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Dissertation of Ioannis Lagouros

Student's Registration Number: 7340122301008

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The application of Competition Law in the sports sector:

The example of Sports Federations and breakaway leagues

Examining the judgment and the effects of C-333/21 European Super League Company v FIFA
and UEFA in the light of EU Competition Law

Examination Board:

(Supervisor) Efthymia Kinini, Assistant Professor of Commercial Law

Emmanuel Mastromanolis, Assistant Professor of Commercial Law

Alexandra Mikroulea, Associate Professor of Commercial Law

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Introduction

1. The European Super League Company case

On the 21st of December 2023, the Court of Justice of the European Union (hereinafter “CJEU”) delivered a judgement that challenged a well-founded status quo in European and global football. The judgement concerned the European Super League (hereinafter “ESL”), a new closed (or at least semi-open) football competition announced by twelve European top-level football clubs¹, administrated by the European Super League Company (hereinafter “ESLC”). This breakaway league would not be bound by regulations of the Union of European Football Associations (hereinafter “UEFA”), which is the sole governing body of European football and organizes the only current European football club competitions: the Champions League, the Europa League, and the recently established Conference League².

As the newly created league would de facto replace the UEFA European tournaments and more importantly the UEFA Champions League, which is the highest grossing annual football club competition worldwide, UEFA reacted swiftly taking direct action against the “revolutionaries”. Invoking FIFA Statute Articles 22(3)(e), 71, 73 and Article 49(3) of the UEFA Statutes, which emphasize on the prior authorization of any competitions not organized by FIFA or UEFA but played on FIFA or UEFA’s territory, the federation noted that participating in the ESL would constitute infringement on FIFA and UEFA core regulations. Following this, FIFA and UEFA along with all regional federations issued a joint statement refusing to recognize the breakaway league and threatening to impose heavy sanctions not only on the participating clubs of the ESL but also on the players, including a ban of competing in competitions organized by UEFA and FIFA³. After judicial proceedings in Madrid’s Commercial Court, the Spanish Court referred the Case to the CJEU for a preliminary ruling to clarify both the applicability of EU Competition Law (Articles 101 and 102 Treaty on the Functioning of the European Union (hereinafter: “TFEU”)) and the compatibility of the aforementioned rules on prior authorization set by FIFA and UEFA with EU Competition law. By May 2021, following the threats made by the federations and a wave of criticism by football fans the ESL project subsequently collapsed as out of the twelve founding clubs, nine had withdrawn from the ESL and agreed to adopt reintegration measures suggested by UEFA, acknowledging their fault in participating in a non-authorized league like the ESL⁴ and the funding for the project was withdrawn⁵. Regardless of this development, the case of breakaway leagues remains active as the latest ruling of the CJEU adds further to the relation between Sports and EU Competition Law ultimately precluding FIFA and UEFA from materializing their threats

¹ The Super League, Leading European football clubs announce new super league competition, 2021. The founding members of the ESL emanated from England (Arsenal F.C., Chelsea F.C., Liverpool F.C., Manchester City F.C., Manchester United F.C., Tottenham Hotspur F.C.), Spain (Atlético Madrid C.F., F.C. Barcelona, Real Madrid C.F.) and Italy (A.C. Milan, F.C. Internazionale Milano, Juventus F.C.); three more clubs would be announced at a later date and five places would be allocated to other clubs through a promotion and relegation system with the games being played mid-week allowing the clubs to participate also in their respective domestic leagues.

² UEFA, “Running Competitions”

³ Case C-333/21, *European Superleague Company*, para 31.

⁴ UEFA, ‘UEFA approves reintegration measures for nine clubs involved in the so-called ‘Super League’, 2021

⁵ JP Morgan ‘misjudged’ football fans over European Super League, The Guardian, 2021

and possibly paving the way for a new era in a very lucrative sector, after what has been described as “la guerre des riches” (a war of the rich)⁶.

The case at hand illustrates the implications that may arise from the application of Articles 101 and 102 TFEU in the context of sports⁷. The key points are the extent to which prior authorization rules as a decision by an association of undertakings violate Article 101 (1) TFEU, the possible abuse of a dominant position under Article 102 TFEU by FIFA and UEFA through the implementation of prior authorization rules and whether UEFA and FIFA statutes can benefit from an efficiency exemption under Articles 101 (3) and 102 TFEU.

This paper examines the relation between Sports and EU Competition Law and more specifically answer the question “Do sports (football in particular) governing bodies violate EU Competition Law by imposing restrictive measures on breakaway leagues?” in light of the recent judgment of the Court in the Case C-333/21 European Super League Company case of December 2023. Moreover, it delves into the legality and the compatibility with Articles 101 and 102 TFEU of the prior authorization rules imposed by FIFA and UEFA. Analyzing the Court’s approach to said conduct it also examines possible efficiency exemptions while mapping potential developments in the field.

Towards that, a threefold approach is employed. First, this paper identifies the nature of the relationship between EU Competition Law and Sports Governance? Second, it examines whether FIFA/UEFA’s restrictive actions violate Article 101 and/or Article 102 TFEU? How Finally, it assesses how will the judgment contribute to the development of Competition law in the Sports sector?

2. Methodology and delimitations

This dissertation follows a doctrinal approach, by locating and surveying the relevance of EU Competition Law and Sports. Through a qualitative analysis, it examines the surrounding context and the particular facts of sports governing autonomy under EU law and possible antitrust faults. Towards that a combination of primary and secondary law is reviewed, interpreting the relevant legal provisions and exploring connected jurisprudence, while maintaining a focus on the ESLC case itself. Alongside scholarly discourse, a particular focus is placed on the Court’s Decision and the Advocate General’s opinion.

In order to clarify and navigate in the most efficient way the research question a few delimitations must be made. Firstly, as this dissertation focuses purely on competition law, an examination of the prior authorization system through Articles 45, 49, 56 and 63 TFEU⁸ which relate to the fundamental freedoms will not be conducted and, consequently, the Court’s judgement on the sixth question referred by the national court will not be addressed. Furthermore, this dissertation considers the conduct relating to prior authorization rules established by UEFA, as a unity with those established by FIFA. The two federations, FIFA and UEFA, are part of the same

⁶ Emma Kemp, Helen Sullivan, ‘It’s war’: what the papers say about the European Super League’, The Guardian, 2021

⁷ Pablo Ibáñez-Colomo, ‘On Superleague and ISU: the Expectation was Justified (and EU Competition Law may be Changing before Our Eyes)’, Chilling Competition Blog Post, 2023

⁸ These Articles Concern the fundamental freedoms of: Free movement of workers (45), the freedom of establishment (49), the free movement of services (56), and the free movement of capital (63).

governance mechanism and UEFA serves as the governing body responsible for the geographic region in which the ESL would be situated.

A. EU Law and Sports: A rather complex relationship?

"Sport is more than just a business; it is a social and cultural activity that plays a very important role in our societies. The EU must ensure that the values of sport are upheld in its policies and actions, while at the same time respecting the autonomy of sports organizations." - Viviane Reding, a former Vice-President of the European Commission and Commissioner for Justice, Fundamental Rights, and Citizenship

In order to explore the extent of EU competition Law applicability in the sports, an analysis of the special features of this economic sector from a legal standpoint has to be made. As the relationship between sports and EU law has evolved over the past few decades and new legal developments such as regulations and case law have been introduced. The Union's interest in regulating sports indicates its growing importance in social, economic, and political terms. The sports market is, aside from the cultural expression aspect, a substantial economic sector worth billions of dollars and employing millions across the EU.

This chapter analyzes the complex relationship between sports and EU law. Firstly, the history of EU sports legislation focusing on the European Model of Sport concept and Article 165 TFEU is examined. This analysis is a crucial part as it serves as a foundation for analyzing the applicability of EU competition rules in sports, particularly any potential exemptions, providing a comprehensive overview of the key legal frameworks and policy regulations that define the relationship between sports and EU law. In the second part, the issue of Competition Law specifically in the context of sport is discussed in relation to sports governance by Sports Governing Bodies (hereinafter: "SGBs") and their market position as "undertakings".

1. Sports and EU Law: The EMoS concept and Article 165 TFEU

1. The European Model of Sport

The organization method of sports in Europe is largely defined by European values and follows a hierarchical structure, originating from the pre-cold war Western European model involving both governmental and non-governmental organizations, forming the present European Model of Sport (hereinafter "EMoS")⁹. Despite the absence of a complete and detailed definition on what is the EMoS from a legal standpoint, the Commission and more recently the Council has provided us with a series of documents to reflect the Union's vision in sports. These documents are: 'The European Model of Sport', the 'White Paper on Sport' and 'Developing the European Dimension in Sport'¹⁰. Additionally, the Council recently adopted a resolution on the EU Work Plan for Sport¹¹. The main focus of the EMoS is a top-down approach to promote the core values of sporting merit and social integration through a system of sports "solidarity". This system typically involves a revenue distribution system with open competitions ensuring that, some of the profits generated

⁹ Nicholas Cachia, 'Breakaway Leagues in Football: Is the Actual Formation of a European Super League Compatible with EU Competition Law?', University of Malta Faculty of Law, 2023, p. 13

¹⁰ Commission, 'The European Model of Sport - Consultation Document of DG X' COM 1999/C 374/14, COM(2007) 391 final, Commission, 'Developing the European Dimension in Sport' COM(2011) 12 final.

¹¹ Council, 'Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the European Union Work Plan for Sport (1 January 2021-30 June 2024)' COM 2020/C 419/01.

by top-level clubs and players are distributed to small members and “grassroots” organizations explained below¹².

The core feature of the EMoS is its hierarchical pyramid structure with the federations of each level charged with football governance within their territory¹³. In the case of football, the lowest level of the structure includes the national clubs employing athletes. The “grassroots” parts of the pyramid are formed by national clubs, along with regional associations and amateur bodies that operate within a country. In turn, the whole of the regional federations forms a national federation which is the sole body governing football on a national level while representing the country on an international level, and has the monopoly of organizing and commercially exploiting football internationally recognized tournaments within its scope of competence¹⁴. Consequently, the EMoS is characterized by the ‘one-federation-per-sport’ principle: only one governing body is allowed to exist at a national and continental level. The Commission itself recognizes this system as the most efficient to manage and organize sports¹⁵, but it is evident that such a system is highly monopolistic in its nature with federations being in an all-powerful position in terms of the football relevant market¹⁶. The pyramid is completed with continental federations, such as UEFA in Europe, and FIFA which fulfils the role of the international federation. It has to be noted. Open competitions are a key feature of the EMoS. Participation in tournaments organized by SGBs is based on sport merit and achievement and not on the club’s financial standing, player roster or sponsorship income, in a wider promotion-and-relegation system allowing new teams to enter competitions¹⁷.

The EMoS therefore, stands on the exact opposite side of the ESL concept in terms of basic organization but a uniform and legally enforceable EMoS across the EU cannot be identified. On the one hand, one can observe the general absence, with some exceptions, of closed competition leagues without a promotion-relegation system, in which the teams elect a commissioner and set their own rules as is the case with American sports leagues¹⁸. Such leagues have been characterized as “franchises”, resembling business corporations, in which the teams behave like joint ventures since they still have to respect one another's market prospects and cooperate to advance their shared financial interests.¹⁹ On the other hand, the non-binding nature of the EMoS, the intense commercialization of sports and the coexistence of heterogeneous systems across the member states raises doubts regarding a shift towards a unified European sports model²⁰. Moreover, some sports, with the most notable case being that of basketball, have long shifted towards a closed-league system, not using the one-federation-principle. FIBA and FIBA Europe, the SGBs in basketball similar to FIFA and UEFA respectively, are involved in a long and bitter struggle with ECA, the

¹² Council, ‘Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies’ Annex IV to the Conclusions of the Nice European Council, Bulletin EU 12-2000

¹³ Lars Halgreen, ‘European Sports Law’, 2nd edn, Karnov Group, 2013, p. 46

¹⁴ Floris de Witte and Jan Zgliniski, *The Idea of Europe in Football*, LSE Legal Studies Working Paper No. 17/2021, p. 3

¹⁵ COM 1999/C 374/14, para 8

¹⁶ Stephen Weatherill, ‘Is the Pyramid Compatible with EC Law?’ in *European Sports Law: Collected Papers*, 2nd edn, Asser Press, 2014, p. 3

¹⁷ COM 1999/C 374/14, para 4.

¹⁸ Isa Rosin, ‘Enforcement of EU Competition Law to Sports Associations after the Super League and International Skating Union Rulings’, *Stanford-Vienna European Union Law Working Paper No. 93*, p. 10

¹⁹ Halgreen (n. 13), p. 73-74

²⁰ Rusa Agafonova, ‘International Skating Union versus European Commission: Is the European Sports Model under Threat?’, *The International Sports Law Journal*, 2019, p. 99

entity responsible for the organization of the Euroleague closed tournament, for the control of the European basketball competitions²¹. The participation of European basketball's top teams in the Euroleague and ECA's legal successes against multiple FIBA attempts at sanctioning clubs that participate in the private tournament, highlight the similarities with the ESL case and may serve as a guide for the coexistence of two rival systems in one sport.

In this context, the conclusion can be drawn that the EMoS is not a legally enforceable part of EU Law and that sports organizations may not follow this model. The Commission claims that applying a one-size-fits-all general guideline system on the application of competition law to all EU sports is impractical and recognizes that providing substance to sports organization is a responsibility of the SGBs and Member States²². The Court assesses on a case-by-case basis whether a certain sporting rule is compatible with EU competition law. Nevertheless, the Commission also emphasizes that it will keep an eye on sports under EU law, regardless of how they are run, with a particular emphasis on non-discrimination laws, free movement laws, and competition law.

