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EU Competition Law Newsletter

Highlights

— Revolution For Sport Gatekeepers? The Grand Chamber Of The Court Of Justice Rules On The *European Super League* And *International Skating Union* Cases

Revolution For Sport Gatekeepers? The Grand Chamber Of The Court Of Justice Rules On The *European Super League And International Skating Union* Cases

On December 21, 2023, the Court of Justice of the EU ("CJEU") delivered two of the most anticipated judgments of the year: *European Super League* ("ESL")[1] and *International Skating Union* ("ISU").[2] The CJEU found that the ISU's and FIFA/UEFA's pre-authorization rules that prevent clubs and athletes from participating in unauthorized third-party sports events infringe EU competition rules because those rules are not based on transparent, objective, non-discriminatory, proportionate, and reviewable criteria.

Key Takeaways

— Sports are subject to EU competition rules if they entail an economic activity.

— Sports federations can participate in, and at the same time regulate, the market for the organization of sports competitions; therefore, sports federations are entitled to require affiliated entities as well as clubs and players to seek prior authorization before setting up, or competing in, parallel competitions ("pre-authorization rules").

— Sports federations, however, must set out a legal framework governing the pre-authorization rules that is based on transparent, objective, non-discriminatory, proportionate, and reviewable criteria; non-compliance with these criteria will qualify the pre-authorization rules as a "restriction by object" under Article 101 TFEU or "abuse" under Article 102 TFEU.

[1] *European Superleague Company SL v. UEFA and FIFA* (Case C-333/21) EU:C:2023:1011 ("ESL Judgment").

[2] *International Skating Union v. Commission* (Case C-124/21 P) EU:C:2023:1012 ("ISU Judgment").

— Pre-authorization rules that significantly distort competition cannot be exempted on public-interest objectives, though might benefit from an exemption under Article 101(3) TFEU if they generate quantifiable efficiencies, have a favorable impact on consumers, are necessary, and do not eliminate all competition.

— Dispute resolution rules attributing exclusive jurisdiction to the Court of Arbitration for Sport (the "CAS") in case of ineligibility decisions do not offer an effective judicial remedy under EU law.

Case Summary

ESL

In 2021, 12 leading European football clubs established two companies in Spain to launch a new European football club competition, known as the "Super League." The project intended to involve 12 to 15 football clubs as "permanent members" and additional "qualified clubs" selected according to a pre-determined process.

FIFA and UEFA issued statements in January and April 2021, refusing to recognize the ESL and threatening to revoke the membership of the football clubs and players involved in the ESL and to expel them from FIFA/UEFA's competitions. The ESL Companies lodged an action before the Commercial Court of Madrid, arguing that FIFA/UEFA's pre-authorization rules infringed Articles 101 and 102 TFEU and EU free movement rules. The Commercial Court of Madrid referred the matter for a preliminary ruling to the CJEU.

ISU

In December 2017, the European Commission ("Commission") adopted a decision finding that ISU's pre-authorization rules, which imposed severe penalties on athletes participating in unauthorized speed staking competitions, infringed Article 101 TFEU.[3]

The General Court upheld the Commission decision, finding that: (i) as a matter of principle, ISU could require prior authorization from affiliated members before participating in third-party competitions; but (ii) ISU's pre-authorization rules were not based on transparent, non-discriminatory and clearly defined criteria and imposed disproportionate penalties on non-complying athletes.[4] ISU appealed the General Court's judgment to the CJEU.

CJEU Judgments

On December 21, 2023, the CJEU issued judgments on the *ESL* preliminary ruling and the *ISU* appeal, addressing the following main legal points:

— **Application of EU competition rules to sports federations.** The CJEU recognized the social role of sports, as codified in Article 165 TFEU,[5] but made clear that this provision cannot exempt sports from the application of EU competition and free movement rules.[6]

— **Dual role of sports federations as market participants and regulators creates a conflict of interest.** The CJEU held that sports federations could simultaneously participate in the market for the organization of sports competitions and regulate access to that market, by establishing a pre-authorization system.[7] However, to mitigate the conflict of interest inherent in the dual role, the federation must set out a substantive framework governing the pre-authorization rules that is based on transparent, objective, non-discriminatory, proportionate, and reviewable criteria, so as to avoid arbitrary decision-making.[8] Failure

[3] *International Skating Union's Eligibility rules* (Case AT.40208), Commission decision of December 8, 2017.

