] 115 F. Supp. 3d 1035 (N.D. Car. 2015).
[147] Order on Motion to Dismiss, supra note xx, at 21.
[148] Id.
[149] Id. at 26.
[150] Id. at 36.
[151] Id.

Electronic copy available at: https://ssrn.com/abstract=4038568

critical because it indicates that FINA and its individual member federations are not a single 'economic unit' and at least have the potential to compete in the relevant market."[152] In other words, the court concluded that a governing body can conspire with its member associations against a competing organization or event promoter.

III. Implications for the Current Disputes

The recent cases on the validity of restrictions imposed by sports governing bodies offer several insights for the current disputes between clubs and their governing bodies in global football. While a fuller picture of the legal environment is still emerging, what we have learned thus far does suggest specific limits for football governing bodies in the way they can and cannot restrict competitors.

A. Participant Bans

One of the most potent tools in the toolboxes of sports governing bodies seeking to enforce their rules against recalcitrant participants is to suspend or ban those individuals from participating in the sport. In some cases, those suspensions can be measured and tied to some narrow objective. For example, FIFA originally threatened to impose a five-day suspension following the international window for players who did not report to their national teams during the window, before deciding against it after the South American countries dropped their complaint on the matter.[153] These suspensions were both short and not really designed to punish the players at all. The intent of the automatic five-day suspension is to force the clubs to lose the services of their

[152] Id. at 36-37.
[153] *Premier League: Players Avoid Bans over Failing to Report for International Duty*, BBC SPORT, Sept. 11, 2021, https://www.bbc.com/sport/football/58522907.

Electronic copy available at: https://ssrn.com/abstract=4038568

players for a time period similar in length to the window, deterring them from not releasing their players for international duty in the future.[154] By contrast, the suspensions threatened for players participating in the proposed English Super League were both more punitive and less clearly connected to any legitimate objective.

When the English Super League proposal first surfaced in January of 2021, one of the first things FIFA and UEFA did was to threaten to ban any players participating in the breakaway league from playing in their events, including with their national teams as part of the European Championships and the World Cup.[155] Gianni Infantino, the president of FIFA, and the presidents of the six regional confederations quickly issued a statement declaring that "[a]ny club or player involved in such a competition would as a consequence not be allowed to participate in any competition organised by FIFA or their respective confederation."[156] By April, when the proposal was formally announced, these threats of player bans had become much more muted. Aleksander Cerefin, UEFA's president, still warned that "[t]he players who will play in teams that might play in the closed league will be banned from playing in the World Cup and Euros, so they will not be able to represent their national teams at any matches."[157] FIFA, however, issued a statement that was described as "tame" and did not mention player bans.[158] It only mentioned that "the governing bodies of football should employ all lawful, sporting and diplomatic means to ensure" that "the

[154] Simon Evans, *Premier Clubs Could Face Sanctions over South American Players*, REUTERS, Sept. 8, 2021, https://www.reuters.com/lifestyle/sports/premier-clubs-could-face-sanctions-if-they-play-south-american-players-2021-09-08/.
[155] *FIFA Threatens to Ban Players from World Cup if they Participate in Proposed Super League*, SPORTS ILLUSTRATED, Jan. 12, 2021, https://www.si.com/soccer/2021/01/21/europe-super-league-fifa-ban-players-world-cup-uefa.
[156] *Statement by FIFA and the Six Confederations*, FIFA, Jan. 21, 2021, https://www.fifa.com/about-fifa/associations/news/statement-by-fifa-and-the-six-confederations.
[157] Sean Ingle, *Super League Players Face World Cup and Euros Ban, Warns Furious Uefa Chief*, THE GUARDIAN, April 19, 2021, https://www.theguardian.com/football/2021/apr/19/super-league-players-face-world-cup-and-euros-ban-warns-furious-uefa-chief.
[158] Alex Richards, *FIFA Issue Pointedly Tame Statement as 12 Clubs Announce European Super League*, MIRROR, April 20, 2021, https://www.mirror.co.uk/sport/football/news/fifa-statement-european-super-league-23937623.