2. Sports and primary law: Art. 165 TFEU

Sports were not at all mentioned in the European Treaties until the Treaty of Lisbon came into force. Article 165 TFEU provides the Union with the authority to assist, coordinate or supplement Member States' efforts in the field of sport under Article 6 TFEU²³. The Article enhanced legal certainty and validated the already established legal practice anchoring sports in the treaties for the first time²⁴. In terms of substance, Article 165 TFEU specifies that Union action must promote European sports while taking into consideration the specificity of sports²⁵, their voluntary activity, and their social and educational roles. Furthermore, according to Article 165 TFEU, the Union action must safeguard athletes' integrity and advance transparency and fairness in athletic contests. Thus, certain aspects of sport's uniqueness are given legal significance by their acknowledgement supported by the Court's recognition of the significance of Article 165 TFEU in various cases.

In the field of competition law, the significance of Article 165 TFEU was first brought to light in *Olympique Lyonnais v Olivier Bernard and Newcastle UFC*, where the Court strongly affirmed the significant societal role of sports but subsequently determined that certain elements of the regulations in dispute exceeded what was necessary to fulfill that aim²⁶. It was mentioned again in the 2019 *International Skating Union* case, where the Court ruled that consideration must be given to the unique features of sport when evaluating the circumstances surrounding a decision or agreement that may limit competition²⁷. The importance of Article 165 was also addressed in the opinion of Advocate General (AG) Rantos in the ESL case. The AG upgraded the article to the point where he considered it to be the EMoS constitutional recognition thus giving the European sports model the standing of European primary law. In this regard, Art. 165 TFEU was to be

²¹ Marine Montejo, 'FIBA/Euroleague: Basketball's EU Competition Law Champions League- first leg in the Landgericht München', *Asser International Sports Law Blog*, 2016

²² COM 2007/391 final, 4

²³ Jacob Kornbeck, 'Lisbonisation without regulation: engaging with sport policy to maximise its health impact?', *The International Sports Law Journal*, 15, 2015, p. 112-113

²⁴ Stephen Weatherill, 'Sources and Origins in EU Sports Law', *Research Handbook on EU Sports Law and Policy*, 2018, p. 19

²⁵ For the notion of specificity see *ibid.* (n. 22)

²⁶ Case C-325/08 *Olympique Lyonnais*, para 40

²⁷ Case T-93/18, *International Skating Union (ISU)*, para 78.

applied in accordance with the concept of specialization and was to be viewed as a special provision in comparison to Art. 101 and 102 TFEU²⁸. The Court seems to have found this interpretation excessive, stating clearly that Art. 165 TFEU is not a “cross-cutting provision having general effect” not being able to prevent the application of the competition provisions²⁹ and mentioned the Article 165 only in the preliminary observations and not on the analysis of Articles 101, 102 TFEU. Furthermore, the Court rejected in practice the AG’s concept of a uniform EMoS, which is not recognized as such at all; rather, the court continued to make reference to the unique aspects of sports.

In light of the above one may view the Article in a symbolic context of ‘social and educational importance’³⁰ rather than a legal provision that could possibly change legal practice³¹. The Court has affirmed that it will apply its own legal toolkit when evaluating the particularities of sports-related matters and will keep Art. 165 TFEU apart from the competition law analysis choosing to interpret EU legislation independently of its political setting³². However, despite acknowledging the elements of the European sports model, the court’s approach is criticized for failing to recognize it as such and instead considering the same aspects of sport when evaluating Art. 101, 102 TFEU, as though it wished to avoid referring to the approach by name³³. It could be noted however, this criticism ignores the fact that the Court does so in a way that sharply divides EU policy and EU jurisprudence from one another.

3. Analysis

To this date there is no universal agreement on the best and most effective sports organization model. Depending on each point of view, the idea of “one federation per sport” may be the most straightforward and effective method of organizing sports, yet greater commercialization and a closed league would also boost the industry’s financial power. Sports markets are unique from other markets in that they don’t fit in the simple model of unrestricted competition due to specificities. Some of these, stem from the fact that sports are primarily non-economic activities, but others are actually the product of the institutions that have developed and play a crucial role in governing sports.

From a European standpoint, it is evident that the EU institutions have paid close attention to the educational, social, and cultural aspects of sports while also acknowledging the significant commercial aspects. The European Model of Sports, although not uniform or protected by primary EU law as demonstrated above, functions as a component of the “European identity” since it incorporates the principles upheld by the European Union³⁴. Therefore, a shift toward the American model would be a departure from the traditional European identity’s tenets of equality,

²⁸ *European Superleague Company* (n. 3), Opinion of AG Rantos, paras 30-35

²⁹ *ibid*, para 100

³⁰ *Ibid*, para 103

³¹ Giorgio Monti, ‘EU Competition Law after the Grand Chamber’s December 2023 Sports Trilogy: European Superleague, International Skating Union and Royal Antwerp FC’, Tilburg Law & Economics Center (TILEC) Law & Economics Research Paper Series, 2024

³² Aurélie Villanueva, ‘Accounting for the Specificities of Sport in EU Law: Old and New Directions in the 21 December 2023 Judgements’, *International Sports Law Journal*, 2024, p. 423-424

³³ Borja García, ‘Down with the Politics, up with the Law! Reinforcing EU Law’s Supervision of Sport Autonomy in Europe’, *ISLJ*, 2024, p. 2

³⁴ Vladimir Zuev, Irina Popova, ‘The European Model of Sport: Values, Rules and Interests’, *International Organisations Research Journal* 51, 2018, p. 5

respect, and openness for all³⁵. Nevertheless, it has been suggested that the EMoS is beginning to resemble its equivalent on the other side of the Atlantic due to a widespread "Americanization" already evident in basketball. The European Super League wanted to follow this path bringing a much greater impact on the European sports and economics. Thus, the survival and future of the European Model of Sports are largely dependent on the CJEU in the European Super League case.

2. European Competition Law

As the Commission emphasizes greatly on the notion of ‘specificity’ in the sports sector, to the point that SGBs are allowed to adopt measures with “*restrictive effects on competition that are inherent in the organization and proper conduct of competitive sport*”³⁶ the next section will approach the relationship between sports and competition focusing on the role of SGBs from a Competition Law point of view and the impact of sports-related case law through CJEU rulings. Before approaching the connection between EU Law and sports and the ESL case, a few core concepts of EU Competition law relevant to this case should be mentioned:

2.1. What is an undertaking?

The notion of an "undertaking" is the primary unit of analysis in EU competition law as Article 101 TFEU refers to undertakings as the subjects that may form agreements, practices, and decisions that limit or distort competition in the EU internal market. In order to better understand the meaning of the term used by the authors of the TFEU to identify the perpetrators of an infringement of EU competition law as is the case with FIFA and UEFA in the ESL case and SGBs in general, it is crucial to analyze this concept with a focus on the methodology developed by the Court.

The question of what is meant by the TEU and TFEU regarding the concept of undertakings in the framework of competition law³⁷ arises from the repeated use of the term "undertaking" in the TFEU in place of other similar terms like "firm," "company," and "legal or natural person" without a clear and precise definition. The Court has adopted a functional approach for a definition of this term in its settled case law, meaning that the legal form of an organization is not important when examining the applicability of competition rules in a case³⁸. The Court held in *Höfner* that an undertaking is any organization that engages in economic activity, independent of its legal form or method of financing³⁹. The Court, additionally, supports an *in concreto* interpretation of the term in the context of the particular activity that is being examined, noting that the concept of an undertaking must be interpreted as identifying an economic unit for the purposes of the agreement's subject matter if an action is brought forth. Even while the Court provides this functional definition of an undertaking, a dispute about the primary criterion it presents—what constitutes an "economic activity" for the purpose of defining an undertaking—remains. The Court has declared repeatedly that providing goods or services on a particular market constitutes an economic activity⁴⁰. For the company in question to meet this criterion and avoid being labeled as "dormant," it must be active,

³⁵ Ibid.

³⁶ COM 2007/391 final, A. 4

³⁷ The term is also used to describe an entity of economic significance for the purposes of Article 80 of the Euratom Treaty and Article 80 of the Treaty establishing the European Coal and Steel Community

³⁸ Johan Van de Gronden & Catalin Rusu, “Competition Law in the EU: Principles, Substance, enforcement”, Edward Elgar Publishing, 2021, p.20

³⁹ Case C-41/90 *Höfner*, para 21

⁴⁰ Case C-35/96 *Commission v Italy*, para 7 and Case C-180/98 *Pavlov*, para 75

possess assets, have workers, and have an economic turnover⁴¹. Furthermore, the pursuit of economic activity does not necessitate a company's profit motive⁴². Therefore, the Court holds that businesses may be regarded as undertakings even if they provide their services for free⁴³ or even if they do not formally have an economic purpose⁴⁴. As previously stated, the legal status and financing of an undertaking are irrelevant to the Court. Aside from firms and partnerships that are qualified for being described as undertakings, the Court has included in this definition other types of institutions such as agricultural cooperatives and Protection and Indemnity Clubs⁴⁵. Sometimes, agreements between trade groups may be captured by the prohibition of Article 101 (1) TFEU⁴⁶. The Commission recognizes foreign trade associations as undertakings, with the Court ruling that this applies only when the Union acts independently, not as an agent of its members or an executive organ of an agreement⁴⁷. It is also important to note that the definition of "undertaking" in terms of relationships between different entities is inextricably linked to the concept of "competition" among them. If multiple entities share the same interests or are managed by the same person, they form a single economic unit because there is no economic competition between them. The Court has ruled that Article 101 (1) TFEU is not applicable to agreements or concerted practices between undertakings belonging to the same group of companies in the form of parent company and subsidiary⁴⁸, as well as when more companies have identical interests and are controlled by the same natural person, constituting a "single party" and rendering competition impossible⁴⁹. As a result, the idea of an undertaking is linked to actual or potential competition among the entities being evaluated. These entities may only be subject to competition law if their interactions have the potential to form a competitive order⁵⁰.

The Court, therefore, presents an undertaking expansively using this functional approach method; nonetheless, the case law imposes some limitations on this idea. The primary limitations are the exercise of public authority and solidarity. The CJEU ruled in *Wouters* that competition rules do not apply to activities that do not fall under the scope of economic activity or are related to the exercise of public authority⁵¹. This means that exercising official authority is not considered economic activity if it is part of the public domain's essential function in the field of the activity concerned. The Court has held that state-owned businesses, institutions assigned with certain functions, and quasi-governmental agencies can operate as undertakings⁵². In the *CEPPB* decision, the Court clarified that pursuing solely social, cultural, and educational purposes does not constitute economic activity for a state-funded body⁵³.

⁴¹ Case T-386/06 *Pegler*, paras 43-49

⁴² See Case C-475/99 *Ambulanz Glockner*: the CJEU determined that non-profit medical organizations—in this case, the German Red Cross—were functioning as undertakings in the context of competition law when they rendered ambulance services in exchange for payment.

⁴³ Case C-41/90 *Höfner*

⁴⁴ Case C-222/04 *Cassa di Risparmio di Firenze*, para 123

⁴⁵ See Case C-61/80 *Coöperatieve Stremsel*, Commission decision (1999/329/EC)

⁴⁶ Richard Whish & David Bailey, *Competition law*, 10th edn, Oxford University, Oxford, 2021, p. 87-88.

⁴⁷ See European Commission, Fourteenth Report on Competition Policy, Publications Office, 1990, para 57 and Cases C-22/98 *Becu*, para 28 and T-217/03 *FNCBV* where the Court examined price fixing agreements between associations of farmers.

⁴⁸ Case C-73/95 *Viho*, para 16

⁴⁹ Case C-170/83 *Hydrotherm*, para 11

⁵⁰ Ioannis Lianos & Valentine Korah & Paolo Siciliani, *Competition Law*, Oxford University Press, 2019, p. 279

⁵¹ Case C-309/99 *Wouters*, para 57

⁵² See Cases 155/73 *Sacchi*, 258/78 *Nungesser KG*

⁵³ Case C-74/16 *CEPPB*

2.2. The prohibition and application elements of Article 101(1) TFEU

Under Article 101(1) TFEU agreements between undertakings, i.e., the concerted practices between undertakings and decisions of associations of undertakings that restrict competition and may affect the trade between Member States are prohibited. The following elements constitute the cumulative requirements for the application of Article 101 (1) TFEU and stem directly from the wording of the Article: a form of cooperation between the undertakings in the form of agreements, concerted practices and decisions of undertakings, restriction of competition and an effect on the trade of the Member States. The analysis of these requirements is important to understand the Court's legal path of thought and examine effectively a possible violation of this prohibition by the SGBs and/or the ESL in the following chapter.

As discussed above, in order for the Court to apply the prohibition of Article 101 (1) TFEU, some sort of cooperation between undertakings is required rather than unilateral behavior. This Article prohibits cartel agreements, practices, and decisions not only between rivals (for example, price fixing agreements, market sharing agreements), but also between enterprises engaged in economic activity at different market levels (vertical agreements). It is important to note that Article 101 (1) does not preclude only formal contracts, which necessitates a broad interpretation of the terms "agreement," "concerted practice," and "decision" to include informal agreements such as gentlemen's agreements and other forms of informal cooperation in the form of parallel behavior by firms, which may constitute a violation of Article 101⁵⁴.

