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The Sporting Exemption of Broadcasting Rights: Why and How Does EU Law Exempt the Collective Sale of Broadcasting Rights by UEFA?

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There are two ways to sell broadcasting rights to a club competition. The first is individual selling, whereby clubs sell the rights to their home games to broadcasters and negotiate prices individually. The second is collective selling, meaning the rights are sold as one bundle to broadcasters and the revenue is then distributed among the clubs according to the criteria set in the relevant agreement. The Union of European Football Associations (UEFA) uses the latter, which in principle constitutes a restriction of competition under European Union (EU) law, as it forecloses the market for broadcasting rights. Yet the practice is exempted from ordinary competition law. This was decided by the European Commission more than 20 years ago in a decision that put forward the arguments of efficiency gains and solidarity redistribution. However, as has been made clear in the recent European Super League judgment, the arguments are of a theoretical nature and the decision is based on a poor and incomplete analysis. The benefits of the collective sale of broadcasting rights by UEFA may or may not outweigh the disadvantages caused, but the fact that the answer is still highly unclear represents a failure by EU law to respect its own competition law, and to justify any exemptions to it.

Keywords: broadcast rights, collective selling, UEFA, EU law, football, soccer

Introduction

The football industry is a peculiar one, for despite the lucrative nature of the market and its immense interest to the public, European Union (EU) law cannot intervene in sporting matters. As per the principal of conferral,[1] the EU possesses only the competences conferred upon it by its Member States in the Treaties; and sports is not one of them. Therefore, it was of significant constitutional importance when the

[1] Articles 4 and 5 TEU.

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Treaty of Lisbon made a first explicit reference to sport in Article 165 TFEU (Treaty on the Functioning of the European Union). In reality, however, this novelty merely served to protect certain values of the European sports model (ESM), such as the idea of promotion and relegation, and not to grant the EU powers to intervene in the market. The regulation of football remains the duty of individual Member States, with it being merely a 'supporting'[2] competence of the EU, despite the transnational nature of the sport resulting in an ineffective regulation by any one jurisdiction. Therefore, EU sports law consists of a patchwork of judicial decisions, which make use of competition and free movement law to address sports governing bodies' (SGBs) practices and their compatibility with the internal market.

The Union of European Football Associations (UEFA) is the sports governing body for football in Europe, and in order to understand its powers, it is important to understand the governance structure within which it operates. Often described as a 'pyramid'[3] structure, football governance has a hierarchical relationship, with the Federation of International Football Associations (FIFA) sitting at the top and directly beneath them UEFA and the other continental associations. The pyramid has a further three levels, with national leagues and associations sitting under UEFA and above regional associations, which themselves are above clubs. The key here is that each level has exclusive rights within its scope and yet still answers to those above them, hence the wide acceptance of the pyramid analogy. As the SBG for football in Europe, UEFA performs a double role in the industry. On the one hand, it is the regulator for the sport, setting the rules for clubs on and off the pitch; on the other hand, it acts as the sole organizer of competitions in Europe. As part of this latter role, UEFA adjudicates itself the exclusive ownership and right of exploitation of all the rights emanating from its competitions, with broadcasting rights being the most notable of these.

The sale of broadcasting rights is an area of great importance in the regulation of European football. Deloitte estimated in 2018 that broadcasting revenues, from both national and European competitions made up 42% of a club's revenue, with the remaining 58% coming from merchandising and matchday sales.[4] On top of technological advances such as near-earth satellites, which enable a higher resolution, broadcasting revenues have increased due to the 'privatisation of the media, the rise

[2] Article 6(e) TFEU.

[3] Borja Garcia, *The influence of the EU on the governance of football,* in The Organisation and Governance of Top Football Across Europe: An Institutional Perspective' 32, 32 (H. Gammelsæter and B. Senaux eds., 2011).

[4] John Considine, *Revenue Sources for Football Clubs*, The Economics of Sport (2019) https://www.sportseconomics.org/sports-economics/revenue-sources-for-football-clubs (last visited Oct. 6, 2024).

of the internet and the spread of football into new markets'.[5] Broadcasters went from being mainly state-run channels in the late 1980s to being mostly private broadcasters that charge for their services. The issue of broadcasting rights is as wide as it is complex, and much of it falls well outside the scope of this article. As this article deals with EU law's justifications for the collective sale of broadcasting rights at the European level, the focus will be on the sale of those rights by UEFA, not national leagues, which differ from the European competition and among each other.

There are two ways to sell broadcasting rights to a club competition. The first is individual selling, whereby clubs sell the rights to their home games to broadcasters and negotiate prices individually. The second is collective selling, meaning the rights are sold as one bundle to broadcasters and the revenue is then distributed among the clubs according to the criteria set in the relevant agreement. UEFA uses the latter and has preferred to sell these on an exclusive basis in arrangements covering a period of several years, which has raised concerns among many for being an anticompetitive practice. Competition rules have a much wider sweep than EU legislation and, therefore, while sport in general escapes the latter,[6] the sale of broadcasting rights, being an economic activity within the internal market, falls under EU law's jurisdiction.

The practice of collective selling is, in principle, a flagrant violation of Article 101 TFEU and a clear restriction of competition, as it replaces the market for multiple bidders with a single one at an elevated price. Therefore, not only does the practice involve price-fixing but it also limits the availability of rights to football matches and strengthens the market position of big broadcasters. As per Article 101 TFEU, any practice involving price fixing is strictly prohibited unless it can be justified. Furthermore, since it has been established by the Court of Justice that UEFA holds a dominant position in the market for the sale of football broadcasting rights, this restriction of competition seemingly represents a violation of Article 102 TFEU as well.[7] Therefore, considering this practice has been ongoing for more than two decades, the question arises as to why, and how, EU law justifies this restriction of competition that comes at the cost of a significant market foreclosure on the supply side.

This article argues that the decision to exempt the collective sale of broadcasting rights from Articles 101 and 102 TFEU may be justified, but the analysis behind the justifications is incomplete. The article will first address the Commission decision of 2003 granting the original exemption to the collective sale of rights by UEFA

[5] Floris De Witte & Jan Zglinski, *The Idea of Europe in Football,* 1 Eur. Law Open 286-315 (2022).

[6] Stephen Weatherill, The Sale of Rights to Broadcast Sporting Events Under EC Law, ISLJ (3-4) 3 (2006).

[7] Case C-333/21 European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA), ECLI:EU:C:2023:1011 (Dec. 21, 2023).

in Section 1. Next, Section 2 will deal with the *European Super League Company (ESLC) Case,* which provides a newer analysis of the issue more than 20 years after the exemption was granted. Section 3 will make a brief comparison between the collective sale of rights by UEFA and the American National Football League (NFL), before addressing the two main justifications offered by EU law for the exemption, as well as some points conditioning the exemption. The argument that will be put forward is that although the decision by EU law to justify the collective sale of broadcasting rights by UEFA is not wrong, the manner in which it is done has been poor.