Electronic copy available at: https://ssrn.com/abstract=4038568

core principles of solidarity, inclusivity, integrity and equitable financial redistribution were maintained.[159]

FIFA's apparent pull back from its initial threats of player bans may have been because its lawyers, as well as some legal commentators,[160] thought that might be difficult to sustain in court. Although the court in *Meca-Medina* case made clear that "the provisions of Community law concerning freedom of movement for persons and freedom to provide services do not preclude rules of practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events," it also emphasized that "such a restriction on the scope of the provisions in question must remain limited to its proper objective."[161] Sanctions against players for participating in non-sanctioned events or leagues are susceptible to challenge if they are not strictly tied to achieving those non-economic objectives necessary in the context of a specific sport in both its nature and its extent. The participant bans struck down in *International Skating Union*, *SBF v. KKV*, and the German Wrestling League dispute were each grounded in the failure to establish that players bans were necessary to achieve a legitimate objective. In the *International Swimming League* case, the court has not addressed the merits of the claims regarding the bans threatened against swimmers participating in the breakaway event, but the court noted in its opinion denying the motion to dismiss that they were allegedly completely at the discretion of the sports governing body and could have been levied "for no other reason than the swimmer competed in a top-tier international swimming event that FINA did not itself organize or approve."[162]

---

[159] Id.

[160] *See, e.g.,* Charlie Walker, *European Super League Clubs Would WIN Any Court Case Brought by UEFA or FIFA, says Expert Lawyer – and He Insists the Premier League Would Also Fail if it Tried to Kick the Big 6 Out*, DAILY MAIL, April 19, 2021, https://www.dailymail.co.uk/sport/sportsnews/article-9486681/European-Super-League-clubs-WIN-court-case-brought-UEFA-FIFA-says-legal-expert.html (quoting Mark Orth of MEOlaw).

[161] Meca-Medina, supra note xx, at par. 26.

[162] Order on Motion to Dismiss, supra note xx, at 4.

Electronic copy available at: https://ssrn.com/abstract=4038568

The *International Skating Union* opinion, citing the *Meca-Medina* case,[163] is instructive in fleshing out what kind of sanctions might be considered to go too far. The ISU had justified its requirement that skaters participate only in authorized competitions on the grounds that the eligibility rules were "necessary to pursue the legitimate objective of protecting the integrity of speed skating from the risks associated with betting."[164] Under the original penalties, skaters who participated in an unsanctioned competition were subject to a life ban, without regard to whether they were involved in betting or whether the competition itself was corrupted by betting, which the court found was "manifestly disproportionate with regard to the objective of the protection of the integrity of skating."[165] Although those penalties were subsequently revised downward, the court noted that even the reduced penalties of a five-to-ten year ban were disproportionate in light of the undisputed fact that the average skater had a career that last eight years, especially given that the line between the severity of certain penalties was not clearly drawn.[166]

The governing bodies in the case of the European Super League never had the chance to fully flesh out their threatened player bans. Nevertheless, it appears that they would have acted as lifetime bans of players from their regional and international competitions, or at least as long as those players continued to play in the unsanctioned league. The court in *International Skating*

[163] See ISU v. Commissioner, supra note xx, at par. 91 (citing *Meca-Medina* for the proposition that "the repressive nature of rules and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition, since they could, if the penalties are not limited to what is necessary to ensure the proper conduct of the sporting competition and if they were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the sporting activity at issue is engaged in").
[164] ISU v. Commissioner, supra note xx, at par. 80.
[165] ISU v. Commissioner, supra note xx, at par. 92.
[166] Id. at par. 93.

Electronic copy available at: https://ssrn.com/abstract=4038568

Union found a lifetime ban, or even a lesser ban that was similar in the context of the sporting career of the average skater, to be "manifestly disproportionate" to any legitimate objective.[167]

B. Access for Competitors

Just as governing bodies likely cannot completely bar players from participating in non-sanctioned events or leagues altogether, they also cannot completely deny competitor organizers of leagues or events access to the market. Once again, the *International Skating Union* court offered guidance in this respect. The court acknowledged that it is legitimate "given the specific nature of the sports . . . to ensure that sporting competitions comply with common standards, seeking in particular to ensure that competitions take place fairly and the physical and ethical integrity of sportspeople is protected."[168] It also acknowledged that "the fact that a federation seeks to protect its own economic interests is not in itself anticompetitive."[169] Nevertheless, the Court found that a pre-authorization system that requires applicants to submit a business plan, and not merely a budget, requires a longer and more cumbersome process for third party applicants than for members, and grants the sports governing body broad discretionary authority to reject the request or to simply sit on it without making a decision in a timely fashion, is all evidence of a process that is more about barring competition than ensuring it meets certain minimum standards.[170] As the Court explained, ISU's process favored its competitions over others and thereby failed to "ensure effective access" to market for skating competitions.[171]

[167] ISU v. Commissioner, supra note xx, at par. 92.
[168] ISU v. Commissioner, supra note xx, at par. 108.
[169] Id. at par. 109.
[170] Id. at 110.
[171] Id. at par. 119.