2.2.1. *Agreements*

The Court has described agreements as occurring when there is a concurrence of wills between at least two parties, the form of which is unimportant as long as it represents the parties' faithful expression⁵⁵. The will of the parties is crucial for the existence of an agreement, and even non-binding, oral, informal agreements and basic understandings may fall within the scope of Article 101 (1) TFEU prohibition if the parties intend to adhere by what was agreed upon⁵⁶. In other words, an agreement may be stated or evident implicitly through the behavior of the participants. Furthermore, the actual implementation of the agreement, or the fact that the person who concluded the agreement lacked the authority within the enterprise to do so, is immaterial to the existence of the agreement⁵⁷. Furthermore, the Court has concluded that there is agreement on the basis of a restriction of competition, even if the specifics of the restriction are still being negotiated⁵⁸.

2.2.2. *Concerted practices*

Anticompetitive conduct, such as concerted practices, that is not the result of an agreement or decision, may constitute an infringement of Article 101(1) TFEU. In that case, the companies involved synchronize their actual commercial operations and activities in a parallel manner. Certainly, such operations could have a major negative impact on competition.

Concerted practices are covered under Article 101 (1) TFEU. In the *Dyestuffs Case*, the Court defined concerted practices as a type of coordination between undertakings that have not yet

⁵⁴ Whish & Bailey (n. 46), p. 104

⁵⁵ Cases C-2 and C-3/01 *Bayer*, para 97

⁵⁶ Case 41/69 ACF *Chemiefarma*, para 110-112

⁵⁷ See Commission Decision of 29 September 2004, *Brasseries Kronenbourg - Brasseries Heineken* (COMP/C.37.750/B2), para 61 and Case C-68/12 *Protimonopolný úrad Slovenskej republiky*, para 25

⁵⁸ Case T-240/07 *Heineken Nederland*, para 45

achieved an agreement and knowingly substitute practical cooperation for the dangers of competition⁵⁹. There are two key components in recognizing coordinated practices: parallel behavior and coordination⁶⁰. Of course, similar market behavior or economic evolution in the same direction regarding the setting of prices and other commercial problems of diverse ventures is possible. Because coordination is typically conducted behind closed doors, it is frequently difficult to demonstrate the presence of contacts that resulted in the alignment of business policies. Cases involving the conclusion of a concerted practice are thus particularly specialized, requiring an in-depth review of the relevant evidence that must prove a causal link between the coordination and the anticompetitive conduct⁶¹. To prove the presence of concerted practices, the Court allows the Commission to provide proof of interactions between the companies or any other evidence that indicates collusive activity. If the Commission can prove both factors, it is assumed that there is a causal relationship between the contacts and the collusive activity. The Court has extended a helping hand in its case-law decision that if undertakings take part in concerted action and remain active on the market, the burden of showing that coordination was a result of autonomous developments in a normal functioning market falls on them⁶².

2.2.3. Decisions of associations of undertakings

Another type of coordination that may be forbidden by competition law is the formation of associations of undertakings with the goal of improving collaboration in terms of common interests. Cooperation between undertakings is not always detrimental to the market in which they operate, since it can, for example, facilitate administrative work and provide facility management services⁶³. However, on many cases, this coordination of undertakings can result in a limitation of competition in the market where they operate, such as when the association's policies lead to price fixing. To apply the EU competition law regulations in a decision by associations of undertakings, two factors must be present⁶⁴. Though the association does not need to have an official legal status or be a profit-making company, it should have an organizational component with a permanent corporate structure. A functional aspect is also required, suggesting that either the association's operations or the actions of its members are economically viable. In other words, this factor corresponds to the aforementioned definition of the undertaking, which implies that the association must truly consist of undertakings in the sense of competition law⁶⁵.

2.2.4. Restriction by object or effect

Agreements that restrict, hinder, or distort market competition are prohibited by Article 101(1). The Article clearly indicates that agreements⁶⁶ are illegal when they have as their object or their effect the restriction competition, it is crucial to grasp the definition and significance of these words in the following paragraphs.

The term 'object', as used above, is a legal notion under Article 101(1) TFEU. The Court has assigned several definitions to this term, categorizing it as the "purpose", "aim", or "intention" of

⁵⁹ Case 48/69 *ICI*, para 64

⁶⁰ Van de Gronden (n. 38), p. 61

⁶¹ Whish & Bailey (n. 46), p. 120

⁶² Case C-455/11 *Solvay SA*, paras 39–41 and Case C-8/08 *T-Mobile*, paras 44-53

⁶³ Van de Gronden (n. 38), p. 64

⁶⁴ Lianos (n. 51), p. 384

⁶⁵ DAF/COMP(2007), 45 OECD, *Trade Associations*, para 19

⁶⁶ The word “agreement(s)” includes also concerted practices and decisions by associations of undertakings

an agreement⁶⁷, or refers to a circumstance where the provisions of an agreement "reveals the effect on competition to be sufficiently deleterious"⁶⁸. The restriction by object as a result of collusive activity generated by an agreement qualifies the agreement as a hard-core restriction of competition if its primary goal is to distort market competition. If the Court determines that an agreement is intended to restrict competition, there is no additional need to prove its anticompetitive impact on the market. Horizontal agreements that have the object of restricting competition frequently involve price fixing, collective exclusive dealing, market or customer sharing and/or manipulating a financial benchmark, whereas vertical agreements may include imposing fixed or minimum resale prices, export bans, or selective distribution agreements⁶⁹. Agreements that restrict competition by object may only be permitted if the economic benefits they generate, a portion of which will be passed on to consumers, are consistent with the legal exception of Article 101 (3).

However, many agreements between undertakings cannot be described as having an "object" of limiting competition, necessitating an assessment of their "effect" on actual and potential competition. As the Court observed in *MasterCard*, an effect on competition exists where the agreement is likely to have a significant negative influence on competition characteristics such as the price, quantity, and quality of products or services⁷⁰. The effect on competition considered is primarily the current effect, but possible consequences may also be taken into account⁷¹. The process of determining whether an agreement falls into the restriction by effect category may often be very complex, as multiple factors must be considered, including the agreement or the clause in the agreement that is said to produce the restrictive effect, an assessment of the relevant product or geographic markets in which the effects take place⁷², and the harm factor showing how and why the agreement has or is likely to have negative effects on competitiveness. Furthermore, it is also crucial to establish a counterfactual, which means that the competition in question, threatened by the agreement, should be judged within the actual setting in which it would occur in the absence of the disputed agreement⁷³.

2.2.5. *Effects on the trade between Member States*

The effect on the trade between Member States is particularly vital to define, as it limits the restriction outlined in Article 101 TFEU. This means that an "EU perspective" is added to the prohibition, since agreements are unlawful when, among other factors described above, they have some degree of cross-border effects inside the EU, significantly influencing commerce between Member States. The Court has determined that this criterion is met not only when there is an actual impact on cross-border commerce, but also when a prospective effect is identified⁷⁴. However, where the implications of an agreement or behavior are limited to one Member State, the EU Courts have no jurisdiction⁷⁵. The term "trade" does not include only the traditional definition of

⁶⁷ See Case C-29/83 and 30/83 *CRAM*, III para 4 and Case C-41/69 *ACF Chemiefarma*

⁶⁸ Case 56/65 *L.T.M.*, para 29

⁶⁹ Whish & Bailey (n. 46), p. 136 and Fig. 3.2

⁷⁰ Case C-382/12 *MasterCard*, para 93; The Commission in the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, explained that restriction by effect takes place when an agreement is likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality and variety, or innovation

⁷¹ Case C-1/12 *OTO*, para 71

⁷² Case C-234/89 *Delimitis*, para 13

⁷³ *MasterCard* (n. 70), para 161

⁷⁴ See Joined Cases 56 and 58/64 *Grundig/Consten*, para 6 of the Summary

⁷⁵ Case 22/78 *Hugin*, para 17

the exchange of goods and services across borders. All cross-border economic activity is covered, including the formation of agencies, branches, or subsidiaries in other Member States by undertakings. Thus, the effect on trade component is satisfied when an agreement disrupts the regular pattern of commerce between Member States, affecting the flow of goods and services or other relevant economic activities. Furthermore, trade could be affected by a particular practice, such as an agreement, even if it covers only the territory of one country⁷⁶, or if it gives rise to a cumulative effect, leading to, at least, a potential effect on cross-border trade between Member States.

2.3. The exemption: Article 101 (3) TFEU

A legal exception to the prohibition of 101 (1) TFEU is introduced by Article 101 (3) TFEU meaning that if certain criteria are satisfied an agreement concluded by two undertakings could be lawful. Agreements, decisions or concerted practices, or categories of agreements, decisions or concerted practices that satisfy the four conditions laid out by the wording of Article 101 (3) are covered by the scope of this exemption. The first and second conditions set that, the agreement under examination must contribute to improving the production or distribution of goods or to promoting technical or economic progress and that consumers must receive a fair share of the resulting benefit. The third condition is formulated negatively and dictates that the restriction of competition must be indispensable to the attainment of these objectives and, finally, the fourth precludes agreements that have the possibility of eliminating competition in a substantial part of the products in question. For the effective application of Article 101 (3), the Commission has published Guidelines on the application of Article 101 (3) of the Treaty, which set out an interpretation of how exemptions must be determined and provide guidance to national Courts and National Competition Authorities on how to apply Article 101(3) in individual cases. The application of these Guidelines is not automatic but the product of a “reasonable and flexible” examination in light of the circumstances specific to each case⁷⁷.

2.4. Article 102 TFEU

After establishing what Article 101 TFEU entails, the focus shall be shifted to Article 102 TFEU. This article bans undertakings from abusing their dominating position in (a substantial part of) the internal market in such a way that it interferes with the trade between Member States. Article 102 TFEU expresses the 'special responsibility' that undertakings with a dominant position have, as these undertakings may not be adequately restrained by other rivals⁷⁸.

Five conditions must be fulfilled for the prohibition of Article 102 TFEU to apply; one or more undertaking(s) must have a dominant position which is held within the internal market or a substantial part of it while engaging in practices constituting an abuse of its power. Lastly this abuse has to have an effect on interstate trade⁷⁹.

2.4.1. *Dominance and definition of a relevant market*

The concept of dominance is not defined in the Treaties, but has evolved through the Court's case law. In *United Brands*, the CJEU defined dominance as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained

⁷⁶ See Case 8/72 *Vereeniging van Cementhandelaren*

⁷⁷ Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 6.

⁷⁸ Case C-322/81 *Michelin*, para 57

⁷⁹ For the notion of the effect on the trade between member states see chapter 2.2.5. above.

on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers.⁸⁰ In *Hoffmann-La Roche*, the CJEU stressed that while this view of dominance does not prevent some competition, the dominating undertaking should be able to influence market competition circumstances⁸¹.

2.4.2. *How a relevant market is identified*

A two-step examination is required to establish whether an undertaking holds a dominant position. First, the appropriate relevant market must be identified in the form of product and geographic markets, following which it may be determined whether the undertaking has a dominating position in that market⁸². The goal of establishing the relevant market is to identify the competitors of the undertaking being investigated. The product market consists of goods or services that can be considered sufficiently interchangeable⁸³. To achieve product and service interchangeability, both demand and supply substitutability must be considered⁸⁴. The SSNIP-test is commonly used to assess demand substitutability, which asks what would happen if a product or service producer implemented a small but significant non-transitory price increase (a 'SSNIP'). If consumers migrate to other items as a result of the price increase, then these products are in the same product market. The relevant geographic market refers to a specific geographic area where a product or service is marketed and conditions are uniform enough to evaluate the impact of the undertaking's economic power⁸⁵. The Commission uses the 'hypothetical monopolist test' to define a geographic market. If a product's price increases in one area and a significant proportion of customers transfer to suppliers in another area, making the increase unprofitable, this indicates that the two places belong to the same geographical market⁸⁶.

After establishing the relevant market, it must be determined whether the relevant undertaking has a dominating position in that market. This can be accomplished by determining the market power of the undertaking. In this assessment, market shares are a useful first indicator of the importance of an undertaking in the relevant market⁸⁷. Market shares greater than 50% are typically thought to imply dominance, and in the absence of special circumstances, such a market share would be adequate evidence of the presence of a dominant position⁸⁸. Market shares that range from 20% to 50% would require the commission to collect supplementary support in order to establish dominance.

Another factor to consider when measuring market dominance is the prospect of potential competitors expanding or entering. Tariffs or quotas, economies of scale and scope, and the requirement to use an established distribution or sales network are examples of potential barriers to expansion or entry⁸⁹. The third important criterion in determining dominance is an analysis of the limits imposed by the bargaining power of the undertaking's clients⁹⁰. If consumers have

⁸⁰ Case 27/76 *United Brands*, para 65

⁸¹ Case 85/76 *Hoffmann-La Roche & Co AG*, para 39

⁸² Case C-6/72 *Continental Can*, para 32

⁸³ *Whish & Bailey* (n. 46), p. 26

⁸⁴ COM 97/C 372/03, paras 2 and 13

⁸⁵ *United Brands* (n. 80), paras 10-11

⁸⁶ *Whish & Bailey* (n. 46), p. 37

⁸⁷ COM 2009/C 45/02, para 13

⁸⁸ Case C-62/86 *AKZO*, para 60

⁸⁹ COM 2009/C 45/02, para 17

⁹⁰ *Ibid*, para 12

considerable negotiating power, even a company with a large market share may be unable to operate independently of them⁹¹.

