

## THE EMERGING BATTLE FOR CONTROL OF GLOBAL FOOTBALL

STEVEN A. BANK\*

### ABSTRACT

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

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

---

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

TABLE OF CONTENTS

INTRODUCTION..... 474

I. CURRENT CONFLICTS BETWEEN CLUBS AND GOVERNING BODIES ..... 480

*A. European Super League*..... 480

*B. Relevent Sports v. United States Soccer and FIFA*..... 486

*C. International Windows*..... 489

II. CHANGING LEGAL ENVIRONMENT ..... 493

*A. The Conditional Autonomy of Sports Governing Bodies*..... 493

*B. Recent Limits on Sports Governing Bodies Outside of Football*..... 496

        1. *European Courts* ..... 496

        2. *United States Courts*..... 501

III. IMPLICATIONS FOR THE CURRENT DISPUTES ..... 503

*A. Participant Bans* ..... 504

*B. Access for Competitors* ..... 507

*C. Legitimate Objectives* ..... 509

CONCLUSION ..... 514

INTRODUCTION

Unlike most American sports, where professional leagues are largely autonomous, soccer, or football as it is called around the world,<sup>1</sup> is nothing if not hierarchical. Domestic football leagues are typically governed by a country’s football association, which is a member of its regional confederation, and both are subject to the oversight of the sport’s international governing body—the Fédération Internationale de

---

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

Football Association (FIFA), located in Switzerland.<sup>2</sup> Even the rules of the game are primarily determined by an international body—the International Football Association Board—rather than by the individual leagues.<sup>3</sup>

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

---

2. Floris de Witte & Jan Zglinski, *The Idea of Europe in Football* 3 (LSE Legal Studies, Working Paper No. 17/2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3973962](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3973962); ALAN TOMLINSON, FIFA (FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION): THE MEN, THE MYTHS, AND THE MONEY 27, 29 (2014).

3. Tomlinson, *supra* note 2, at 30-32. In most cases, FIFA mandates as a condition of membership that the national association use the IFAB Laws of the Game. *See, e.g., U.S. SOCCER FED’N, BYLAWS OF THE U.S. SOCCER FED’N, INC.* 1 (2021) (“The “Laws of the Game” as issued by the International Football Association Board apply to soccer games.”) By contrast, in American-style football, the Canadian Football League has a larger field, more players, and fewer downs than the National Football League. *See* Mark Perry, *CFL v. NFL Rules: What Are The Differences?* CFL NEWS HUB (May 21, 2021), <https://cflnewshub.com/cfl-news/cfl-vs-nfl-rules-what-are-the-differences/>. These rule differences occur even in sports that also play in international competitions under common rules. For example, the National Basketball Association’s rules differ in a number of material respects from the Federation of International Basketball Association’s (FIBA) rules used in European contests and the Olympics, including the length of the game, the dimensions of the court, the location of the three-point line, the size of the restricted area (or “key”), and rules regarding goaltending and zone defense. Cody Taylor, *Tokyo Olympics: The biggest rule differences between FIBA and NBA*, USA TODAY SPORTS: ROOKING WIRE (July 14, 2021), <https://therookiewire.usatoday.com/lists/tokyo-olympics-nba-fiba-rule-differences/>.

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

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

of increasing the profiles and profitability of the clubs and their leagues.<sup>6</sup>

FIFA's most important role may be mediating between clubs and national teams to facilitate the staging of international tournaments among countries.<sup>7</sup> Most prominent of these international tournaments is the World Cup, football's biggest competition and what even the most curmudgeonly of American sportswriters concede is one of the greatest spectacles in modern sports.<sup>8</sup> FIFA requires clubs to release their players for national team duty.<sup>9</sup> In the absence of this requirement, clubs might sensibly refuse such requests on the grounds that it would disrupt their seasons or endanger their players. In other sports, most notably hockey and baseball, American professional sports leagues often deny players the ability to participate in international competitions.<sup>10</sup> Moreover, as the organizer of the World Cup, FIFA has an incentive to encourage broad participation among countries, which it has done by

---

6. Mark White, *How the Champions League copied the World Cup—before rivalling it as the most prestigious tournament in football*, FOURFOUR TWO (Aug. 26, 2021), <https://www.fourfourtwo.com/features/champions-league-draw-2021-world-cup-best-tournament-world-football>.

7. See FIFA STATUTES art. 2(b) (2021) (identifying as one of FIFA's objectives, "to organize its own international competitions.").

8. Norman Chad, *A primer on earth's greatest sporting spectacle, the World Cup*, THE WASH. POST (June 8, 2014), [https://www.washingtonpost.com/sports/a-primer-on-earths-greatest-sporting-spectacle-the-world-cup/2014/06/08/ecb6cd12-ef25-11e3-bf76-447a5df6411f\\_story.html](https://www.washingtonpost.com/sports/a-primer-on-earths-greatest-sporting-spectacle-the-world-cup/2014/06/08/ecb6cd12-ef25-11e3-bf76-447a5df6411f_story.html).

9. FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS annex 1, section 1.1 (2021) ("Clubs are obliged to release their registered players to the representative teams of the country for which the player is eligible to play on the basis of his nationality if they are called up by the association concerned").

10. See, e.g., Ben Shpigel, *N.H.L. Says its Players Will Not Participate in 2018 Winter Olympics*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/sports/hockey/nhl-2018-olympics-pyeongchang.html> (the National Hockey League announced that its players would not participate in the 2018 Winter Olympics); Chris Cwik, *Don't Expect to See Players Like Mike Trout or Bryce Harper Play for Team USA at Tokyo Olympics*, YAHOO SPORTS (Feb. 28, 2020), <https://www.yahoo.com/now/dont-expect-to-see-players-like-mike-trout-or-bryce-harper-play-for-team-usa-at-the-tokyo-olympics-012639144.html> (Major League Baseball, the MLB Association, and World Baseball Softball Confederation agreed on which players were eligible to represent Team USA in the 2020 Tokyo Olympics).

funding initiatives to spread football to more countries.<sup>11</sup> By doing so, FIFA has simultaneously aided those countries lacking infrastructure and other resources.<sup>12</sup> FIFA has not done this without being criticized over corruption and misconduct in its organization or the recipient nation,<sup>13</sup> but there is little denying football has become the “World’s Game,” and that is in no small part to FIFA’s mission to spread the game globally.<sup>14</sup>

Despite the advantages of global football’s tight hierarchical structure, a battle has been brewing between clubs and their governing bodies on at least three fronts: (1) The authority of confederations over regional competitions, as seen most recently by the attempt by a number of well-known European clubs’ attempt to create a new European Super League that would operate alongside or instead of the Union for European Football Association’s (UEFA) Champions League;<sup>15</sup> (2) The authority of national football associations over competitions in their country, which has been recently challenged by several clubs and their match promoter, Relevent Sports, seeking to stage a foreign league match in the U.S. notwithstanding a refusal to sanction by the game by FIFA and

---

11. See, e.g., *The Impact of the FIFA Forward Programme on Uruguayan Football*, SOCCEREX (Mar. 30, 2021), <https://www.soccerex.com/insight/articles/2021/the-impact-of-the-fifa-forward-programme-on-uruguayan-football> (explaining that FIFA’s Forward Development Programme has been one of the cornerstones for achieving Uruguayan Football Association’s goals).

12. *Id.*

13. See, e.g., Michael Sheetz, *Here’s who is getting rich off the World Cup*, CNBC (June 14, 2018), <https://www.cnbc.com/2018/06/14/the-business-of-the-world-cup—who-makes-money-and-how-much.html>; Oluwashina Okeleji, *Africa lags in FIFA development funding*, BBC SPORT (Dec. 1, 2018), <https://www.bbc.com/sport/football/46407393>.

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

15. Ed Aarons & Sean Ingle, *European Super League: Premier League ‘Big Six’ sign up to competition*, THE GUARDIAN (Apr. 18, 2021), <https://www.theguardian.com/football/2021/apr/18/five-english-clubs-sign-up-to-european-super-league-report-says>.

the United States Soccer Federation (USSF);<sup>16</sup> and (3) Mandatory releases of players for international competitions, which clubs have long resisted, but has come to a head most recently because of pandemic-related quarantines and extended game windows that increased the length of time players were gone.<sup>17</sup>

While concerning, these tensions are not new. In the 1980s and 1990s, for similar reasons, a group of elite European football clubs threatened to break away from UEFA's European championship, which led to the creation and subsequent expansion of the Champions League.<sup>18</sup> Then, a group of English clubs were dissatisfied with the English Football League's operation of the first division, which led to the creation of the Premier League.<sup>19</sup> Clubs have also long complained to FIFA about injuries suffered to its players while away on national team duty,<sup>20</sup> including filing lawsuits over compensation,<sup>21</sup> which ultimately led FIFA to provide its own insurance in 2012.<sup>22</sup> Although these

16. *Soccer Promoter Asks Judge to Revive FIFA Antitrust Suit*, COMPETITION POL'Y INT'L (Aug. 29, 2021), <https://www.competitionpolicyinternational.com/soccer-promoter-asks-judge-to-revive-fifa-antitrust-suit/>.

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

18. See generally Arne Neimann & Alexander Brand, *The UEFA Champions League: A Political Myth?*, 21 SOCCER & SOC'Y 329 (2019).

19. Andrew Murray, *How the Premier League breakaway happened: The first season of 1992/93, as told by its heroes*, FOURFOUR TWO (Apr. 19, 2021), <https://www.fourfourtwo.com/us/features/199293-premier-league-first-season-sky-sports-man-utd-champions>.

20. See, e.g., Associated Press, *Why should football clubs pay the price for players' international injuries?* THE NAT'L NEWS (Mar. 29, 2011), <https://www.thenationalnews.com/sport/why-should-football-clubs-pay-the-price-for-players-international-injuries-1.459790>; Jonathan Rest, *Who Pays When a Soccer Player is Hurt?*, WALL STREET J. (May 13, 2010), <https://www.wsj.com/articles/SB10001424052748704500104574650480019898974>.

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

22. *FIFA to address insurance of injured internationals*, BBC SPORT (Mar. 31, 2012), <https://www.bbc.com/sport/football/17572896>; *European Clubs Want FIFA to Insure Players Injured in International Games*, CLAIMS J. (Sept. 10, 2010),

tensions were resolved without a fundamental restructuring of the global governance system, they were done so without meaningful judicial intervention and, in some respects, without truly addressing the clubs' fundamental concerns.

This Article argues that part of what has allowed these familiar old tensions to resurface is the changing legal environment. In several recent cases—some in the U.S., some in Europe, and some relating to football, others relating to different sports—courts have begun to address potential limits on the authority of sports governing bodies. This is part of a process that started, at least in football, over twenty-five years ago. In the famous *Bosman* case,<sup>23</sup> the European Court of Justice recognized that there were certain fundamental rights, such as the freedom of movement and of association, that could not be abrogated notwithstanding the special nature of sport under the European Union treaty.<sup>24</sup> The Court, therefore, held that European footballers were free to move to a new club following the end of their contracts.<sup>25</sup> In recent decisions, however, the courts have more directly invoked concerns about competition law, or antitrust law as it is known in America, which strikes at the heart of sport's "special" status in both Europe and America and considers to what extent its governing bodies can exercise control over their sports.