Electronic copy available at: https://ssrn.com/abstract=4038568

In *SBF v. KKV*, the Swedish courts appeared to take a similar stance as in *ISU v. Commission*, rejecting the Solidarity Clauses that would have bound participants to the existing motorsports federation not so much because it would have conflicted with the European Union's guarantee of freedom of movement, but because the Solidarity Clauses were being used to deprive the upstart federation of their right to effectively compete in the market. As Johan Lindholm, a lecturer at the Umeá University in Sweden noted, "[a] narrower understanding of competition law's scope or a more generous application of the *Meca-Medina*-exception would in practice amount to a sport exception from competition law that is clearly contrary to established law."[172] Lindholm concluded that the outcome in *SBF v. KKV* demonstrated that "the organizational principle of one federation per sport is strongly susceptible to challenge," noting that it is "anti-competitive per se."[173]

At least in the U.S., *International Swimming League v. FINA* also suggests that a national sports governing body might not be able to avoid antitrust liability simply by claiming it could not conspire with its international sports governing body and the other members. In *Relevent Sports*, however, where a similar complaint was dismissed, the court made clear that there must at least be some allegations of such a conspiracy beyond the mere votes by the members for a particular rule. Nevertheless, the amicus brief submitted by the Department of Justice suggests that this higher pleading standard might be the basis of a reversal on appeal.

Commentators appear to agree that actions taken to ban the founding clubs of the European Super League from FIFA and UEFA competitions, as well as from their domestic leagues, could

[172] Id. at 371.
[173] Id. at 371-72.

Electronic copy available at: https://ssrn.com/abstract=4038568

effectively deny breakaway leagues the right to operate. Maastricht University's Faculty of Law blog wrote that the recent trend in case law has strengthened the ESL's case:

> Although long-standing scholarly opinion has been sceptical [sic] of the probability of success of such a format as the ESL, the recent shift in case law towards promoting greater autonomy for athletes and breakaway leagues suggests that ESL might have had its day in court if matters so escalated. The ESL would have a strong case against UEFA on the basis of the fact that the latter not only organizes the biggest football championships but also enters into contracts to exploit those same competitions commercially, thereby placing UEFA in a compromised position with respect to its regulatory position.[174]

It concluded that "[r]ecent decisions highlight that UEFA is more likely to be found in breach of competition law instead of a competing association such as the ESL."[175]

C. Legitimate Objectives

Although the trend in the case law does suggest that competition law limits the ability of governing bodies to maintain a complete monopoly over their sports, courts have acknowledged their right to exercise control over certain aspects of their sports if done in the pursuit of legitimate objectives and the restrictions are not disproportionate to achieving those objectives.[176] There is a similar concept under antitrust law in the U.S. that applies to all but a narrow set of clear violations such as price fixing. Under what is called the rule of reason approach, parties can act in concert in restraint of trade if the restriction is beneficial in that it has pro-competitive effects that outweigh the negative effects of the restraint on trade.[177]

What constitutes a legitimate objective or pro-competitive effect? Neither standard is particularly well suited for a bright-line rule. In the U.S., the jurisprudence over what restraints

---

[174] *The European Super League: opening the floodgates of competition law*, MAASTRICHT UNIVERSITY LAW BLOG, May 20, 2021, https://www.maastrichtuniversity.nl/blog/2021/05/european-super-league-opening-floodgates-competition-law.
[175] Id.
[176] ISU. V. Commissioner, supra note xx, at par. 60.
[177] Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 81 (2018).

