analysis exercise was not required, and merely acting in a way that, in the eyes of some, could represent a lack of faith in a post-Brexit UK would be sufficient.

The judge rejected any need for an evidential link of demonstrable economic harm: a loose symbolic nexus would do. The journalist was offering a "take" on how people might envisage the claimant's actions and was not attempting to shine a light on the claimant's thought-processes or motivation.

Jay J found that the journalist fell short of accusing the claimant of dishonesty, and so the scope for honest opinion, however unbalanced or wounding, was considerable. The journalist had kept within the wide margin available to him, and so MGN made out a defence of honest opinion.

Serious harm

Jay J found that the claimant could not demonstrate financial loss as a result of the article; nor could the claimant show that his philanthropic work (primarily directed to young people and schools) had been harmed in any way. While that was by no means fatal to the claim, the claimant was still required to advance an "inferential case" based on the most serious part of the article and the inherent probabilities flowing from the publications.

The judge accepted that the article went further than other articles on the same subject, in that the claimant was accused not only of being a hypocrite but also of having "screwed the country". The judge also accepted that the charge of setting a poor moral example to young people was wounding, particularly in the context of the claimant's charity work in that area.

Yet the judge found that the article was intended to be light-hearted and humorous. It was not really about the claimant, but was rather about the character of others who, in the journalist's estimation, were liars and cheats. The theme was hypocrisy, which, as the judge put it, was "not at the gravest end of the scale".

Furthermore, the judge held that the article, published in January 2022, was dealing with old news that had been subject to wide debate. Most people would already have formed a view about the actions of the claimant three years beforehand, and the journalist was not adding to the debate. Most readers would see the article as crude, rhetorical and hyperbolic, and that the journalist was not making a particularly illuminating observation. Few people would take those points seriously.

Accordingly, the claimant failed to prove serious harm, and the claim was dismissed.

Comment

The judgment provides a useful illustration of the operation of the defence of honest opinion, and in particular how a defendant might, in certain circumstances, be able to rely on a relatively loose nexus. That said, the need for honesty arguably requires at least some sincerity of rationale for holding the opinion, and whether the defence succeeds or fails will often be quite fact-specific.

The decision also highlights the potential relevance of the temporal nature of the subject matter to an assessment of serious harm. While the claimant was no doubt aggrieved by the article, the fact that it dealt with relatively old events made the judge doubt whether the article would have shifted the public's perception of the claimant, and whether the claimant had in fact suffered any serious harm.

In his closing remarks, Jay J pointed out that the article was not necessarily the most defamatory of all other publications on the subject. The judge pointed to a piece by Jonathan Freedland in *The Guardian* which, in his view, advanced a sustained, detailed series of arguments targeting the claimant that a reasonable reader would surely consider to be more compelling and damning than the publication in this case.[7] This suggests that, in a scenario where multiple publishers are dealing with the same subject matter, a potential claimant should carefully consider which publication is likely to have caused the most damage.

CJEU Judgment in European Superleague Case has Significant Implications That Go Beyond Football

Stephen Smith
PARTNER, BRISTOWS LLP

Sean-Paul Brankin
OF COUNSEL, BRISTOWS LLP

Matthew Hunt
SENIOR ASSOCIATE, BRISTOWS LLP

LT Abuse of dominant position; EU law; Freedom to provide services; Sports governing bodies

On 21 December 2023, the Court of Justice of the European Union (CJEU) held that the rules under which FIFA and UEFA took action to prevent the formation of the break-away European Super League infringed both EU competition law and EU rules on freedom to provide services.[1] In particular, the rules of the two organisations

[7] J. Freedland, "Wealthy Brexiteers like James Dyson are jumping ship. Why might that be?", *The Guardian*, 23 January 2019 at *https://www.theguardian.com/commentisfree/2019/jan/23/james-dyson-brexiteer-elite-brexit-rees-mogg*.
[1] *European Superleague v FIFA and UEFA* (C-333/21) EU:C:2023:1011.

requiring that third parties obtain prior consent from FIFA and UEFA in order to organise rival football competitions both constitute an abuse of their "indisputable" dominance and infringe the EU prohibitions on anti-competitive agreements and freedom to provide services.

