

PODCAST CVA

EUROPEAN SUPERLEAGUE COMPANY

Inês Domingues Alves: Welcome to 'Unwrapping EU Law', Cruz Vilaça Advogados' podcast that brings you the latest legal developments in the European Union. CVA, based in Lisbon, is a law firm specialising in European law, competition law and fundamental rights. It relies on a team of lawyers with extensive experience in these areas. In this first episode, we look at the hot topic of the moment, the European Super League. José Luís da Cruz Vilaça, founding partner of CVA, and Mariana Martins Pereira, principal associate at the same law firm, are here to discuss the recent judgment delivered by the Court of Justice of the European Union in the European Super League Company case. Professor Cruz Vilaça, I am going to start with you. Having represented Portugal at the hearing in this case, has the Court of Justice's judgment met your expectations?

José Luís da Cruz Vilaça: Inês, it is never possible, in a case as complex as this one, to expect the Court of Justice to decide exactly as we have proposed. I would even point out that, if I'm not mistaken, 22 Member States spoke at the hearing, having also submitted written observations. In fact, all of them made comments along the same lines, that is, to defend the compatibility of the FIFA and UEFA rules in question with European Union law. Other institutions also intervened, such as EFTA, as this is such a delicate matter, firstly, because it has very specific rules. Article 165 of the Treaty on the Functioning of the European Union is one of those specific rules that apply to sports. The European Union doesn't really have competences, it does not have exclusive competences in any case and it only has competences that aim to supplement or complement the competences of the Member States in the field of sport, as in other areas. This is an area of interface between the competences of the European Union and the competences of the Member States. It is therefore a complex matter, to which it is not easy to mechanically apply the rules that prevail in other areas.

The Court of Justice has recognised the specific nature of sports, not just football, but sports in general. What we are talking about here are the rules that apply in matters where the exercise of an economic activity is at stake. But this economic activity has a very strong connection with objectives that are not strictly economic. Objectives of a social nature, of a cultural nature, of solidarity and also of satisfying thousands or millions of fans of sporting competitions, as it happens with football. Furthermore, the positions I expressed on behalf of the Portuguese government during the hearing before the Court of Justice had to be summarised, because each party had only a quarter of an hour to express what they considered to be essential in their positions. Therefore, these observations were far from

covering all the issues that the Court dealt with in its judgment. Thus, as for those that were not covered by the observations produced during the hearing, I had no expectations. I had expectations only regarding those matters considered essential, and which the Portuguese government also considered essential, to underline, in terms of principle, above all, what it believed to be the best interpretation of the art of European Union law and its requirements in this area.

Inês Domingues Alves: Turning now to the more legal side of the judgment, what rules instituted by FIFA and UEFA are at issue here and how do these rules constitute violations of European Union law?

Mariana Martins Pereira: Inês, there are three types of rules at stake here. Firstly, the need for prior authorisation to organize competitions by third parties, that is, outside the so-called FIFA and UEFA ecosystem. Secondly, these two bodies also regulate the terms of participation of clubs and players in external competitions, as well as sanctions in the event of participation in unauthorised competitions. Finally, FIFA and UEFA also regulate the economic exploitation of the rights associated with these competitions, which is currently exclusive to FIFA and UEFA. Now, as for the violations of European Union law at issue here, the Court of Justice found that the rules issued by FIFA and UEFA constitute an agreement between undertakings, as well as a decision to associate undertakings, which are restrictive of competition. The reasoning behind this, as the Court has already stated in previous case law, is that FIFA and UEFA are undertakings for the purposes of European Union law. As Professor Cruz Vilaça has also said, they exercise an economic activity, even if that economic activity cannot be totally dissociated from other non-economic objectives, and not only are these entities undertakings, but they are also made up of national associations, which in turn are made up of clubs, all of which are also considered undertakings for the purposes of European Union law.

In addition to the restrictions on competition deriving from an agreement between undertakings, the Court of Justice also found that FIFA and UEFA have abused their dominant position, both in the market for organising sports competitions and in the exploitation of related economic rights.

Finally, it considered that these rules are contrary to the freedom to provide services by undertakings, such as Super League, a mere example, which was the first to try to enter this market, but others may follow its footsteps, such as undertakings that want to create alternative leagues. Now, it is important to understand that the Court of Justice has condemned FIFA and UEFA's rules essentially because they do not contain transparent, objective, non-discriminatory and proportional requirements on which authorisation for the organisation of competitions by third parties depends. In other words, a company interested in organising a competition has to know in advance what criteria it has to meet in order for its project to be authorised. Otherwise, this regulation by FIFA and UEFA does not comply with the requirements of European Union law.

To clarify, the Court was very clear when considering that the power of FIFA and UEFA to authorise competitions organised by third parties is not in itself contrary to European Union law. And the same applies to the possibility of applying sanctions, which is considered by the Court of Justice to be a necessary measure to ensure that the rules adopted are effective. Thus, I would say that if FIFA and UEFA change their rules in line with the Court of Justice's demands, they could actually continue to control the organisation of competitions by third parties. It will all depend on the way they do it or not.

Inês Domingues Alves: Professor Cruz Vilaça, can you explain to us how FIFA and UEFA's discretion over the organisation and marketing of rights associated with competitions can limit the access of new participants or restrict the different related economic activities?