Section 1: The Commission Decision of 2003

In 2001, the Commission sent a statement of objections to UEFA stating that the arrangements for the sale of broadcasting rights to the Champions League infringed Article 81 EC (now Article 101 TFEU). UEFA duly responded by proposing an unbundling of rights, as well as offering three main justifications for the collective selling of these rights, hoping to be granted an exemption under Article 101(3) TFEU.

1.1. Arguments Considered by the Commission

The first of the arguments put forward to justify this restriction on competition was the unique nature of the football market. Weatherill illustrates the point excellently by writing 'a market's sole producer of sausages or sole maker of tractors enjoys great economic power, for consumers have no choice. A solitary sports team is of no interest to anyone'.[8] The point is clear—a team needs rivals, which creates a necessary interdependence that does not exist in most markets. It is right for the law to consider this special nature, for otherwise, there would be a 'risk of mishandling the peculiar economic context'[9] in which sports leagues operate. Despite the clear interdependence between rivals, however, this does not justify the restriction of output caused by collective selling. In response to UEFA's claim, Crave and Crandall argue it is possible to separate activities that must be carried on collectively, such as agreements on rules or coordinated fixtures, and activities that must be undertaken collectively.[10] The sale of broadcasting rights falls into the latter category, they argue. Indeed, the Commission accepted that collective selling is a commercial choice and not a necessity for the functioning of sport. Therefore, it seems this justification of collective selling is a weak one; it rightly points out the special nature of the football market but fails to establish a convincing link between that and the justification of collective selling. Based solely on this first argument, Cave and Crandall are right

[8] Weatherill, *supra* note 6.

[9] *Id*.

[10] Martin Cave & Robert Crandall, Sports Rights and the Broadcast Industry, 111 Econ. J. F4, 26 (2001).

to argue joint selling is more the 'operation of a cartel'[11] than a justified necessity.

The second argument advanced by UEFA is a more convincing one, though not without its flaws. An attractive sports league requires a certain competitive balance between the teams to guarantee more equal opportunities to hire the best players and ensure some uncertainty of outcome. Collective selling, it is argued, is an effective way to ensure an even, or at least a fair, revenue distribution. The argument is certainly a valid one, for the alternative of individual selling would result in the biggest clubs earning exponentially more than the smaller ones. With collective selling, the combined broadcasting rights for the Champions League are sold at one price and distributed between the teams. However, Szymanski makes an important point regarding this model. Perfect competitive balance may not be welfare enhancing. Due to population differences, competitive 'imbalances which favour teams with larger support bases might result in higher consumer welfare'.[12] Enhancing the competitive balance of a competition does seem like a respectable reason for joint selling, but this does not mean that an ideal competition is perfectly competitive. Indeed, 'even quite unbalanced matches … can be attractive' to football fans.[13]

Another noteworthy flaw with the competitive balance argument identified by Szymanski is that a large amount of economic literature surrounding the world of sports 'is based on the assumption that there is a fixed supply of talent available to clubs'.[14] This, of course, is not the case, as clubs scout talent individually and anyone good enough will, in theory, get signed to a club. Szymanski attributes this false assumption to the fact that much of the literature has focused on U.S. sports leagues, where there is a draft at the beginning of each season and that is the sole injection of new talent into the league. In European sports, where there is no such thing as a draft, the bidding market opens up more and clubs are able to acquire young superstars for next to nothing if they are the first to discover the player. However, it is important to have a certain competitive balance in a competition, and collective selling certainly helps achieve that better than individual selling. While there have been suggestions for individual selling coupled with some sort of internal revenue distribution agreement,[15] it seems unlikely that would work in practice. Clubs are businesses and, therefore, selfish in nature; it is difficult to imagine them readily giving up their revenue for any reason, especially to their rivals.

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[11] *Id*.

[12] Stefan Szymanski, *Income Inequality, Competitive Balance and the Attractiveness of Team Sports: Some Evidence and a Natural Experiment from English Soccer*, 111 Econ. J. 69, 69-84 (2001).

[13] *Id*.

[14] Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 JEL 1137, 1137-1187 (2003).

[15] Weatherill, *supra* note 6.

The third argument offered to justify collective selling was that, just as 'horizontal solidarity' between clubs offers welfare gains, so too does 'vertical solidarity.'[16] It is argued this contributes to 'wider policy issues'[17] by having some distribution to lower levels of football. Though this argument is not important enough to settle any disputes on its own, it certainly adds value to UEFA's overall justification. The Champions League is the highest possible level in club football but for a player to get there, they need the support and opportunities given in lower levels. Though Massey calculates that only 6% of Champions League revenue is distributed to National Associations to fund grassroots activities,[18] it is unlikely they would receive anywhere close to that were there not a central distributor, as well as a higher total revenue resulting from the collective sale of rights.

1.2. Reasoning by the Commission

In 2003, the Commission adopted a formal decision regarding its initial statement of objections. As previously mentioned, it rejected the first of the three arguments on the grounds that it was a commercial choice and not a necessity for the organization of football. However, it accepted the remaining arguments founded on solidarity, and added to the justification of collective selling the fact that the system created efficiencies of a particularly significant magnitude by creating a single point of sale for defined packages of matches. This resulted in the elimination of the need for broadcasters to deal with many different clubs 'subject to different ownership structures in different jurisdictions throughout Europe.'[19] Low transaction costs, coupled with solidarity arguments, seemed to satisfy the criteria for exemption, while the first argument of interdependence did not. However, the Commission exempted the practice only on the condition that certain changes were made to the exclusivity of these rights.

Two main changes were made to the way the rights were sold. The first was that the Commission insisted on an unbundling of the packages of matches. Instead of selling the entirety of the rights to one broadcaster, a package was split into six, which included several for matches as well as one for highlights. This, coupled with the condition that one broadcaster could buy a maximum of five of those packages, allowed multiple broadcasters to enter the market. The reality, of course, is that big broadcasters often buy all five of the packages they are allowed, thus substituting monopolies for heavily slanted duopolies. There are some notable exceptions like

[16] *Id*.

[17] Patrick Massey, *Are Sports Cartels Different? An Analysis of EU Commission Decisions Concerning Collective Selling Arrangements for Football Broadcasting Rights*, 30 World Compet 87, 87-106 (2007).

[18] *Id*.

[19] Weatherill, *supra* note 6.

Italy, where the packages are split between three broadcasters; in Spain, for example, there is only one. However, the fact that a separate package was made for highlights has allowed clubs, through their social media accounts, to benefit more under the new exclusivity rules. The other condition laid out was a shortening of the duration of these contracts to a maximum of three years. While long exclusive contracts can lead to a market foreclosure, by suppressing the market for the duration of the contract, shorter ones allow prices to adapt as well as giving competitors the chance to enter the market every three years.