The CJEU acknowledged that, in principle, FIFA and UEFA might be able to justify the prior approval requirements on the basis of their wider benefits to "users" of football, including fans, clubs and players. This would be an issue for the Madrid court that referred the case to the CJEU to decide on the facts. However, the CJEU hinted strongly that the arguments of FIFA and UEFA in this regard were likely to fail, at least absent substantial changes to their existing statutes.

The CJEU also found that rules granting FIFA and UEFA exclusive rights to organise the broadcasting of their own competitions—such as the Champions League—in principle infringed EU competition rules (regardless of the actual ownership of the broadcasting rights). However, on this issue, the CJEU suggested that the arguments on justification appeared prima facie to be convincing.

The judgment creates a headache for FIFA and UEFA. They will find it much more difficult to take action against future breakaway competitions and also potentially face extensive claims for damages from the collapsed Super League.

More generally, the judgment raises issues for other sporting associations that seek to control their members' ability to participate in alternative competitions. Although the CJEU found that the control exercised by FIFA and UEFA gave them dominance over commercial arrangements in relation to football, the CJEU's reasoning is not dependent on that finding. In principle, the CJEU's finding that FIFA and UEFA's rules constitute a "by object" restriction of competition means that similar rules in any association of undertakings will infringe EU competition law, without having to consider their effect on competition. Indeed, in its judgment in *International Skating Union*, also issued on 21 December, the CJEU confirmed that similar prior approval rules in the statute of the International Skating Union (ISU) also infringed EU competition law.[2]

Facts and procedure

The facts leading up to CJEU judgment are likely to be well known to all. On 18 April 2021, 12 top European football clubs—including Real Madrid, Barcelona Juventus and Manchester United—announced their intention to establish a breakaway European Super League that would operate as a competitor to UEFA's Champion's League competition.

Within 48 hours, the plans had effectively collapsed with the six participating English clubs withdrawing under pressure from fans and the Government. However, prior to the collapse, both FIFA and UEFA had issued press releases threatening sanctions against participating clubs and their players. In January, before the Super League was officially announced, FIFA issued a release stating that it was refusing to recognise the Super League and that clubs and players taking part would be expelled from FIFA and UEFA competitions. On the day of the Super League's announcement, UEFA issued a further release, jointly with the English, Spanish and Italian football associations, stating that the clubs involved would be banned from other competitions at domestic, European or world level, and their players could be denied the opportunity to represent their national teams.

These statements were based, among others, on art.22 of the FIFA statutes which provides that "international leagues or any other such groups of clubs or leagues shall not be formed without … the approval of FIFA" and art.49(3) of the UEFA statutes provides that "International matches, competitions or tournaments which are not organised by UEFA but are played on UEFA's territory shall require the prior approval of FIFA and/or UEFA".

European Superleague, the company established by the participating clubs to oversee the new competition, brought an action in the Madrid Commercial Court seeking protective measures. That action continued even after the apparent collapse of the project and, in the course of its deliberations, the Madrid court referred a number of preliminary questions of EU law to the CJEU. That reference is the basis for the CJEU's 21 December judgment. Given this procedural context, the CJEU was not able to finally determine the facts or issues in the case, which now returns to the Madrid court for final assessment in light of the CJEU's guidance on EU law.

The CJEU judgment in European Superleague

Preliminary issues

As a preliminary issue, the CJEU confirmed that, since the organisation and marketing of sporting competitions constitutes an economic activity, sporting associations involved in such activities are subject to EU rules on competition and freedom of movement.[3] The CJEU emphasised that art.165 of the Treaty on the Functioning of the European Union (TFEU), which entered into force in 2009 and states that the EU is to contribute to the promotion of European sporting issues, does not exempt sporting activity from those rules or directly impact their application.[4]

[2] *International Skating Union v European Commission* (C-124/21 P) EU:C:2023:1012.
[3] *European Superleague* (C-333/21) EU:C:2023:1011 at [90].
[4] *European Superleague* (C-333/21) EU:C:2023:1011 at [101].

Prior approval requirements

The CJEU examined the prior approval requirements imposed on third parties wishing to organise international football competitions by the statutes of FIFA and UEFA under both the prohibition on abuse of positions of market dominance under the TFEU art.102 and the prohibition on anti-competitive agreements under the TFEU art.101.