2.4.3. *Abuse of Dominant position*

Article 102 TFEU does not prohibit an undertaking from holding a dominant position in a relevant market; rather, it is unlawful to abuse such a position. A dominant undertaking has a 'special obligation' not to allow its conduct to hinder undistorted competition on the internal market⁹². This means that certain conduct by dominant undertakings may be found illegal under Article 102 TFEU, although similar conduct by non-dominant firms does not raise any concerns under EU competition law. Subparagraphs (a) to (d) of Article 102 TFEU include examples of misuse, however this list is not exhaustive⁹³. According to the Hoffmann judgement, 'abuse' is an objective concept pertaining to the behavior of a dominant undertaking that decreases the degree of competition on the market through recourse to practices that are different from normal competition⁹⁴.

The Court's characterization of abuse as an objective term indicates that abuse can transpire regardless of the dominant undertaking's aim⁹⁵. A statement by the undertaking asserting the absence of intent to exploit its dominant position will not constitute a viable defense⁹⁶. Secondly, the Court asserted that dominating entities must avoid employing 'methods distinct from those that facilitate normal competition.'⁹⁷ raises the inquiry regarding the ways that regulate standard competition. In *Deutsche Telekom v Commission*, the Court clarified this assertion, stating that dominant enterprises must avoid practices 'beyond those that fall within the parameters of competition on the merits'.⁹⁸ In later cases, the Court has often employed the term 'competition on the merits'.⁹⁹ Merit-based competition may result in the exit of a less efficient enterprise, rendering it less appealing to consumers in terms of price, selection, quality, or innovation¹⁰⁰. The Commission provides examples of competition on the merits in its *Guidance on Article 102 Enforcement Priorities*. This encompasses providing reduced prices, enhanced quality, and a broader selection of new and improved products and services¹⁰¹.

The Court ruled in *Continental Can* that Article 102 forbids two kinds of abuse: exploitative abuse and exclusionary abuse. Although the authorities have not distinctly defined these two forms of abuse, it is evident that exploitative abuse pertains to actions that directly hurt consumers, such as when a dominating undertaking raises product prices or imposes unjust terms and conditions¹⁰². Exclusionary abuse pertains to the conduct of a dominating entity that indirectly detrimentally impacts customers by adversely influencing market structure¹⁰³. An instance of exclusionary abuse

⁹¹ *Ibid*, para 18

⁹² *Michelin* (n. 78), para 57

⁹³ *Case C-333/94 P Tetra Pak*, para 37

⁹⁴ *Hoffmann-La Roche* (n. 81), para 91

⁹⁵ Nicolas Petit, 'Intel, leveraging rebates and the goals of Article 102 TFEU', *European Competition Journal*, 2015, p. 26, 36

⁹⁶ *Whish & Bailey* (n. 46), p. 199

⁹⁷ *Hoffmann-La Roche* (n. 81), para 6

⁹⁸ *Case C-280/08 Deutsche Telekom*, para 173

⁹⁹ *C-209/10 Post Danmark*, para 22; *Case C-413/14 P Intel*, para 134

¹⁰⁰ *Post Danmark* (n. 99), para 22

¹⁰¹ COM 2009/C 45/02, para 5

¹⁰² *Whish & Bailey* (n. 46), p. 210

¹⁰³ Hans Wolfgang Friederiszick & Linda Gratz, *Hidden Efficiencies: On the Relevance of Business Justifications in Abuse of Dominance Case*. *Journal of Competition Law & Economics*, 2015, p. 671-674

is anti-competitive foreclosure, which transpires when a dominating entity obstructs potential competitors from joining the market, therefore diminishing customer choice and elevating prices in the medium run¹⁰⁴. The Commission's Guidance on Article 102 Enforcement Priorities outlines the typical approach the Commission takes towards exclusionary conduct, including variables such as the dominant entity's position, market conditions, and evidence of abuse¹⁰⁵. A last argument concerning abuse is that dominance, abuse, and its ramifications do not need to occur within the same market. The scope of Article 102 covers the possibility of a dominant enterprise operating in two distinct markets, which may engage in activities in one market to gain an advantage in the other¹⁰⁶.

Unlike Article 101 TFEU, which provides the Article 101(3) exemption, Article 102 TFEU does not include any exemptions. Undertakings may present 'objective justifications' for their actions, and if these justifications are accepted, their conduct is deemed non-abusive, thus not violating Article 102 TFEU. This can be achieved by either demonstrating that the conduct is objectively necessary or by showing that the conduct generates substantial efficiencies that outweigh any anticompetitive effects on consumers¹⁰⁷. In any case, the conduct must meet the indispensability and proportionality principles relating to the object pursued by the dominant undertaking, in a similar fashion to Article 101(3). The sole example for an objectively necessary conduct provided by the Commission in its Guidance Paper pertains to conduct essential for ensuring health or safety considerations. Nonetheless, the Commission emphasizes that it is typically the responsibility of public authorities to establish and enforce such standards¹⁰⁸. Consequently, it seems very challenging to rationalize and ultimately allow abusive conduct based on these criteria. In *CEAHR*, however, the Commission concluded that the probability of violating Article 102 TFEU was minimal. This assessment considered that the refusal to supply could be justified by objective reasons, including the pursuit of productivity gains, the maintenance of brand image and product quality, the prevention of counterfeiting, and the heightened technical complexity of mechanical watches, necessitating high-quality repairs. On the contrary, in the decisions regarding *Google Search (Shopping)* and *Google (Android)*, the General Court assigned limited significance to the objective justifications presented by the undertakings, indicating the substantial threshold required for the acceptance of such justifications¹⁰⁹. Secondly, conduct may be justified by the efficiency defense, as established by the Court in *Post Danmark I*. The Court characterized this evaluation as a 'balancing of the positive and negative impacts of the practice in question on competition.'¹¹⁰ For a defense to be successful, four cumulative criteria must be met. 1) Efficiencies have been, or are likely to be, achieved as a result of the conduct; 2) The conduct is essential for the realization of those efficiencies; 3) The anticipated efficiencies resulting from the conduct surpass any potential negative impacts on competition and consumer welfare in the relevant markets; 4) The conduct does not eradicate effective competition by eliminating all or most existing sources of actual or potential competition¹¹¹.

¹⁰⁴ Whish & Bailey (n. 46), p. 215

¹⁰⁵ COM 2009/C 45/02, para 20

¹⁰⁶ Whish & Bailey (n. 46), p. 216, *Tetra Pak* (n. 93), para 27

¹⁰⁷ COM 2009/C 45/02, para 28

¹⁰⁸ COM 2009/C 45/02, para. 29

¹⁰⁹ Johannes Persch, 'Google Shopping: The General Court takes its position', *Kluwer Competition Law Blog*, 2021

¹¹⁰ *Post Danmark I* (n. 99), para 42

¹¹¹ COM 2009/C 45/02, para 30

The EU courts have adopted a restrictive interpretation of efficiency defenses under Article 102 TFEU, and although it seems unlikely that an efficiency claim to justify a violation of Article 102 can provide an exemption to the abusive conduct, the new draft guidelines published by the Commission may direct the Court towards a more lenient approach as the efficiency defense is similar to that outlined in Article 101(3) TFEU. It is necessary to show that the exclusionary effects are offset or surpassed by efficiencies that also advantage consumers. If a sufficient connection exists between consumer benefits and potential exclusionary effects, and the conduct is deemed proportionate¹¹².

2.5. Competition Law and SGBs

As it was established above, the Court defines an 'undertaking' as any entity involved in economic activity, irrespective of its legal status or financing method. SGBs may function as entities engaging in economic activities, such as the sale of broadcasting rights, thereby qualifying as undertakings. Additionally, an SGB may also constitute an association of undertakings that consolidates a group of members, such as clubs and players, engaged in economic activities. Although some members may not engage in economic activities, it is essential that at least a portion of the members participate in such activities and qualify as undertakings under Article 101 TFEU¹¹³. Thus, it is essential for the sport to attain a minimum level of commercialization, even when the athletes maintain amateur status¹¹⁴. However, as also stated above, the notion of an undertaking does not require a profit-making intention, and non-profit organizations are also included within this framework¹¹⁵. In general, the SGB represents an undertaking or an association of undertakings, thereby activating the applicability of Articles 101 and 102 TFEU.

Competition law investigations frequently focus on the provisions within the statutes of SGBs. These statutes govern multiple domains, encompassing participation rules, game regulations, and internal organizational protocols. Certain factors influence the unique attributes of sports more significantly than others, thereby presenting greater challenges for the analysis of Competition Law.

Initially, SGBs are responsible for setting rules governing the game, conditions for participation, and associated disciplinary measures. The economic aspect appears to be minimal, as these are closely associated with the practice of the sport. Additionally, there are regulations governing the internal organization and behavior of members off the pitch but within the association. A diverse array of rules exists, with some recently contested, including arbitration clauses for sports disputes, limitations on club ownership, and regulations regarding homegrown players¹¹⁶.

¹¹² Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, para 58

¹¹³ Isa Rosin (n. 18), p. 20

¹¹⁴ Case T-193/02 *Piau*

¹¹⁵ Ben Van Rompuy, 'The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations', *Maastricht Journal of European and Comparative Law*, 2015, p. 179, 184.

¹¹⁶ See Case C-680/21 *Royal Antwerp Football Club*

Conversely, certain provisions clearly aim to achieve economic objectives, which are less related to the practice of sport¹¹⁷. An example of these regulations, previously examined by the European Commission, is the exclusive marketing of television rights¹¹⁸. Additionally, regulations governing player agents are relevant to activities that do not directly influence gameplay and primarily target entities outside the SGBs¹¹⁹. Furthermore, the Commission regards regulations related to the sale of tickets for sporting events, advertising practices, and the transfer of athletes as distinctly economic activities¹²⁰. Lastly, there exists a category in which the conduct of members beyond the frameworks of the SGBs is governed. The rules in question are especially relevant to the ESL and ISU cases, specifically concerning the prior authorization of competing sporting events and the prohibition of athlete participation in these events, along with the associated sanctions. The SGBs bind athletes, clubs, staff, and officials to their activities, raising significant concerns regarding compliance with competition law due to their similarity to non-competitive or exclusive clauses.¹²¹ The various provisions of SGBs may be relevant from a competition law perspective, with interests that can be either sport-specific or economic in nature. This should be considered in the application of Articles 101 and 102 TFEU, necessitating a suitable and adaptable case-by-case analysis.

2.5.1. The development of Case Law on SGBs and Competition

2.5.1.1. The development until 2006

In the past two decades, there has been increased interest in examining the compatibility of sports associations' rules with European law. Prior to that, a principle established by the CJEU in 1974 was in effect for an extended period, which stipulated that purely sporting regulations were not included within the scope of application¹²². This concept was based on the idea that sporting regulations, including the rules of the game, exclusively cater to sporting interests and are not amenable to scrutiny under European law¹²³. This general exception was applicable until the 1990s. Consequently, there have been few instances to date in which the regulations of sports associations have undergone legal scrutiny. In 1995, the CJEU applied internal market law to a sporting regulation for the first time, thus rejecting the previously applicable general exception¹²⁴. The progressive professionalization of football, as a leader among European sports, along with its resulting economic significance, was acknowledged for the first time. The Bosman ruling was pivotal and influenced the policy of both the Commission and the Court within the sports sector. In subsequent years, there was an increase in notifications and complaints regarding the regulations of sports associations, prompting the Commission to intensify its involvement in investigations within the sports sector as observed in the section regarding the EMOs. An example is the inquiry by the Commission into the Fédération Internationale de l'Automobile (FIA), the SGB regulating the racing tournament Formula 1, regarding its licensing monopoly and prohibition of competing

¹¹⁷ Pablo Ibáñez-Colomo, 'Competition Law and Sports Governance: Disentangling a Complex Relationship', *World Competition* 45 (3), 2022, p. 333

¹¹⁸ *Ibid.*, p. 347

¹¹⁹ See Case C-209/23 *RRC Sports* (pending as of 2024) and Case C-428/23 *ROGON and Others* (pending as of 2024)

¹²⁰ COM 2007/391 final, ch. 1

¹²¹ Rusa Agafonova (n. 21), p. 91; See also Rusa Agafonova, 'ISU and Superleague Judgements: Sports Governance in the Market Driven Era', *The International Sports Law Journal*, 2024

¹²² Case 36/74 *Walrave and Koch*

¹²³ Ben Van Rompuy, 'A Motor of Change? EU Antitrust Law and Sports Governance from Meca-Medina to the European Superleague', *Antitrust Law and Sport Governance: The next Frontier?*, Routledge, 2022, p. 29

¹²⁴ Case C-415/93 *Bosman*

events¹²⁵. The investigation concluded with a settlement, wherein the FIA opted to delineate the regulatory function from the commercial aspect, thereby enhancing transparency. Although the Commission did not address the substance of the FIA's rules, the procedure illustrates how the SGBs can resolve conflicts of interest independently.

The Piau case was a turning point for the recognition of SGBs, and especially football federations as undertakings. The General Court was tasked with determining whether FIFA's regulations, which mandate that agent licenses for players be obtained from the relevant national football association, violated Articles 81 (now 101) and 82 (now 102) of the TFEU. The General Court ruled that football clubs are undertakings, and as a result, FIFA and national football associations, the organizations that oversee the sport, are also associations of undertakings¹²⁶. Moreover, the GC determined that the players' agent license in question inherently impacts competition under Article 101 since it creates a barrier to entry for the economic activity of acting as a player's agent. As a result, the license need can only be approved provided that the requirements outlined in Article 101(3) TFEU are met¹²⁷. The GC also argued that the Commission did not err in considering the restriction's potential exemption under Article 101(3)¹²⁸.

