

The Super League case at the crossroads of law and politics

An essay on how trends in football business may influence the outcome of the Super League case

Prof.dr Robby Houben

University of Antwerp

23 June 2023

A hot summer for European football governance

The governance of football in Europe faces a hot summer. In the upcoming weeks, the shape of the football industry will be decided by 15 judges in Luxembourg, perhaps for decades to come. The Court of Justice of the European Union ('CJEU') will do so through its judgments in the case of the [European Super League](#) ('ESL'), the [International Skating Union](#) ('ISU') and [Royal Antwerp FC](#) ('Antwerp').

Especially the verdict in ESL, heard in July 2022, is long awaited. It was expected sooner, but has been delayed because of the Antwerp case. That case was heard in March 2023. By now, it has become clear that the CJEU is considering these cases together, and it would come as no surprise should the verdicts in ESL, ISU and Antwerp be delivered at the same day, shortly after the end of the summer. A little later, the CJEU is due to deliver a verdict in the [Diarra](#) case.

Together, these cases create a perfect storm, wherein the very foundations of football's current governance model are put to the test of the European rule of law. Especially, the Court will have to rule on:

- the legality of UEFA's and FIFA's monopoly for the organization of transnational club competitions;
- UEFA's territorial model, prohibiting e.g. clubs from setting up competitions with clubs from other Member States, even neighboring ones;
- the regulation by UEFA (rules on locally trained players) and by FIFA (transfer system) of a labor market within the EU, without having to

obtain the agreement of the social partners, *i.e.* the players' unions and the clubs' associations;

- the dual role of UEFA and FIFA, as both monopolistic operators of a market and regulators of that same market, enabling to deny access to any competing candidate more or less at will, in particular by using their disciplinary powers over clubs; and finally
- the forced arbitration in favor of the Court of Arbitration for Sport ('CAS'), imposed by the statutes of FIFA and UEFA (and for a substantial part financed in particular by FIFA), whereby the CAS is not obliged to apply EU law and cannot refer questions to the CJEU for a preliminary ruling, *de facto* sheltering FIFA, UEFA and their members from EU law.

The clash of the Advocate Generals

On 15 December 2022, Advocate General ('AG') Rantos delivered his [opinion](#) in the ESL case. He found no reason to sanction FIFA and UEFA. On the contrary, he saw in these private, Swiss based entities gatekeepers protecting an 'alleged' European model of sport, a constitutional principle of the EU, according to the AG. FIFA and UEFA were quick to declare victory. The game was over.

Alas, victory was cried too soon. Meanwhile, AG Rantos' colleague, first AG Szpunar (*primus inter pares*) made clear that AG Rantos' opinion does not reflect a consensus within the Court – and he criticized the views of his colleague Rantos in his own [opinion](#) in the Antwerp case, delivered on 9 March 2023. This is peculiar: it is unprecedented that an AG quite openly contradicts a colleague, practically via an *obiter dictum*, in an opinion on a different, although substantially related matter.

In his opinion, AG Szpunar emphasizes that the European Treaties do not grant any privileges to the international and national football federations. Furthermore, the EU institutions cannot "outsource" to UEFA their functions relating to the development of the EU dimension of sport. Hence, UEFA cannot be considered as a gatekeeper for any so-called 'model of sport.' If, on the basis of the Treaty, someone needs to watch a gate, if at all, the EU must do so itself.

Moreover, AG Szpunar recognizes that national and international federations are private entities, who are subject to unavoidable conflicts of interest, since they pursue economic objectives and - at the same time - claim the role of regulator

("Put differently, UEFA and the URBSFA [note: the Belgian Football Association] would be behaving irrationally if they attempted to further public objectives which ran directly counter to their commercial interests"). This statement has the merit of uncovering the key systemic error in the governance of contemporary football – an error that is at the root of the legal issues in the ESL case. It focuses the Court's attention to the heart of the matter.

Top football: soon confined to an island and a peninsula?

In the aforementioned cases, the Court will not rule on the law in isolation. It will take account of the economic, sociological, sportive and political realities, among others. And rightly so: the law is not a tool in the abstract, but should always be considered within its context.

From a political perspective, the Court will have duly noted the political support of a vast majority of Member States for UEFA, as expressed as at the court hearing in ESL of 6 and 7 July 2022. This massive show of support for UEFA, showcases there is no political appetite for an overhaul of the *status quo* of football governance.

However, whilst football governing bodies and politicians cling to the past, from an economic and sociological perspective, the beautiful game is emigrating from the EU, in favor of an island, the UK, and a peninsula, Saudi Arabia foremost.