José Luís da Cruz Vilaça: This issue was addressed by the Court of Justice in its judgment. Mariana has already referred to the conditions of the rules applicable to the creation of new competitions, how to access to them, and the conditions that these rules must meet in order to be considered compatible with European law. The question is not if FIFA and UEFA are able to be called upon to authorise, in accordance with their statutes and in the exercise of their statutory autonomy, within the framework of European Union law, nor the possibility of authorising competitions for clubs that are affiliated to the associations that constitute them. Therefore, in itself, this regulatory and disciplinary intervention in sporting activity is not condemned by the judgment. The judgment is rigorous in demanding the conditions and qualities that this regulation must have, so that all interested parties can be aware of them in advance, of what these conditions are, that they are transparent, that they are not discriminatory and that they do not apply differently in situations that are identical or that they do not apply in the same manner in situations that are different. There is no doubt that UEFA and FIFA have a very special position in the organization of international football, both at a European and international level.

All of this must be taken into account, there is no doubt that the Court of Justice was quite strict in stating these conditions, but it is now up to the national judge to whom this case has been brought to apply them in the context of the specific case, since the Court of Justice has not decided in the specific case of Super League and has even said clearly that it will interpret rules of general definition. It is the national court to which the matter has been brought that will decide it, taking into account the principles and rules defined by the Court in its judgment. That is the next step, and there is no doubt about it, as Mariana has already pointed out: UEFA and FIFA must now reflect on their own rules to see to what extent they are compatible with this judgment, against which there is no possible appeal.

Inês Domingues Alves: The court addressed the questions asked in the specific context of professional football, taking into account its social and cultural particularities. Might this have influenced its decision?

José Luís da Cruz Vilaça: The Court recognized the specific nature of the sporting phenomenon in Europe. The Court has not condemned, nor validated the very creation of the European Super League, neither has it condemned the so-called European model of sport, the characteristics of which I myself have listed, which imply an idea of solidarity, equality in competition, access to competitions according to merit, homogeneity and coordination. We are referring to frequent international competitions that overlap with national competitions, such as UEFA and FIFA, whose mission is to ensure the smooth running of international competitions, to ensure their harmonisation and complementarity, their balance, the balance of competition, all of which is covered. But the Court was also clear in recognising the merits of the values and the principles that underlie the regulation of sport and that the Treaty itself has raised to a level, I would say, constitutional, under Article 165 of the Treaty on the Functioning of the European Union.

Inês Domingues Alves: After this judgment, what we all want to know is whether or not the Super League can move forward?

Mariana Martins Pereira: Well, we must contextualise the case before the Court of Justice. The Court has only answered questions that were referred by the Commercial Court of Madrid, which is the competent court to decide the dispute between FIFA, UEFA and the Super League. That process will now continue, but the Madrid Court is obliged to respect the decision of the Court of Justice. Furthermore, the Court of Justice did not prohibit the requirement of prior authorisation and, it seems, the Super League never formally requested such authorisation. Therefore, I would say that everything will depend on the changes to the rules that FIFA and UEFA will have to make. If the Madrid court, which is the only court competent to settle the dispute, considers that these new rules respect the requirements of the Court of Justice, the Super League will have to comply with these requirements before it can move forward.

But one thing is certain, FIFA and UEFA cannot simply and without further ado prohibit the creation of the Super League.

Inês Domingues Alves: Finally, I would like to ask Professor Cruz Vilaça what are the immediate practical effects of this judgment?

José Luís da Cruz Vilaça: The practical effects of this judgment have already been explained here. The Commercial Court of Madrid will take note of the judgment of the Court of Justice and will make its decision, taking into account the considerations of the Court. This applies to UEFA's rules, in particular, as they currently stand. This also implies a reflection that is taking place. I have already heard about a press conference held by UEFA officials, who have assured that they will take the Court of Justice's judgment into account and that they will continue to reflect on the compatibility of these rules with the demands made by the Court in interpreting European Union law.

DECEMBER 2023

What is at stake is whether or not certain rules, the ones that Mariana has already mentioned, are compatible with European Union law. One of the requirements pointed out by the Court of Justice is that these rules must not result in the suppression of competition in the internal market or in a significant part of the internal market. The truth is that the Court of Justice was quite strict. It even spoke of infringements of Article 101 of the Treaty on the Functioning of the European Union by object and spoke of risks of abuse of a dominant position to UEFA and FIFA themselves, who must also take this into account. I note that they are already doing so and that, therefore, the matter is not closed and that everything that will now happen depends on each of the actors, and I am not going to substitute them myself while making judgments about what needs to be done. But surely, given the authority of the Court of Justice's judgment in these circumstances, they will certainly take it into account, for the sake of an activity that thousands of people appreciate and that I appreciate as well, in which I see some problems but many virtues.

Ideally, especially in a complicated, complex and troubling world like the one we live in, it is increasingly important to overestimate the positive elements, the virtues and the values, present in the practice of sport, which are also linked to economic considerations. There is a need to maintain a balance here, and I think that this call for balance is also present in the Court of Justice's judgment.

Inês Domingues Alves: Thank you both. This concludes the first "Unwrapping EU Law" podcast, produced by Cruz Vilaça Advogados.