Although the case was not related to sports, the Wouters judgment established a three-stage doctrine to clarify which non-competitive interests are exceptionally taken into account in the examination of Art. 101 TFEU¹²⁹. According to the Wouters doctrine, the regulations of an SGB must aim toward a legitimate objective. The initial assessment determines if the purpose sought by the SGBs should be considered. In the subsequent stage, the potentially anti-competitive regulation is analyzed to determine if it is intrinsic to the legitimate purpose. In this regard, a strong correlation must exist between the measure and the target, which must be actively and efficiently pursued¹³⁰. The regulation must be proportionate, meaning it should not exceed what is necessary to achieve the aim. The proportionality of each rule must be assessed individually through a case-by-case consideration of the relevant facts and circumstances. The Wouters doctrine represents a specific iteration of the 'ancillary restraints' doctrine¹³¹. This is a recognized dogmatic principle whereby certain provisions are excluded from the application of Art. 101 (1) TFEU, as they, despite being restrictive to competition, are deemed ancillary agreements essential for the operation of legitimate main rules¹³².

Here an important decision must be made. The Wouters doctrine is not replacing the exception outlined in Article 101(3) TFEU. The two exceptions can be invoked independently due to three fundamental differences. Article 101(3) TFEU serves as a justification that is assessed only subsequent to the identification of a breach of Article 101(1) TFEU. The Wouters doctrine is incorporated into the analysis of competition restrictions; if the three conditions are satisfied, such

¹²⁵ European Commission, Notification by FIA/FOA of agreements relating to the Formula One World Championship (2001/C 169/03)

¹²⁶ *Piau* (n. 114), paras 71, 78

¹²⁷ *Ibid*, para 101

¹²⁸ *Ibid*, para 104

¹²⁹ *Wouters* (n. 51), para 97

¹³⁰ Miguel Maduro, 'A New Season – Will it also be a New Beginning for Sports and EU Law?', *Weekend EU Law Live*, 2023, p. 7

¹³¹ A similar point is made also on the Opinion of AG Rantos in his opinion on the ESLC Case, see chapter 2.2.1.; See also Guillermo Íñiguez, *European Super League Company and the (New) Law of European Football*, *European Papers* vol. 9, 2024

¹³² See Case C-382/12 P *MasterCard*

a restriction is deemed permissible. Secondly, the two exceptions consider effects that differ in nature. Article 101(3) TFEU focuses solely on economic or competition-enhancing effects, while the Wouters doctrine, as previously outlined, considers only non-economic benefits. Consequently, the scopes of application do not overlap. Under Article 101(3) TFEU, the conditions for justification are explicitly outlined and must be satisfied. The three-step test is notably more flexible, allowing for the assessment of effects on a case-by-case basis¹³³. Article 101(3) TFEU mandates appropriate consumer participation, establishing a more stringent requirement compared to the general proportionality test outlined in the Wouters doctrine¹³⁴. To enhance convergence between these two instruments, there are proposals for the Wouters doctrine to incorporate the feature from Article 101(3) TFEU that competition must not be eliminated¹³⁵. In general, Art. 101 (3) TFEU is typically assessed in a subsequent step, allowing SGBs the opportunity to invoke this justification should the court dismiss the Wouters exception and a justification under Art. 101 (3) TFEU is challenging to establish because of the strict conditions that SGBs must demonstrate¹³⁶.

In 2006, the Court issued its first ruling regarding the application of competition law and the Wouters to SGB rules in the case of *Meca-Medina and Majcen v Commission*¹³⁷. In the early 2000s, concurrent with advancements in the Commission and the courts, the SGBs proposed the establishment of block exemptions for specific agreements under competition law¹³⁸ however this implementation did not occur; instead, the CJEU formulated an alternative concept in *Meca-Medina and Majcen v Commission*, which will be discussed subsequently.

2.5.1.2. *Meca – Medina: Accountability reaches SGBs*

As stated above the Court decided in 2006 on a case concerning two professional swimmers who contended that articles 81 and 82 of the EC Treaty (now articles 101 and 102 TFEU) were violated by the anti-doping regulations implemented by the International Olympic Committee (IOC) and the Fédération Internationale De Natation (International Swimming Federation, FINA). After establishing that a sporting rule set by an SGB remains within the purview of the Treaty even if it is purely of sporting nature, it is required to determine if the regulations controlling a sport that is considered an economic activity and so falls under the purview of the Treaty comply with Articles 56, 101, and 102 TFEU¹³⁹. The Court ruled, citing the Wouters case and applying the doctrine of restraints in the pursuit of legitimate objectives, that it is not possible to evaluate a rule's compatibility with EU competition law in an abstract manner and that not all agreements or decisions that restrict competition fall under the purview of Article 101(1) TFEU. Before applying Article 101(1) to sports, one must consider the decision's goals and the larger context in which it was made. The question of whether the resulting impacts that restrict competition are inherent in pursuing those goals and if they are proportionate to them must then be addressed¹⁴⁰. The CJEU

¹³³ Jan Zgliniski, 'Can EU Competition Law save Sports Governance?', *International Sports Law Journal*, 2024, p. 477

¹³⁴ Ben Van Rompuy, 'EU Court of Justice Delineates the Scope of the Wouters Exception', *Kluwer Competition Law Blog*, 2024

¹³⁵ *ibid*

¹³⁶ European Commission, 'Staff Working Document – The EU and European Communities Sport: Background and Context – Accompanying document to the White Paper on Sport, Annex I, ch. 2.1.6.

¹³⁷ Case C- 519/04 *Meca-Medina*

¹³⁸ Walter S Palmer, 'Antitrust Law, Sport and the European Social Model' in Jacob Kornbeck, 'Antitrust Law and Sport Governance: The next Frontier?', Routledge, 2023, p. 129

¹³⁹ *Meca-Medina* (n. 137), para 27

¹⁴⁰ *Ibid*, para 42

ruled in the Meca-Medina case that anti-doping regulations are intrinsic and appropriate given the organization's justifiable goals and the appropriate conduct of sports.

2.5.1.3. *MOTOE*: The introduction of Article 102 in sports

The question in *MOTOE* was whether a non-profit-making association that has the power to authorize the organization of motorcycling events, but also organizes such events in a commercial manner itself, falls within the scope of Articles 102 and 106 TFEU. The Court held that such an organization constitutes an undertaking, and it was for the national court to decide whether it had a dominant position¹⁴¹. Moving on, the Court highlighted that a system of undistorted competition can only be guaranteed if equality of opportunity is secured as between undertakings¹⁴². When an undertaking which itself organizes and commercially exploits specific events, also has the power to authorize such events organized by other entities, such power can give rise to a possible conflict of interests and places that entity at an obvious advantage over its competitors as it can deny other operators access to the relevant market. When such power is not made subject to restrictions, obligations and review, it could lead the entity entrusted with giving that consent to distort competition by favoring events which it organizes or those in whose organization it participates, infringing Article 102 TFEU¹⁴³. In *MOTOE*, the CJEU for the first time applied Article 102 in the field of sports and, specifically, to a prior authorization scheme as is the case with the rules set by UEFA and FIFA examined in the ESL case.

2.5.2. *ISU and Royal Antwerp*: The December EU sports law and policy trio

2.5.2.1. ISU: The “sister judgment” of ESL?

In the International Skating Union (ISU) case, two Dutch ice skaters filed a complaint with the Commission, claiming that the eligibility regulations of the ISU, the only international sports federation for ice skating, violate Articles 101 and 102 TFEU by inhibiting skaters from competing in events not sanctioned by the ISU.

The regulations concerning the prior authorization of additional skating events and the eligibility of athletes in ISU-organized competitions. The prior authorization regulations are well called as they establish a method to secure the preliminary approval of ISU for each competition involving ISU members. The organizers of a competing competition must provide the ISU with financial, technical, commercial, and sporting information, including the event venue, prize value, business plan, budget, and television coverage, along with a declaration affirming acceptance of the ISU's Code of Ethics. The eligibility criteria related to an athlete's qualification to participate in an ISU-organized event but athlete would forfeit their eligibility, either temporarily or permanently, by participating in a non-sanctioned event. Before 2016, the eligibility criteria stipulated that they were "established for the sufficient safeguarding of the economic and other interests of the ISU, which allocates its financial revenues for the management and advancement of [...] sport disciplines and for the support and benefit of [its] Members and their Skaters"¹⁴⁴. Since 2016, the eligibility criteria have shifted from economic interests to stipulating that “the condition of eligibility is established for the adequate protection of ethical values, jurisdictional objectives, and

¹⁴¹ Case C-49/07 *MOTOE*, paras 29-36

¹⁴² *Ibid*, para 51

¹⁴³ *Ibid*, para 52

¹⁴⁴ Case C-124/21 P *International Skating Union*, para 14

other legitimate respective interests” of the association, “which allocates its financial revenues for the administration and development of ISU sport disciplines and for the support and benefit of [its] Members and their Skaters.”¹⁴⁵

The main point of both regulations is clear: an athlete must decide between competing in ISU events or in non-sanctioned third-party activities. This complicates the organization of skating events without ISU's prior approval, as ISU oversees the majority of significant skating competitions, and athletes—essential participants in any sporting event—are discouraged from participating in alternative competitions due to the risk of ineligibility for ISU events. The implementation of these regulations may constitute a total exclusion of all rival competitions by establishing an exclusivity for athletes within the ISU framework, thus obligating them to participate just in competitions organized or sanctioned by the ISU and its recognized third parties. Additionally, as the complainants indicated, no third-party organized event received approval unless it was subsequently assumed by an ISU national member organization¹⁴⁶. Consequently, the primary concern in ISU is the parameters under which a sports organization can structure its activities to effectively exclude practically all competitive events.

In the proceedings before the General Court, the GC recognized that safeguarding integrity is a “legitimate objective”¹⁴⁷; nonetheless, the penalties imposed by the SGB in this instance exceeded what is essential to achieve that objective¹⁴⁸. According to the GC the eligibility criteria were disproportionate and hence unjustifiable. Consequently, the General Court determined that the Commission correctly concluded that the eligibility restrictions represent a restriction of competition by object under Article 101 TFEU¹⁴⁹.

The similarity with the ESL case is obvious. The two cases are connected by a controversy in the conduct of the respective SGBs managing their dual functions as both regulators and economic participants. In both cases, the rules under consideration exhibit comparable effects and the Court applies competition law to solve this conflict. An important part is also the existence of an authorization requirement for competing organizers and a system of sanctions for members (athletes, clubs) to safeguard its position as an organizer of sporting events against the potential entry of competitors into the market for organizing such events. As the two SGBs are challenged by other stakeholders via the establishment or involvement in breakaway leagues rules of competition and more specifically Articles 101 and 102 TFEU may be violated prompting the Court to provide a detailed commentary on the application of competition law in the realm of sport, marking its first such analysis since 2006.

In the recent judgment, the Grand Chamber confirmed the approach of the Commission and General Court stating that Articles 101 and 102 TFEU apply to the same conduct and that “therefore” based on consistency “it must be held that such a power [held by ISU] may be regarded as having as its ‘object’ the prevention, restriction or distortion of competition, within the meaning of Article 101(1) TFEU”¹⁵⁰. The Court support this view referring to its internal market case-law finding that the fundamental economic freedoms of free movement of workers and capital apply

¹⁴⁵ Ibid, para 17

¹⁴⁶ Ibid, para. 7

¹⁴⁷ Case T-93/18 *International Skating Union*, para 102

¹⁴⁸ Ibid, para 103

¹⁴⁹ Ibid, para 120

¹⁵⁰ *ISU* (n. 144), para 128

but also to sport associations. The principles of public competition law can be applied analogously to sports associations and stated that “[...]rules are thus able to be used to allow or exclude from that market any competing undertaking, even an equally efficient undertaking¹⁵¹, or at least restrict the creation and marketing of alternative or new competitions in terms of their format or content. In so doing, they also completely deprive athletes of the opportunity to participate in those competitions, even where they could be of interest to them [...]. Ultimately, they are such as to completely deprive spectators and viewers of any opportunity to attend those competitions or to watch a broadcast thereof.¹⁵²”

The Court emphasized not only in the economic harm caused to the supply side (athletes) but also to the demand side (consumers). The next step involves the Court applying the established legal standard to the present case concerning the ISU rules. Not surprisingly, the Court does not prohibit ISU from organizing events or from mandating that event organizers obtain prior authorization, nor does it prevent ISU from imposing penalties on skaters who fail to adhere to its regulations. However, substantive and procedural safeguards must be implemented on ISU regulations¹⁵³, requirements that also play a crucial role in the ESL judgment and will be examined in the following chapter.

2.5.2.2. Royal Antwerp Football Club¹⁵⁴

The third judgment, issued on December 2023, also addressed the statutes of UEFA; however, the rules under consideration differ. The home-grown player (HGP) rule, under review by the referring Belgian court, mandates that clubs in European competitions maintain a minimum number of players who were trained at a national club during their youth, irrespective of the players' nationalities. The court refrained from addressing the substantive issues regarding compliance with competition rules, as this responsibility lies with the national court for examination. It established guidelines and criteria consistent with the aforementioned judgments for evaluation by the national court. A notable distinction from other regulations is that the home-grown player rule aims to ensure adequate training for young athletes, which may represent a more compelling legitimate objective for an exemption analysis.

The main theme of this decision is a clear recognition of the specificities inherent to the sport¹⁵⁵. The court adheres to the standards established in the ISU and ESL decision regarding the HGP rule, but adds that it is significant that the regulation encourages football clubs to support young players. This positively impacts competition in youth player training, ultimately resulting in an elevated overall level of play and economic advantages. The promotion of young players serves a critical social and educational role and may constitute a valid objective in the public interest¹⁵⁶. This case exemplifies the interconnection between the competitive and non-competitive dimensions of such regulations.

