

EU rulings reflect increased antitrust scrutiny of sports governance in parallel with the US

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Professional soccer in Europe has faced a number of antitrust rulings over the past year that very likely will impact its governance. Recent legal decisions have concluded that FIFA — the international governing body for soccer, responsible for setting, maintaining and enforcing rules across worldwide soccer competitions — and UEFA, FIFA's European counterpart, have potentially dominant positions and that some of their rules infringe European antitrust law. Parallels can also be drawn with recent treatment of professional swimming and college athlete transfers in the United States.

This includes rules on participation in alternative competitions, the composition of teams and player movement between teams — fundamental rules that require significant revision and affect the manner in which governance of sporting competitions is conducted. Collectively, these developments signal that a significant transformation is coming for the governance of sports, in Europe and the United States.

Competition participation (European Super League/ International Swimming League)

At the end of 2023, the highest court in the European Union, the European Court of Justice (CJEU), was asked to consider whether FIFA and UEFA rules are anticompetitive by virtue of preventing teams from participating in a new, alternative, "European Super League" competition and threatening sanctions for doing so.

As part of its evaluation, the CJEU indicated that both governing bodies should be subject to standard antitrust laws and may be dominant because of "an economic and monetary monopoly" over rights exercised when undertaking various economic activities, including organizing and marketing sporting events, as well as exploiting associated financial and commercial rights, particularly given the lack of alternative worldwide or European soccer governing bodies (CJEU, *European Superleague Company SL v FIFA, UEFA*, C-333/21, para. 35).

Consequently, according to the CJEU, those rules would restrict trade as an abuse of dominance, unless they were underpinned by "substantive criteria and detailed procedural rules" ensuring their clarity, transparency, objectivity and non-discrimination (para. 39). Upon remittal, the national court ultimately found the rules did not meet these standards so were unlawful.

New competitions aiming to establish themselves as alternatives to pre-existing leagues in Europe have a right to do so insofar as governing bodies do not have clear, transparent, objective and non-discriminatory rules in place to prevent their authorized establishment. Furthermore, being labelled as potentially dominant suggests that governing bodies like FIFA and UEFA may need to consider their rules and processes in regulating international competitions more broadly to avoid similar legal consequences.

In the United States, on Nov. 25, the 9th U.S. Circuit Court of Appeals rejected a petition by the international swimming governing body, World Aquatics ("WA"), to reconsider reinstating claims of a class of individual swimmers and the International Swimming League ("ISL") that WA violated antitrust law by allegedly boycotting a proposed ISL event in 2018 after withdrawing sponsorship.

Cases highlight the increasing antitrust scrutiny of the governance of sports. FIFA and UEFA have been identified as dominant undertakings with almost monopolistic control of the performance and consumption of soccer worldwide and in Europe, respectively.

ISL originally claimed that WA restrained competition in the market for top-tier international swimming competitions by blocking non-WA-sanctioned competitions and threatening swimmers who participated with bans from the Olympics. Although a federal court in California had granted WA summary judgment in 2023 because ISL could not demonstrate that WA's actions harmed competition in a relevant market, the 9th Circuit determined that WA's actions could be considered an anticompetitive group boycott that disadvantaged competitors (*Shields v. World Aquatics and International Swimming League v. World Aquatics*, 9th U.S. Circuit Court of Appeals, Nos. 23-15092 and 23-15156).

The outcome at trial could make it easier to create alternative competitions to pre-existing leagues in the United States, much like in Europe.

Team composition (Royal Antwerp)

Also last December, the CJEU considered UEFA's rule requiring European domestic teams to contract a minimum number of players originating from the same country. The CJEU held national Courts should determine the legality of this rule in the context of national social and economic policy. This includes the rule's overall objective to ensure training of domestic soccer players (CJEU, *SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL*, C-680/21, Judgment of 21 December 2023, para. 110).

National courts were tasked with assessing the legality of the rule in terms of whether it is absolutely required to achieve the objective (i.e., "necessary"); otherwise the CJEU expected it to be restrictive of competition as a limitation on soccer teams from recruiting young players from foreign countries (para. 150).