Despite the lower transaction costs, the clear losers in the system of collective selling are the purchasing broadcasters. From their perspective, collective selling merely leads to a restriction in competition that diminishes choice and increases in price. Weatherill is right to question whether the sports industry 'should be permitted to improve its position at the expense of third parties.'[20] The Commission failed to address this issue in its decision but exempted the practice, nonetheless, leaving the impression that there was more analysis to be made before accepting this restrictive practice as legitimate. Weatherill rightly wonders if this is a sound matter of law and argues that the orthodox approach would be to condemn collective selling as an unlawful restriction and to expect clubs to sell rights individually. Only then 'would the issue of sport's need for internal organizational solidarity be properly invoked.'[21] In this vein, he suggests an 'internally arranged sharing of income'[22] that, as previously argued in this article, would be unlikely to work due to the selfish nature of clubs. However, his point of third-party costs is a good one and one that failed to be addressed by the Commission. Meanwhile, broadcasters are left paying a higher price, which is inevitably passed on to consumers.

Overall, it is clear that 'at stake is a balance'[23] between the advantages and costs of collective selling. On the one hand, selling collectively allows both a vertical and a horizontal solidarity that would be very difficult to achieve otherwise, as well as lowering transaction costs. On the other hand, the practice is an obvious restriction of output and results in the suppression of a market (individual selling) that would otherwise have existed. It also results in broadcasters, and ultimately consumers, paying a higher price. Judging by the Commission's decision that established the practice, more analysis was required than was done before issuing the exemption. The fact that broadcasters losing out so clearly was not even considered in a competition

[20] Stephen Weatherill, *Never Let a Good Fiasco Go To Waste: Why and How the Governance of Football Should be Reformed after the Demise of the 'SuperLeague',* Blogpost for EU Law Analysis (2021), http://eulawanalysis.blogspot.com/2021/04/never-let-good-fiasco-go-to-waste-why.html.

[21] Weatherill, *supra* note 6.

[22] *Id*.

[23] *Id*.

law analysis is unacceptable and Weatherill is right to point this out. Despite this, the alternative of individual selling might well result in an unfairer situation, as the difference between what big and small clubs make would be much greater than it is today, and to this day big clubs still make much more than their smaller counterparts. Even if the unique nature of the football market, advanced by UEFA in its first argument, is disregarded, the need for some sort of competitive balance, as well as some vertical solidarity, however small, seems a good enough reason to justify collective selling. The Commission's conditions on reducing the exclusivity of the rights sold, by shortening contracts and unbundling the packages, improved the competitiveness of the sale. Perhaps these did not go far enough and should have required shorter contracts and a greater unbundling, but they were undoubtably a step in the right direction, despite the basis of an incomplete analysis.

Section 2: The European Super League Company Case

On April 18, 2021, the European Super League Company (ELSC), a company governed by Spanish law and originally comprising 12 prestigious football teams, announced the creation of the European Super League (ESL), a European breakaway competition that was to be set up as an alternative to UEFA's flagship competition—the Champions League. The proposal was that of a 'semi-open'[24] competition, whereby 15 members would have a place guaranteed in the competition, without having to qualify, while the rest would have to. This was then altered in a subsequent proposal in 2023 to include 60-80 teams and a system of promotion and relegation among these.

The day of the first announcement, UEFA responded with a press release defending the current model and warning that clubs and players participating in the proposed ESL would be banned from all FIFA and UEFA competitions, including national teams.[25] The ESLC swiftly brought a claim before a Spanish court claiming UEFA's behavior was 'anti-competitive and incompatible'[26] with Articles 101 and 102 TFEU, as well as being in violation of several of the fundamental economic

[24] Case C-333/21 European Superleague Company SL v Unión de Federaciones Europeas de Fútbol (UEFA), Fédération internationale de football association (FIFA), ECLI:EU:C:2022:993 (Dec. 15, 2022), Opinion of AG Rantos, at 14.

[25] Peter Hall, *UEFA Reacts to European Super League – Full Statement*, Reuters (Apr. 19, 2021), https://www.reuters.com/lifestyle/sports/uefa-reacts-european-super-league-full-statement-2021-04-19/#:~:text="Our%20game%20has%20become%20the,Never,%20ever.

[26] Case C-333/21 European Superleague Company SL v Unión de Federaciones Europeas de Fútbol (UEFA), Fédération internationale de football association (FIFA), ECLI:EU:C:2022:993 (Dec. 15, 2022), Opinion of AG Rantos, at 17.

freedoms enshrined in the TFEU. The court immediately granted a series of protective measures and, since it established UEFA's position to be that of a monopoly, decided to refer several questions to the Court of Justice regarding certain practices and their compatibility with EU law. The effect of this has been that UEFA' system of governance has undergone a process of judicial review for the first time, as the court analyzed its objectives and practices of governance

The first three questions referred to the Court of Justice concerned whether UEFA's rules relating to the prior approval scheme and the corresponding sanctions were in violation of Articles 101 and 102 TFEU, considering there was 'no regulated procedure, based on objective, transparent and non-discriminatory criteria.'[27] The fourth question, by far the most relevant to this article, questioned whether Articles 67 and 68 of the FIFA Statutes are incompatible with Articles 101 and 102 TFEU, in so far as they identify UEFA as 'original owners of all the rights emanating from competitions … coming under their respective jurisdictions,' as well as arrogating to themselves the sole responsibility for the marketing of those rights.[28] This preliminary question offered the best opportunity in more than 20 years to revisit the analysis made by the Commission in 2003, and to address the gaps that were left. However, although the Court of Justice delved into the matter with promising detail, the analysis was not carried on nor finalized by the Spanish national court that had referred the questions, as will be elaborated on later in this section. As a result, the best chance in 20 years for EU law to examine the current model of collective sales might have slipped away.

2.1. Article 67: Exclusive Ownership of Rights

Within the fourth preliminary question concerning broadcasting rights emanating from football competitions, two issues are raised. The first, relating to FIFA Article 67, questioned whether it is contrary to EU competition law for UEFA, as a confederation of FIFA, to attribute to itself the title of original owners of all rights emanating from competitions and other events coming under their respective jurisdiction. The second, which will be addressed next, questions the legality of UEFA being exclusively responsible for the exploitation of said rights.

The question of the ownership of these rights is dealt with swiftly by the Court of Justice. The Court first noted that, in their written observations and pleading before the Court, UEFA clarified what is meant by 'competitions, matches and other events

[27] *Id*. at 19.

[28] Case C-333/21 European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA), ECLI:EU:C:2023:1011 (Dec. 21, 2023), at 47(4).

coming under their jurisdiction.'[29] UEFA argued that by 'jurisdiction' the Article refers not to its territorial jurisdiction but to competitions organized by the European confederation, to the exclusion of those organized by third parties. The applicant (the ESLC) noted that the rule at issue could easily be construed otherwise, and indeed probably would without this timely clarification by UEFA, 'given the different meanings that can be attributed to the term 'jurisdiction.'[30] However, the Court sided with UEFA's interpretation of the term and put an end to that ambiguity.

The Court of Justice went on to address the issue of original ownership as a whole by clearly stating that under Article 345 TFEU, the EU and TFEU Treaties 'are in no way to prejudice the rules in Member States governing the system of property ownership.'[31] Therefore, since property ownership does not fall under the purview of EU law, Articles 101 and 102 TFEU cannot be said to preclude rules that designate UEFA the original owner of all rights emanating from competition organized by them, once the jurisdictional ambiguity has been resolved. It is for the Member States and not the Court of Justice to further examine the issue of property ownership in question.