Firstly, the January 2023 mercato confirmed the ultra-dominance of English Premier League clubs in the transfer market, particularly through their media revenues. The Premier League transferred players for a higher global amount than all the other professional leagues in the world combined. With the best players at its disposal, the Premier League offers the most attractive product. As a result, it is in a continuous upward spiral: success breeds money and money breeds success. All other European (EU based) leagues, even the four bigger ones, are sidelined by the financial and sportive success of the Premier League. This brings some to say that the "Super League" already exists: it's the Premier League.

Furthermore, following the example of Qatar, but with even bigger resources, Saudi Arabia has invited itself to the world football table. After Cristiano Ronaldo, Saudi Arabia now attracted Karim Benzema, the 2022 golden ball winner and no

less than the captain of Real Madrid. It is likely that in the coming weeks more 'big' names will be announced. The salaries offered by Saudi clubs, financed in particular by state money, are reportedly around 5 times higher than those offered by the major clubs in the European Union, making it almost impossible for EU based clubs to compete on salary.

EU clubs are, therefore, somehow trapped in an economic pincer between, on the one hand, the Premier League and, on the other, Gulf State oil money, the former drawing on the manna of its media revenues, the latter on its state resources.

Secondly, in a couple of years, looking back, the 2022-2023 Champions League may have symbolized a takeover of European football by foreign 'state clubs': after successively sweeping aside the historical power houses Bayern Munich and Real Madrid, Manchester City - a club closely linked to Abu Dhabi - beat Inter Milan in the final, thus bringing the Holy Grail back to the Arabian Peninsula for the first time. A milestone, and it would come as no surprise should PSG (linked to Qatar) and Newcastle FC (recently acquired by Saudi Arabia, in an attempt to not only triumph at home, but also in Europe) soon lift the supreme European trophy.

Nevertheless, a small stone is pinching in state-clubs' shoes: Royal Excelsior Virton. This Belgian second-division club filed a complaint with the European Commission, notably on the basis of the new EU regulation aimed at combating "foreign subsidies", in order to put a stop to this aid from third countries which, according to the Belgian club, generates major distortions of competition in the European professional football market. Interestingly, the Commission can go back five years in time. Yet, naivety is not in its place. The Gulf States are powerful economic and geopolitical actors. It is not in the interest of the EU and many of its Member States to throw them under the bus. Hence, as regards the oil money in football, not a lot is to be expected from the EU institutions. This is probably one of the reasons why Virton is also founding its claim on the general prohibition of unfair competition, included in Articles 101 and 102 of the Treaty. These Articles allow EU enterprises to go to court themselves.

'Juvexit'

Providing additional context for the Court, is the recent case of 'Juvexit', Juventus' contemplated exit out of the ESL project.

European press is speculating that UEFA might have exerted pressure on the three surviving clubs in the ESL project, particularly on Juventus and Barcelona, incentivizing them to jump ship. The strategy seems: if there are no more claimants, there is no case, and therefore no ESL ruling from the CJEU. And indeed, Juventus recently announced that it was considering to leave ESL, stating, however, at the same time that this decision was not due to any pressure from UEFA.

Has pressure been exerted? Maybe. We don't know. But, in reality, it doesn't matter. Assuming that UEFA has not exerted any pressure on Juventus, it is plausible that the 'Juvexit' is motivated by the silent hope of Juventus to get more leeway from UEFA in the short term. Juventus is caught up in disciplinary proceedings in Italy, on the basis of which UEFA has opened disciplinary proceedings at European level. Perhaps, if Juventus 'pleases' UEFA in its capacity of organizer and monopolist of European club competitions, it may receive a more lenient treatment by UEFA in its capacity of regulator and enforcer of disciplinary sanctions, namely not to be excluded from UEFA competitions in the near future ?

The 'Juvexit' presents a perfect example of football governance's systemic error. It illustrates UEFA's inherent conflict of interest. And, all this quite openly, while the ESL case is still pending, with exactly this conflict at the core of the matter: a case of *hubris* by UEFA ?

As recognized by first AG Szpunar, and as illustrated by the 'Juvexit', UEFA's dual role gives rise to structural conflicts of interest and inevitably leads to abuses. It is naïve or romantic to think that UEFA could self-impose rules of good governance. It seems that only the separation of roles can provide a real solution to this issue. Usually, a structural problem requires a structural response.

Scratching somewhat further under the surface of 'Juvexit', Juventus' decision to withdraw from ESL seems to reflect the Italian club's fear that the rule of law, as applied by the Court, will not be able to protect it. If UEFA has the disciplinary power to exclude it from current European competitions with immediate effect, how could Juventus – currently in a weak position – remain involved in setting

up an alternative competition, which probably takes several years? This is an assessment with broader relevance too: setting up a new competition, competing with UEFA competitions, seems to be possible only if the exiting clubs are protected from UEFA's disciplinary sanctions in the transitional period. When - furthering AG Szpunar's assessment of UEFA's inherent conflict of interest - the Court would sanction UEFA's anticompetitive behavior in ESL, it should at least be mindful of that need for protection in a transitional period – on pain of issuing a verdict with only symbolic value.