This does not mean that a shift in the balance of power from governing bodies to clubs or other competitors is imminent. To the extent these disputes are being litigated, some of the cases are still pending, going through the appeals process, or their decisions have been procedural or narrow rather than sweeping in their effect. Nevertheless, as football becomes increasingly global and commercial, it is difficult to ignore the line of argument that treats it like a business enterprise in the eyes of the law, with all the protections and obligations that entails. Moreover, these disputes come at a delicate time in the relationship between clubs and FIFA, with clubs already upset that FIFA president

---

<https://www.claimsjournal.com/news/international/2010/09/10/113145.htm>; *UEFA and FIFA Will Pay Clubs Player Compensation*, N.Y. TIMES (Jan. 21, 2008), <https://www.nytimes.com/2008/01/21/sports/21iht-soccermoney21.9381516.html>.

23. Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman*, 1995 E.C.R. I-4921.

24. *Id.* at I-5071-72.

25. *Id.* at I-5070 (¶ 100).

Gianni Infantino’s somewhat quixotic, if not persistent, quest for a biennial World Cup could come at the expense of player safety, league seasons, and regional competitions.<sup>26</sup>

Part I of this Article explains how the current sources of tension over the Super League, the ability of a local football association to restrict play by clubs from another jurisdiction, and mandatory releases of players for national team duty, reflect the historically unresolved tensions between clubs and their governing bodies. Part II describes the recent legal cases that have suggested growing limits on European sports governing bodies in a variety of related contexts. Part III explains how this changing legal environment could affect the outcomes of these disputes and why football’s governing bodies need to take these developments seriously. The Article then concludes by placing these disputes in the broader context of a battle for the control of global football.

## I. CURRENT CONFLICTS BETWEEN CLUBS AND GOVERNING BODIES

### A. *European Super League*

The biggest clubs in Europe have long threatened to depart from existing European tournaments or their domestic leagues to form their own competitive circuits, often using those threats as leverage to get what they wanted. In the early 1990s, top clubs threatened to depart from UEFA’s European Cup, which AC Milan president Silvio Berlusconi called “a historical anachronism.”<sup>27</sup> According to Berlusconi, who was the former prime minister of Italy, “It is economic nonsense that a club such as Milan might be eliminated in the first round. It is not modern thinking.”<sup>28</sup> In 1992, UEFA “eventually succumbed” by replacing the European Cup with a new competition—the Champions League—which offered the top clubs larger shares of the revenues and

---

26. Simon Evans, *Clubs say FIFA’s biennial World Cup plan would have ‘destructive impact’*, REUTERS (Sept. 24, 2021, 7:58 A.M. PDT), <https://www.ctvnews.ca/sports/clubs-say-fifa-s-biennial-world-cup-plan-would-have-destructive-impact-1.5599054>.

27. Mark Doidge, *An ‘infallible FIFA prevails in power struggle over World Cup move*, THE CONVERSATION (Mar. 25, 2015), <https://theconversation.com/an-infallible-fifa-prevails-in-power-struggle-over-world-cup-move-38117>.

28. *Id.*

a structure that ensured it would be easier for them to qualify and advance.<sup>29</sup> Around the same time, top English clubs threatened to leave the top division of English football over a dispute regarding the allocation of television revenues.<sup>30</sup> Eventually, the English Football Association effectively “let go of the reins” and “ceded control of the direction of English football” by permitting the top clubs to create the Premier League in 1992.<sup>31</sup> Similar to UEFA’s Champions League, the Premier League allowed the top English clubs to retain more of the income rather than watching most of it trickle down to the lower clubs in the football pyramid.<sup>32</sup>

Perhaps emboldened by their previous success in the 1990s, there was another round of threats to depart Europe in 2011. European clubs planned to “break away from FIFA and UEFA and create their own super league unless the world governing body urgently address[ed] their growing concerns over international fixtures and finances.”<sup>33</sup> By departing from UEFA’s Champions League, the 197 member European Clubs Association, led by a group of nine of the largest clubs—Real Madrid, AC Milan, Liverpool, Inter Milan, Manchester United, FC Barcelona, Arsenal, Chelsea, and Bayern Munich—sought to “seize control of their own affairs from the regulators.”<sup>34</sup> Although this breakaway ultimately did not occur, the concerns about football’s “unfulfilled [financial] potential” lingered.<sup>35</sup> As one commentator observed, “when you have every club losing money every year and the only winners [are] the players and FIFA, how can that be allowed to go on[?]”<sup>36</sup> This set

---

29. *Id.*

30. Paul MacInnes, *Deceit, determination, and Murdoch’s millions: how Premier League was born*, THE GUARDIAN (July 23, 2017), <https://www.theguardian.com/football/2017/jul/23/deceit-determination-murdochs-millions-how-premier-league-was-born>.

31. *Id.*

32. *Id.*

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

34. *Id.*

35. *Id.*

36. *Id.*

the stage for other short-lived attempts at a European super league over the next decade.<sup>37</sup>

In April 2021, twelve European clubs announced that they had agreed to establish a mid-week European Super League as an alternative to the current Champions League.<sup>38</sup> Much like in 2011, the group cited the “instability in the existing European football economic model” as a reason for the move.<sup>39</sup> The clubs emphasized the need to improve “the quality and intensity of existing European competitions,” but appeared to focus on the need for a “sustainable commercial approach.”<sup>40</sup>

What distinguished the 2021 Super League proposal from the 2011 version is that it was forwarded by a small group of clubs, rather than the entire European Clubs Association, and it adopted a primarily closed-league structure. As proposed, the founding clubs would automatically qualify for the tournament, with a smaller number of spots reserved for other clubs to qualify based on the prior year’s results.<sup>41</sup> This approach would be a hybrid between the North American “Closed League” sports model for the founding clubs and the European “Open League” sports model for the other clubs.<sup>42</sup>

The Super League proposal was “met with widespread criticism and resistance from former players, politicians, governing bodies, pundits, and fans.”<sup>43</sup> What attracted the most ire was that the founding clubs

---

37. See generally KATARINA PIJETLOVIC, EU SPORTS LAW AND BREAKAWAY LEAGUES IN FOOTBALL 53-73 (2015) (describing various threats to form breakaway leagues); *Stillitano: European super league would make top clubs richer*, SI.COM (Mar. 3, 2016), <https://www.si.com/soccer/2016/03/03/champions-league-super-europe-icc-stillitano> (describing meetings between Relevant Sports and top Premier League clubs about guaranteed spots in a revamped Champions League).

38. *The ‘Super League’ Announcement*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/interactive/2021/04/19/sports/soccer/super-league-announcement.html>.

39. *Id.*

40. *Id.*

41. *Id.*

42. See James A.R. Nafziger, *European and North American Models of Sports Organization*, in HANDBOOK ON INT’L SPORTS L. 88-111 (James A.R. Nafziger & Stephen F. Ross, eds., 2011), for a description of the two models.

43. Sam Shead, *‘Disgusted’: Plans for a breakaway European Super League met with widespread fury*, CNBC (Apr. 19, 2021), <https://www.cnbc.com/2021/04/19/european-super-league-met-with-widespread-fury.html>.

would receive automatic spots and there would only be five slots reserved for clubs that qualified through open competition. This was viewed as an assault of the fundamental notion of European football,<sup>44</sup> which infuriated people.<sup>45</sup> One fan remarked, “the idea that everybody has to fight for five places that rotate each year and these 15 clubs are always involved is crazy . . . [it] kills the whole idea and spirit of competition.”<sup>46</sup> Football pundit and former English national team player Gary Lineker called it the “anti-football pyramid scheme,”<sup>47</sup> while UEFA argued that “football is based on open competitions and sporting merit; it cannot be any other way.”<sup>48</sup>

Both governments and sports governing bodies promised to fight the Super League proposal. British Prime Minister Boris Johnson declared, “we are examining every option from governance reform to competition law” to defeat the proposal.<sup>49</sup> UEFA, whose Champions League competition would be threatened by the Super League, issued a joint statement with the national football governing bodies of England, Spain, and Italy, as well as the top leagues in each country, warning that they would “consider all measures available to [them], at all levels, both judicial and sporting” to prevent it from happening.<sup>50</sup> The football governing bodies even went so far as to warn that “[t]he clubs concerned will be banned from playing in any other competition at domestic, European or world level, and their players could be denied the opportunity to represent their national teams.”<sup>51</sup> FIFA President Gianni

---

44. De Witte & Zglinski, *supra* note 2, at 3-4.

45. *Id.* at 5.

46. Shead, *supra* note 43.

47. *Id.*

48. *Id.*

49. Mike DeCourcy, *How the European Super League unraveled in 48 Hours: What it means for soccer, fans, and teams*, SPORTING NEWS (Apr. 21, 2021), <https://www.sportingnews.com/us/soccer/news/how-the-european-super-league-unraveled-what-it-means/ry7xzfz3vvqw1bqfdpdel76i7>.

50. *Statement by UEFA, the English Football Association, the Premier League, the Royal Spanish Football Federation (RFEF), LaLiga, the Italian Football Federation (FIGC) and Lega Serie A* (Apr. 18, 2021), <https://www.uefa.com/insideuefa/mediaservices/mediareleases/news/0268-12121411400e-7897186e699a-1000—joint-statement-on-super-league/>.

51. See Dwayne Bach, *The Super League and its Related Issues under EU Competition Law*, KLUWER COMPETITION L. BLOG (Apr. 22, 2021), <http://competitionlawblog.kluwercompetitionlaw.com/2021/04/22/the-super-league-and-its-related-issues->

Infantino issued his own warning, stating that the Super League clubs could not be “half in and half out.”<sup>52</sup> This was perceived to be “a warning, mostly implied, that if clubs launched the Super League without a sanction that was not forthcoming, players for those teams might be ineligible for international competition that culminates at the World Cup.”<sup>53</sup> According to Infantino, “If some elect to go their own way, they must live with the consequences of their choice,” Infantino said. “This has to be absolutely clear.”<sup>54</sup>

Amidst the public uproar, the Super League proposal was suspended within a matter of days.<sup>55</sup> All six of the Premier League clubs publicly renounced their participation in the Super League under a Club Commitment Declaration they executed with UEFA.<sup>56</sup> Under the Declaration, the clubs agreed to collectively pay €15 million to a fund for youth and grassroots football in Europe and forfeit the equivalent of one percent of a season’s revenues from participating in European competitions.<sup>57</sup> If they reneged on the deal and joined an unauthorized competition in the future, they would be subject to a €100 million fine and if they breached any part of the Declaration, which included a commitment to abide by UEFA rules, they would be subject to a €50 million fine.<sup>58</sup>

---

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

52. DeCourcy, *supra* note 49.

53. *Id.*

54. *Id.*

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

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

57. *Id.*

58. *Id.*

The three non-English clubs—Real Madrid, Barcelona, and Juventus—refused to enter into the Club Commitment Declaration, calling the pressure to end the project by UEFA “intolerable.”<sup>59</sup> Instead, the clubs went to court and were granted a temporary injunction by the Madrid Commercial Court, blocking any retaliation by FIFA or UEFA against the clubs or participants in the Super League proposal.<sup>60</sup> They argued that the governing bodies were in violation of Article 102 of the EU Treaty because prohibiting clubs from participating in an event that would compete with UEFA’s own event was an abuse of power.<sup>61</sup> Later that year, the court also granted a preliminary injunction against disciplinary proceedings started against the three non-English clubs and against actions to dissolve the European Super League or to punish the English clubs for committing to the new league.<sup>62</sup> Opponents of the Super League scoffed at the decision, claiming it was the product of the judicial bias or the *ex parte* procedure used in deciding the motion.<sup>63</sup>

59. Reuters, *Juventus, Real Madrid, Barcelona Slam UEFA ‘Threats’ over Super League Exit*, ESPN (May 8, 2021), <https://www.espn.com/soccer/uefa-champions-league/story/4379721/juventusreal-madridbarcelona-slam-uefa-threats-over-super-league-exit>.