¹⁵¹ The reference to the concept of the as efficient competitor seems out of place here; See Monti (n 31), p. 26

¹⁵² ISU (n 144), para 146

¹⁵³ Monti (n 31), p. 26

¹⁵⁴ Case C-680/21 *Royal Antwerp Football Club*

¹⁵⁵ Aurélie Villanueva, ‘Accounting for the Specificities of Sport in EU Law: Old and New Directions in the 21 December 2023 Judgements’, *International Sports Law Journal* 2, 2024, p. 426-427

¹⁵⁶ *Royal Antwerp Football Club* (n. 154), para 144

B. FIFA and UEFA vs. EU Competition Law: An anti-competitive match?

"By my opinion, this idea is a spit in the face of all football lovers, and our society as well, so we will not allow them to take it away from us." Aleksander Ceferin, UEFA president

After establishing the status of FIFA and UEFA as undertakings, this chapter utilizes the above established framework of EU competition law as applied to the sports sector and the judgment of the Court in the ESLC case to assess FIFA's and UEFA's prior authorization regulations under the scope of Article 101 TFEU. This involves examining the presence of a restriction under Article 101(1) TFEU, followed by a discussion of various reasonable aims that may justify such a restriction and a possible application of the legal exception under Article 101(3) TFEU to the prior authorization rules.

1. Relevant market

Before evaluating those rules, it is essential to identify the relevant market in order to assess the possibility of a dominant position under Article 102 TFEU and find whether market access is obstructed. Although the Court does not mention this directly, it is assumed that the relevant geographical market of the ESL is the European market considering all the facts of both ESL's and UEFA's geographical area of operation. At present, UEFA administers the Champions League, Europa League, and Conference League in this market including all of Europe¹⁵⁷. As stated in the introduction of this dissertation, all 15 founding clubs of the ESL, hailed from Europe, as this league offered an alternative to the UCL. It can be inferred that football consumers across Europe will be engaged, given the Founding Clubs are some of the premier football clubs in the region. Consequently, the relevant geographical market is identical and should be defined as the European football market.

However, the unique characteristics of professional sports can complicate the defining of the relevant product market¹⁵⁸. First of all, product market in professional football is thought to be composed of three dimensions: exploitation, contest, and supply¹⁵⁹. The exploitation market encompasses the sale and utilization of broadcasting rights, whereas the contest market relates to the sporting events including competition between two or more clubs. In the competitive market, the unpredictability of outcomes and the dynamics of promotion and relegation are significant elements but the core of the sports product primarily centers on the players, trainers, and medical staff, without whom the product would not be feasible. The supply market consists, therefore, of the transactions involving the selling and acquisition of players. The football transfer system enables clubs to regulate player interchangeability by establishing their valuation. The three marketplaces are interrelated yet can be differentiated based on the context.

¹⁵⁷ Valerie Kaplan, *UEFA Financial Fairplay Regulations and European Union Antitrust Law complications*, *Emory International Law Review*, 2015, p. 843

¹⁵⁸ Alexander Egger, Christine Stix-Hackl, 'Sports and competition law: a never-ending story?', *European Competition Law Review* 23, p. 81

¹⁵⁹ *Ibid.*; for a similar reasoning see also *MOTE* (n. 136), para 33

Having these facts in mind, the relevant market about the European Super League appears to be the organization of football competitions in Europe¹⁶⁰. This market is linked to the exploitation market, as the organization of football involves the selling and distribution of advertising and broadcasting rights. Although in this market, teams do not directly compete with FIFA and UEFA, the unification of clubs to establish a European Super League would provide direct competition¹⁶¹. In order to reach this conclusion, a SSNIP test shows whether consumers would transition to the ESL if the prices of the Champions League, Europa League, and Conference League were to rise. Predicting audience attendance is challenging due to the presence of many spectator demographics. Some individuals watch the highest quality games available, irrespective of the clubs involved in the league, and these viewers may transition to the ESL if it provides superior game quality. Nonetheless, some supporters possess an emotional attachment to 'their' team and will exclusively follow the league in which their club competes, irrespective of the cost. The huge outcry from fans after the ESL announcement indicates that some supporters of clubs involved would not transition to the ESL¹⁶².

This may, however, differ for sponsors and broadcasting organizations. The substantial financial implications associated with the ESL may incentivize these consumer groups to transition to the ESL, particularly if the costs of the Champions League, Europa League, and Conference League escalate or, and a more probable situation, if the ESL hands out better commercial deals. The exploitation of television rights constitutes the primary source of revenue for UEFA. Calculating these findings and in accordance with the Courts judgment, the ESL will occupy the same relevant market as the Champions League, Europa League, and Conference League organized by UEFA and FIFA, despite the challenges in forecasting spectator behavior. Utilizing a simplified SSNIP test to evaluate demand substitutability in the contest market indicates that clubs are inclined to transition from UEFA leagues to the ESL, particularly given that the guaranteed revenue from ESL participation will significantly exceed the potential earnings from the Champions League, Europa League, or Conference League¹⁶³. This demonstrates the product's substitutability in this setting, thereby positioning both entities inside the same market.

It can be inferred that the ESL would integrate into the existing relevant market, specifically the market for organizing transnational club football leagues in Europe, together with the economic exploitation of such leagues. This parallels the relevant markets delineated by the Commission in both *MOTOE* and *ISU*, which similarly pertained to the organization of athletic events and the commercial exploitation thereof¹⁶⁴. The European Courts have validated the Commission's market assessment in these instances, and in *MOTOE*, the CJEU ruled that the 'two categories of activity [organization and commercial exploitation] are not interchangeable but are functionally complementary.'¹⁶⁵. Lastly the cross-border character of European football competitions and the fact that European football competitions are a billion-dollar industry, are clear indicators that a

¹⁶⁰ Luca Marruzzo, 'UEFA's monopoly v the European Super League: chronicle of an already written ending?', *European Competition Law Review* 43(5), 2022, p. 219

¹⁶¹ *ibid*

¹⁶² Many such cases exist in European football with a part of a club's fans even switching their loyalty and founding new clubs after a controversial 'commercialization' decision by the original club's ownership; See PAC Omonia and AFC Wimbledon as examples of fan-owned protest clubs.

¹⁶³ Justin Birnbaum, 'European Super League Aims To Swipe Champions League's \$2.4 Billion In TV Money and Bury UEFA', *Forbes*, 2019

¹⁶⁴ *MOTOE* (n. 141), para 33 and *ISU* (n. 144), paras 29 and 88

¹⁶⁵ *MOTOE* (n. 141), para 33

potential restriction of access and a subsequent distortion of competition will have a sizable effect on the economic activity in the Union a point made by the referring Madrid Court and confirmed by the CJEU¹⁶⁶.

2. Application of Article 101 (1) TFEU in the FIFA-UEFA rules

2.1. FIFA and UEFA as undertakings and restriction of Competition

The analysis of the typical requirements before deciding on whether FIFA's and UEFA's prior authorization rules violate Article 101 TFEU, although essential, seems to be rather simple for the Court. As stated above¹⁶⁷ the CJEU has ruled determined in Piau that FIFA, its member associations, and football clubs may be classified as (associations of) undertakings under EU competition Law and again in ISU, the Commission determined that ISU represented an association of undertakings, as it engages in 'commercial activities related to the organization and marketing of international skating events'¹⁶⁸. Consequently, the regulations outlined in their statutes constitute decisions made by associations of undertakings as defined by Article 101 TFEU. Additionally, the refusal to authorize the ESL, given that FIFA and UEFA are cross-border organizations and the ESL is established by football clubs in various Member States, is likely to significantly impact trade among those Member States¹⁶⁹.

2.2. Are the FIFA-UEFA rules restrictive by object?

2.2.1. *The AG's opinion*

A much more interesting and impactful part of the decision concerns the 'object or effect' of restriction of competition as a result of the anticompetitive behavior of FIFA and UEFA. As AG Rantos observed, it is important to emphasize that, to fall under the prohibition established in Article 101(1) TFEU, an agreement must possess as its 'object or effect' the limitation of competition. The notion of 'restriction by object', according to the AG requires a stringent interpretation and is applicable solely to certain concerted practices among undertakings that, by their nature and considering their provisions, objectives, and the relevant economic and legal context, exhibit a sufficient degree of detrimental impact on competition. Consequently, it may not be necessary to evaluate their effects, as certain forms of coordination among undertakings are inherently considered harmful to the proper functioning of normal competition¹⁷⁰.

AG Rantos commenting on the alleged infringements of Article 101 TFEU likened UEFA's pre-approval and sanctioning regulations to a framework of "non-competition and exclusivity clauses accompanied by sanctions" found them not to be restrictive to competition by object and, after an analysis of the possible effects on the relevant market, categorized them as being "by effect" restrictive of competition¹⁷¹. This, however, is in turn bypassed by the application to FIFA and UEFA rules of the "ancillary restraints" doctrine first developed in Wouters¹⁷² and subsequently applied to sport in Meca-Medina. He argued that this conduct can be justified through the pursuit of certain legitimate objectives by the SGBs, such as participation based on sporting

¹⁶⁶ European Super League Company (n. 3), para 157

¹⁶⁷ Chapter 2.5.1.1.

¹⁶⁸ Notably the Court only cites the *MOTOE* case; see European Super League (n.3), para 113

¹⁶⁹ See also European Superleague Company (n. 3), Opinion of AG Rantos, para 60

¹⁷⁰ *Ibid*, para 62

¹⁷¹ *Ibid*, paras 63-78

¹⁷² See chapter 2.5.1.1 above

results, equal opportunities and solidarity upon which the pyramid structure of European football is founded¹⁷³. The preservation of these principles combined with prevention of freeriding by the ESL's clubs which could take advantage of the rights and advantages linked to membership and UEFA, without however being bound by UEFA's rules and obligations"¹⁷⁴, prompted the AG to take a radical stance of complete FIFA-UEFA control over European football. Players would be the only parties benefiting from a protective safeguard as the AG made a distinction regarding the proportionality of the sanctions imposed.

According to AG Rantos, sanctions may be considered proportionate when imposed on clubs; however, sanctions targeting players associated with these clubs, especially when it comes to national team participation, may be deemed disproportionate, as players "were not parties to the decision to establish the ESL" and thus "do not seem to have engaged in any misconduct concerning UEFA regulations."¹⁷⁵

2.2.2. The Court's findings and evaluation - Analysis of the "by object" restrictions

The Court in its ruling takes a different course. After a long analysis of the relevant concepts of restriction by object and by effect¹⁷⁶ the Court using a similar wording as it did in ISU¹⁷⁷ to find that the actions of FIFA and UEFA are restrictive "by object". This violation "by object" is applied here because, despite the sport-specific factors that may support such a framework, these contextual elements are inadequate to justify the lack of substantive criteria and detailed procedural rules governing the application of this framework by UEFA and FIFA¹⁷⁸, thus rendering the rules vulnerable to abuse by FIFA and UEFA, which "become the gatekeepers to the very market in which they compete"¹⁷⁹. In other words, the Court found that the prior authorization rules set by FIFA and UEFA and their ability to impose sanctions, give them the power to authorize, control and set the conditions of access to the market concerned for any potentially competing undertaking. By doing so the SGBs are able to determine not only the degree of competition that may exist on the European football market but also the conditions in which that potential competition may be exercised¹⁸⁰. Additionally, due the absence of a clear framework, according to the Court, FIFA and UEFA could potentially ban, without sufficient justification, any breakaway competition which offers a new format and which complies with the "principles, values and rules" of European football¹⁸¹. To seal the anticompetitive effect the Court also adds the consumer protection element by affirming that the practices of FIFA and UEFA can ultimately deprive spectators and television viewers of the opportunity to attend those competitions or to watch the games broadcast¹⁸².

On the other hand, the Court does not explicitly say that FIFA and UEFA cannot set prior authorization rules or that it is forbidden to impose penalties and sanctions on the parties (clubs and players) that do not comply with these rules. The key difference is on the novelty of substantive

¹⁷³ *European Superleague Company* (n. 3), Opinion of AG Rantos, para 110

¹⁷⁴ *Ibid*, para 107

¹⁷⁵ *Ibid*, paras 118-112

¹⁷⁶ *European Superleague Company* (n. 3), paras 155-170

¹⁷⁷ ISU (n. 144), paras 98-110

¹⁷⁸ *European Superleague Company* (n. 3), para 175

¹⁷⁹ Guillermo Íñiguez (n. 132), p. 6

¹⁸⁰ *European Superleague Company* (n. 3), para 176

¹⁸¹ *ibid*

¹⁸² *Ibid*, para 177

and procedural safeguards that must be followed by SGBs regarding this issue¹⁸³ Substantive safeguards include criteria for parties interested in providing competing sporting event organization which are transparent, clear and precise preventing their arbitrary use. By analogy with the recent ISU judgment, it is apparent that such criteria should ensure the “holding of sporting competitions based on equality of opportunity and merit”¹⁸⁴. Additionally, the principles of non-discrimination and proportionality regarding sanctions both for football clubs and players must be followed to ensure that it is not de facto impossible for rivals to compete in the market. Regarding the procedural safeguards, the aforementioned criteria must be explicitly defined in an accessible format before the implementation of the powers they are designed to limit and there should be a mechanism for reviewing these criteria, allowing members or third parties to contest them in court Lastly, there must exist non-discriminatory procedural rules, including those concerning the time limits for submitting prior authorization requests and the decision-making process regarding those requests¹⁸⁵. With this judgment the Court clearly states that from now on SGBs must reconsider their regulations to permit new entrants to seek authorization for organizing competing events and to adjust their penalty rules to ensure proportionality. Moreover, as SGBs now required to adhere to these good governance standards, numerous associations must reevaluate their regulations to ensure adherence to this standard.

