

Introduction to Sports Law FS 2022

Total: 38 Points

Die folgende Skizze gibt die Gliederung der zu behandelnden inhaltlichen Aspekte vor; bei der Klausur wurde eine ausformulierte Argumentation erwartet. Die Vergabe der vollen Punktezahl setzt einen systematischen Aufbau der Anspruchsprüfung, die saubere Subsumtion des Sachverhalts unter die gesetzlichen Tatbestandselemente und eine fallbezogene Problemerkörterung voraus.

General conditions of Articles 101 and 102 TFEU (5 Points)	
It was expected that the candidates recognise the need to establish whether the general conditions of Articles 101 and 102 TFEU are met.	
Territorial scope	The provision is applicable whenever the European internal market is affected. The act in question need not be performed within the trade between member states which may be affected.
Undertaking	<p>The candidates had to establish whether UEFA and the national federations, which are members of FIFA, are undertakings within the meaning of Article 101 TFEU.</p> <ul style="list-style-type: none">- Undertakings are any legal or natural persons engaged in own economic or commercial activity involving the provision of goods and services.- <i>ECJ Walrave und Koch v. Union Cycliste Internationale, December 12, 1974</i>: Activity of a sports federation is subject to EU law since it constitutes an economic activity. UEFA – even though an association according to Swiss law with a non-economic purpose – engages in the provision of goods and services (establishing, promoting, exploiting, etc. of international football competitions).- It can be referred to <i>ECJ Méca-Médina precedent, 18 July 2006</i>: Sports activities are subject to EU competition law when their aim is to offer goods and/or services on a given market- The same holds true for the national federations on a national level.

Application of Article 101 TFEU (11 points)	
The candidates were expected to discuss the application of Article 101 TFEU in view of the threat of sanctions that may violate Article 101 TFEU.	
Agreement	<p>Such agreement between two or more undertakings is to be construed broadly and covers any conduct which is done or pursued in view of a certain behaviour of another undertaking.</p> <ul style="list-style-type: none">- These agreements can be horizontal or vertical.

	<ul style="list-style-type: none"> - In the case at hand, UEFA entered into membership agreements with the National Federations and the national federations represented within UEFA took a resolution to sanction any club that participates in the ESL. UEFA and the national federations rely on each other's agreed course of action. - The pyramidal structure in sport (e.g. FIFA/UEFA) has been characterized as an association of undertakings in the Meca-Medina precedent (<i>ECJ, 18 July 2006</i>).
Anti-competitive element	Such an anti-competitive element is given if there is prevention, restriction or distortion of the competition, i.e. replacing the free interaction of market forces by an arrangement that is not negligible. This may be either the object or the effect. However, the trade between members states must be impacted. The fact that only a market of an individual member state is affected, does not suffice. This is the case here since UEFA oversees the international match calendar and thereby has full control of the temporal market by formal agreement.
Exemptions	<p>It was expected that the candidates discuss the exemptions laid out in para. 3 of Article 101.</p> <p>An exemption is possible if</p> <ul style="list-style-type: none"> - the restriction leads to an improvement in the production, distribution, technical and economic progress of goods; - is indispensable in order to achieve the efficiencies; - a fair share of the benefits resulting from an agreement will accrue to consumers; and - it must not lead to the elimination of competition in a substantial part of the market. <p>Para. 3 is applied by analogy in case a sports federation is the regulator. For instance:</p> <ul style="list-style-type: none"> - <i>Donà v. Mantero, July 14, 1976, CJEU</i>: Sports regulations are not contrary to European Law if justified by non-economic reasons. - <i>Bosman precedent, 15 December 1995</i>: '<i>restrictions must remain limited to its proper objective</i>'. - <i>EU Commission White Paper on Sports, 2007</i>: '<i>there are organizational sporting rules that – based on their legitimate objectives – are likely not to breach the anti-trust provisions of the EC Treaty, provided that their anti-competitive effects, of any, are inherent and proportionate to the objectives pursued</i>'.

Application of Article 102 TFEU (7 Points)

The candidates were expected to discuss the application of Article 102 TFEU in view of the threat of sanctions that may violate Article 102 TFEU.

Dominant position of UEFA	The discussion of the dominant position of UEFA was expected to entail the relevant market (product market / geographical market). The relevant market being international football competitions (because other sports / events cannot be substituted from a consumer's perspective). In view of the test, UEFA clearly has a position of dominance in terms of organization of sports.
Abusing the position of dominance	Here the candidates were expected to discuss how the dominant position affects the other party. It can be argued that at first sight no, since the ESL does not have to comply with / submit to UEFA's authority. The ESL is free to create its own competition, members must only resign from FIFA and consequently from UEFA. However, there is an indirect pressure not to join the ESL (this already suffices). In addition, the detrimental act pursues neither a legitimate aim nor in a proportionate manner.

Legitimate objectives in relation to Articles 101 and 102 TFEU (3 points)

In view of the application of Articles 101 and 102 TFEU, the candidates were expected to discuss possible legitimate objectives.

Main legitimate objectives	<p>It was expected that the candidates extensively argue this and discuss to what extent these objectives are affected in the case at hand.</p> <p>Integrity and objectivity of sports competitions, equal chance for all athletes and clubs (open competition based on equal chance for all athletes and inclusion of all clubs), education, inclusion, ethical values like transparency in club's management, solidarity, licensing system.</p>
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Proportionality of the proposed sanction (4 points)

It was expected that the candidates discuss the proportionality of the proposed sanction. The proportionality test is three-pronged.

Is the sanction proposed necessary to pursue the above goal?

Is the sanction proposed proportional to achieve the above goal?

Balancing of interests	<p>This last segment of the test entails balancing the interests between the ESL and UEFA.</p> <ul style="list-style-type: none"> - What are the pros of the ESL? <ul style="list-style-type: none"> Diversification of the spectators' offer: Fans will have more choice on which competition they can watch; Opening of labour market for players: Players will have the choice on the competition can compete in More competitive and unique moments: Great teams means higher valued games with greater unique players, <i>'the best will play the best'</i>;
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	<p>More money injected in football: For now, the ESL stands that it will implement a solidarity mechanism, if it does so, this could lead to a lot of money reinjected in smaller football clubs.</p> <p>- What are the cons of the ESL?</p> <p>The European Super League could be considered as a cartel itself (undertakings: the 12 founding clubs. Agreement : the creation of a semi-closed competition)</p> <p>There is an imbalance between the 15 permanent clubs and the 5 vacant clubs. The ecosystem of the Super League is already creating a situation of a dominant position for the 15 permanent clubs. Semi-closed competition scheme goes against the legitimate objective of inclusion.</p>
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Other possible legal provisions (8 points)

The candidates were not expected to test other provisions but were given points for discussing the applicability.

Free movement of services (Article 56 TFEU): UEFA's measures impede the provision of services by the ESL.

Free movement of workers (Article 45 TFEU): It can be argued that it prevents the players from supplying their services through the participation in the Super League.

Free movement of capital (Article 63 TFEU): UEFA's measures impede intra-community movements of payments and capitals linked to the ESL project.

Freedom of establishment of companies (Article 49 TFEU): It can be argued that UEFA's measures preclude the creation and development of the ESL company.