2.2. Article 68: Exclusive Exploitation of Rights

Having dealt with the ownership of the rights related to football competitions under their jurisdiction, the Court turns its attention toward the legality of the 'exclusive' exploitation of these rights, based on Article 68 of the FIFA Statutes. After briefly clarifying that Articles 101 and 102 TFEU may apply to the present question simultaneously, as long as their conditions are met,[32] the Court delves into an analysis of the effects of UEFA's exclusive exploitation of rights to conclude that their behavior is contrary to Articles 101 and 102 TFEU, unless it can be justified.

Notably, Articles 101(1)(b) and 102(b) TFEU expressly prohibit decisions by associations of undertakings and abuse consisting in preventing and restricting competition to the prejudice of consumers. The Court established that the rule at issue, Article 68 of the FIFA Statutes, has as its 'very purpose,'[33] as evidenced by an examination of its content, to substitute an arrangement for the exclusive and collective exploitation of the rights emanating from UEFA competitions for 'any other form of exploitation' that might have been freely chosen by participating clubs in the absence of such a rule.[34] Moreover, the rule makes subject to such powers of

[29] *Id*. at 211.

[30] *Id*. at 212.

[31] *Id*. at 213.

[32] *Id*. at 119.

[33] *Id*. at 219.

[34] *Id*.

exclusive authorization, in no ambiguous terms, all of the emanating rights, including audiovisual and radio recording, reproductions and broadcasting rights multimedia rights, marketing and promotion rights, or intellectual property rights, to name but a few. The legal and economic context in which this takes place does nothing but exacerbate the magnitude of such powers, for the various rights listed constitute the primary source of revenue for both UEFA and the participating clubs, without whom these competitions would not be possible.

Since these rights are legally protected and have their own economic value,[35] they constitute an essential parameter of competition that the rule at issue removes from the control of the participating football clubs. The Court makes sure to distinguish that unlike the organization of inter-club football competitions, which is a horizontal economic activity involving only those entities that are actual or potential participants and organizers, the marketing and exploitation of emanating rights is a vertical economic activity, which affects more than merely the clubs.[36] On the supply side lie these clubs, by making possible the existence of the rights, while on the demand side lie those wishing to purchase those rights, for example media service providers, in order to broadcast or sell them. These broadcasters are themselves 'liable to sell space or time to undertakings which are active in other economic sectors,'[37] for the purposes of advertising or sponsorship, thus amplifying the effects of UEFA's exclusive exploitation rights.

Hence, the Court concludes its analysis by stating that 'given their content, what they objectively aim to achieve in terms of competition and the economic and legal context of which they form a part,' the rule at issue—namely the exclusive exploitation of all rights emanating from inter-club football competitions—is liable to be contrary to Articles 101 and 102 TFEU.[38] Firstly, by preventing 'any and all competition between professional football clubs' and secondly, by affecting the functioning of competition to the detriment of third party undertakings operating across a range of markets situated downstream of UEFA's marketing, and consequently also to the detriment of consumers and televisions viewers who are not given the opportunity to benefit from competition.[39]

In particular, the rule in question that confers on UEFA a monopoly consisting of a total control over the supply of all emanating rights, is liable to enable UEFA

[35] Case C-206/01 Arsenal Football Club v Matthew Reed, 2002 E.C.R. I-10273, at 50.

[36] Case C-333/21 European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA), ECLI:EU:C:2023:1011 (Dec. 21, 2023), at 227.

[37] *Id*. at 227.

[38] *Id*. at 228.

[39] *Id*.

to charge 'excessive, and therefore abusive' prices.[40] To further add to UEFA's commanding position, the actual or potential buyers have only limited negotiation power, to put it mildly, given the 'fundamental and inescapable place held by inter club football competitions' as products with drawing power able to attract, and importantly retain, the loyalty of a large audience throughout the year.[41] Moreover, by forcing all buyers to purchase from a single vendor offering a product with no alternatives and a 'strong image and reputation,'[42] the rule at issue is liable to incentive buyers to standardize their conduct on the market and their offerings to their customers, leading to 'a narrowing of choice and less innovation,' to the detriment of consumers and television viewers more broadly.[43]

The Court of Justice concludes that Article 68 of the FIFA Statutes substitutes 'imperatively and completely'[44] an arrangement for the exclusive exploitation of all the rights emanating from inter-club competitions organized by UEFA, for any other mode of exploitation that might have been freely chosen in the absence of such a rule. Therefore, the Court is of the (rather important) opinion that the rule in question may be regarded as having as its 'object' the prevention or restriction of competition within its meaning of Article 101(1) TFEU, as well as constituting an 'abuse' of a dominant position as per Article 102 TFEU;[45] that is, unless it can be proven to be justified, which the Court addresses next.

2.3. Possible Justifications Considered by the Court

With regard to the question of whether the exclusive exploitation of rights by UEFA may qualify for an exemption under Article 101(3) TFEU and a justification under Article 102 TFEU, the Court of Justice first makes sure to clarify that under Article 267 TFEU this is for the referring court to decide, having allowed the parties to discharge their respective burdens of proof. That said, it does highlight some of the guiding principles of the analysis to be carried out, albeit leaving the questions open and for the national court to decide. After laying out the analysis made by the Court of Justice, which is similar to that of the 2003 decision dealt with in the previous section, this article will address the response and the decisions taken by the Spanish referring court to conclude that the overall justifications offered are done so in a poor manner.

In order to qualify for an exemption under Article 101(3) TFEU, the rule in question must meet four cumulative conditions: it must be proven to achieve efficiency

[40] *Id*. at 229.

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] *Id*. at 230.

[45] *Id*.

gains, an equitable part of the profit must be reserved for the users (clubs and fans), the restrictions imposed must be indispensable, and must not allow the opportunity to eliminate a substantial part of the competition. Similarly, to be justified under Article 102 TFEU, the rule must be shown to counterbalance the harm caused with the efficiency gains. Therefore, an analysis of the four conditions under Article 101(3) TFEU will also address whether it is justified under Article 102 TFEU.

The first point raised by the Court of Justice, that of the possible efficiency gains, is of a very similar nature to that of the 2003 decision. The Court argues that having an exclusive vendor brings down purchasers' costs significantly and reduces the uncertainty they would have to face when negotiating with individual clubs, which would possibly have 'divergent respective positions and interests' in relation to the marketing of those rights.[46] Additionally, the product purchased is a much more attractive one since it is guaranteed to cover the entirety of the competition, and not a patchwork of individual matches—a point the 2003 decisions fails to give its weight. However, the Court of Justice makes sure to clarify that it is for the national court to determine 'the extent of those efficiency gains' and crucially, whether any such gains 'would be such as to compensate for the disadvantages in terms of competition' resulting from UEFA's exclusive exploitation.[47] The skeleton of the analysis is drawn out, therefore, but the analysis is not actually made by the Court, trusting that the national court will do so. This delegation is nothing out of the ordinary, particularly since the Court of Justice seems to be shifting from an institution 'known for its activism,' to much more cautions decisions, as explained by Zglinski.[48] However, this can be problematic if the national court fails to carry on the analysis delegated to it, as this article will argue has been the case with the *ESLC Case*.