On a more theoretical note, as already established, it is well-known that the Court favors a restrictive interpretation regarding the scope of restrictions ‘by object’. There are two main dimensions in this stance. Firstly, not every restriction of conduct should be found as a restriction of competition during an evaluation by Courts or National Competition Authorities (NCAs) and, secondly, an indication that proving a restriction by object is not an easy task requiring implementing a complex analytical framework¹⁸⁶, responding to concerns that NCAs were wide in their interpretation of restrictions by object and signifying a more economic approach in the evaluation of an anti-competitive conduct¹⁸⁷. In order to do so, the Court innovated and provided a list of by object restraints which can be a part of two categories.

The first, relates to restraints that are particularly harmful to competition, such as horizontal cartels leading to price-fixing, limitations on production capacity or allocation of customers¹⁸⁸ and the second to restrictions that that “without necessarily being equally harmful to competition [...] may also be considered, in certain cases, to have an anticompetitive object”. That is the case, *inter alia*, of certain types of horizontal agreements other than cartels, such as those leading to competing undertakings being excluded from the market, or even certain types of decisions by associations of undertakings aimed at coordinating the conduct of their members, in particular in terms of prices¹⁸⁹. The Court emphasizes, however, on the necessity of examining, the content of the agreement, decision or practice in question, the economic and legal context of which it forms a part and its objectives because the characterization of restriction by object must clearly articulate the specific reasons why such conduct demonstrates a sufficient degree of harm to competition, thereby justifying a ruling that it possesses the ‘by object’ characteristic. The court in the past

¹⁸³ Also found in ISU (n. 144), paras 131-135

¹⁸⁴ ISU (n. 144), para 132

¹⁸⁵ European Superleague Company (n. 3), paras 151 and 178

¹⁸⁶ Monti (n. 31), p. 20

¹⁸⁷ *ibid*

¹⁸⁸ European Superleague Company (n. 3), para 163

¹⁸⁹ *Ibid*, para 164

sometimes utilizes an ‘orthodox approach’ when addressing by object restrictions, conduct as restrictive by its very nature, and sometimes it adopts a more analytical approach requiring an assessment of the legal and economic context which is nearly as detailed as that for effects cases for conduct deemed as restrictive by its very nature and sometimes it opts a more analytical approach requiring an assessment of the legal and economic context which is a similar concept in its detail as that for ‘by effect’ cases¹⁹⁰. A legal issue arises when pairing the Court’s judgment with already established theory and case law. Anti-competitive conduct that falls within the first aforementioned ‘by object’ category are actions that must be restrictive, regardless of the context.

However, regarding the second category, the possibility of the conduct being restrictive is the rationale for employing a general test rather than a definitive list. But since the extent of harm caused by the conduct is not pertinent to assessing whether it constitutes a restriction of competition by object, the Court does not evaluate on the purpose of including a qualifier to assess whether said conduct is not equally harmful to competition¹⁹¹. As a result, implementing this approach on a national level by National Courts and NCAs may be a strenuous task for judges and NCA officers. As there is already a sufficiently good standard of the more analytical approach established, by which an assessment the content of the agreement, its legal and economic context and its objectives takes place, it is apparent that there is no need of further additions¹⁹².

2.3. Defenses: The evolution of the Wouters and Meca Medina doctrine and Article 101 (3) TFEU

2.3.1. *The Wouters- Meca Medina Doctrine: A new step by the Court*

In the judgments the Court addressed the scope of application of the Wouters doctrine to the statutes of association of SGBs for the first time¹⁹³. The first interesting finding is the exclusion of restrictions by object from the scope of application of the Wouters doctrine. The judgment clearly restricts the exception to rules or practices that do not aim to prevent, restrict, or distort competition, in accordance with Article 101 TFEU¹⁹⁴. As clarified above, the court found that the rules in question constitute a restriction by object, as the prior authorization rules lack substantive criteria and detailed procedural guidelines, resulting in a procedure that is deficient in transparency, objectivity, precision, and non-discrimination. The court did not address issues related to legitimate objectives, inherent nature, and proportionality of the rules, resulting in the non-application of the Wouters doctrine. This approach was not necessarily predictable, as AG Rantos's opinion promoted greater leniency in his legal analysis of the statutes of the SGBs, questioning the object-based restriction and applying the Wouters doctrine to the relevant rules. Furthermore the ‘ancillary restraints’ concept in relation to this case, which was a crucial in the AG’s analysis was deemed unapplicable by the Court¹⁹⁵. This approach may be the start of a significant jurisprudential shift¹⁹⁶, with the Court, though not overruling the Meca-Medina, radically narrowing its scope.

¹⁹⁰ See Saskia King, *Agreements that restrict competition by object under Article 101(1) TFEU: past, present and future*, PhD thesis, London School of Economics and Political Science, 2015

¹⁹¹ Monti (n. 31), p. 21

¹⁹² *ibid*

¹⁹³ Ben Van Rompuy (n. 135)

¹⁹⁴ *European Superleague Company* (n. 3), para 186

¹⁹⁵ *ibid*

¹⁹⁶ Jan Zglinski (n. 134)

This is an important consequence of the CJEU’s ruling. The exclusion of restrictions of competition by object from the Wouters exception leads in a narrowed scope of application of the Wouters doctrine in the present case¹⁹⁷. Following the Meca-Medina case and the conclusion of the classification of purely sporting rules, the distinction between rules that fall within the scope of the exception and those that do not has been eliminated. The comprehension of a relatively open-ended assessment of the Wouters doctrine prevailed, with a limitation arising solely from the application of the three-step test itself.

The method of limiting scope by excluding restrictions based on object is intuitive and aligns with the framework of Article 101 TFEU comparable to the exemptions that are provided from the vertical block exemptions regulations (VBER) of Article 101(3) TFEU. According to Article 4 of Regulation (EU) 2022/720, restrictions by object (hardcore restrictions) are excluded from the protections offered by the VBER. A notable comparison can be made also with the Cassis de Dijon exemption regarding the freedom of movement, which stipulates that rules inherently discriminatory should not be afforded benefits¹⁹⁸. There exists a notion within the EU competition law legal system that certain violations are so disruptive to competition and limit freedom to such a degree that they typically do not warrant an exemption. With this judgment it is now established that stringent restrictions may also be present within the organizational rules of SGBs.

This introduces a substantial change in the order of 101 (3) analysis and alleviates the court from addressing complex issues regarding legitimate objectives in sport and their proportionality, enabling a focus on fundamental competition law questions. By doing so, the evaluation of a rule's nature concerning competition restrictions is assessed also on a separate level, a “scope of application” test for the Wouters doctrine, preceding the examination of the three-step test.

The Court stated that the exclusion of by object restrictions from the Wouters doctrine does not signify a change in case law, as it was previously established in *MOTOE*¹⁹⁹. However, this interpretation of its own decision is not clear, as the statements in *MOTOE* to which the court refers do not indicate any such exclusion or restrictions of competition by object in general²⁰⁰. Despite the fact that the Court is criticized for obscuring and minimizing a significant change in case law, the rationale for which remains unclear²⁰¹, the changes do seem to already influence the application of competition law in sports. The German NCA, the Bundeskartellamt, has indicated a shift in its application practice by publishing a press release concerning the examination of the 50+1 rule of the German Football Association. The authority announced that it would need to re-evaluate the case in light of the amendments made in the December rulings²⁰².

The changes also signify an acknowledgment that competition rules are not overridden by sporting characteristics; rather, the effect of the rules prevails, and the characteristics may only be

¹⁹⁷ Steve Weatherill, ‘Football Revolution: How do the Court’s Rulings of 21 December 2023 affect UEFA’s Role as “Gatekeeper”?’ , EU Law Analysis, 2024, p. 410-411

¹⁹⁸ *ibid*

¹⁹⁹ European Superleague Company (n. 3), para 185

²⁰⁰ *MOTOE* (n. 141), para 53

²⁰¹ There are suggestions to change the name of the test to ISU test or European Superleague test because of the introduced innovations; See Rupprecht Podszun and Alexander Kirk, ‘Fifa’s Football Agent Regulation and European Competition Law’, 2024; See Jan Zglinski (n. 134)

²⁰² Stephen Weatherill, ‘Changing the Law without Admitting it: The Court’s Three Rulings of 21 December 2023 Applied Twice in January 2024’, Kluwer Competition Law Blog, 2024

considered within the framework of competition law²⁰³. The Wouters doctrine established a new trend, contrasting with the prior general exception for purely sporting rules, which has been further emphasized by recent judgments. Although the competition rules are generally applicable, there remained a risk that the Wouters doctrine could be employed to circumvent competition law because of its expansive scope. Nonetheless, the modifications have faced criticism, particularly regarding the general exclusion of 'by object' restrictions, which may be unnecessary and could be more effectively assessed through a case-by-case analysis within the framework of the proportionality test. Proponents of the Wouters doctrine express concern that this adaptable, case-specific framework for evaluating sports-related matters may become outdated, potentially jeopardizing valid decisions in sports governance.

The enthusiasm remains tempered, as it does not resolve the uncertainties surrounding the application of the Wouters doctrine²⁰⁴. A degree of uncertainty persists due to the varying interpretations of the rules. Some contest the CJEU's assessment, expressing skepticism regarding whether the eligibility and prior authorization rules constitute restrictions by object²⁰⁵, and criticizing the judgment's lack of justification and precedent for the non-applicability of the doctrine²⁰⁶. New standards have been established to assess applicability, shifting focus from the essential inquiry regarding the legitimacy of sport governance objectives of SGBs to a competition law-oriented examination of which measures implemented by SGBs inherently restrict competition. The uncertainty may render the application of the Wouters doctrine less probable for SGBs, increasing the likelihood that they will fall outside its scope altering the emphasis of their defense strategy and increasing focus on the efficiency defense.

2.3.2. *Article 101(3) TFEU*

In line with the aforementioned remarks on the Wouters judgment²⁰⁷ the Court indicated that the application of Article 101(3) necessitates meeting conditions that are more rigorous than those of the Wouters defense, yet it does not clarify the specific differences²⁰⁸. The strictness is evident in two aspects: first, there are additional requirements that must be met and second, the evidentiary burden is significantly greater than that associated with the Wouters defense.

The Court reworded the original formulation in the Treaty primarily focusing on efficiency gains. Confirming narrowing of Article 101(3), as advocated by the Commission in its 2004 Article 101(3) TFEU Guidelines, the Court relied on an assessment of the fundamental economic concepts of allocative efficiency (improved distribution), productive efficiency (enhanced production), and dynamic efficiency (technical and economic advancement)²⁰⁹. By doing so, the Court diverges from longstanding Commission practice and recent sustainability promoting efforts and affirms that the efficiency gains must be sufficiently substantial to offset the anticompetitive effects. However, it achieves a form of rationalization: efficiency defenses are addressed under Article 101(3), whereas any non-economic public interest justification is evaluated under Wouters.

²⁰³ *ibid*

²⁰⁴ Petros C Mavroidis and Damien Neven, 'Legitimate Objectives in Antitrust Analysis- The FIFA Regulation of Agents and the Right to Regulate Football in Europe', Columbia Law School, Law & Economics Research Paper Series, 2024, p. 19

²⁰⁵ Pablo Ibáñez-Colomo (n. 117), p. 345

²⁰⁶ Monti (n. 31), p. 35

²⁰⁷ See chapter 2.5.1.1. of this dissertation

²⁰⁸ *European Superleague Company* (n. 3), para 189

²⁰⁹ Monti (n. 31), p. 37

In the second condition, the Court elucidates that the agreement must exert a "positive impact on all users, be they traders, intermediate consumers, or end consumers, in the different sectors or markets concerned."²¹⁰ The agreement in question must provide a fair share across all market sectors affected by its anticompetitive impact. Clarifying that the regulations concerning prior authorization and sanctions may impact several groups, each of which must achieve a favorable outcome for the condition outlined in Article 101(3) TFEU to be fulfilled²¹¹. These groups are specified as the national football associations, professional or amateur clubs, professional or amateur players, young players and consumers, including both spectators and television viewers²¹².

Analyzing the two conditions of Article 101(3) TFEU as interpreted here by the Court, the main problem of Article 101(3), that is proving the fulfilment of all conditions set in the Article, may become an even more significant challenge for both the plaintiff and the defendant in procedures before the Court. Even in an object case, the plaintiff must articulate a theory of harm to certain categories, linking the relevant rules to the potential impact on a user group. The defendant must subsequently demonstrate countervailing benefits, as the Court articulates, "genuine, quantifiable efficiency gains"²¹³. The situation may represent a "probatio diabolica" in 'by object' cases, as the plaintiff is not required to quantify the harm, thereby rendering it impossible for the defendant to demonstrate that the benefits exceed an unmeasured harm²¹⁴.

Lastly, the Court in ESL remained highly doubtful regarding the probability that the agreement in question will fulfill the fourth condition (no elimination of competition). The lack of a sufficient substantive and procedural framework for selecting competing football competitions and the status of FIFA and UEFA as gatekeepers to football tournament organization, raises concerns that the decision may allow entities adhering to those rules to inhibit competition in the market for organizing and marketing interclub football competitions within the European Union. Consequently, it can be assumed that if an SGB can establish sufficient rules as outlined in the judgment, the exclusion of competitors becomes permissible, as it would not violate Article 101 TFEU.