Electronic copy available at: https://ssrn.com/abstract=4038568

are considered beneficial or procompetitive has been described as "chaos . . . without clear guidance,"[178] while in Europe, although "the general approach is to discuss whether there is a legitimate objective being pursued," the European Court "gives little clues as to the benchmarks by which one judges legitimacy."[179]

While the procompetitive effects standard is somewhat narrowly focused on commercial benefits to competition, such as remedying a market failure or increasing opportunities for competing businesses,[180] the legitimate objectives requirement is a broader standard, permitting something akin to a public policy analysis. The European Court's Justice's Advocate General, Jan Mazak, delivered an opinion in one case that a legitimate objective should be "of a public law nature and therefore aimed at protecting a public good and extend beyond the protection of the image of the products concerned or the manner in which an undertaking wishes to market its products"[181]

Some of the recent disputes between clubs and their governing bodies more easily fall within these standards than others. For example, although US Soccer's denial of a sanction for Relevent Sports to host a non-domestic league match in the United States might fairly be characterized as protecting U.S. leagues from competition, the FIFA policy against playing league matches in other countries arguably helps to foster the growth and sustainability of domestic leagues. In an era in which most people can watch games in the top leagues from anywhere in the world, what makes domestic leagues unique is that they people in that country can attend the games

[178] John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 504 (2019).
[179] Giorgio Monte & Jotte Mulder, *Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives*, 5 EUR. L. REV. 635, 646 (2017), http://awa2018.concurrences.com/IMG/pdf/monti_mulder_2017_42_elrev_issue_5_offprint.pdf.
[180] Newman, supra note xx, at 506-513.
[181] Id. (*quoting* Opinion of AG Mazak in *Pierre Fabre Dermo-Cosmetique SAS v President de l'Autorite de la Concurrence* (C-439/09) EU:C:2011:113; [2011] 5 C.M.L.R. 31 at [35]).

Electronic copy available at: https://ssrn.com/abstract=4038568

in-person. If that was no longer true and fans could more easily attend games of the top leagues in-person, they might no longer attend the games of their "lesser" domestic leagues, reducing the domestic competitors for football fans. This not only could lead to the concentration of football in a few select leagues worldwide and drive down the number of games and professional teams, but it could allow those top leagues to raise prices, which would ultimately hurt consumers.

Similarly, the requirement that clubs release players for international windows, while disruptive to league schedules, is likely justified because it is in pursuit of a legitimate objective. Organizing international tournaments among national teams is one of FIFA's missions and it arguably has a variety of benefits, including growing the game, sparking national interest and support for the sport, and, more broadly, fostering a spirit of national cooperation that comes from competing on the playing field, rather than the battlefield. Moreover, while there might be some length of time for international duty that would be disproportionate to these legitimate objectives, the current scheme, with the negotiation among all of the relevant parties, appears to be a narrowly tailored mechanism for enabling international tournaments and qualifying events with a minimum of disruption to domestic leagues. [182]

Preventing competitors or breakaway leagues is harder to justify as either in pursuance of a legitimate objective or as being procompetitive. For example, in the *SBF v. KKV* case, the Swedish court was unpersuaded that the purported objective of protecting the sport's social, cultural, and educational values and protecting the safety and access of the events was legitimate or the penalty of a participant ban was proportionate to that objective.[183] Similarly, in the German

[182] FIFA, *International Match Calendars*, https://www.fifa.com/international-match-calendars; Press Release, *FIFA Executive Adopts Principles of International Calendar*, March 28, 2000, https://www.sportcal.com/News/PressReleases/30838?&f=i%3A2%2FFederations+%26+NOCs%7C.
[183] Lindholm, supra note xx, at 369.

Electronic copy available at: https://ssrn.com/abstract=4038568

Wrestling league case, the Nuremberg Court of Appeals found that the purported objective of requiring sanctioning to ensure adherence to their anti-doping rules was questionable, since the German Wrestling Federation could still test the wrestlers themselves.[184] It noted that other objectives cited, such as preserving the "cohesion between grassroots and competitive sports" or supporting the Federation's "talent promotion system" were not endangered by having a new league.[185]