60. Christina Unkel, *What is the legal status of the failed Eur. Super League and could Europe’s big teams break away again?*, CBS SPORTS (Apr. 26, 2021), <https://www.cbssports.com/soccer/news/what-is-the-legal-status-of-the-failed-european-super-league-and-could-europes-big-teams-break-away-again/>.

61. Case C-333/21, *Eur. Super League Co., S.L. v. Union of Eur. Football Associations (UEFA) and Fédération Internationale de Football Ass’n (FIFA)*, 2021 O.J. (L. 382) *passim*.

62. Florian Mueller, *Madrid Commercial Court injunction against UEFA over disciplinary proceedings against Super League clubs and the Club Commitment Declaration*, LINKEDIN (July 1, 2021), <https://www.linkedin.com/pulse/madrid-commercial-court-injunction-against-uefa-over-super-mueller/>.

63. See, e.g., Reuters, *Tebas Dismisses Court Ruling Asking UEFA to Revoke Action against Super League Trio*, AS.com (July 31, 2021), [https://en.as.com/en/2021/07/31/soccer/1627760636\\_480114.html](https://en.as.com/en/2021/07/31/soccer/1627760636_480114.html); *Bavarian Legal Works: The Super League Strikes Back?*, BAVARIAN FOOTBALL WORKS (Aug. 4, 2021, 3:00pm CEST), <https://www.bavarianfootball-works.com/2021/8/4/22604764/bavarian-legal-works-the-super-league-uefa-bayern-munich-real-madrid-juventus-barcelona-psg-fifa>. UEFA tried to get the judge recused from the case on account of bias, but their efforts were rebuffed by the court, which instead required UEFA to pay costs and a fine. Alex Kirkland and Rodrigo Faez, *Eur. Super League: Madrid court rejects UEFA appeal over judge*, ESPN (Jan. 27, 2022), <https://www.espn.com/soccer/uefa-champions-league/story/4579929/european-super-league-madrid-court-rejects-uefa-appeal-over-judge>.

However, the underlying case is still pending after the Madrid court referred it to the European Commission for a ruling as to whether FIFA and UEFA's actions are consistent with competition law.<sup>64</sup>

*B. Relevent Sports v. United States Soccer and FIFA*

For many years, Relevent Sports, a promoter of international football matches, has organized international friendly matches and tournaments in the United States during the summer between well-known European teams prior to the start of their league seasons.<sup>65</sup> In 2018, Relevent partnered with Spain's La Liga, which sought to grow its brand in America,<sup>66</sup> and organized an official league match between two Spanish clubs—Barcelona and Girona—in Miami, Florida.<sup>67</sup>

Under FIFA rules, the national federation has sanctioning authority for all games played in its territory.<sup>68</sup> Thus, Relevent and La Liga applied to the U.S. Soccer Federation for approval to organize the match in the U.S.<sup>69</sup> Unsure about whether an official league match would be permissible, U.S. Soccer; Spain's football federation, the Real Federación Española de Fútbol (RFEF); and the Confederation of North, Central America, and Caribbean Association Football (CONCACAF),

---

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

65. Kevin Draper, *Relevent Sports Sues U.S. Soccer, Escalating Fight Over Sanctioning*, N.Y. TIMES (Apr. 22, 2019), <https://www.nytimes.com/2019/04/22/sports/relevent-sports-us-soccer-lawsuit.html>.

66. Brian Straus, *La Liga's North American Project and its Hurdles in Cracking the U.S. Market*, SI.COM (July 2, 2020), <https://www.si.com/soccer/2020/07/02/la-liga-north-america-usa-market-tv-deal-barcelona-real-madrid-icc>.

67. *Girona v Barcelona 90% likely to be played in Miami, says La Liga president*, THE GUARDIAN (Sept. 7, 2018), <https://www.theguardian.com/football/2018/sep/07/girona-v-barcelona-miami-likely-la-liga-javier-tebas-manchester-city>.

68. FIFA STATUTES AND REGULATIONS art. 72 (2021).

69. See *Relevent Sports, LLC v. Fédération Internationale De Football Ass'n.*, 19-CV-8359, 2021 U.S. Dist. LEXIS 135017, at \*6 (S.D.N.Y. July 20, 2020).

requested guidance from the FIFA Council.<sup>70</sup> Upon consideration and after consulting with the FIFA Stakeholder Committee, the FIFA Council “emphasized the sporting principle that official league matches must be played within the territory of the respective member association.”<sup>71</sup> Relevant attempted again to organize a league match in the U.S. with two Ecuadorian teams, this time with the blessing of their national association, but U.S. Soccer denied their request for sanctioning.<sup>72</sup>

La Liga and Relevant brought lawsuits against the respective sports governing bodies; La Liga sued RFEF in 2018 and Relevant sued FIFA and U.S. Soccer in 2019.<sup>73</sup> In the Spanish case brought before the provincial court in Madrid, the lower court ruled against La Liga and the appellate court affirmed in December 2021.<sup>74</sup> The lower court maintained that holding a match in another country had to be “carried out in coordination” with RFEF, as required by the decisions in other disputes between La Liga and RFEF.<sup>75</sup> However, RFEF does not consider this a “definitive ruling on the issue of playing games abroad,” with the possibility of appealing the case to the Spanish Supreme Court.<sup>76</sup> Even still, the likelihood of a ruling in favor of RFEF appears slim.<sup>77</sup>

70. *FIFA Council makes key decisions for the future of football development* (Oct. 26, 2018), <https://www.fifa.com/tournaments/mens/futsalworldcup/lithuania2021/media-releases/fifa-council-makes-key-decisions-for-the-future-of-football-development>.

71. *Id.* Ultimately, the matter became moot because they failed to secure sanctioning in time for the match to be moved to the United States.

72. *Relevant Sports, LLC*, 19-CV-8359, 2021 U.S. Dist. LEXIS at \*6.

73. Straus, *supra* note 66.

74. *Madrid Court Backs Federation in Ban of League Match in U.S.*, MARCA (Dec. 2, 2021), <https://www.marca.com/en/football/spanish-football/2021/12/02/61a8eb7f22601d90218b45c4.html>.

75. Paul Nicholson, *LaLiga loses court appeal over staging league match in US, but vows to fight on*, INSIDE WORLD FOOTBALL (Mar. 6, 2020), <https://www.insideworldfootball.com/2020/03/06/laliga-loses-court-appeal-staging-league-match-us-match-vows-fight/>.

76. Adriana Garcia, *LaLiga plan for Miami regular-season match suffers new setback in Madrid court*, ESPN (Dec. 2, 2021), <https://www.espn.com/soccer/spanish-laliga/story/4537067/laliga-plan-for-miami-regular-season-match-suffers-new-setback-in-madrid-court>.

77. See Jamie Kemble, *Spanish court rules against La Liga staging games outside Spain amid Miami plans*, FOOTBALL-ESPANA (Dec. 2, 2021), <https://www.football-espana.net/2021/12/02/spanish-court-la-liga-miami>.

Relevant Sports met with a similar result in its case in the U.S. courts. Relevant claimed that through FIFA's policy, FIFA and its national associations like U.S. Soccer were in an unlawful vertical agreement to divide the market among leagues and teams and the leagues and teams were in an unlawful horizontal agreement to adhere to the policy.<sup>78</sup> The District Court, however, noted that "allegations of parallel conduct alone are insufficient to allege the existence of a conspiracy."<sup>79</sup> It noted that U.S. Soccer's "compliance with the Policy, without additional factual allegations, is insufficient to constitute direct evidence of an unlawful agreement."<sup>80</sup> According to the court, Relevant needed to plead facts to suggest an agreement was actually made,<sup>81</sup> and since it failed to do so, the court granted the defendants' motion to dismiss.<sup>82</sup>

Despite the result, Relevant Sports has reason to be optimistic on appeal. As part of Relevant's appeal, the U.S. Department of Justice (DOJ) filed an amicus brief.<sup>83</sup> Although the brief is not in support of either party, the filing does reflect the government's interest in the standards for antitrust cases involving member associations like U.S. Soccer and FIFA. The DOJ argued that the defendants' claim that Relevant not only had to allege that the members voted on the policy to establish concerted action for purposes of an antitrust claim, but also that the members agreed ahead of time "to vote a particular way on a rule or policy" was incorrect under the law.<sup>84</sup> According to the DOJ, this sets the bar too high and "could improperly shield many anticompetitive association rules from Section 1 scrutiny."<sup>85</sup>

---

78. *Relevant Sports, LLC v. Fédération Internationale De Football Ass'n.*, 19-CV-8359, 2021 U.S. Dist. LEXIS 135017, at \*7-8 (S.D.N.Y. July 20, 2020).

79. *Id.* at \*9.

80. *Id.* at \*13.

81. *Id.* at \*10.

82. *Id.* at \*27.

83. *See* Brief for the United States of America as Amicus Curiae in Support of Neither Party, *Relevant Sports, LLC v. U.S. Soccer Fed'n., Inc., and Fédération Internationale de Football Ass'n.*, 2020 U.S. Dist. LEXIS 128260 (S.D.N.Y. July 20, 2020) (No. 21-2088).

84. *Id.* at 10.

85. *Id.* at 7.

*C. International Windows*

In disputes over the Super League or attempts to stage domestic league matches in foreign locations, the clubs or leagues involved are arguably trying to encroach on the traditional roles of governing bodies to expand their own power and influence. By contrast, in disputes over the release of players for international games, the opposite is taking place. Clubs sign and pay players to perform a service for them. Mandatory releases for international duty deprive the clubs of those players' services and can deprive leagues of some of their seasons in the case of major events. Moreover, if the players are injured while away on international duty, they may be unavailable even upon their return. Historically, clubs have resented being asked to release their players, especially for tournaments in which the governing bodies are profiting from players that the clubs, not the governing bodies, pay the vast amount of their salaries.<sup>86</sup> In 1999, the top clubs formed what was called the Group of 14 (the "G-14") to air their grievances collectively.<sup>87</sup> Eventually, several of those clubs sued FIFA and UEFA for compensation.<sup>88</sup>

In 2008, in settlement of the lawsuits then pending, FIFA and UEFA agreed to start compensating clubs whose players competed in the European Championships and the World Cup.<sup>89</sup> UEFA president Michel Platini noted that "Clubs who provide UEFA and FIFA with certain amounts of money through these players should get some compensation and share in these profits."<sup>90</sup> Under the original arrangement, FIFA agreed to pay \$110 million in aggregate to clubs whose players participated in the 2010 World Cup and UEFA agreed to pay clubs in

---

86. See Ryan Kelly, *Can football clubs prevent players from playing in international matches?*, GOAL (Oct. 26, 2019), <https://www.goal.com/en/news/can-football-clubs-prevent-players-from-playing/eksoltaiss191hjgdwoch6u8>.