The point that follows is whether a 'fair share of the profit' that appears to result from the efficiency gains is reserved for the users.[49] This point is the most similar to that of the 2003 decision and, therefore, requires less attention since it has already been addressed in the previous section.[50] However, they key is that whether the redistribution is horizontal, benefitting participating clubs, or vertical, trickling down all the way to grassroots football, such financial redistributions are beneficial for the sustainability

[46] *Id*. at 232.

[47] *Id*. at 233.

[48] Jan Zglinski, *The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law*, 55 Common Mkt. L. Rev. 1341, 1385 (2018), https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/55.5/COLA2018116#.

[49] Case C-333/21 European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA), ECLI:EU:C:2023:1011 (Dec. 21, 2023), at 234.

[50] Chapter 1.

of the sport and for equality of opportunity between clubs. One might argue that the question then arises as to whether the money is redistributed fairly between different sized clubs. However, since the alternative to an individual selling of the rights would almost guarantee a disproportionate difference in the value of clubs' rights, it is more likely than not to be better for the relevant actors. Again, the Court makes sure to point out that these are questions for the referring court to determine, in particular with regard to the accounting and financial evidence submitted by the parties.

The Court of Justice then notes that the referring court will have to decide whether the exclusive exploitation of these rights by UEFA is 'indispensable'[51] for achieving the efficiency gains if these are established, and for ensuring a solidarity redistribution of a share of the profits, whatever form this redistribution takes.

Lastly, and perhaps most controversially, the analysis must establish whether the rule at issue allows 'effective competition to remain for a substantial part of the products or services concerned.'[52] This is one of the novel points in the analysis, despite being an obvious one, since the 2003 decision barely mentioned the resulting market foreclosure. The Court of Justice points out that while the rule in question eliminated all competition on the supply side, by having a single vendor, they do not 'seem by themselves to eliminate competition on the demand side.'[53] Despite being liable to result in a higher price for purchasers, thereby reducing the number of interested buyers, the Court argues, it also allows them access to a more attractive product for which there is 'fierce competition' considering the interest from consumers.[54] Furthermore, the Court notes that where there is no supply-side competition, competition between buyers can still be ensured through a transparent and non-discriminatory bidding process, as well as through measures like the duration, exclusivity, or geographical scope of the rights on sale.

With this analysis, which is for the referring court to utilize in its decision-making, the Court concludes that Articles 101 and 102 TFEU preclude the rule that confers on UEFA the exclusive exploitation of rights emanating from inter-club football competitions, unless it is demonstrated 'through convincing arguments and evidence,' that all conditions under Articles 101(3) and 102 TFEU are met.[55]

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[51] Case C-333/21 European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA), ECLI:EU:C:2023:1011 (Dec. 21, 2023), at 238.

[52] *Id*. at 239.

[53] *Id*.

[54] *Id*.

[55] *Id*. at 241.

2.4. Decision by the Referring Court

Up to this point, all seems well in the process of establishing why and how the collective sale of broadcasting rights is allowed under EU law, despite it being an obvious restriction of competition under Articles 101 and 102 TFEU. Seemingly, the next step was for the referring court—in this case a commercial court in Madrid—to take the baton of the analysis and reach a final decision. The twist in the tale of the justification of the collective sale of broadcasting rights comes when the referring court declares that this matter is 'not the subject of pronouncement or analysis' and resolves the *ESLC Case* without reaching a decision on the questions raised by the Court of Justice in its analysis.[56]

The Spanish court, in its recent judgment on the matter, dedicated a fraction of the judgment to the issue of the exploitation to the rights emanating from competitions. Indeed, although it is one of only five questions referred to the Court of Justice, it seems to have been dedicated a disproportionately small amount of space and analysis, considering that it is covered in only two pages out of the 34 total pages of the judgment. Deciding to accept UEFA's argument that the 2003 decision by the Commission has not been called into question, the judge concludes that there is no need for it to involve itself with the matter, despite the extensive analysis laid out by the Court of Justice and the questions it raised for the referring court to decide. The result is an awkward lack of analysis and the continuation of an evaluation made more than 20 years ago with some obvious gaps, as established in the second section of this article.

The only explanation this article can offer for such a disconcerting disparity between the European and national courts is that the issue at hand is one of judicial retreat, a concept illustrated by Nowak and Glavina. According to the authors, there are two main types of judicial retreatism: the 'shameful' and 'respectable' versions.[57] The shameful version involves the most extreme cases such as not showing up to work or postponing cases for non-legal reasons. In essence, it involves cases where judges are so uninvolved with their work that it is not done properly, which of course is subject to all kinds of disciplinary measures and rare to see in practice. The respectable version of judicial retreatism emphasizes dispute resolution over rule application, which can include 'solving a dispute as fast and as efficient as possible without using (the correct) legal means.'[58]

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[56] A22 Sports Management, S.L. and European Super League Company S.L. v Liga Nacional de Futbol Profesional, Real Federación Española de Futbol, UEFA and FIFA [2024] Procedimiento Ordinario (Materia Mercantil - 249.1.4) 150/2021.

[57] Tobias Nowak & Monika Glavina, *National Courts as Regulatory Agencies and the Application of EU Law,* 43 J. Eur. Integr. 739, 753 (2020), https://doi.org/10.1080/07036337.2020.1813734.

[58] *Id*.

The present case is likely one of respectable judicial retreatism with a touch of the shameful version. The *ESLC Case* is a novel and at times complex one, with very significant consequences that are widely followed around the world. Additionally, the issue of the ownership and exploitation of rights is but one of five issues referred to the Court of Justice and in a sense, the matter can be resolved without addressing that particular issue; indeed, the bulk of the judgments by both the Court of Justice and the national court concerns the prior approval and sanctioning power of UEFA, not the matter of the emanating rights. Therefore, a possible explanation for the matter being so evidently overlooked by the referring court is that the judge prioritized resolving the matter over the comprehensive legal analysis the Court of Justice pointed to. In any case, the fact is we are left with all the pertinent questions, as raised by the Court in its analysis, but few of the relevant answers, for the court responsible did not deem the matter not to be 'the subject of pronouncement or analysis.'[59]

Section 3: The Reasoning Behind the Exemption

3.1. EU and US Exemptions Compared

Given the special nature of the sports market, and more specifically the market for football given its immense public appeal, it is often difficult to find any point of comparison with other markets. The one that comes the closest is that of the National Football League (NFL) in the US, which, despite some clear sporting and regulatory differences that will be laid out in this section, also sells its broadcasting rights collectively. Though there are perhaps more differences than similarities between the collective sale of rights in the US and in the EU, the comparison serves to highlight some key points regarding the justification for the collective sale of rights.