[4] *International Skating Union v. Commission* (Case T-93/18) EU:T:2020:610.

[5] Article 165 TFEU provides that: "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 … Union action shall be aimed at: … developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen."

[6] ESL Judgment, paras. 101–104; ISU Judgment, paras. 91–96.

[7] ESL Judgment, paras. 143–146.

[8] ESL Judgment, paras. 134–138; ISU Judgment, paras. 125–126, 131–138, and 144.

to respect these requirements constitutes, "*by [its] very nature*," an abuse of dominance under Article 102 TFEU or a "restriction by object" under Article 101 TFEU.[9]

The CJEU found that the discretionary nature of the pre-authorization rules of ISU and FIFA/UEFA makes it impossible to verify on a case-by-case basis whether their implementation is justified and proportionate in view of the specific characteristics of the international competition project at issue.[10] That said, the CJEU emphasized that it only ruled on the compatibility of FIFA/UEFA's discretionary preauthorization rules with EU competition and free movement rules, and did not take a specific position on the ESL project.[11]

— **Application of the "ancillary restraints" and Article 101(3) TFEU exemptions.** Conduct may be exempted from the application of EU competition rules if it is necessary and proportionate to pursue a legitimate objective.[12] The CJEU held that insofar as ESL's and ISU's pre-authorization rules infringed, by their very nature, Articles 101 and 102 TFEU, they could not benefit from the ancillary restraints exemption.[13] However, the CJEU did not rule out a possible exemption under Article 101(3) TFEU,[14] which is left for the national court to assess, focusing on whether the pre-authorization rules generate quantifiable efficiencies, have a favorable impact on consumers, are necessary, and do not eliminate all competition.[15]

— **CAS's exclusive jurisdiction.** Athletes affected by an ineligibility decision adopted by the ISU were required to bring arbitration proceedings exclusively before the CAS. The CAS's exclusive jurisdiction did not allow for an effective review of ISU's compliance with EU competition rules and did not satisfy the requirements of Article 267 TFEU insofar as the CAS, being an arbitration body established outside the EU, could not raise questions for a preliminary ruling to the CJEU on the interpretation of EU law.[16] The CJEU indicated that the lack of effective remedy could not be compensated for by the fact that athletes could seek damages for the harm caused before national courts or lodge a complaint for an infringement of competition rules to the European Commission or national competition authorities.[17]

Reflections

The CJEU gave its final judgment on appeal in the *ISU* case, but the national judge will have the final word in the *ESL* case. The national ruling will unlikely be the end of the story: UEFA amended its pre-authorization framework in June 2022,[18] while ESL introduced changes to make the competition more open by eliminating permanent members and keeping domestic leagues as the foundation of European football.[19]

[9] ESL Judgment, paras. 147–149 and 176–179; ISU Judgment, paras. 127–128 and 145–146.

[10] ESL Judgment, para. 148.

[11] ESL Judgment, paras. 80–81.

[12] ESL Judgment, para. 183; ISU Judgment, para. 111.

[13] ESL Judgment, paras. 185–186; ISU Judgment, paras. 113 and 148.

[14] ISU Judgment, para. 114.

[15] ESL Judgment, paras. 195–199.

[16] ISU Judgment, paras. 193, and 197–199.

[17] ISU Judgment, paras. 200–203.

[18] UEFA, "UEFA statement on the European Super League case", December 21, 2023, available here.

[19] A22 Proposal, available here.

News

Commission Updates

Opting-Out-Of-Settlement Could Be Costly: Commission Fines Largest Nordic Ethanol Producer €48 million For Manipulating Ethanol Benchmarks

On December 7, 2023, the Commission imposed a fine of almost €48 million on Lantmännen ek för, the largest producer of ethanol in the Nordic region, for participating in a 1.5-year cartel manipulating the wholesale price of ethanol in the EEA.

S&P Global Platts ("Platts") publishes reference ethanol prices calculated through a "Market on Close" ("MOC") price assessment process, which is primarily based on bids, offers, and transaction information gathered during a "MOC Window" (generally 16:00-16:30 London time). Lantmännen coordinated with competitors to limit the supply of ethanol to the Rotterdam area during the MOC Window, which artificially increased the ethanol benchmarks during the assessment window.