87. Timothy Collings, *Top clubs flex their muscles*, THE GUARDIAN (Feb. 13, 1999), <https://www.theguardian.com/football/1999/feb/13/newsstory.sport27>.

88. Case C-243/06, SA Sporting du Pays de Charleroi, G-14 Groupment des clubs de football européens v. Fédération internationale de football ass'n. (FIFA), 2006 O.J. (C 212) 11; *Europe's Richest Clubs Sue FIFA Over Players' Use*, DW (Mar. 21, 2006), <https://www.dw.com/en/europes-richest-soccer-clubs-sue-fifa-over-players-use/a-1940006>.

89. *UEFA and FIFA Will Pay Clubs Player Compensation*, N.Y. TIMES (Jan. 21, 2008), <https://www.nytimes.com/2008/01/21/sports/21iht-soccer-money21.9381516.html>.

90. *Id.*

aggregate \$63 million for the 2008 Euros and \$79 million for the 2012 Euros.<sup>91</sup> The president of Chelsea Football Club called it a “historic day,” while the director of AC Milan welcomed the “direct dialogue and direct influence” clubs would now have with UEFA through the creation of the European Club Association, which represented all clubs in Europe and replaced the G-14 that was disbanded as a sign of goodwill in the wake of the settlements.<sup>92</sup>

To this day, FIFA’s Club Benefit Programme<sup>93</sup> and UEFA’s version for European clubs participating in its competitions,<sup>94</sup> continue to provide compensation to clubs for the use of their players. For the 2018 World Cup in Russia, FIFA paid \$209 million in aggregate, amounting to \$8,530 per day per player.<sup>95</sup> UEFA agreed to pay a little under \$230 million in aggregate for clubs with players participating in the 2020 Euros, including the qualifiers, and the UEFA Nations League.<sup>96</sup> Creation of the benefits programs was soon followed by the creation of similar programs to compensate clubs for injuries suffered by their players while away on international duty. Under the Club Protection Programme, which was originally funded by UEFA for clubs competing in Euro 2012 and then extended by FIFA to cover clubs worldwide,<sup>97</sup> FIFA effectively provides insurance to clubs for the financial consequences of those injuries.<sup>98</sup>

---

91. *Id.*

92. *Id.*

93. *FIFA Club Benefit Programme*, FIFA, <https://www.fifa.com/about-fifa/legal/football-regulatory/stakeholders/fifa-club-benefit-programme> (last visited Mar. 29, 2022).

94. *UEFA Euro Club Benefits*, EUR. CLUB. ASS’N, <https://www.ecaeurope.com/about-eca/main-achievements/club-benefits/> (last visited Mar. 29, 2022).

95. FIFA, *FIFA WORLD CUP CLUB BENEFITS PROGRAMME 1* (2018), <https://digitalhub.fifa.com/m/63651247df9b8ba2/original/bxkl7wgkgyv0ar7scko-pdf.pdf>.

96. *UEFA Euro 2020 club benefits paid in advance*, UEFA (Apr. 23, 2020), <https://www.uefa.com/insideuefa/about-uefa/news/025c-0f8e77f5f6c7-5e481e4f75d1-1000—uefa-euro-2020-club-benefits-paid-in-advance/>.

97. *Club Protection Programme*, EUR. CLUB. ASS’N, <https://www.ecaeurope.com/about-eca/main-achievements/club-protection-programme/> (last visited Mar. 29, 2022).

98. Lloyd Thomas & Rose Duckworth, *Your Guide to FIFA’s Club Protection Programme*, LAWINSPORT (July 25, 2014), <https://www.lawinsport.com/topics/sports/football/item/your-guide-to-fifa-s-club-protection-programme>.

Unfortunately, the spirit of cooperation between clubs and governing bodies was short-lived. In 2015, FIFA changed the Men's World Cup from a summer tournament to a winter tournament for the 2022 World Cup in Qatar, which angered clubs and other stakeholders.<sup>99</sup> As the *New York Times* observed, "the switch to winter will disrupt not only league competitions in Europe and elsewhere, but also the lucrative UEFA Champions League, and it will require starting seasons earlier or finishing them later, or both."<sup>100</sup> This is true not only at the regional level, but also in individual domestic leagues. The President of France's first division Ligue 1 confirmed this, lamenting that "players will not play, the clubs will not make any money, the fans will be deprived of national competitions and television companies will be furious."<sup>101</sup> The frustration was even higher for some lower leagues, as clubs in England's second division Championship have complained that they are forced to "shoehorn" games into a "farcical fixture" schedule, threatening the safety and well-being of their players.<sup>102</sup>

Clubs and their leagues threatened to sue for additional compensation if the move of the 2022 World Cup to winter was finalized, arguing that it would cause significant schedule disruption and loss of revenue.<sup>103</sup> FIFA, however, quickly rejected this argument.<sup>104</sup> Ironically, FIFA's justification for rejecting the claim for compensation was based in the Club Benefits Programme. As FIFA's former general secretary

---

99. Sam Borden, *FIFA Confirms Winter World Cup for 2022*, N.Y. TIMES (Mar. 9, 2015), <https://www.nytimes.com/2015/03/20/sports/soccer/fifa-confirms-winter-world-cup-for-2022.html>.

100. *Id.*

101. *Ligue 1 president: Holding winter World Cup is 'the worst solution'*, SI.COM (Feb. 25, 2015), <https://www.si.com/soccer/2015/02/25/2022-winter-world-cup-opposition>.

102. Ricky Charlesworth, *EFL Championship sides furious with farcical fixture plans for next season due to Qatar World Cup*, DAILY MAIL (Sept. 17, 2021), <https://www.mirror.co.uk/sport/football/news/efl-sides-furious-world-cup-25006472>.

103. John Cross, *2022 winter World Cup plan faces lawsuit from Eur. football's top leagues*, THE MIRROR (Feb. 24, 2015), <https://www.mirror.co.uk/sport/football/news/2022-winter-world-cup-plan-5223760>.

104. *FIFA confirms clubs will not be compensated for winter 2022 World Cup*, THE GUARDIAN (Feb. 25, 2015), <https://www.theguardian.com/football/2015/feb/25/2022-world-cup-fifa-uefa-no-compensation>.

Jerome Valcke said at the time, “why are we talking about compensation? . . . We have had an agreement with the clubs that they are part of the beneficiaries. It was \$40m dollars (£25.8m) in 2010 and \$70m (£45m) in 2014.”<sup>105</sup>

Recently, the Covid-19 pandemic has caused another flashpoint for club tension over international windows. This tension is partly due to the national quarantine requirements for persons traveling from another country with an elevated rate of transmission of the virus. In the summer of 2021, the Premier League voted to not release players if their national teams were scheduled to play in “red list” countries.<sup>106</sup> Under UK rules, individuals entering from the “red list” countries were subject to a ten-day quarantine.<sup>107</sup> This meant that those players would not only miss games required by the mandatory release for the window under FIFA rules, they would also miss games and training while stuck in quarantine upon their return, possibly for up to a month.<sup>108</sup> Spain’s La Liga made a similar announcement for its players from South America, where FIFA had extended the international window by three days in the first two windows in the Fall of 2021 to make up for games canceled during the pandemic.<sup>109</sup> That winter, the Premier League renewed its stance regarding releasing players, this time for the African Cup of Nations, which had been moved because of Covid-19 and weather conditions, before FIFA relented and allowed players to come after their games during the holiday period.<sup>110</sup>

---

105. *Id.*

106. The “red list” was comprised of more than fifty countries that the United Kingdom considered to be at elevated risk of Covid-19 transmission. Gabriele Marcotti, *Premier League can’t be allowed to undermine World Cup qualifiers—and they probably won’t*, ESPN (Aug. 25, 2021), <https://www.espn.com/soccer/blog-marcottis-musings/story/4461746/premier-league-cant-be-allowed-to-undermine-world-cup-qualifiers-and-they-probably-wont>.

107. *Id.*

108. *Id.*

109. Simon Borg, *Players not released for FIFA World Cup qualifiers: Explaining the moves by Premier League, La Liga*, SPORTING NEWS (Aug. 26, 2021), <https://www.sportingnews.com/us/soccer/news/players-release-fifa-world-cup-qualifier-premier-league-liga/1tsqa5gif72ns1ub0f3zbwltjc>.

110. Matt Slater, *Premier League clubs will not have to release players for AFCON until January 3*, THE ATHLETIC (Dec. 26, 2021), <https://theathletic.com/news/premier-league-clubs-will-not-have-to-release-players-for-afcon-until-january-3/DLxdNbgK2Fla/>.

## II. CHANGING LEGAL ENVIRONMENT

A. *The Conditional Autonomy of Sports Governing Bodies*

For many years, international sports organizations have enjoyed a unique status in Europe. Under Article 165 of the Treaty of Lisbon, which created the European Union (EU), “the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.”<sup>111</sup> This “specific nature of sport” language has effectively allowed sports organizations wide latitude in complying with EU requirements,<sup>112</sup> including Article 101 of the EU Treaty, prohibiting “agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.”<sup>113</sup>

This wide latitude to operate according to the specific needs of the sport allows for certain actions to be taken that would not ordinarily be permitted for normal commercial enterprises. At its most basic level, professional sports clubs agree to play the game using common rules over a specific time period called a “season.” They also agree to play against other teams in a league as dictated by the schedule created by the league organizers. If manufacturers made similar agreements to that of a normal professional sports league, the agreements could be questioned under competition or antitrust laws, especially if they controlled enough of the market to effectively limit consumer choices. This latitude explains why in European football, a single organization can establish a system of promotion and relegation within a pyramid of leagues in which teams are required to start at the bottom and move

---

111. Consol. Version of the Treaty on the Functioning of the Eur. Union, art. 165, Sept. 5, 2008, O.J. (C 115) 120–21 [hereinafter EU Treaty].

112. See EUR. COMM’N., DEVELOPING THE EURO. DIMENSION IN SPORT 10-13 (2011), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:en:PDF>.