In 1961, a U.S. District Court decision found that the method of negotiating broadcasting rights by the NFL was in violation of U.S. antitrust law. The court ruled that the "pooling" of rights by all the teams to conclude an exclusive contract between the league and CBS was illegal.[60] In response to the judgment, and in order to overrule it and permit the collective sale of rights, the U.S. Congress passed the Sports Broadcasting Act that same year. This Act serves as a 'limited antitrust exemption' for the collective sale of rights by U.S. sports leagues, much like

[59] A22 Sports Management, S.L. and European Super League Company S.L. v Liga Nacional de Futbol Profesional, Real Federación Española de Futbol, UEFA and FIFA [2024] Procedimiento Ordinario (Materia Mercantil - 249.1.4) 150/2021.

[60] United States of America v. National Football League, 196 F. Supp. 445 (E.D. Pa. 1961).

the Commission decision of 2003 does for UEFA.[61] They key, however, lies in the difference between the two.

First, it must be noted that the structural differences between the markets involved—that of the US and the EU—already change the landscape enough for the decisions to have more differences than similarities. While the U.S. leagues operate in a single market (for the purposes of national legislation) where a handful of national broadcasters purchase the exclusive rights in contracts worth tens of billions, UEFA sells its rights in what can be deemed a fragmented market—or, perhaps, more accurately, in dozens of distinct markets that the EU Member States make up. Therefore, the decisions cannot be said to be directly equivalent. However, a comparison of the Sports Broadcasting Act and the Commission decision of 2003 serves to highlight what the aims of the pieces of legislation are and why these exemptions to traditional competition law are justified.

Second, and crucially for the purposes of this analysis, there are some major differences in the intention behind the US and EU justifications for this exemption. The EU, as already detailed, seemingly justifies the decision to foreclose the supply side market for football broadcasting rights on the grounds of resulting efficiencies and a certain solidarity redistribution that allegedly benefits the entire football pyramid, from Champions League teams to grassroots football, due to the fact that the pooling of broadcasting rights elevates the price at which these can be sold. Therefore, the EU's intention behind the exemption to a clear violation of competition law is that it benefits the much-needed competitive balance between football teams. In contrast, the aim of the exemption granted by the Sports Broadcasting Act seems to be an absolute revenue maximization.

However, the American reasoning is not as cold-hearted as it may initially appear to be. While it is widely argued that the aim of the American exemption is to keep the NFL being 'financially viable' and 'not necessarily for the public benefit,' the structural differences alluded to above help to explain the lack of interest in solidarity.[62]The most important factor here is that the NFL, unlike any EU football league, is a closed competition without the possibility of promotion or relegation. While this is one of the few aspects of sports codified into EU law as a necessity for any sports league, under the term 'openness' in Article 165 TFEU, the US has never

[61] Marc Edelman, *Why Disney, Fox and ESPN's Sports Streaming Service Might Create More Problems Than It Solves*, Forbes (Feb. 15, 2024), https://www.forbes.com/sites/marcedelman/2024/02/15/why-disney-fox-and-espns-sports-streaming-service-might-create-more-problems-than-it-solves/.

[62] David L. Anderson, *The Sports Broadcasting Act: Calling It What It Is – Special Interest Legislation,* 17 UC Law SF Comm. & Ent. L.J. 945 (1995), https://repository.uclawsf.edu/hastings_comm_ent_law_journal/vol17/iss4/9/.

adopted this model and thus has different interests to protect. Indeed, the American solidarity model is one of great effectiveness; the NFL distributes broadcasting revenues among all teams equally, regardless of performance. Though the figures are not public, the Kansas City Chiefs' tax returns from a few years ago provided a rare insight that allowed us to see that every team in the league received $255 million (US) annually as of 2019.[63] The objective of the Sports Broadcasting Act, therefore, is not to benefit the game at all levels, as the EU uses to justify the collective sale of broadcasting rights. Rather, it is a 'special interest legislation' designed to maximize revenues. While the EU could not viably justify an exemption to its competition laws if the consumer were not to benefit, at least in theory, the Sports Broadcasting Act serves as a 'single-industry exception to a law designed for the protection of the public,' with the sole aim of maximizing the revenue of their sports leagues.[64]

What both the EU and US exemptions to ordinary competition law share are the conditions set in order to open up the market somewhat for broadcasting purchasers, though even here the differences in intention are obvious. In its decision of 2003, the EU Commission set out certain conditions to the exemption granted, which included splitting up the rights into a minimum of five different packages, including packages for highlights and games abroad. Similarly, NFL rights are split into six different packages. Contrastingly, while the EU set out that exclusive broadcasting contracts could not last more than three years in order to allow newcomers to have a chance at entering the market for football broadcasting rights, the NFL sells its rights exclusively in contracts that last 10 or 11 years, indicating that not much importance is given to newcomers being able to enter the market.

Interestingly, one point where both the Commission and the U.S. Courts seem to have reached a full agreement is on rejecting the argument, offered both by UEFA and the NFL, that the collective sale of rights is a necessity given the special nature of sports leagues. The Commission, as illustrated in Section 2 of this article, rejected the argument by claiming that despite the interdependence between teams, this was not enough to justify the restriction of output that it supposed, and classed it as a commercial decision—and not a necessity. Similarly, a U.S. court noted that, given the fact that Brigham Young University and the University of Notre Dame (two of the biggest college football teams in the US) had sold their rights individually, 'the evidence shows it is possible for the member clubs to act individually to produce

[63] Mike Hendricks, *Kansas City Chiefs' Tax Returns Provide Rare Look Inside the Business of Pro Football,* Kansas City Star (Feb. 6, 2019), https://www.kansascity.com/sports/nfl/kansas-city-chiefs/article225279155.html.

[64] Anderson, *supra* note 62.

telecasts.'[65] Although the interdependence of clubs in a competition is clear and well illustrated by Weatherill's sausage market metaphor,[66] it is curious to see that the argument gets rejected in both the EU and the US, and deemed not to be a necessity. It serves to highlight that the bar is set high in order to exempt a practice from competition law, despite the fact that the practice by UEFA and the NFL has so readily been accepted in the end.

Having analyzed the Commission decision of 2003, the *ESLC Case*, and having made the comparison with the US broadcasting exemption, it becomes clearer that the collective sale of broadcasting rights by UEFA is justified on two grounds: efficiency gains and solidarity redistributions. Despite the fact that the analysis is incomplete, first due to the gaps in the decision of 2003 and second due to the refusal by the Spanish referring court to carry out the pertinent analysis, it is fair to say the two justifications offered carry some weight.