The case dates back to 2013, when the Commission conducted inspections at the premises of various companies active in the EEA-wide ethanol market. The Commission opened formal proceedings against Lantmännen, Alcogroup, and Abengoa in December 2015. Each participant followed a different procedural avenue. Abengoa and Lantmännen (but not Alcogroup) initially engaged in settlement discussions with the Commission; though only Abengoa decided to settle for a fine of €20 million. Lantmännen opted out of settlement and joined Alcogroup in the ordinary adversarial process. Alcogroup eventually persuaded the Commission to drop the case against it, which is the first time the Commission did so with a non-settling party in a hybrid settlement procedure.

The Ethanol case is part of a stream of recent EC benchmark cartel cases in the chemical industry, including Ethylene and Styrene Monomer.

Opening Up The Wallet: Apple To Offer Rivals Access To NFC System On iOS Devices

In a move intended to put an end to the Commission's recent investigation into mobile payment restrictions on iOS, Apple offered third-party developers access to the tap-and-go system (*i.e.*, Near-Field Communication or "NFC") on its devices.[20]

Responding To The EU Mobile Wallet Probe

Apple's initiative aims at answering the Commission's charges published in May 2022[21] that Apple has prevented third-party developers from using the embedded NFC system on iOS devices, hindering the development of alternative applications to Apple Pay.[22] NFC is a standard technology that facilitates contactless payments in stores by permitting the phone to directly communicate with payment terminals,[23] and is, therefore, an essential input for mobile wallet applications. As a result of these restrictions, Apple secured Apple Pay's central position as the sole payment solution within Apple's ecosystem. The Commission is currently seeking market feedback from Apple's competitors and customers, prior to determining whether to accept Apple's commitments offer.[24]

Apple Under EU Scrutiny

Over the last couple of years, the Commission has scrutinized Apple for a series of potential antitrust

[20] *See* Reuters, "Exclusive: Apple offers to let rivals access tap-and-go tech in EU antitrust case," December 12, 2023, available here.

[21] *See* Commission Press Release IP/22/2764, "Commission sends Statement of Objections to Apple on App Store rules for music streaming providers," May 2, 2022.

[22] *Ibid.*

[23] *Ibid.*

[24] *See* Reuters article, *supra* fn 20.

infringements. For example, following a complaint lodged by Spotify, the Commission set out antitrust charges against Apple in April 2021[25] and February 2023.[26] According to the Commission, Apple forced music-streaming service providers to use its own in-app purchase payment technology when users subscribed to their service through the App Store (resulting in Apple getting a 30% fee for a given transaction).[27] Apple also prohibited advertising that would promote consumers to use alternative subscription options offered outside the App Store (the "Anti-steering rules"). By doing so, Apple prevented "those developers from informing consumers about where and how to subscribe to streaming services at lower prices."[28] Apple has since amended its rules: agreeing, for instance, to allow applications to advertise lower prices for subscriptions available outside of the App Store. Despite these modifications, the Commission is expected to adopt a decision against Apple in early 2024.[29]

Three other Commission investigations were launched against Apple regarding the App Store[30] and Apple Pay,[31] and remain pending.

Court Updates

European Commission In A "Reflection Mode" Following CJEU Loss In The Engie State Aid Case

On December 5, 2023, the CJEU overturned the judgment of the General Court,[32] which upheld the Commission decision of June 20, 2018 finding that Luxembourg had granted unlawful State aid of €120 million to Engie.[33]

Article 107 TFEU prohibits State aid, which concerns aid measures that grant a "selective advantage" to certain undertakings over others, and thus distort competition. A selective advantage requires three determinations: (i) the relevant benchmark within the investigated Member State's national law (the "reference framework"); (ii) a derogation from that benchmark (the "advantage"); and, (iii) a lack of justification for that derogation. In essence, the broader the reference framework, the easier it is for the Commission to find that a given Member State has granted a selective advantage. The judgment clarifies that in determining the reference framework, the Commission must follow the interpretation of the national law provided by the investigated Member State unless that interpretation is clearly incoherent with the prevailing interpretation under the national legal system based on the relevant legal provisions, case law, and decisional practice.

Background

In 2018, the Commission found that Luxembourg had granted unlawful State aid to Engie through two individual tax decisions ("tax rulings"[34]), which enabled Engie to avoid taxation on almost all the profits of its Luxembourgish subsidiaries since 2008.[35]

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[25] *See* Commission Press Release IP/21/2061, "Commission sends Statement of Objections to Apple on App Store rules for music streaming providers," April 30, 2021.