113. EU Treaty, *supra* note 111, art. 101.

their way up, but leagues can never move up or down the pyramid regardless of their success in staging high quality matches, attracting fans, and generating revenue.<sup>114</sup>

Notwithstanding this special treatment, sport's autonomy to operate in a way that makes sense given the nature of the activity is not unlimited. As the European Commission wrote in its 2007 White Paper on Sport, "[s]port activity is subject to the application of EU law," including, as an economic activity, competition law.<sup>115</sup> The Commission concluded "[i]n line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law."<sup>116</sup> This is known as the conditional autonomy of sport in Europe.<sup>117</sup>

The question is, how do courts determine whether a sports organization, which occupies a dominant position and/or has market power under the conventional tests under EU competition law, has exceeded the limits of its autonomy? The European Court of Justice in *Meca-*

---

114. See EUR. COMM'N., *supra* note 112, at 11 ("The concept of the specific nature of sport is taken into account when assessing whether sporting rules comply with the requirements of EU law (fundamental rights, free movement, prohibition of discrimination, competition, etc.)"). By contrast, in the U.S., leagues operate as independent businesses. Although one could establish a system of promotion and relegation among its own teams, a system in which the main competitors got together and decided that no new leagues could ever be established except with the permission of the competitors, and even then, could only exist at the bottom would likely be challenged under antitrust laws. Indeed, the North American Soccer League has sued the U.S. Soccer Federation on the grounds that a licensing system that classified leagues into tiers violated antitrust laws even though the classification system did not actually limit what clubs could play in which leagues like a promotion-relegation system. See *North Am. Soccer League, LLC v. USSF*, 883 F.3d 32, 45 (2d Cir. 2018) (upholding the denial of a preliminary injunction, while noting that although the plaintiffs had sufficiently alleged that the professional league standards had an adverse effect on competition, there was sufficient evidence of its pro-competitive benefits).

115. *Comm'n of the Eur. Communities White Paper on Sport*, art. 4.1 at 13, COM (2007), 0391 final (Nov. 7, 2007) [hereinafter *White Paper*].

116. *Id.*

117. See Stephen Weatherill, *The Influence of EU Law on Sports Governance*, in EUR. SPORTS LAW 443, 445 (2d ed., 2014) ("Governance is a matter of sporting autonomy but that autonomy is *conditional*—conditional on compliance with the rules of the EC Treaty.").

*Medina v. Commission* is the leading case in this area.<sup>118</sup> It addressed whether the anti-doping rules established by the International Olympics Committee and the Fédération Internationale de Natation (“FINA”), the international governing body of swimming, constituted an unlawful agreement under competition laws.<sup>119</sup> The Court dismissed the notion that sports was beyond the review of competition laws stating, “the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty, the conditions for engaging in the activity governed by that rule or the body which has laid it down.”<sup>120</sup> The Court instead evaluated the question using a balancing test that compared the threat to competition with the legitimacy of the objectives of the sporting organizations:

Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives ... and are proportionate to them.<sup>121</sup>

According to the Court, even if the anti-doping regulations constituted an agreement among undertakings that limited the swimmers’ freedom of action, they do not “necessarily constitute a restriction of competition incompatible with the common market” because the anti-doping regulations “are justified by a legitimate objective. . . . [in the] proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.”<sup>122</sup>

In the wake of *Meca-Medina*, the European Commission adopted the basic standards for understanding the limits imposed on sporting

---

118. Case C-519/04, *Meca-Medina and Majcen v. Comm’n of the Eur. Communities*, 2006 E.C.R. I-06991.

119. *Id.* ¶¶ 16-17.

120. *Id.* ¶ 27.

121. *Id.* ¶ 42.

122. *Id.* ¶ 45.

organizations. According to the Commission, “In order to assess the compatibility of sporting rules with EU law, the Commission considers the legitimacy of the objectives pursued by the rules, whether any restrictive effects of those rules are inherent in the pursuit of the objectives and whether they are proportionate to them.”<sup>123</sup> These three factors: (1) the legitimacy of the objectives, (2) whether any actions that restrict rights under EU law are inherently necessary in the pursuit of those objectives, and (3) whether those actions are proportionate to the objectives sought—form the basis for the conditional autonomy of sport under European law.

### *B. Recent Limits on Sports Governing Bodies Outside of Football*

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

#### *1. European Courts*

Although *Meca-Medina* acknowledged the limits on the autonomy of sports organizations under European competition laws, it did so in the context of a decision that permitted the governing body to require participants to comply with anti-doping testing protocols.<sup>124</sup> By contrast, as will be shown in this section, European courts have recently cited competition and other laws to strike down the actions of sports governing bodies in a variety of contexts. These decisions are consistent with *Meca-Medina*, but they suggest a somewhat more conservative view of what objectives and measures are legitimate and proportionate.

The most prominent recent European case to overturn the actions of a sports governing body is *International Skating Union v. Commission*.<sup>125</sup> In that case, two professional speed skaters—Mark Jan Hendrik Tuitert and Niels Kerstholt—sought to compete in a series of special

---

123. EUR. COMM’N., *supra* note 112, at 13.

124. Case C-519/04, *Meca-Medina and Majcen v. Comm’n of the Eur. Communities*, 2006 E.C.R. I-06991 ¶¶ 59-60.

125. Case T-93/18, *Int’l Skating Union v. Eur. Comm’n.*, 2020 ECLI:EU:T:2020:610 (Dec. 16, 2020).

speed skating events organized in 2014 in Dubai by a third-party organizer, Icederby International.<sup>126</sup> This so-called Dubai Grand Prix offered higher prize money than was typically offered by the International Skating Union (ISU),<sup>127</sup> which operated as both a regulator, as the governing body of the sport, and a commercial participant, as the organizer of its own series of speed skating events, including the European and World Championships.<sup>128</sup>

The problem for Tuitert and Kerstholt was that the Dubai Grand Prix was not an ISU authorized event and, under ISU rules, athletes competing in a non-authorized event were subject to penalties up to and including a lifetime ban from ISU competitions.<sup>129</sup> Tuitert and Kerstholt complained to the European Commission, arguing that ISU's actions violated Articles 101 and 102 of the EU Treaty, which bars undertakings of associations that restrict competition within the internal market and the abuse of an undertaking that has a dominant position in the market.<sup>130</sup> The Commission agreed that the ISU's eligibility rules at issue would improperly restrict competition in the market by "depriv[ing] potential organisers of competing events of the services of the athletes which are necessary in order to organise those events."<sup>131</sup>

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

[W]hen a rule entrusts a legal person, which itself, organises and commercially operates competitions, with the task of designating the persons authorised to organise those competitions and to determine the conditions under which they are organised, it grants that entity an

---

126. *Id.* ¶ 20; Press Release, General Court of the European Union, The General Court confirms that the rules of the Int'l Skating Union (ISU) providing for severe penalties for athletes taking part in speed skating events not recognized by it are contrary to EU competition law, E.U. Press Release No. 159/20 (Dec. 16, 2020).

127. Andrea Cattaneo, *International Skating Union v. Commission: Pre-authorisation Rules and Competition Law*, 12 J. EUR. COMP. L & PRAC. 318, 318 (2021).

128. Case T-93/18, *Int'l Skating Union v. Eur. Comm'n.*, 2020 ECLI:EU:T:2020:610 ¶ 3 (Dec. 16, 2020).

129. *Id.* ¶ 92.

130. EU Treaty, *supra* note 111, arts. 101-102.

131. Case T-93/18, *Int'l Skating Union v. Eur. Comm'n.*, 2020 ECLI:EU:T:2020:610 ¶ 32 (Dec. 16, 2020).

obvious advantage over its competitors. Such a right may therefore lead the undertaking making use of it to prevent access by other operators to the market concerned. The exercise of that regulatory function should therefore be made subject to restrictions, obligations and review, so that the legal person entrusted with giving that consent may not distort competition by favouring events which it organises or those in whose organisation it participates.<sup>132</sup>

As the Court later explained, “in view of its role as an organiser of events and holder of the power to authorise events organised by third parties, the applicant is required to ensure undistorted competition between economic operators”<sup>133</sup> The Court did acknowledge that ISU’s authority to sanction speed skating competitions was not a delegated power from a public authority, but noted that “it exercises, as the sole international sports federation recognised by the IOC for the disciplines in question, a regulatory power.”<sup>134</sup>

After finding that the ISU’s eligibility rules were not sufficiently connected to any legitimate objective and were disproportionately restrictive, the Court concluded that ISU’s system of sanctioning or authorizing events in which athletes could enter without being restricted from its own events was anti-competitive. “[T]he applicant’s pre-authorisation system allows it to distort competition on the relevant market by favouring its own events to the detriment of events offered by third parties and that, therefore, those rules do not ensure effective access to that market.”<sup>135</sup> As a result, the court upheld the Commission’s decision that the ISU’s eligibility rules “reveal a sufficient degree of harm to be regarded as restricting competition by object within the meaning of” the EU Treaty.<sup>136</sup> There have been earlier European cases to uphold the rights of third-party competitors to operate in the sports space,<sup>137</sup> but the ISU case is arguably most similar to the recent disputes.

---

132. *Id.* ¶ 70.

133. *Id.* ¶ 114.

134. *Id.* ¶ 73.

135. *Id.* ¶ 119.

136. *Id.* ¶ 120.

137. *See* De Witte & Zglinski, *supra* note 2, at 27 (citing Formula One racecar driving, motorcycling in Greece, basketball, bodybuilding, and equestrian sports).

There have also been decisions at the country level in Europe that have used competition law to strike down sports federation actions against third party organizers. Similar to *International Skating Union*—this time in wrestling—a German court also decided in favor of the upstart independent league and against the international sports federation.<sup>138</sup> This case was brought by the Deutsch Ringer-Liga (the German Wrestling League), an independent league founded in 2016 because of disputes with the Deutscher Ringer-Bund (the German Wrestling Federation), which ran its own league and was a member of United World Wrestling, the international governing body of the sport.<sup>139</sup> To “prevent wrestlers and teams from participating in the new ‘maverick league,’”<sup>140</sup> the German Wrestling Federation banned nine athletes that had been competing in the upstart league from participating in the 2017 German wrestling championships organized by the federation.<sup>141</sup> The United World Wrestling also banned some of the same wrestlers and a few more from competing in all international competitions under its auspices in 2018.<sup>142</sup>

Citing to *International Skating Union*, the German Wrestling League claimed that the “suspensions and sanctions are just an obvious try to sabotage the finals of the German Wrestling League.”<sup>143</sup> In a letter to the United World Wrestling, the German Wrestling League argued that not only did the suspensions impair the wrestlers’ freedom, but United World Wrestling “misuses its monopolised position in that she prohibits the GWL from organizing their own ring events.”<sup>144</sup>

---

138. Sinziana Ianc, et al., *German Court Ends the Anti-Trust Fight Between Rival Wrestling Federations*, L. IN SPORT (July 16, 2021), <https://www.lawinsport.com/topics/item/german-court-ends-the-anti-trust-fight-between-rival-wrestling-federations>.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Statement by the German Wrestling League, *World Ass’n to Finally Acknowledge Straight Forward Legal Status* (Feb. 5, 2018), <https://www.ringerliga.de/2018/02/05/weltverband-soll-die-eindeutige-rechtslage-endlich-erkennen-erklaerung-der-deutschen-ringerliga-2/>.