3.2. The Efficiency Gains Argument

The point of efficiency gains is perhaps the most unclear of the two. The fact that having a single vendor for broadcasting purchasers reduces costs requires little clarification. Instead of having to deal with the 32 participating teams in the Champion League, for example, with their differing whims and demands requiring negotiating teams to be sent to each of them, having a single vendor drastically reduces these transaction costs. The point that requires a closer look, given the almost contradictory takes of the 2003 decision and the *ESLC Case*, is that of the justification based on having a single, and therefore more attractive, product rather than a patchwork of individual clubs' rights. The Commission made clear in 2003 that the collective sale of broadcasting rights was not a necessity despite the interdependence between clubs, and thus could not justify the exemption to EU competition law. Seemingly in contrast, the Court of Justice stated in the ESCL preliminary reference that a possible advantage to consider was the fact that broadcasters could access a more attractive product if all the matches in a competition were sold as one.[67] While these points appear to be very similar, they have some differentiating nuances. However, it is also a perfect example of how the analysis made by the EU to justify the collective sale of broadcasting rights by UEFA lacks clarity and could have benefitted from a comprehensive evaluation by the referring court in the *ESLC Case*.

[65] United States of America v. National Football League, 196 F. Supp. 445 (E.D. Pa. 1961).

[66] Chapter 1.1.

[67] Case C-333/21 European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA), ECLI:EU:C:2023:1011 (Dec. 21, 2023), at 232.

It is well established that the interdependence between football clubs is real—for a club needs competitors to play against. However, that point in itself does not serve to justify the restriction of competition caused by foreclosing the supply-side market for broadcasting rights. As the Commission argued in 2003 (just as a U.S. District Court did when faced with the same question),[68] there is no justifying link between that interdependence and the need to pool together clubs' rights. Moreover, there are examples of clubs selling their rights individually and competing with clubs that opted to collectivize the sales of these, such as Real Madrid and Barcelona in their national league, or Notre Dame in the hugely lucrative U.S. college football league. The path of collective selling was therefore deemed to be a commercial choice, and not something to justify an exemption to Articles 101 and 102 TFEU. When the Court said in the *ESCL Case* that the collective sale made for a more attractive and more trustworthy product for purchasing broadcasters, and listed it under the possible justifications for an exemption, it was not contradicting the Commission rejection of the aforementioned argument. The point was made by the Court as part of its efficiency gains argument, which can, by contrast, serve to justify an exemption. While in itself, the collective sale is no reason to exempt the sale from competition law norms, having a more attractive product to offer purchasers may add to the resulting efficiency gains, which as a whole is an argument with much more weight. The argument borders on being a catch-22, since the pooling of broadcasting rights is found to be a commercial choice, and thus not justifiable, while the fact that such a commercial choice results in possible efficiencies is seen to justify that very commercial choice.

The fact that what analysis there exists is to be found between a Commission decision from 20 years ago with some obvious gaps, along with a preliminary reference that raises many pertinent questions but gives no answers to them, almost inevitably leads to some unclarity in the analysis. However, that is not to say the conclusion reached is not right. The point of efficiency gains should indeed serve to justify an exemption to competition law norms, since that is exactly what exemptions are for; to enable the flexibility to adapt to markets that do not quite fit the norm, as is without a doubt the case of the market for football broadcasting rights. Yet here too the gaps in the analysis prevent the conclusion from being a clean one. As the Court states in the *ESCL Case* after making the aforementioned efficiencies point, that is the theory and it is up to someone (the referring court in this case) to make the actual analysis. The Court makes sure to clarify that it is for the national court to determine 'the extent

[68] United States of America v. National Football League, 196 F. Supp. 445 (E.D. Pa. 1961).

of those efficiency gains,' taking into account the accounting and financial evidence submitted by the parties.[69] However, since the referring court decides not to make the analysis, as explained in Section 2,[70] the collective sale of broadcasting rights is seemingly justified based, at least partly, on an unproven theory.

3.3. The Redistribution Argument

The second justification offered to exempt the pooling together of rights is that of the ensuing solidarity redistribution by UEFA. Unlike U.S. sports leagues, which consist of a limited number of established franchises, European competitions are open, meaning teams are subject to promotion and relegation based on performance, as codified by Article 165 TFEU. Therefore, inferior football leagues gain a lot more importance, for they serve as more than merely stepping stones for players to reach the only professional league; they themselves are professional teams and therefore potential competitors. Since it is likely the collective sale of broadcasting rights leads to a higher total price (though the financial analysis is yet to be done), allowing for more money to be redistributed, this is one of the strongest arguments offered to justify the exemption granted to the collective sale of rights. Importantly for the purposes of this justifying argument, the redistribution is not exclusively for teams participating in UEFA competitions, such as the Champions League, but also for teams that are not participating, be it because they did not perform well enough in their leagues or, more often, because their leagues are too small to allow for direct qualification to UEFA competitions.

Interestingly, not long after the ESLC challenged the status quo in football with the announcement of the European Super League, which resulted in the *ESLC Case*, UEFA announced a significant increase in its solidarity payments, from 4% of its total broadcasting revenue to 7%.[71] Of the roughly 2 billion euros made annually by the Champions League, 27.5% are distributed to participating teams, 37.5% are paid to these same teams based on their performance in the competition, with the remaining 35% being distributed to national football federations based a mix of broadcasting market share and a performance coefficient of the previous decade.[72] The solidarity payments are found in this payment to national federations, which are free to choose how the money is spent—with 7% having to be destined to non-participating clubs.

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[69] Case C-333/21 European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA), ECLI:EU:C:2023:1011 (Dec. 21, 2023), at 233.

[70] Chapter 2.4.

[71] Matt Slater, *UEFA to Increase Solidarity Payments to Clubs Not Competing in European Club Competitions,* The Athletic (Sept. 6, 2023), https://www.nytimes.com/athletic/4838513/2023/09/06/uefa-eca-solidarity-payments/.

[72] *Id*.

While it was possible to improve the efficiency with which that money is then spent, it falls outside of UEFA's scope of action and is therefore irrelevant for the purposes of this analysis.

In this author's view, the argument regarding solidarity payments is perhaps the strongest. If the result of restricting competition in the supply-side market for broadcasting rights is an increased amount of money for those restricting competition, the money must be destined for a justified purpose. While the efficiency argument focuses more on the lack of negatives, such as reduced transaction costs, the solidarity argument offers some positives. In a sense, the American justification of maximizing revenues is not dissimilar to the European idea of solidarity payments. However, the US has only to distribute its revenues among a reduced and fixed number of teams, which it does evenly. The EU, with sporting merit at the heart of sports regulation, as indicated by Article 165 TFEU, adjudicates this extra money according to sporting merit first, and solidarity among the rest second. And it is rightly so. Sporting merit should indeed be the main focus, as it is what makes sports outside of the US so exciting for those at the top of their competitions but also for those at the bottom, who are playing to avoid relegation. However, solidarity payments make a strong case for increasing revenues, despite the anticompetitive nature of the way it is done. Guaranteeing a certain equality of opportunity is the only way to make a system based on sporting merit viable; otherwise, the risk of a handful of teams getting exponentially richer based solely on performance is too great.

Although the argument is possibly the best justification in theory, the effects must be beneficial in practice, and this is where the lack of analysis on the courts' part plays such a big role. As the Court makes sure to note in the ESCL Case, though the redistribution argument appears convincing, 'the profit generated by centralised sales of the rights … must be proven to be real and concrete.'[73] Therefore, the Court accepts the theoretical argument but highlights that it is 'for the referring court to determine'[74] whether its application is truly beneficial in reality. While it is likely that the football industry does indeed gain from such redistributions being made possible by restricting competition to increase the price of broadcasting rights, the fact that such a significant exemption to EU competition law is based on an unfinished analysis seems sloppy, if not downright negligent.