[26] According to the Commission's press release, this State of Objections was the final, refined, version sent to Apple regarding to App Store rules, wherein the Commission dropped some of the concerns set out in the initial April 2021 Statement of Objections. *See* Commission Press Release IP/23/1217, "Commission sends Statement of Objections to Apple clarifying concerns over App Store rules for music streaming providers," February 28, 2023.

[27] *See* Bloomberg, "Apple Set to Be Hit by EU Antitrust Order in Spotify Clash," December 13, 2023, available here.

[28] *See* Commission Press Release IP/23/1217, *supra* fn 26.

[29] *See* Bloomberg article, *supra* fn 27.

[30] The Commission is also currently investigating whether the App Store's anti steering rules and mandatory use of the in-app purchase mechanism had anticompetitive consequences beyond Spotify and the other providers of music-streaming services. Two other matters are currently ongoing: (i) one in the e-books/audiobooks industry (*see* AT.40652); (ii) one regarding any other services affected by the App Store rules besides music-streaming services and e-books/audiobooks (*see* AT.40716).

[31] The original inquiry from which the aforementioned EU Mobile Wallet Probe stems remains outstanding. As mentioned in the May 2, 2022, Commission Press Release IP/22/2764 (*supra* fn 2): "Today's Statement of Objections takes issue only with the access to NFC input by third-party developers of mobile wallets for payments in stores. It does not take issue with the online restrictions nor the alleged refusals of access to Apple Pay for specific products of rivals that the Commission announced that it had concerns when it opened the in-depth investigation into Apple's practices regarding Apple Pay on 16 June 2020." In other words, the Commission seems to reserve the right to release new charges related to Apple Pay. For more information regarding the initial inquiry: *see* Commission Press Release IP/20/1075, "Commission opens investigation into Apple practices regarding Apple Pay," June 16, 2020.

[32] *Grand Duchy of Luxembourg and Others v. European Commission* (Cases T-516 and T-525/18) EU:T:2021:251 ("GC *Engie*").

[33] Commission Decision (EU) 2019/421 of 20 June 2018 on State aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favor of Engie (the "Decision").

[34] "The function of a tax ruling is to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances", Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 2016 C 262/1 para. 169.

[35] The complex financial arrangements are described in detail at paras. 23–27 of the Decision.

The Commission found that the tax rulings granted a selective advantage within the meaning of Article 107(1) TFEU because they afforded a favorable tax treatment to Engie compared to the normal tax regime applied by Luxembourg, without justification.[36] To support its finding, the Commission defined a broad reference framework as tax on "the profit of all companies [...] in Luxembourg,"[37] and concluded that the reference framework could not be defined more narrowly as "the specific provisions of that system applicable only to certain taxpayers or to certain transactions."[38] The Commission also found that Luxembourg should have applied its tax avoidance rules to reject Engie's tax ruling requests, thereby preventing the selective advantage.[39] On this basis, the Commission ordered the recovery of €120 million in unlawful aid.[40]

The parties challenged the Commission decision before the General Court, which upheld the Commission decision on May 12, 2021. The General Court essentially confirmed the Commission's findings that the two tax rulings granted a selective advantage to Engie, insofar as they afforded Engie a tax treatment that departed from the reference framework as broadly defined by the Commission,[41] and that the Luxembourg tax authority should have applied its tax avoidance rules.[42] The parties appealed to the ECJ.

The CJEU Overturned The General Court's Ruling

The CJEU emphasized the need to correctly identify the reference framework as the basis for the selectivity assessment.[43] The CJEU held that it is not up to the Commission to pick the reference framework by trying to define the objective of the national tax system;[44] instead, the Commission should accept the Member State's interpretation of its own national law,[45] unless it is not aligned with the prevailing interpretation under the national legal system based on the relevant legal provisions, case law, and decisional practice.[46] In doing so, the CJEU essentially followed the proposal of Advocate General Kokott to limit the Commission's standard of review of national law to a "plausibility check" *i.e.*, the Commission can only find a selective advantage where the tax treatment applied by the investigated Member State manifestly deviates from national law.[47]

On this basis, the General Court and the Commission made an error in law in defining the reference framework, which vitiated the selectivity analysis altogether and consequently required the setting aside of the General Court's judgment and annulment of the Commission decision.[48]

[36] Articles 18, 23, 40, 159 and 163 of the Luxembourg Income Tax Law, as cited in the Decision, para. 162.