144. *Id.*

In a 2019 decision by the Nuremberg-Furth Regional Court, the German courts struck down the bans on the wrestlers.<sup>145</sup> On January 26, 2021, the Nuremberg Higher Regional Court upheld the ruling, noting that although a sports organization could protect its own economic interests, it agreed with the lower court that the sanctions unfairly hindered the German Wrestling League and were not founded in any legitimate objective or any specific licensing regulation of the federation.<sup>146</sup>

A Swedish case from several years ago raised a different, but related question of a maverick federation. In *Svenska Bilspportförbundet v. Konkurrensverket* (SBF v. KKV),<sup>147</sup> a disgruntled member of the Svenska Bilspportförbundet (the Swedish Automobile Sports Federation or SBF), which was the official Swedish representative of the sport's international governing body, the Federation Internationale de l'Automobile (FIA), decided to create a competing organization for motor-sports in Sweden—the Svenska Motorsport Alliansen (the Swedish Motorsports Alliance or SMA).<sup>148</sup> The problem was that SBF's rules forbade its participants from participating in non-sanctioned events through so-called Solidarity or Loyalty Clauses, making it difficult for SMA to attract drivers and staff for its races.<sup>149</sup>

The Konkurrensverket (Swedish Competition Authority or KKV) agreed with SMA that the Solidarity Clauses were a violation of competition law.<sup>150</sup> On appeal, the Swedish Market Court upheld the decision without seeking a preliminary ruling from the European Court of Justice.<sup>151</sup> According to the English-language reports of the decision, the Court applied the *Meca-Medina* test and concluded that the Solidarity Clauses were anti-competitive.<sup>152</sup> It reportedly “did not consider the

---

145. LG Nürnberg-Fürth [Lower Court Nuremberg] Feb. 28, 2019, 19 O 1079/18 (Ger.).

146. OLG Nürnberg [Higher Regional Court Nuremberg] Jan. 26, 2021, 3 U 894/19 (Ger.); Press Release 5, Nuremberg Higher Regional Court Upholds Ruling in “Wrestling Dispute,” (Jan. 29, 2021), <https://www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/nuernberg/presse/2021/5.php>.

147. Marknadsdomstolen [MD] [Market Court] 2012 Case A 5/11 (Swed.).

148. Johan Lindholm, *The Impact of SBF v. KKV on Sport: Swedish Fender-Bender or European Pileup?*, 34 EUR. COMP. L. REV. 367, 367 (2013).

149. *Id.*

150. *Id.* at 368.

151. *Id.*

152. *Id.* at 369.

Solidarity Clauses to be proportional restrictions on competition for the purpose of achieving” the objectives of protecting the sport’s social, cultural, and educational values and protecting the safety and access of the events.<sup>153</sup> This was true even if competition with another federation or event organizer would reduce the resources available for the growth of the sport.<sup>154</sup>

## 2. *United States Courts*

Legal disputes over the actions of sports governing bodies to hinder so-called “maverick” leagues are not limited to Europe. In a case that originated in Europe, but spilled over to the United States, Konstantin Grigorishin, a Russian billionaire from the Ukraine, funded the creation of the International Swimming League (ISL), an upstart league that promised to pay higher prize money for its events than that offered by swimming’s international governing body—the Fédération Internationale de Natation (FINA).<sup>155</sup> Much like in skating and wrestling, the sports governing body was both a regulator of the sport and a commercial participant.<sup>156</sup> Responding similarly to its counterparts in the other sports, FINA threatened to ban participants from competing in FINA-sanctioned events, including the Olympics.<sup>157</sup>

The International Swimming League and the swimmers who were threatened with suspension sued FINA in federal court in the United

---

153. *Id.*

154. *Id.*

155. Tariq Panja, *A Familiar Rebellion Spreads to International Swimming*, N.Y. TIMES (Dec. 20, 2018), <https://www.nytimes.com/2018/12/20/sports/swimming-fina.html>.

156. *Id.*

157. *Id.*

States.<sup>158</sup> The primary allegation was that FINA colluded to unreasonably restrict competition in violation of the Sherman Antitrust Act.<sup>159</sup> According to ISL's complaint, FINA's internal documents discuss how ISL could be "very dangerous" to FINA and concluded that ISL cannot exist alongside FINA, with FINA Vice President Dale Neuberger writing, "[w]e must win, we will win."<sup>160</sup>

The legal case is still pending, but ISL and the swimmers won in the first round as the court denied FINA's motion to dismiss both suits.<sup>161</sup> FINA's first argument for dismissal was a lack of personal jurisdiction.<sup>162</sup> In rejecting this, the court noted that FINA's "purposeful direction of its anticompetitive conduct at the United States,"<sup>163</sup> which ranged from general reminders to all federations that ILS competitions were not FINA sanctioned nor FINA approved and that "[n]o affiliated Member shall have any kind of relationship with a non-affiliated or suspended body"<sup>164</sup> to direct communication between FINA and USA Swimming regarding the ISL event.

The court distinguished this case from *Mehr v. Federation Internationale de Football Association*,<sup>165</sup> where the court dismissed FIFA

---

158. See First Amended Complaint, Int'l Swimming League, Ltd. v. Fédération Internationale de Natation, No. 3:18-cv-7394-JSC, 2021 U.S. Dist. LEXIS 9806, (N.D. Cal. May 24, 2021) [hereinafter ISL Complaint] & Thomas A. Shields et al. v. Fédération Internationale de Natation, 419 F.Supp.3d 1188 (N.D. Cal. 2019) (brought as a class action on behalf of all affected swimmers). Jurisdiction was based on FINA's ties to the U.S. and allegations that FINA's threats against USA Swimming caused it to withdraw its support of ISL which ultimately led to the cancellation of an event planned for Las Vegas. *Id.* at 1210-1212.

159. 419 F.Supp.3d at 1213-1215.

160. ISL Complaint, *supra* note 158, at 20.

161. Order Re: Defendant's Motions to Dismiss Following Supplemental Briefing on Personal Jurisdiction, Thomas A. Shields et al., v. Fédération Internationale de Natation International Swimming League, Ltd. v. Fédération Internationale de Natation, Cases No. 18-cv-07393-JSC, No. 18-cv-07394-JSC (N.D. Cal. 2019) [hereinafter Order on Motion to Dismiss]; Dan Harrington & Eric Solomon, *Swimming in Hot Water: FINA Loses First Round in U.S. Competition Law Complaint Filed by Organiser of "Unofficial" League*, LEVEL (Jan. 20, 2020), <https://level.law/news/swimming-in-hot-water-fina-loses-first-round-in-us-competition-law-complaint-filed-by-organiser-of-unofficial-league>.

162. Order on Motion to Dismiss, *supra* note 161, at 1.

163. *Id.* at 21.

164. *Id.* at 15.

165. *Id.* at 21; see also 115 F. Supp. 3d 1035 (N.D. Cal. 2015).

from the lawsuit for lack of personal jurisdiction because “FIFA’s commercial contacts with California (the relevant forum) had nothing to do with the plaintiff’s claim” that it failed to adopt adequate guidelines for concussions.<sup>166</sup> According to the court in the ISL case, “the record supports an inference that ‘but for’ the conduct, ISL would have hosted an event with USA Swimming in the United States.”<sup>167</sup>

FINA’s second argument for dismissal was that the complaint failed to allege sufficient facts to state a claim under Federal Rules of Civil Procedure Rule 12(b)(6).<sup>168</sup> To this point, FINA claimed it was incapable of conspiring to restrain trade because “FINA and its member federations are not distinct entities,” but instead “share a complete unity of economic interest.”<sup>169</sup> The court rejected this argument, noting that the members of FINA are at least potential competitors capable of conspiring under the Sherman Act.<sup>170</sup> The court continued:

The distinction between FINA’s own competitions where member federations merely participate and ‘member-federation events’ organized and conducted by the individual member federations themselves—and where the member federations ‘reap all (or most) of the financial benefit’—is critical because it indicates that FINA and its individual member federations are not a single ‘economic unit’ and at least have the potential to compete in the relevant market.<sup>171</sup>

In other words, a governing body could conspire with its member associations against a competing organization or event promoter.

### III. IMPLICATIONS FOR THE CURRENT DISPUTES

The recent cases on the validity of restrictions imposed by sports governing bodies offer several insights for the current disputes between clubs and their governing bodies in global football. While a fuller picture of the legal environment is still emerging, what we have learned

---

166. Order on Motion to Dismiss, *supra* note 161, at 12.

167. *Id.*

168. *Id.* at 1.

169. *Id.* at 36.

170. *Id.*

171. *Id.* at 36-37 (citing *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003)).

thus far does suggest specific limits for football governing bodies regarding their ability to restrict competitors.

#### A. *Participant Bans*

One of the most potent tools available to sports governing bodies seeking to enforce their rules against recalcitrant participants is to suspend or ban those individuals from participating in the sport. In some cases, those suspensions can be measured and tied to some narrow objective. For example, FIFA originally threatened to impose a five-day suspension following the international window for players who did not report to their national teams, before deciding against it after the South American countries dropped their complaint on the matter.<sup>172</sup> These suspensions were short and not really designed to punish the players at all. The intent of the five-day suspension was to force domestic clubs to lose the services of their players for a time period similar in length to the window, deterring clubs from not releasing their players for international duty in the future.<sup>173</sup> By contrast, the threatened suspensions imposed for players participating in the proposed English Super League were more punitive and less clearly connected to any legitimate objective.

When the English Super League proposal first surfaced in January of 2021, one of the first things FIFA and UEFA did was threaten to ban any players participating in the breakaway league from playing in their events, including with their national teams for the European Championships and the World Cup.<sup>174</sup> FIFA's president Gianni Infantino and the presidents of the six regional confederations quickly issued a statement declaring that "[a]ny club or player involved in such a competition

---

172. *Premier League: Players avoid bans over failing to report for int'l duty*, BBC SPORT (Sept. 11, 2021), <https://www.bbc.com/sport/football/58522907>.

173. Simon Evans, *Premier clubs could face sanctions over South American players*, REUTERS (Sept. 8, 2021), <https://www.reuters.com/lifestyle/sports/premier-clubs-could-face-sanctions-if-they-play-south-american-players-2021-09-08/>.

174. *FIFA Threatens to Ban Players from World Cup if they Participate in Proposed Super League*, SI.COM (Jan. 12, 2021), <https://www.si.com/soccer/2021/01/21/europe-super-league-fifa-ban-players-world-cup-uefa>.

would as a consequence not be allowed to participate in any competition organised by FIFA or their respective confederation.”<sup>175</sup> By April, when the proposal was formally announced, these threats of player bans had become much more muted. UEFA’s president Aleksander Cerfin still warned that “[t]he players who will play in teams that might play in the closed league will be banned from playing in the World Cup and Euros, so they will not be able to represent their national teams at any matches.”<sup>176</sup> However, FIFA issued a statement that was described as “tame” and did not mention player bans.<sup>177</sup> It only mentioned that “the governing bodies of football should employ all lawful, sporting and diplomatic means to ensure” that “the core principles of solidarity, inclusivity, integrity and equitable financial redistribution were maintained.”<sup>178</sup>

FIFA’s apparent pull back from its initial threats of player bans may have been because its lawyers and some legal commentators thought the player bans might be difficult to sustain in court.<sup>179</sup> Although the court in *Meca-Medina* made clear that “the provisions of Community law concerning freedom of movement for persons and freedom to provide services do not preclude rules of practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events,” it also emphasized that “such a restriction on the scope of the provisions in question must remain limited to its proper

---

175. *Statement by FIFA and the six confederations*, FIFA (Jan. 21, 2021), <https://www.fifa.com/about-fifa/associations/news/statement-by-fifa-and-the-six-confederations>.