For the European Super League, there is some question whether UEFA's threatened sanctions are in pursuance of a legitimate objective. Possible justifications such as the protection of the match calendar and the system of solidarity payments seem unlikely to justify the kinds of sanctions proposed, especially given that the match calendar already allows for regional competitions and the ESL founders promised substantial contributions to the solidarity payment system as part of their proposal. That leaves the hybrid closed league model of the competition as originally proposed. Floris de Witte and Jan Zglinski of the London School of Economics have concluded that "the protection of the relegation-and-promotion system or the idea of open competitions" is probably the only legitimate justification UEFA might raise in support its restrictions against the European Super League."[186] Most commentators view the ESL as anticompetitive because not all clubs would have an equal chance to qualify for the league, which only reserved a few spots for non-founding clubs, and it would therefore be a violation of the principle of sporting merit.[187] Nevertheless, as de Witte and Zglinski have noted, the protection

[184] Ianc et al., supra note xx.
[185] Id.
[186] De Witte & Zglinski, The Idea of Europe in Football, supra note xx, at 28.
[187] Alex Webb, *The Antitrust Case Against Europe's Breakaway Soccer League*, BLOOMBERG, April 19, 2021, https://www.bloomberg.com/opinion/articles/2021-04-19/super-league-the-case-against-europe-s-breakaway-soccer-league; Tsjalle van der Burg, *A European Super League would Violate Competition Law – as would UEFA's Proposed Reforms of the Champions League*, LSE BLOG, Feb. 20, 2021,

Electronic copy available at: https://ssrn.com/abstract=4038568

of the open league model is "a justification ground that has not yet been tested judicially." Moreover, as the European Commission noted in 2007 in its White Paper on Sport, while "the political debate on sport in Europe often attributes considerable importance to the so-called 'European Sport Model'" of open competitions, "it is unrealistic to try to define a unified model of organisation of sport in Europe.[188]

If the major legal justification for restricting clubs and players from joining the European Super League is that it would be a hybrid closed league, that suggests that revising the league to be open, or at least more open, would undercut efforts to prevent it legally. There have been proposals to do just that. Aurelio de Laurentiis, the president of Napoli, which was not one of the founding clubs of the ESL, proposed a version of the breakaway league that would be based on sporting merit.[189] It reportedly would involve the creation of a Pan-European League based on performance in domestic leagues,[190] with qualification to the Super League presumably based on performance in the Pan-European League. That does not mean it would not require radical change. Laurentiis promised that his proposed version could bring €10bn to the European game," but the catch was that "we need willingness and total independence" from UEFA and "[w]e need to reduce the number of games by reducing the size of the top divisions across Europe."[191]

https://blogs.lse.ac.uk/europpblog/2021/02/20/a-european-super-league-would-violate-eu-competition-law-as-would-uefas-proposed-reforms-of-the-champions-league/;

[188] White Paper, supra note xx, at 12.

[189] *A New Proposal for European Super League*, AS, Sept. 15, 2021, https://en.as.com/en/2021/09/15/soccer/1631707856_696538.html.

[190] Id.

[191] Tom Collomosse, *I Dream of a £8.5bn European League: Napoli President Aurelio de Laurentiis Proposes Radical Football Shake-up – and Qualification would be Based on Merit Unlike Super League*, DAILY MAIL, Sept., 14, 2021, https://www.dailymail.co.uk/sport/football/article-9991091/Napoli-president-Aurelio-Laurentiis-travels-Leicester-proposing-radical-football-shake-up.html.

Electronic copy available at: https://ssrn.com/abstract=4038568

It is possible that UEFA could have a legitimate justification to restrict efforts to start even an open Super League. As at least one observer contends, an open version might be considered anticompetitive because clubs that qualify the most often would continue to earn the most money and thereby gain unfair advantage against other clubs in their domestic leagues, leading to less competition in those markets.[192] This objection, however, seems curious given that it is effectively an admission that the current system is anticompetitive. After all, the Champions League arguably produces the same effect. Critics charge that UEFA's Financial Fair Play rules, which force clubs to spend within their revenues, rather than from borrowing or capital contributions from investors, already gives Champions League participants a leg up on qualifying for next year's Champions League.[193] An open Super League that allowed leagues and clubs to choose which competition to enter would presumably double the opportunities to enter and force the leagues to compete for participants on price and quality grounds. Perhaps the existence of two pathways to Europe-wide championships – UEFA's Champions League and a new European Super League – would frustrate the goal of crowning one club as the champion of Europe, but that has always been more myth than reality since the Champions League provides automatic entry to winners of the top leagues of EU countries even if mid-table clubs at neighboring country's league might be stronger. Moreover, even if it reduced the luster and revenue of each competition, it might more evenly spread those revenues around Europe, promoting greater access to opportunities.

