

The European Super League. A Madrid commercial court grants an injunction and addresses questions to the CJEU

Madrid, June 2021

On 18 April 2021 twelve of Europe's leading football clubs¹ announced their agreement to launch a new competition, the European Super League (ESL), and leave the existing competitions organised by UEFA "as soon as practicable"².

The ESL immediately received strong opposition from fans, players, managers, other clubs, national football governing bodies and governments, as well as sanction warnings from FIFA and UEFA, so that nine clubs withdrew from the project shortly afterwards and, as a consequence, on 21 April 2021 the ESL was forced to "reconsider the most appropriate steps to reshape the project"³.

Nevertheless, the ESL filed a claim against FIFA and UEFA⁴ that has given rise to two noteworthy resolutions issued by a Madrid commercial court: an *ex parte* interim injunction and a request for a preliminary ruling from the Court of Justice of the European Union (CJEU)⁵.

The Madrid court found *prima facie* that FIFA and UEFA have a monopoly in the market for the organisation of international football competitions and are infringing articles 101⁶ and 102⁷ TFEU as their by-laws forbid any international competition not previously authorised by them.

The court also noted that FIFA and UEFA could block the launch of the new competition by imposing certain sanctions they had already announced and, thus, prevent the effectiveness of a potential judgment favourable to the ESL. Therefore, it granted an *ex parte* interim injunction ordering FIFA and UEFA, *inter alia*:

- (i) to refrain from taking any measure or action which directly or indirectly prevents or hinders the preparation, launch or development of the ESL or the participation of any club or player in it;
- (ii) to refrain from directly or indirectly announcing, threatening with, preparing or taking any disciplinary or sanctioning measures against the clubs taking part in

¹ AC Milan, Arsenal FC, Atlético de Madrid, Chelsea FC, FC Barcelona, FC Internazionale Milano, Juventus FC, Liverpool FC, Manchester City, Manchester United, Real Madrid CF and Tottenham Hotspur.

² ESL's press release.

³ ESL's statement.

⁴ The ESL sought a declaration that FIFA and UEFA were infringing articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and an order for them to refrain from continuing to breach such provisions and, in particular, from hindering in any way the new competition (e.g. by sanctioning the clubs, their executives, employees or players).

⁵ Orders of the Madrid commercial court no. 17 respectively dated 20 April 2021 and 11 May 2021.

⁶ "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".

⁷ "Abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it".

the ESL, their executives, employees or players, or inducing or encouraging third parties to do so;

- (iii) to refrain from directly or indirectly excluding the clubs and players taking part in the ESL from any competition in which they had been participating regularly or are eligible to participate; and
- (iv) to instruct their associate members, confederations, federations, licensee clubs and national leagues to comply with the above and, in particular, not to allege any matter relating to the ESL as a ground for complaint, sanction or exclusion from national or international competitions against any club or its executives, employees or players.

Three weeks later the same court referred the following questions to the CJEU seeking a preliminary ruling:

- (i) Should articles 101 and 102 TFEU be interpreted as preventing FIFA and UEFA from making the launch of a new European competition by a third entity subject to their prior authorisation (particularly, there being no regulated procedure based on objective, transparent and non-discriminatory criteria and considering FIFA's and UEFA's possible conflicts of interests)?
- (ii) Should articles 101 and 102 TFEU be interpreted as preventing FIFA, UEFA, their federations and national leagues from threatening to impose sanctions on the clubs taking part in the ESL or their players? If sanctions such as the exclusion from competitions or the ban from participating in national team matches (not based on objective, transparent and non-discriminatory criteria) were imposed, would they constitute a breach of articles 101 or 102 TFEU?
- (iii) Are FIFA's by-laws, which recognise UEFA and its national federations as "the original owners of all of the rights emanating from competitions [...] under their respective jurisdiction" and, thus, deprive organisers and clubs of any alternative competition of such rights, contrary to articles 101 or 102 TFEU?
- (iv) If FIFA or UEFA opposed to the launch of the ESL, could they benefit from the exception rule of article 101.3 TFEU considering that production is substantially limited, alternative products are prevented and innovation is restricted? Would there be any objective justification for the abuse of dominance?
- (v) Are FIFA's and UEFA's by-laws, which make the launch of a new European competition by an economic operator of a Member State subject to their prior authorisation, contrary to any of the fundamental freedoms set out in articles 45, 49, 56 and 63 TFEU⁸?

This request for a preliminary ruling will allow the CJEU to analyse the market position held by FIFA and UEFA from a competition law perspective and the outcome will probably have an important impact not only on football but also on other sports and activities with a great social relevance.

⁸ Free movement of persons, services and capital.