176. Sean Ingle, *Super League players face World Cup and Euros ban, warns furious Uefa chief*, THE GUARDIAN (Apr. 19, 2021), <https://www.theguardian.com/football/2021/apr/19/super-league-players-face-world-cup-and-euros-ban-warns-furious-uefa-chief>.

177. Alex Richards, *FIFA issue pointedly tame statement as 12 clubs announce European Super League*, MIRROR (Apr. 20, 2021), <https://www.mirror.co.uk/sport/football/news/fifa-statement-european-super-league-23937623>.

178. *Id.*

179. *See, e.g.*, Charlie Walker, *European Super League Clubs Would WIN Any Court Case Brought by UEFA or FIFA*, DAILY MAIL (Apr. 19, 2021), <https://www.dailymail.co.uk/sport/sportsnews/article-9486681/European-Super-League-clubs-WIN-court-case-brought-UEFA-FIFA-says-legal-expert.html>.

objective.”<sup>180</sup> Sanctions against players for participating in non-sanctioned events or leagues are susceptible to challenge if they are not strictly tied to achieving those non-economic objectives necessary in the context of a specific sport in both its nature and its extent.<sup>181</sup> The participant bans struck down in *International Skating Union, SBF v. KKV*, and the German Wrestling League dispute, were each grounded in the failure to establish that players bans were necessary to achieve a legitimate objective.<sup>182</sup> In *International Swimming League*, the court has not addressed the merits of the claims regarding the bans threatened against swimmers participating in the breakaway event.<sup>183</sup> However, the court noted in denying the motion to dismiss that the bans were allegedly completely at the discretion of the sports governing body and could have been levied “for no other reason than the swimmer competed in a top-tier international swimming event that FINA did not itself organize or approve.”<sup>184</sup>

The *International Skating Union* opinion, citing *Meca-Medina*,<sup>185</sup> is instructive in fleshing out what kind of sanctions might be considered to go too far. The ISU had justified its requirement that skaters participate only in authorized competitions on the grounds that the eligibility rules were “necessary to pursue the legitimate objective of protecting the integrity of speed skating from the risks associated with betting.”<sup>186</sup> Under the original penalties, skaters who participated in an unsanctioned competition were subject to a life ban, without regarding whether they were involved in betting or whether the competition itself was cor-

---

180. Case C-519/04, *Meca-Medina and Majcen v. Comm’n of the Eur. Communities*, 2006 E.C.R. I-06991, ¶ 26.

181. See discussion *supra* Section II.B.1.

182. *Id.*

183. *Id.*

184. Order on Motion to Dismiss, *supra* note 161, at 4.

185. See Case T-93/18, *Int’l Skating Union v. Eur. Comm’n.*, 2020 ECLI:EU:T:2020:610 ¶ 91 (Dec. 16, 2020) (citing *Meca-Medina* for the proposition that “the repressive nature of rules and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition, since they could, if the penalties are not limited to what is necessary to ensure the proper conduct of the sporting competition and if they were ultimately to prove unjustified, result in an athlete’s unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the sporting activity at issue is engaged in.”).

186. *Id.* ¶ 80.

rupted by betting, which the court found was “manifestly disproportionate with regard to the objective of the protection of the integrity of skating.”<sup>187</sup> Although those penalties were subsequently revised downward, the court noted that even the reduced penalties of a five-to-ten year ban were disproportionate in light of the undisputed fact that the average skater had a career that last eight years, especially given that the line between the severity of certain penalties was not clearly drawn.<sup>188</sup>

The governing bodies in the case of the European Super League never had the chance to fully flesh out their threatened player bans. Nevertheless, it appears that they would have acted as lifetime bans of players from their regional and international competitions, or at least as long as those players continued to play in the unsanctioned league. The court in *International Skating Union* found a lifetime ban, or even a lesser ban that was similar in the context of the sporting career of the average skater, to be “manifestly disproportionate” to any legitimate objective.<sup>189</sup>

#### B. Access for Competitors

Just as governing bodies likely cannot completely bar players from participating in non-sanctioned events or leagues altogether, they also cannot completely deny competitor league/event organizers access to the market. The *International Skating Union* court offered guidance in this respect. The court acknowledged that it is legitimate “given the specific nature of the sports . . . to ensure that sporting competitions comply with common standards, seeking in particular to ensure that competitions take place fairly and the physical and ethical integrity of sportspeople is protected.”<sup>190</sup> It also acknowledged that “the fact that a federation seeks to protect its own economic interests is not in itself anticompetitive.”<sup>191</sup> Nevertheless, the Court found that a pre-authorization system that requires applicants to submit a business plan, and not merely a budget, requires a longer and more cumbersome process for

---

187. *Id.* ¶ 92.

188. *Id.* ¶ 93.

189. *Id.* ¶ 92.

190. *Id.* ¶ 108.

191. *Id.* ¶ 109.

third party applicants than for members.<sup>192</sup> This requirement also grants the sports governing body broad discretionary authority to reject the request or to simply sit on it without making a decision in a timely fashion.<sup>193</sup> This is all evidence of a process that is more about barring competition than ensuring it meets certain minimum standards.<sup>194</sup> As the Court explained, ISU's process favored its competitions over others and thereby failed to "ensure effective access" to market for skating competitions.<sup>195</sup>

In *SBF v. KKV*, the Swedish courts appeared to take a similar stance as in *ISU v. Commission*.<sup>196</sup> The Court in *SBF v. KKV* rejected the Solidarity Clauses that would have bound participants to the existing motorsports federation, not so much because it would have conflicted with the European Union's guarantee of freedom of movement, but because the Solidarity Clauses were being used to deprive the upstart federation of their right to effectively compete in the market.<sup>197</sup> As Johan Lindholm, a lecturer at the Umeå University in Sweden noted, "[a] narrower understanding of competition law's scope or a more generous application of the *Meca-Medina*-exception would in practice amount to a sport exception from competition law that is clearly contrary to established law."<sup>198</sup> Lindholm concluded that the outcome in *SBF v. KKV* demonstrated that "the organizational principle of one federation per sport is strongly susceptible to challenge," noting that it is "anti-competitive per se."<sup>199</sup>

At least in the U.S., *International Swimming League v. FINA* also suggests that a national sports governing body might not be able to avoid antitrust liability simply by claiming it could not conspire with its international sports governing body and the other members. However, in *Relevant Sports*, where a similar complaint was dismissed, the Court

---

192. *Id.* ¶ 110.

193. *Id.*

194. *Id.*

195. *Id.* ¶ 119.

196. Lindholm, *supra* note 148, at 367.

197. *Id.* at 369.

198. *Id.* at 371.

199. *Id.* at 371-72.

made clear that there must at least be some allegations of such a conspiracy beyond the mere votes by the members for a particular rule.<sup>200</sup> Nevertheless, the amicus brief submitted by the Department of Justice suggests that this higher pleading standard might be the basis of a reversal on appeal.<sup>201</sup>

Commentators seem to agree that actions taken to ban the founding clubs of the European Super League from participating in FIFA and UEFA competitions, and from their domestic leagues, could effectively deny breakaway leagues the right to operate.<sup>202</sup> Maastricht University's Faculty of Law blog wrote that the recent trend in case law has strengthened the ESL's case:

Although long-standing scholarly opinion has been sceptical [sic] of the probability of success of such a format as the ESL, the recent shift in case law towards promoting greater autonomy for athletes and breakaway leagues suggests that ESL might have had its day in court if matters so escalated. The ESL would have a strong case against UEFA on the basis of the fact that the latter not only organizes the biggest football championships but also enters into contracts to exploit those same competitions commercially, thereby placing UEFA in a compromised position with respect to its regulatory position.<sup>203</sup>

It concluded that “[r]ecent decisions highlight that UEFA is more likely to be found in breach of competition law instead of a competing association such as the ESL.”<sup>204</sup>

### C. *Legitimate Objectives*

Case law suggests that competition law limits the ability of governing bodies to maintain a complete monopoly over their sports. However, courts have acknowledged governing bodies' right to exercise

---

200. *Relevant Sports, LLC v. United States Soccer Fed'n, Inc.*, No. 19-CV-8359 (VEC), 2020 WL 4194962, at \*7 (S.D.N.Y. July 20, 2020).

201. *Id.* at \*14.

202. See generally *The Eur. Super League: opening the floodgates of competition law*, MAASTRICHT UNIV. (May 20, 2021), <https://www.maastrichtuniversity.nl/blog/2021/05/european-super-league-opening-floodgates-competition-law>.

203. *Id.*

204. *Id.*

control over certain aspects of their sports if done in the pursuit of legitimate objectives and the restrictions are not disproportionate to achieving those objectives.<sup>205</sup> There is a similar concept under antitrust law in the U.S. that applies to all but a narrow set of clear violations, such as price fixing. Under what is called the “rule of reason” approach, parties can act in concert in restraint of trade if the restriction is beneficial in that it has pro-competitive effects that outweigh the negative effects of the restraint on trade.<sup>206</sup>

What constitutes a legitimate objective or pro-competitive effect? Neither standard is particularly well suited for a bright-line rule. In the U.S., the jurisprudence over what restraints are considered beneficial or procompetitive has been described as “chaos . . . without clear guidance.”<sup>207</sup> In Europe, although “the general approach is to discuss whether there is a legitimate objective being pursued,” the European Court “gives little clues as to the benchmarks by which one judges legitimacy.”<sup>208</sup>

While the procompetitive effects standard is somewhat narrowly focused on commercial benefits to competition, such as remedying a market failure or increasing opportunities for competing businesses,<sup>209</sup> the legitimate objectives requirement is a broader standard, permitting something akin to a public policy analysis. The European Court’s Justice’s Advocate General, Jan Mazak, delivered an opinion in one case stating that a legitimate objective should be “of a public law nature and therefore aimed at protecting a public good and extend beyond the protection of the image of the products concerned or the manner in which an undertaking wishes to market its products.”<sup>210</sup>

---

205. Case T-93/18, *Int’l Skating Union v. Eur. Comm’n.*, 2020 ECLI:EU:T:2020:610 ¶ 60 (Dec. 16, 2020).

206. Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 131 n.271 (2018).

207. John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 504 (2019).

208. Giorgio Monte & Jotte Mulder, *Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives*, 5 EUR. L. REV. 635, 646 (2017).