IV. Conclusion

[192] Van der Burg, *supra* note xx.

[193] Martin Samuel, *Champions League Carve-Up is in Place Simply to Reward European Elite for their Failures . . . They Have Already Removed as Much Potential Jeopardy as is Possible from the Competition*, DAILY MAIL, Oct. 22, 2020, https://www.dailymail.co.uk/sport/football/article-8870033/MARTIN-SAMUEL-Champions-League-carve-place-reward-European-elite-failures.html.

Electronic copy available at: https://ssrn.com/abstract=4038568

Many have suggested that the root of the growing disputes between clubs and their governing bodies is greed.[194] There is little doubt that there is greed on both sides. In the uproar over the European Super League, UEFA tried to align itself with the fans by accusing the founding clubs of being greedy,[195] but UEFA's operation of the Champions League is subject to the same charge.[196] Indeed, as Henry Bushnell stated when describing the dispute between FIFA and UEFA over the proposed biennial World Cup, it's primarily a battle between "greed" and "more greed."[197] In this case, UEFA is the latter given that the unstated part of its objection to the proposal appears to be the fear that it would divert some of its annual revenues from the Champions League to other regions in a biennial World Cup.[198] "This fight," wrote Bushnell "is not good vs. evil. It's a battle for control."[199]

By re-framing the disputes as being about control rather than simple greed, the legal framework takes on renewed importance. Even with sports' special status under European law, the power of sports governing bodies is not unlimited. As courts have recently acknowledged,

---

[194] See, e.g., Kaveh Solhekol, *"The proposed New European Super League is Driven by Greed and Money" says Kaveh Solhekol*, SKY SPORTS, April 20, 2021, https://www.skysports.com/football/news/12037/12280202/the-proposed-new-european-super-league-is-driven-by-greed-and-money-says-kaveh-solhekol (European Super League); David Goldblatt, *The Greed of the European Super League has been Decades in the Making*, THE GUARDIAN, April 20, 2021, https://www.theguardian.com/commentisfree/2021/apr/20/greed-european-super-league-football-billionaires (European Super League); Bill Haisley, *New Marketing Deal Will Bring Regular Season La Liga Match to the U.S.*, DEADSPIN, Aug. 16, 2018, https://deadspin.com/new-marketing-deal-will-bring-regular-season-la-liga-ma-1828389417 (characterizing leagues that play games abroad, like La Liga and some of its clubs proposed as "greedy).

[195] *UEFA Chief Hits Out at "Greediness, Narcisissim" of Clubs over Super League Plans*, WORLD SOCCER TALK, April 19, 2021, https://worldsoccertalk.com/2021/04/19/uefa-chief-hits-out-at-greediness-narcissism-of-clubs-over-super-league-plans/.

[196] *Chelsea Fans Accuse "Greedy" UEFA of "Ruining" Champions League Final as Club Return Hundreds of Unsold Tickets for Man City Clash*, RT, May 26, 2021, https://www.rt.com/sport/524856-chelsea-fans-angry-uefa-tickets-champions-league-final/; Iain Macintosh, *UEFA Champions League Changes Reek of Green and Incompetence*, ESPN, March 25, 2016, https://www.espn.com/soccer/uefa-champions-league/2/blog/post/2836024/uefa-champions-league-changes-reek-of-greed-and-incompetence;

[197] Henry Bushnell, *In Battle over Biennial World Cups, FIFA isn't the Villain You Think It Is*, Yahoo Sports, Oct. 20, 2021, https://sports.yahoo.com/world-cup-every-two-years-fifa-plan-uefa-greed-023441265.html.

[198] Id.

[199] Id.

Electronic copy available at: https://ssrn.com/abstract=4038568

governing bodies' dual role as regulators and commercial participants in a trillion-dollar industry can make their restrictions on competitors suspect even if they are characterized as an effort to preserve certain fundamental values of the sport. If football's governing bodies fail to take seriously this emerging new legal reality, they may be heading for a reckoning.

Electronic copy available at: https://ssrn.com/abstract=4038568