The responsible Belgian court may still uphold the need for a minimum number of domestic players because of the broad national importance of soccer and the development of future national players. The potential impact of this decision stretches beyond sports and into European labor markets generally. In essence, this rule reduces the number of places available to foreign players. While it has long been unlawful to fix wages, the CJEU's judgment may provide companies authority to fix the number of opportunities available for certain nationalities so long as doing so could arguably be considered "necessary."

Player transfers (NCAA/Diarra)

Team composition issues are far less likely in U.S. sports, where professionals enter into collective bargaining agreements ("CBA") with the major leagues. These CBAs are exempt from antitrust laws and provide negotiating power for fundamental terms of participation, including wage structures and team sizes. CBAs provide security to players and teams across the major leagues, although this does not apply to college athletics, where athletes often transfer between institutions for a variety of reasons.

In 2023, Attorneys General from 10 states across the United States, the District of Columbia and the Department of Justice sued the NCAA alleging that its rules on student athlete transfers restricted their ability to engage in the market for labor in college athletics.

The NCAA argued that requirements for student athletes to not participate for a certain period immediately following a transfer served to protect the amateur model of the sports by preventing colleges from actively recruiting and poaching student athletes from other colleges.

After a federal judge in West Virginia granted motions for a temporary restraining order and preliminary injunction to ensure student athletes who transferred could resume playing immediately, (*State of Ohio et al. v. NCAA, United States District Court for the*

Northern District of West Virginia, Civil Action No. 1:23-cv-100), the NCAA agreed, in May this year, to a consent decree lifting the bar on immediate participation for transfers and granting an additional year of eligibility to all of those who had been declared ineligible as a consequence. This outcome highlights the enforcement trend in the United States to protect labor rights from anticompetitive conduct.

The stability of playing contracts is a risk in Europe. The CJEU most recently considered a FIFA rule concerning transfers of players between teams — specifically, the "Regulations on the Status and Transfer of Players" — requiring that if a player or team terminates a playing contract prematurely they are liable to compensate the other, and if a player terminates the contract to join a new team, that player and their new team are both liable to pay the former team compensation, as well as sporting sanctions for the assumed inducement of the player to terminate their contract prematurely.

Similarly to the NCAA rules, FIFA's rules were designed to offer protection and stability to players, teams and their contracts, by preventing solicitation of players under contract, in light of soccer's dependence on transfer fees rather than player trades.

Following a challenge to the transfer rules, the CJEU was definitive in finding them to be restrictive of competition as agreements designed to prevent, restrict or distort trade between EU member states by establishing effectively a "general, absolute and permanent ban" on recruitment of players contracted by other soccer teams (CJEU, *FIFA v BZ ("Diarra")*, C-650/22, 4 October 2024, para. 146).

In this way, the CJEU drew a parallel between FIFA's rules and no-poach agreements, which are already scrutinized significantly under European labor law as being presumed to restrict competition without need for anticompetitive effects to be shown (para. 145).

The CJEU encouraged the referring national Belgian court to make a final decision on the legality of the rules, including examining whether they could be justified with a countervailing procompetitive rationale, despite suggesting that these rules cannot be justified as indispensable or necessary to achieve efficiencies in organizing soccer teams given the "discretionary and/or disproportionate" nature of the rules (para. 157). The Belgian court will have to consider FIFA's stated objective of maintaining the stability of player contracts and teams' rosters (para. 98).

Irrespective of the impending decision, FIFA has already committed (<https://reut.rs/3CYJ3SL>) to revising its transfer rules with input from players and teams to make sure they are compliant with EU antitrust law and ensure that the CJEU ruling does not give players license to terminate contracts to move to different teams in the absence of negotiations for transfer fees.

Absent update to FIFA's transfer rules, there is potential for significant changes to affect soccer's international transfer market, as it could become commonplace for players to terminate their contracts unilaterally — and freely — to seek a preferable opportunity with a different team, leaving playing contracts comparably unstable.

Conclusion

These cases highlight the increasing antitrust scrutiny of the governance of sports. FIFA and UEFA have been identified as dominant undertakings with almost monopolistic control of the performance and consumption of soccer worldwide and in Europe, respectively. Other sports' governing bodies are also under threat of challenges to their processes and management.

In the wake of these legal decisions, FIFA, UEFA and other governing bodies are faced with an urgent need to assess the risk of their rules in restricting competition in the markets for their sports to avoid finding out the hard way.

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