209. Newman, *supra* note 207, at 506-513.

210. Cour d’appel [CA] [regional court of appeal] Paris, Third Chamber, Oct. 29, 2009, Case C-439/09, ¶ 35.

Some of the recent disputes between clubs and their governing bodies more easily fall within these standards than others. For example, while U.S. Soccer's denial of a sanction for Relevant Sports to host a non-domestic league match in the United States could be characterized as protecting U.S. leagues from competition, the FIFA policy against playing league matches in other countries arguably helps to foster the growth and sustainability of domestic leagues. In an era in which most people can watch games in the top leagues from anywhere in the world, what makes domestic leagues unique is that the people in that country can attend the games in-person. If that was no longer true and fans could more easily attend games of the top leagues in-person, they might no longer attend the games of their "lesser" domestic leagues, reducing the domestic competitors for football fans. This not only could lead to the concentration of football in a few select leagues worldwide and drive down the number of games and professional teams but it could allow those top leagues to raise prices, which would ultimately hurt consumers.

Similarly, while the requirement that clubs release players for international windows is disruptive to league schedules, it is likely justified as a pursuit of a legitimate objective. One of FIFA's missions is to organize international tournaments among national teams. Arguably, this has many benefits, including growing the game, sparking national interest and support for the sport, and, more broadly, fostering a spirit of national cooperation that comes from competing on the playing field, rather than the battlefield. Moreover, while there might be some length of time for international window that would be disproportionate to these legitimate objectives, the current scheme, with the negotiation among all the relevant parties, appears to be a narrowly tailored mechanism for enabling international tournaments and qualifying events with a minimum of disruption to domestic leagues.<sup>211</sup>

Preventing competitors or breakaway leagues is harder to justify as either in pursuance of a legitimate objective or as being procompetitive. For example, in *SBF v. KKV*, the Swedish court was not convinced that the purported objective of protecting the sport's social, cultural, and educational values and protecting the safety and access of the events was

---

211. See generally *Int'l Match Calendars*, FIFA, <https://www.fifa.com/international-match-calendars> (last visited Mar. 20, 2022); *FIFA Executive Adopts Principles of Int'l Calendar*, SPORTCAL (Mar. 28, 2000), <https://www.sportcal.com/News/PressReleases/30838?&f=i%3A2%2FFederations+%26+NOCs%7C>.

legitimate, or that the penalty of a participant ban was proportionate to that objective.<sup>212</sup> Similarly, in the German Wrestling league case, the Nuremberg Court of Appeals found that the purported objective of requiring sanctioning to ensure adherence to their anti-doping rules was questionable, since the German Wrestling Federation could still test the wrestlers themselves.<sup>213</sup> The Court noted that other objectives cited, such as preserving the “cohesion between grassroots and competitive sports” or supporting the Federation’s “talent promotion system” were not endangered by having a new league.<sup>214</sup>

For the European Super League, there is doubt as to whether UEFA’s threatened sanctions are in pursuance of a legitimate objective. The protection of the match calendar and the system of solidarity payments seem unlikely to justify the kinds of sanctions proposed, especially given that the match calendar already allows for regional competitions and the ESL founders promised substantial contributions to the solidarity payment system as part of their proposal. That leaves the hybrid closed league model of the competition as originally proposed. Floris de Witte and Jan Zglinski of the London School of Economics have concluded that “the protection of the relegation-and-promotion system or the idea of open competitions” is probably the only legitimate justification UEFA might raise in support of its restrictions against the European Super League.<sup>215</sup> Most commentators view the ESL as anticompetitive as not all clubs would have an equal chance to qualify for the league, which only reserved a few spots for non-founding clubs, and it would therefore violate the principle of sporting merit.<sup>216</sup> Nevertheless, as de Witte and Zglinski have noted, the protection of the open league

---

212. Lindholm, *supra* note 148, at 369.

213. Ianc et al., *supra* note 138.

214. *Id.*

215. De Witte & Zglinski, *supra* note 2, at 28.

216. Alex Webb, *The Antitrust Case Against Europe’s Breakaway Soccer League*, BLOOMBERG (Apr. 19, 2021, 6:33 AM PDT), <https://www.bloomberg.com/opinion/articles/2021-04-19/super-league-the-case-against-europe-s-breakaway-soccer-league>; Tsjalle van der Burg, *A European Super League would violate competition law – as would UEFA’s proposed reforms of the Champions League*, LSE BLOG (Feb. 20, 2021), <https://blogs.lse.ac.uk/euoppblog/2021/02/20/a-european-super-league-would-violate-eu-competition-law-as-would-uefas-proposed-reforms-of-the-champions-league/>.

model is “a justification ground that has not yet been tested judicially.”<sup>217</sup> Moreover, as the European Commission noted in 2007, while “the political debate on sport in Europe often attributes considerable importance to the so-called ‘European Sport Model’” of open competitions, “it is unrealistic to try to define a unified model of organisation of sport in Europe.”<sup>218</sup>

If the major legal justification for restricting clubs and players from joining the European Super League is that it would be a hybrid closed league, that suggests that revising the league to be open, or at least more open, would undercut efforts to prevent it legally. There have been proposals to do just that. Aurelio de Laurentiis, the president of Napoli, which was not one of the founding clubs of the ESL, proposed a version of the breakaway league that would be based on sporting merit.<sup>219</sup> It reportedly would involve the creation of a Pan-European League based on performance in domestic leagues, with qualification to the Super League presumably based on performance in the Pan-European League.<sup>220</sup> That does not mean it would not require radical change. Laurentiis promised that his proposed version “could bring €10bn to the European game,” but required the “willingness and total independence” from UEFA and reducing the number of games by reducing the size of the top divisions across Europe.<sup>221</sup>

It is possible that UEFA could have a legitimate justification to restrict efforts to start even an open Super League. As at least one observer contends, an open version might be considered anticompetitive because clubs that qualify the most often would continue to earn the most money and thereby gain unfair advantage against other clubs in their domestic leagues, leading to less competition in those markets.<sup>222</sup> However, this objection seems curious given that it is effectively an admission that the current system is anticompetitive. After all, UEFA’s

---

217. De Witte & Zglinski, *supra* note 2, at 28.

218. *White Paper*, *supra* note 115, at 12.

219. *A new proposal for European super league*, AS.COM (Sept. 15, 2021, 9:54 AM), [https://en.as.com/en/2021/09/15/soccer/1631707856\\_696538.html](https://en.as.com/en/2021/09/15/soccer/1631707856_696538.html).

220. *Id.*

221. Tom Collomosse, *I dream of a £8.5bn European League*, DAILY MAIL (Sept. 14, 2021), <https://www.dailymail.co.uk/sport/football/article-9991091/Napoli-president-Aurelio-Laurentiis-travels-Leicester-proposing-radical-football-shake-up.html>.

222. Van der Burg, *supra* note 216.

Champions League arguably produces the same effect. Critics charge that UEFA's Financial Fair Play rules, which force clubs to spend within their revenues rather than from borrowing or capital contributions from investors, already gives Champions League participants an advantage in qualifying for the following year's Champions League.<sup>223</sup> An open Super League that allows leagues and clubs to choose which competition to enter would presumably double the opportunities to enter and force the leagues to compete for participants on price and quality grounds. Perhaps the existence of two pathways to Europe-wide championships—UEFA's Champions League and a new European Super League—would frustrate the goal of crowning a single club as the champion of Europe. However, that has always been more myth than reality. The Champions League provides automatic entry to winners of the top leagues of each member association of UEFA, plus only a few additional spots for countries with stronger leagues such as England, Spain, Germany, and Italy even if mid-table clubs from those countries' leagues might be stronger than the winners from other countries.<sup>224</sup> Moreover, even if it reduced the luster and revenue of each competition, it might more evenly spread those revenues around Europe, promoting greater access to opportunities.

#### CONCLUSION

Many have suggested that the root of the growing disputes between clubs and their governing bodies is greed.<sup>225</sup> There is little doubt that

223. Martin Samuel, *Champions League carve-up is in place simply to reward European elite for their failures*, DAILY MAIL (Oct. 22, 2020), <https://www.dailymail.co.uk/sport/football/article-8870033/MARTIN-SAMUEL-Champions-League-carve-place-reward-European-elite-failures.html>.

224. Travis Yoesting, *The Champions League Format, Explained*, THE 18 (Apr. 5, 2019), <https://the18.com/en/soccer-learning/champions-league-format>.

225. See, e.g., Kaveh Solhekol, *'The proposed New European Super League is driven by greed and money,' says Kaveh Solhekol*, SKY SPORTS (Apr. 20, 2021), <https://www.skysports.com/football/news/12037/12280202/the-proposed-new-european-super-league-is-driven-by-greed-and-money-says-kaveh-solhekol> (European Super League); David Goldblatt, *The Greed of the European Super League has been Decades in the Making*, THE GUARDIAN (Apr. 20, 2021), <https://www.theguardian.com/commentisfree/2021/apr/20/greed-european-super-league-football-billionaires> (European Super League); Bill Haisley, *New Marketing Deal Will Bring Regular Season La Liga Match to the U.S.*, DEADSPIN (Aug. 16, 2018), <https://deadspin.com/new-marketing-deal-will-bring-regular-season-la-liga-ma-1828389417>

there is greed on both sides. In the uproar over the European Super League, UEFA tried to align itself with the fans by accusing the founding clubs of being greedy,<sup>226</sup> but UEFA's operation of the Champions League is subject to the same charge.<sup>227</sup> Indeed, the dispute between FIFA and UEFA over the proposed biennial World Cup has been described as a battle between "greed" and "more greed."<sup>228</sup> In this case, UEFA is the latter given that the unstated part of its objection to the proposal appears to be the fear that it would divert some of its annual revenues from the Champions League to other regions in a biennial World Cup.<sup>229</sup> "This fight," wrote Henry Bushnell "is not good vs. evil. It's a battle for control."<sup>230</sup>

By re-framing the disputes as being about control rather than simple greed, the legal framework takes on renewed importance. Even with sports' special status under European law, the power of sports governing bodies is not unlimited. As courts have recently acknowledged, governing bodies' dual role as regulators and commercial participants in a trillion-dollar industry can make their restrictions on competitors suspect even if they are characterized as an effort to preserve certain fundamental values of the sport. If football's governing bodies fail to take seriously this emerging new legal reality, they may be heading for a reckoning.

---

(characterizing leagues that play games abroad, like La Liga and some of its clubs proposed as "greedy").

226. *UEFA chief hits out at 'greediness, narcissism' of clubs over Super League plans*, WORLD SOCCER TALK (Apr. 19, 2021), <https://worldsoccer-talk.com/2021/04/19/uefa-chief-hits-out-at-greediness-narcissism-of-clubs-over-super-league-plans/>.

227. *Chelsea fans accuse 'greedy' UEFA of 'ruining' Champions League final as club return hundreds of unsold tickets for Man City Clash*, RT.COM (May 26, 2021), <https://www.rt.com/sport/524856-chelsea-fans-angry-uefa-tickets-champions-league-final/>; Iain Macintosh, *UEFA Champions League changes reek of green and incompetence*, ESPN (Mar. 25, 2016), <https://www.espn.com/soccer/uefa-champions-league/2/blog/post/2836024/uefa-champions-league-changes-reek-of-greed-and-incompetence>.

228. Henry Bushnell, *In Battle over biennial World Cups, FIFA isn't the villain you think it is*, YAHOO SPORTS (Oct. 20, 2021), <https://sports.yahoo.com/world-cup-every-two-years-fifa-plan-uefa-greed-023441265.html>.

229. *Id.*

230. *Id.*