The love for Switzerland

Another recent development, also providing context, concerns the case of Swift Hespérange against UEFA. In this case, Luxembourg club Swift is requesting the judge of the city of Luxembourg to ask the CJEU whether the UEFA and FIFA territorial model, requiring clubs to operate only within the limits of their national territory, infringes EU competition law.

In its [press release](#) of 22 May 2023, Swift Hespérange argues as follows: *"As usual and in an attempt to once again evade the application of EU law, UEFA is now arguing that the Luxembourg judge is incompetent on the grounds that this dispute should be submitted exclusively to the 'Court of Arbitration for Sport' in Lausanne, in the context of forced arbitration imposed by UEFA's statutes. Swift Hespérange points out that such forced arbitration in Switzerland, the sole - and illegitimate - purpose of which is for UEFA to escape the control of the EU courts and in particular that of the CJEU (since the CAS is not obliged to apply EU law and cannot refer preliminary questions to the CJEU), violates the general principle of EU law of "effective judicial protection" as specified by the CJEU's ACHMEA case law"* (free translation of original French text).

The language of the press release is somewhat provocative, but its message unveils another inconvenient truth of European football governance: mandatory arbitration in Switzerland, even on matters of EU law. Arbitration definitely has advantages in sports, but arguably it falls short of providing an adequate review under the EU rule of law when it concerns the application of EU law. For cases relating to EU law and involving EU citizens the option should be available for a trial before an EU based court, at least before an EU based tribunal, allowing access to the CJEU.

Remarkably, while FIFA and UEFA are forcing clubs to remain within the confines of their national territories, these international federations themselves do not hesitate to create – mostly in their own commercial interests - new competitions for national teams or clubs, further overloading an already overcrowded calendar. Last December, the FIFA President – who was funnily met with resistance by UEFA, that saw its honey pot threatened by another bear - announced the creation of a Club World Cup, bringing together "the 32 best teams in the world" as of 2025. They did so without consulting the clubs, nor the players.

EU politicians in oblivion and all eyes on the Court

If the examples throughout this essay are telling for the future, the EU may be relegated to the role of spectator on the (geo)political, economic, sportive and sociological terrain of football, especially if EU policy remains focused on preserving the organizational *status quo*, instead of enabling reform to preserve high quality football within the EU. Cynically, whilst EU politicians remain in oblivion, UK politicians realize they possess the crown jewel and are envisaging legislation to preserve their dominant domestic league position.

Preserving top football in the EU should be of concern to EU politicians too, even those that don't supporter for the game. The football economy represents more than 1% of the EU's GDP. That is worth something. Furthermore, 'premium football content' has always been a driver of technological and/or commercial innovation. The cable television sector was largely built on this content. On this content, EU initiatives in the digital sector could develop in the near future too. Illustrative for the potential is that the EU's 16 most followed clubs count approximately 1.5 billion followers, while TikTok 'only' has 835 millions of users. In the distant future, this same content can contribute to technical and commercial developments unknown to date.

The EU cannot rely on UEFA to cater for its interests. UEFA's governance simply does not allow that, as the majority of its members are non-EU states. Furthermore, it is Swiss based – and a private entity with private interests, prevailing over public interests, as AG Szpunar rightly emphasized in his Antwerp opinion. In fact, the EU's interests will only be observed by the EU itself. Firstly, by imposing good governance on UEFA, with respect for the EU rule of law. But

also, and perhaps foremost, by safeguarding access to the internal market for other organizers than UEFA that strive to continue to offer top football within the EU. Such 'competition between competitions' may very well grow the pie for football as a whole, to the benefit of all stakeholders, fans of EU based clubs not in the least. At a time when European leaders are championing the reindustrialization of the EU and the development of digital technology and AI within the EU, is this so far-fetched ?

Absent political interest, in the short term innovators who challenge the *status quo* place all hope in the hands of the Court. The CJEU has the opportunity to address football governance's systemic errors. And, by freeing up the market for club football competitions, it could empower football's stakeholders, especially clubs and players, supported by progressive politicians, to co-build a sustainable future for (top) football in the EU. Such future could very well include a pan-European competition model truly capable of competing with the Premier League and 'state clubs'. It seems the CJEU has all the keys in hand to unlock a continued prosperous future for club football in the EU, for the benefit of all Europeans to enjoy.