[37] The Decision, para. 176.

[38] The Decision, para. 178.

[39] The Decision, paras. 289–312.

[40] The Decision, para. 369.

[41] "[C]omprising Articles 164 and 166 of the LIR, namely provisions on the taxation of profit distributions and the participation exemption". GC *Engie*, paras. 254–383.

[42] GC *Engie*, paras. 464–478.

[43] ECJ *Engie*, para. 110.

[44] ECJ *Engie*, para. 138.

[45] ECJ *Engie*, para. 120.

[46] The ECJ also found that the Commission failed to prove that the Luxembourgish tax authorities misapplied the tax avoidance rules regarding Engie's tax rulings (ECJ *Engie*, para. 155).

[47] *Ibid.*, para. 101.

[48] ECJ *Engie*, para. 186.

Engie Opens A "Period Of Reflection"

The *Engie* judgment is one of several recent Commission losses in State aid cases concerning tax rulings, which prompted a remark by a Commission official that the Commission is entering a "period of reflection" in EU State aid.[49] On July 15, 2020, the General Court annulled the Commission's landmark decision against Apple.[50] On November 8, 2022, the CJEU set aside the General Court's judgment and annulled the Commission's decision concerning Fiat.[51] Most recently, on December 14, 2023, the ECJ upheld the General Court's judgment that annulled the Commission's decision concluding that Luxembourg granted unlawful State aid to Amazon.[52]

Antitrust Violations May Oust Companies From Public Tenders (Infraestruturas de Portugal)

On December 21, 2023, the Grand Chamber of the CJEU delivered a judgment on the interplay between public procurement rules and competition law.[53] The judgment replies to questions raised on a preliminary reference by the Portuguese Supreme Administrative Court on the interpretation of Article 57(4) of the Public Procurement Directive ("PPD"),[54] which states that tendering authorities may exclude from participation in a procurement procedure any economic operator involved in anticompetitive behavior. The judgment provides the following clarifications:

— The tendering authorities must be able to exclude a tenderer if there are indications of anticompetitive behavior.[55]

— The assessment of the integrity and reliability of the tenderers, and ensuing ability to exclude a tenderer, cannot be reserved to competition authorities alone.[56]

— Competitors interested in obtaining a public contract must be able to challenge a decision of the contracting authority to refuse to exclude another economic operator from the tender where there are indications of anticompetitive behavior.[57]

— Tendering authorities must give reasons for their decision to exclude a tenderer or include a tenderer who could have been excluded under Article 57(4) PPD, given that this "affects the legal situation of all of the other economic operators participating in the public procurement procedure."[58]

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[49] GCR, "EU needs 'period of reflection' over state aid tax cases, commission lawyer says," December 8, 2023, available here.

[50] *Ireland and Others v. European Commission* (Cases T-778/16 and T-892/16) EU:T:2020:338.

[51] *Fiat Chrysler Finance Europe v. Commission* (Joined Cases C-885/19 P and C-898/19 P), EU:C:2022:859. *See* our Blog post, "State Aid: Court of Justice Clarifies Limits for Multinational Tax Deals in Fiat Chrysler," November 8, 2022.

[52] *Commission v. Amazon.com and Others* (Case C-457/21 P) EU:C:2023:985. Similarly, the ECJ found that the Commission had wrongly identified the reference framework, which invalidated its assessment of the existence of a selective advantage. Along the line of *Engie*, the ECJ emphasized that the Commission could not rely on the arm's length principle as defined by the OECD Guidelines, unless there were to be an express reference to them in the national law.

[53] *Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias* (Case C-66/22) EU:C:2023:1016, para 26 ("*Infraestruturas de Portugal and Futrifer*").

[54] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014 L 94/65.

[55] *Infraestruturas de Portugal and Futrifer*, para 72.

[56] *Ibid.*, para 82.

[57] *Ibid.*, para 62.

[58] *Ibid.*, para 90.

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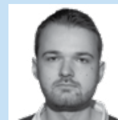

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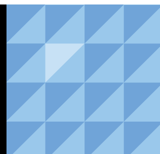

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