The CJEU noted that, since FIFA and UEFA are the only associations active on the market for the organisation and marketing of interclub football competition at world and European levels it was "indisputable" that they hold dominant market positions for the purposes of art.102.[5] It also observed that, since the statutes of FIFA and UEFA have a direct impact on the economic activities of their member clubs, they would fall within the prohibition on anti-competitive agreements where they have the object or effect of restricting competition.[6]

In principle, rules allowing FIFA and UEFA to exercise prior approval in relation to the participation of member clubs in international tournaments could be legitimate, if necessary to ensure that participation in such competitions is based on sporting merit and subject to uniform technical conditions and regulations.[7]

However, such rules also put FIFA and UEFA in the position of both participating in the market for organising and exploiting football competitions and having de facto power to determine which other undertakings can access the market. This created a "conflict of interests".[8] To avoid that power infringing competition law rules—as both an abuse of dominance and an automatic (by object) restriction of competition—it had to be placed within an appropriate substantive and procedural framework that would prevent its use in an arbitrary manner.[9]

An appropriate framework would need to meet a number of stringent criteria. Both the substantive criteria and the procedural rules would need to be transparent, objective, precise and non-discriminatory.[10] The procedure would need to set out appropriate time limits and an effective review process.[11] If sanctions were applicable for breaches, the framework should ensure that they are proportionate and are not imposed in a discretionary fashion.[12] Finally, the criteria and procedures must be set out in an accessible form prior to their implementation.[13]

The requirement for a framework of this type was all the more necessary given the dominant market positions of FIFA and UEFA, but would apply in any event.[14]

In the case of the relevant FIFA and UEFA rules, the Madrid court had indicated that no such framework existed.[15] As a result, those rules constituted both an abuse of dominance contrary to art.102 and an automatic, by object, restriction of competition contrary to art.101.[16]

Finally, the CJEU found that the prior approval requirements also infringed the freedom to provide services guaranteed under TFEU art.56 since the failure to put in place an appropriate substantive and procedural framework tended to impede or make less attractive the organising and marketing of interclub football competitions by third parties.[17]

Exclusive exercise of commercial rights

The CJEU also examined the application of EU competition law to FIFA and UEFA rules granting the associations exclusive control of the broadcasting rights in the competitions they organise, even where those rights might be owned by third parties (such as individual clubs). The CJEU noted that this had the effect of granting FIFA and UEFA an effective monopoly over the principal source of revenues in relation to those competitions.[18] As a result, the CJEU held that such rules constituted a restriction of competition contrary to art.101 as well an abuse of dominance contrary to art.102.

Potential justifications

While finding that the rules in the FIFA and UEFA statutes on both prior approval requirements and exclusive control of broadcasting rights on their face infringed EU competition rules, the CJEU acknowledged that, in principle, these rules could escape prohibition if appropriately justified.

This would require FIFA and UEFA to show that four criteria were fulfilled in relation to each set of rules.[19] First, it should be demonstrated that they give rise to genuine, quantifiable efficiency gains, sufficient to offset any harm to competition. Secondly, "users"—in this case including football associations, clubs, players, spectators and television viewers—must obtain a fair share of those efficiency gains.[20] Thirdly, the restrictive effects on

[5] *European Superleague* (C-333/21) EU:C:2023:1011 at [117].
[6] *European Superleague* (C-333/21) EU:C:2023:1011 at [118].
[7] *European Superleague* (C-333/21) EU:C:2023:1011 at [143] and [144].
[8] *European Superleague* (C-333/21) EU:C:2023:1011 at [133].
[9] *European Superleague* (C-333/21) EU:C:2023:1011 at [135] and [154].
[10] *European Superleague* (C-333/21) EU:C:2023:1011 at [147].
[11] *European Superleague* (C-333/21) EU:C:2023:1011 at [135] and [136].
[12] *European Superleague* (C-333/21) EU:C:2023:1011 at [148].
[13] *European Superleague* (C-333/21) EU:C:2023:1011 at [151].
[14] *European Superleague* (C-333/21) EU:C:2023:1011 at [137].
[15] *European Superleague* (C-333/21) EU:C:2023:1011 at [141].
[16] *European Superleague* (C-333/21) EU:C:2023:1011 at [152] and [154].
[17] *European Superleague* (C-333/21) EU:C:2023:1011 at [249].
[18] *European Superleague* (C-333/21) EU:C:2023:1011 at [222], [223] and [229].
[19] *European Superleague* (C-333/21) EU:C:2023:1011 at [190] and [204].
[20] *European Superleague* (C-333/21) EU:C:2023:1011 at [195].

competition must be necessary in order to achieve the efficiency gains. Fourthly, the result must not be the elimination of all effective competition.