3.4. Conditioning the Exemption

Furthermore, more conditions should have been imposed on UEFA in order to grant the exemptions for the collective sale of broadcasting rights. When the exemption

[73] Case C-333/21 European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA), ECLI:EU:C:2023:1011 (Dec. 21, 2023), at 236.

[74] Id. at 237.

was initially granted in 2003, the Commission did lay out certain conditions in order to make what competition remained as open as possible. They set certain condition such as establishing a maximum duration of three years for broadcasting contracts, as well as splitting the rights into multiple packages in order to allow more than one broadcaster to enter the market, as explained in Section 1.[75] Similarly to those conditions being set, the Commission should have demanded a clearer and stronger commitment by UEFA to these solidarity payments. It took a threat to UEFA's status quo, in the form of the ESL, for UEFA to increase by 3% of the total revenues the money that was redistributed to non-participants—the flipside being that it spent 20 years re-investing a mere 4% into football clubs not participating in the Champions League. If the Commission had initially set the solidarity payments at 7%, for example, non-participating clubs in the Champions League, right down to grassroots football, would have received more than one billion euros more than they have received since the exemption was granted.

This is one of the great issues in the matter of football governance, as Weatherill explains,[76] for the EU does not have a sporting competence, and so cannot intervene in the market beyond the lens of internal market law. However, the matter of broadcasting rights is an economical one, and therefore one where the EU does have the competence to intervene. The Commission could have set such conditions, and indeed still can, as can the courts, just like conditions are set in mergers or acquisitions in the internal market. Therefore, this author's view is not that the exemption is wrong, but the manner in which it has been granted is certainly not right. The decision is based on an incomplete analysis, first in the form of gaps in the 2003 decision and later through an unfinished analysis by the courts. Moreover, the conditions set in order to grant such a significant exemption did not go far enough to guarantee that the increased revenue gained through a restriction of competition is indeed destined to a justified cause. While the exemption to the collective sale of broadcasting rights by UEFA was granted under EU law in order to achieve greater efficiencies and promote a greater 'proper functioning, sustainability and success'[77] of football competitions, the analysis was left at a purely theoretical point, and little was done in order to guarantee the proper functioning and sustainability of these competitions.

[75] Chapter 1.2.

[76] Weatherill, *supra* note 20.

[77] Case C-333/21 European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA), ECLI:EU:C:2023:1011 (Dec. 21, 2023), at 235.

Conclusion

In conclusion, this article argues that the analysis behind the decision to exempt the collective sale of broadcasting rights by UEFA is a poor one and exhibits some significant gaps. The analysis on which the decision is based to this day is that of the Commission from more than 20 years ago, which made some important points, but omitted others. Twenty years later, the matter landed before the Court of Justice, presenting an invaluable opportunity to re-assess the justifications for the exemption. However, despite a much more comprehensive analysis by the Court, it was for the referring court to finalize this analysis, which it failed to do. The two arguments put forth by the two decisions of EU law, in order to justify the exemption to competition law, are those of efficiency gains and the solidarity redistribution, which help even the playing field in the football industry. Although the arguments are strong, they are both of a theoretical nature. Indeed, in the *ESLC Case*, the Court makes clear that despite the arguments being valid, a further analysis is required to establish whether the advantages of the collective sale of rights—the efficiency gains and extra profit that may be redistributed—outweigh the disadvantages of foreclosing a market in reality. Since the referring court decided not to carry out this analysis, the arguments on which the exemption is based remain valid in theory, but uncertain in practice. While the collective sale of broadcasting rights is certainly beneficial for some actors in the football industry, as restrictions of competition often are for the restricting party, this comes at a cost and the balance has not been done in any convincing manner.

The 2003 decision by the Commission offered two important justifications and, importantly, rejected a third. However, it made a glaring omission when failing to appreciate the costs that are unfairly passed on to the purchasers of broadcasting rights, following a market foreclosure on the supply side. This decision first put forward the justifications of efficiency gains and solidarity payments, while rejecting UEFA's claim that the collective sale of rights is a necessity due to the interdependence between clubs. Labeling the practice as a 'commercial choice' and not a necessity, the Commission forced UEFA to justify the collective sale of rights based on its advantages, and not merely the market structure. However, the analysis focused on establishing the validity of the arguments and failed to balance the possible advantages with the known disadvantages of foreclosing the market for the supply of broadcasting rights in football. Moreover, though it conditioned the exemption slightly, it did not go far enough in its demands and thus allowed UEFA too much freedom without sufficient guarantees of what the possible extra profits would be used for in practice.

Twenty years later, the Court of Justice was faced with the question of the validity of the practice with regard to Articles 101 and 102 TFEU, as part of the *ESLC Case*, which was referred to the Court by a Spanish commercial court. The analysis provided by the Court of Justice was a much more comprehensive one than the one 20 years prior, and indeed raised many of the pertinent questions regarding the effects in practice of granting such an exemption. However, since it was dealing with a preliminary reference, it went no further than raising the questions and noted it was for the referring court to answer them. In what can only be explained as a case of judicial retreatism, the referring court failed to even address the Court's analysis of the collective sale of broadcasting rights and undid much of the promising, detailed analysis of the Court. The result is that an invaluable opportunity to re-assess and clarify the justifications behind such a significant exemption to EU competition law has been wasted.

EU law, in the form of a Commission decision, justified the restriction of competition caused by the collective sale of broadcasting rights by UEFA on the basis of gains in efficiency and the opportunity to redistribute the extra profit among all levels of the football pyramid. It may well be that the efficiency gains are real, particularly since it reduces the transaction costs and provides a more uniform product across the EU. However, the analysis required to establish whether these are indeed real and, moreover, outweigh the disadvantages to broadcasters and competition in the market has not been carried out at all. Therefore, the argument is purely theoretical and may just as well be wrong. Either way, it is not right for an exemption to competition law—which is meant to ultimately protect consumers—to be based on an ambiguous argument. The solidarity argument is better established, although, as the Court notes in the *ESLC Case*, it has not been proven in any formal manner whether the collective sale of broadcasting rights by UEFA does indeed result in greater profits that can then be redistributed. Therefore, the second argument of the two is also based on a shaky foundation.

It is this author's opinion, that the exemption that was granted 20 years ago should have been more heavily conditioned than it was, demanding guarantees that a more significant part of those extra profits should be redistributed across the entire football pyramid, down to grassroots football. However, as a result of the incomplete analysis upon which the exemption is based, since there are no calculations on the added benefits of collectivizing the sale of rights, it becomes much more difficult to make concrete demands. The benefits of the collective sale of broadcasting rights by UEFA may or may not outweigh the disadvantages caused, but the fact that the answer is still highly unclear represents a failure by EU law to respect its own competition law and justify any exemptions to it.

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