While the final decision on justification would be for the Madrid court, the CJEU indicated that in the absence of an appropriate framework for their application, the prior approval requirements were unlikely to meet the fourth criteria (no elimination of competition). In contrast, it suggested that arguments relating to "solidarity redistribution" and the need to ensure the sustainability and success of football competitions "appear prima facie to be convincing" in relation to the exclusive control of broadcasting rights.

The CJEU judgment in International Skating Union

In a second judgment issued on the same day, the CJEU also considered the application of EU competition law to rules in the statute of the ISU requiring that all international skating competitions, including those organised by third parties, obtain prior approval from the ISU. The CJEU also examined the legal status of the ISU's "eligibility rules" under which skaters participating in an unauthorised event could be subject to a lifetime ban from ISU competitions. In 2017, the European Commission had found that both the prior approval requirements and the eligibility rules infringed the prohibition on anti-competitive agreements in TFEU art.101.[21]

The CJEU upheld the European Commission decision on grounds similar to those applied in *European Superleague*. The fact that the ISU both participated in the market for the organisation and exploitation of skating events and held the power to determine which other undertakings were also authorised to participate in that market gave it a competitive advantage and created a conflict of interest. As a result, such powers constituted an automatic (by object) restriction of competition contrary to TEFU art.101, unless placed within an appropriate substantive and procedural framework.

One interesting point of difference from the facts in *European Superleague* was that the ISU had published, in advance, the rules and procedures third parties were required to follow in order to obtain prior authorisation for their skating competitions. Those rules included a series of general, financial, technical, commercial, sporting and ethical requirements, as well as procedural timelines. They also established a process under which the Court of Arbitration for Sport (CAS) could hear appeals from the approval process on an exclusive basis. Appeals from CAS decisions would then lie to the Federal Supreme Court of Switzerland.

The CJEU found that this framework was not sufficient to prevent an infringement of EU competition law. In particular, the fact that the CAS had exclusive jurisdiction over appeals and that its decisions were not subject to review by a court within the EU, meant that the process could not guarantee compliance of the rules with EU competition law.

Conclusions and comment

The CJEU's judgment is not (quite) the final word in this case, which will return to the Madrid Commercial Court for a final ruling on the facts and possible justifications (the hearing in the Madrid court is scheduled for 14 March). Nonetheless, it does seem likely to cause a significant headache for FIFA and UEFA and to have important implications for other sporting associations.

In principle, FIFA and UEFA can cure the competition law infringements in relation to the prior approval requirements for third-party competitions by adopting and publishing a suitable framework for their enforcement. This will not, however, be a simple task—the CJEU judgment suggests that a suitable framework will be burdensome to develop and implement. In order to cure the fundamental "conflict of interest" in relation to the associations' dual roles as both gatekeepers to football markets and competitors on them, the procedure may need to involve independent decision makers (e.g. third-party arbitrators) and an appeals structure.[22] Given their resources, this will be achievable for FIFA and UEFA, but smaller sporting associations—who are, in principle, subject to the same requirements—may not find it so easy.

Moreover, it will be a challenge to adopt a set of substantive rules for decision-making that would both allow for the swift refusal of any future Super League application for approval and meet the requirement that the rules be objective and non-discriminatory. Unless it can find a way to satisfy the commercial requirements of Europe's largest clubs, UEFA may find that it, ultimately, has to live with the emergence of a competitor tournament to the Champions League.

On top of this, the issue may turn out to be an expensive one for FIFA and UEFA in a more direct manner. Third parties that suffer loss as a result of infringements of EU competition law can sue for damages to cover their losses. Assuming that the Madrid court agrees with the CJEU's not so subtle hints that the prior approval requirements are not capable of justification, the associations may find themselves the target of a substantial claim for damages from the European Superleague and some or all of the founder clubs.

Finally, it is worth emphasising again that, as illustrated by the *International Skating Union* judgment, the EU competition law issues in relation to prior approval rules

[21] Commission Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40208—*International Skating Union's Eligibility Rules*) [2017] OJ C148/9.
[22] See, e.g. *Ordem dos Técnicos Oficiais de Contas v Autoride da Concorrencia* (C-1/12) EU:C:2013:127 at [99]; [2013] 4 C.M.L.R. 20; and Commission Decision 85/563 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.590—London Sugar Futures Market Ltd) [1985] OJ L369/25 at [3].

are not dependent on whether the relevant sporting association holds a dominant position. In principle, it applies to any sporting association where the activities of its members—be they individual sportsmen, clubs or national franchises—have commercial value. Many, if not most, will be in that situation and will therefore need to reflect carefully on whether and how this judgment applies to them.

Skill and Labour Not Enough for Copyright—But Software-Generated Art Still Original

Dionne Clark
ASSOCIATE, SIMKINS LLP

Artistic works; Computer-generated works; Copyright; EU law; Originality; Software

The Court of Appeal has upheld a finding that charts in graphic displays produced by software were sufficiently original to be protected by copyright, which the defendants had accordingly infringed.[1] The judge at first instance had applied the older test for originality of "skill and labour", which has been replaced by the EU-derived test of the "author's own intellectual creation". Although the correct test amounts to a higher standard, the Court of Appeal still found the works to be original: while the charts' purpose was informational and the degree of visual creativity was low, the component parts were laid out with care and choices were made about fonts, colours and other creative elements.

Background

The first claimant, THJ Systems Ltd, was owned by Andrew Mitchell, a software developer in the UK, and the second claimant was OptionNET LLP. Mr Mitchell had created software called OptionNET Explorer to assist with options trading. The software displays financial information about the market performance of options, including risk and price charts produced by the software.

The first defendant, Daniel Sheridan, was a US citizen who provided training and mentoring on options trading. The second defendant, Sheridan Options Mentoring Corp, was Mr Sheridan's company.

Mr Mitchell and Mr Sheridan went into business together in 2010/2011 and set up the LLP. Under that business, Mr Mitchell and THJ would provide the software for Mr Sheridan and his company to use in his mentoring business. In return, Mr Sheridan would promote the software to his mentees.

The parties fell out in 2014/2015, and Mr Mitchell sought to expel Mr Sheridan from the LLP. The claimants also terminated the defendants' licence to use the software and brought claims in passing off and for copyright infringement concerning alleged use of the software after termination.

In the copyright claim, the claimants claimed copyright in the charts as artistic works (specifically, graphic works) under the Copyright, Designs and Patents Act 1988 (CDPA) s.4(1)(a). For copyright to subsist in an artistic work, it must be original (CDPA s.1(1)(a)).

High Court decision

The judge at first instance, John Kimbell KC (sitting as a deputy High Court judge), dealt with the LLP expulsion dispute. He held that Mr Mitchell had validly expelled Mr Sheridan, and that the software licence had been validly terminated by no later than 25 January 2016. The passing-off claim was dismissed and not appealed.

As to the copyright claim, the judge found that the graphic user interface, the graphic displays produced by the software during use and the ONE logo were artistic works in which copyright subsisted, and that Mr Mitchell was the author and THJ was the owner.

Yet he dismissed the claim on the basis that no copyright infringement had been proved. In the defendants' written closing submissions, they had denied, seemingly for the first time, any communication to the public in the UK that was alleged to be infringing. The defendants argued that the claimants were not relying on any specific factors to show targeting of a UK audience, and that available indications, such as pricing in US dollars, did not suggest such targeting. The judge concluded that the relevant events appeared to have physically taken place in the US, any communication originated there, and the claimants had not identified factors to support a targeting case or offered any evidence that the communications reached the UK. So the judge found that the claimants had failed to prove infringement.

While the parties were dealing with the order following judgment, the claimants asserted there had been a misunderstanding over what was before the court on the liability part of the trial. In particular, the claimants argued that the defendants had admitted that, if subsistence and ownership were found in the claimants' favour, the defendants had infringed the copyright in the charts. So the claimants sought that the order say no infringement of copyright had *yet* been proved, and that an inquiry as to damages or an account of profits be ordered. The judge refused this on the basis that the

[1] *THJ Systems Ltd v Sheridan* [2023] EWCA Civ 1354; [2024] E.C.D.R. 4.