3. FIFA and UEFA as the only players of the game: Examining dominance under Article 102 and 106 TFEU

3.1. FIFA and UEFA as football's sole regulators in Europe

A question referred to the Court by the national judge in ESLC inquired about the applicability of Article 102 TFEU to UEFA and FIFA. The question mirrors that of Article 101 discussed above: whether the establishment and enforcement of regulations by FIFA and UEFA violate competition law, particularly considering that both organizations participate in the football competition market and that the mechanisms for endorsing new competitors lack sufficient safeguards. The national judge appeared to assert that both UEFA and FIFA hold dominant market position. The Court

²¹⁰ *European Superleague Company* (n. 3), para 190

²¹¹ *Ibid*, paras 193-194

²¹² *Ibid*, para 195

²¹³ *Ibid*, para 196

²¹⁴ Monti (n. 31), p. 38

deemed this to be “indisputable, particularly given that FIFA and UEFA are the sole associations responsible for organizing and marketing such competitions at the global and European levels”²¹⁵. It stated that, as is well-established, the same conduct may be regarded as an infringement of both Article 101 and 102 TFEU, provided the relevant elements are met.

The Court started the analysis of Article 102 TFEU a restatement of the law and repeating some of the previous case law that established the general principles of the Article. Article 102 TFEU is explained by the Court as having “the effect of hindering competition on the merits and is thus likely to cause direct harm to consumers, or which causes them harm indirectly by hindering or distorting that competition”²¹⁶. Noticeably, the Court here does not use the notion of “user undertakings” as it did in the analysis of Article 101 as a further class of persons protected not considering that dominant undertakings can cause harm to business counterparties through the exclusion of potential competitors.

Next, the Court also adds a set of options to assess the presence of abuse in a dominant position which can be summarized in three categories: The first relates to conduct that has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market through the use of methods other than those which are part of competition on the merits between undertakings; secondly, conduct that has the actual or potential effect of hindering the growth of equally efficient competitors on those markets and, thirdly, where the conduct “has been proven to have the actual or potential effect — or even the object — of impeding potentially competing undertakings at an earlier stage from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation”²¹⁷. For the first two categories the Court states that “different analytical templates depending on the type of conduct at issue in a given case” may be used to clarify the fact that there is not a single method for showing anticompetitive exclusion²¹⁸. Additionally, a recognition by the Court of partial foreclosure being sufficient, which was firstly stated in *Generics*, not allowing a dominant company to dictate how much competition there can be on a market, can also be assumed here²¹⁹. The third category does not include the notion of the “as efficient competitor” meaning that it is used on markets where there is no existing rival to the dominant undertaking, concept similar to the *Generics* case where the various settlements constituted an “overall strategy” aimed at delaying market entry²²⁰.

The Court of Justice found that both UEFA and FIFA are undertakings which “hold a dominant position, or even a monopoly”, in the relevant market: namely that for the “organization and marketing of international football competitions and the exploitation of the various rights related to those competitions”²²¹. Moreover, their conduct can constitute both an anticompetitive practice under Article 101 TFEU and an abuse of a dominant position under Article 102 TFEU. The CJEU asserts that the existence of a legal monopoly by FIFA and UEFA is irrelevant, as establishing a viable competition outside their ecosystem is currently unfeasible²²². Similarly to the examination

²¹⁵ *European Superleague Company* (n. 3), para 117

²¹⁶ *Ibid*, para 124

²¹⁷ *Ibid*, para 131

²¹⁸ *Ibid*, para 130

²¹⁹ *Monti* (n. 31), p. 29

²²⁰ *Case C-307/18, Generics (UK) Ltd*, para 155

²²¹ *European Superleague Company* (n. 3), para 139

²²² *Ibid*, para 149

of Article 101 TFEU the Court finds that as there is no framework of adequate substantive or procedural rules that delineates those powers, FIFA and UEFA possess the authority to regulate the involvement of teams and players in a prospective third-party football competition. Rules and sanctions lacking an adequate framework are deemed to violate Article 102 TFEU²²³. The criteria for sufficient substantiality and procedural rules align with the standard for identifying a "by object" restriction of competition as established in the CJEU's ISU judgment. It is crucial to emphasize that the CJEU delegated to the referring court, the responsibility of assessing whether FIFA's and UEFA's statutes represent an abuse of a dominant position²²⁴.

3.2.SGBs and Article 106 TFEU

The CJEU clearly indicates that Article 102 TFEU should be interpreted alongside Article 106 TFEU when a dominant undertaking possesses the authority to dictate market access for other undertakings or to set the conditions for such access²²⁵. The CJEU notably applied criteria established in *MOTOE* when examining Art. 101 and 102 TFEU to assess an infringement of Art. 106 TFEU. The court evaluated the anti-competitive regulations of a state-designated SGB establishing a parallel between private governing bodies and those that have been accorded significant status by a member state²²⁶. This acknowledges that SGBs bear a unique responsibility owing to their dominant status, as Article 106 TFEU primarily addresses undertakings that receive exclusive or special rights from a Member State. The CJEU, as seen in ISU, extends this concept to Articles 101 and 102 TFEU for undertakings that have positioned themselves similarly through their own autonomous conduct²²⁷ signifying a modification as more stringent criteria were formerly imposed on state regulatory agencies. The Court thus acknowledges the significant regulatory role of SGBs and determines that this necessitates the establishment of a duty of self-discipline²²⁸. The essence of the parallelism indicates that the special responsibility of the SGBs entails an obligation for their rules regarding the approval of rival competitions, to include 'substantive criteria and detailed procedural rules that ensure transparency, objectivity, non-discrimination, and proportionality'²²⁹.

It should be noted, that the safeguards the Court provides for a Member State to escape liability in light of Article 106²³⁰, are in essence good governance principles and a rather procedural solution to a risk of competition distortion, not a remedy normally found in competition law applied to private undertakings. In passage of central importance to the abuse of dominance in general, the Court states:

“Requirements identical to those recalled in the three preceding paragraphs [...] are all the more necessary when an undertaking in a dominant position, through its own conduct and not by virtue of being granted exclusive or special rights by a Member State, places itself in a situation where it is able to deny potentially competing undertakings access to a given market.... That may be the case when that undertaking has regulatory and review powers and the power to impose sanctions enabling it to authorise or control that access, and thus a means which is different to those normally available to undertakings and which govern competition on the merits as between them”.

²²³ Ibid, paras 147-148, 152

²²⁴ Ibid, para 150. The Madrid Court did, indeed, find an abuse of dominance position

²²⁵ Ibid, paras 133-134

²²⁶ Petros C Mavroidis and Damien Neven (n. 204), p. 9

²²⁷ *European Super League* (n. 3), para 137; ISU (n. 144) para 126

²²⁸ Petros C Mavroidis and Damien Neven (n. 204), p. 10

²²⁹ *European Super League* (n. 3), para 152

²³⁰ Ibid, paras 134-136

In contexts where Member States utilize legislative authority to restrict market access for new entrants the Court has adopted the joint application of Articles 102 and 106 TFEU to establish a strict competition law standard. In ESL, the most important aspect of this joint application is that the Court refrained from restricting it to sporting organizations, which are like other entities, bound by the internal market rules. In order to disentangle this situation, the Court could have clarified that the public competition law it has established is applicable to sporting associations, stating that this theory of abuse of dominance relates not only to the actions of public authorities but also encompasses regulations of any nature that govern economic activities in a collective manner²³¹.

Using ESL's broad interpretation of Article 106 TFEU policymakers and litigants can now imply that dominant firms possess not only a special responsibility to avoid abusing their dominant position but also ex ante obligations to facilitate market entry²³². The reference to the potential for 'favoring one's own activity'²³³, also highlights issues of self-preference abuse, which reminds of the Google Shopping case. This approach, when connected to the developments that highlight 'the setting up of barriers to entry,' suggests that the Court may be addressing instances where dominant digital platforms, without resorting to aggressive tactics, leverage their technologies and interoperability measures to monopolize the market. Such technological barriers or substantial investments can establish areas where competitors are deterred from entering, referred to as 'innovation kill zones'²³⁴. The Digital Markets Act seeks to address this issue, particularly through the imposition of interoperability; however, it appears now to be a comparatively less robust approach than the assertive position taken by the Court in ESL.

3.3. The efficiency defense

Established case law indicates that a dominant undertaking can demonstrate that conduct falling under Article 102 TFEU is justified, thereby evading the prohibition set forth in Article 102 TFEU²³⁵. There are two primary methods to justify a conduct: An undertaking may demonstrate that: (1) objective justification/objective necessity of the conduct when, for example, a refusal to maintain supply is due to a shortage resembling a force majeure event; (2) the efficiency defense, wherein the anti-competitive effects of the conduct are at least outweighed by its positive effects²³⁶. The CJEU asserts that actions intended to eliminate all competition from third-party entities cannot be justified by objective necessity and are subject to the prohibition established in Article 102 TFEU²³⁷. This closely parallels the CJEU's rejection of the Meca-Medina test for "by object" restrictions of competition under Article 101(1) TFEU. Such conduct may be justified only by the efficiency defense²³⁸. The CJEU asserts that the four criteria for an efficiency defense follow the criteria of Article 101(3) discussed above, aside from demonstrating that users obtain a fair portion of the beneficial outcomes of the agreement²³⁹. An examination of the efficiency defence by itself in the future after substantial changes of the rules of prior authorization by the SGBs seems paradoxical. The Court may consider applying objective justification to the relevant rules if they

²³¹ Monti (n. 31), p. 32

²³² *ibid*

²³³ *European Superleague Company* (n. 3), para 133

²³⁴ Jean-Christophe Roda, What if the Super League Case Was about the Digital Market?, *Journal of European Competition Law & Practice*, 2024, p. 1

²³⁵ Case C-377/20, *Servizio Elettrico Nazionale*, para 46

²³⁶ Case C-95/04 P *British Airways*, para 69

²³⁷ *European Superleague Company* (n. 3), para 203

²³⁸ *Ibid*, paras 204-209

²³⁹ *Ibid*, para 204

are adequately designed and include the satisfactory procedural safeguards mentioned above. However, as previously noted, if these criteria are satisfied, there would be no abuse initially.

3.4.SGBs winning the broadcasting match?

The section regarding broadcasting rights appears to be the most advantageous for UEFA and FIFA. This section of the judgment is particularly noteworthy, demonstrating the practical application of Article 165 TFEU.

The referring court inquired whether Union law prohibits the existing ownership structure, wherein UEFA and FIFA possess all rights associated with football competitions held in Europe, including those organized by third parties, and which grants them exclusive authority to market these rights²⁴⁰. The Court after clearly stating that the current framework can be classified as a “by object” restriction under Article 101(1) TFEU and as a “abuse” under Article 102 TFEU outlines how, depending on the referring court's analysis, such practices may be justified on an efficiency exemption basis. This illustrates how the ESoM concept as analyzed above can influence the analysis of EU competition law. The initial argument presented by the Court is fundamentally economic, focusing on the potential efficiency gains from the collective utilization of broadcasting rights. Selling jointly matches is expected to reduce transaction costs and provide actual and potential buyers access to rights that are significantly more appealing than those offered by individual clubs in specific matches. This advantage arises from the FIFA-UEFA brand image and the comprehensive coverage of relevant competitions²⁴¹.

It is at this juncture that the ESM becomes relevant. The defendants presented the argument of "solidarity redistribution" before the Court. Their argument posited that the additional profit generated from the joint sale of rights could be reinvested into European football, benefiting amateur clubs, professional players, women's football, young players, and other stakeholders, as well as consumers and supporters²⁴². The Court of Justice accepts this argument, emphasizing that “the proper functioning, sustainability and success of [football] competitions depend on maintaining a balance and preserving a certain equality of opportunity among participating professional football clubs.” The judgment here emphasizes on the genuine “solidarity role of football,” which enhances its educational and social functions within the European Union and on the justification of restrictive rules if the profit generated from the central sales of the rights is demonstrated to be “real and concrete”, and if the framework is considered proportionate.

²⁴⁰ Ibid, para 210

²⁴¹ Ibid, para 232

²⁴² Ibid, para 234

C. Sports Governance vs EU Competition Law: Extra time?

We trust that the solidarity-based European football pyramid that the fans and all stakeholders have declared as their irreplaceable model will be safeguarded against the threat of breakaways by European and national laws. -UEFA statement on the European Super League case December 21, 2023

The most significant declarations from the ESL case²⁴³ can be summarized as follows. The primary issue is the restricted applicability of the Wouters theory, specifically on the exclusion of restrictions by object. Secondly, it is essential to recognize that Articles 101 and 102 TFEU must be interpreted in connection with Article 106 TFEU, and that the controlling body's status should not be influenced by whether it arises from public law authorization or market structure. Consequently, the SGBs must formulate their regulations in a 'transparent, objective, nondiscriminatory, and proportionate' way to prevent contravening Articles 101 and 102 TFEU. The CJEU has definitively determined that Art. 165 TFEU is a non-cross-cutting provision, indicating that the SGBs cannot utilize it as this clause cannot exert any direct, binding influence on the enforcement of the competition regulations.

1. A promising future of sports governance in light of competition law?

Initially, the implications of the Court's revised legal framework seem promising. The governance rule standards set by the Court may result in heightened external regulatory supervision, potentially enhancing internal governance procedures. The Court's re-interpretation of competition statutes implies that a wider array of sporting rules may be subject to review and could undergo more rigorous assessment than previously. Although commentary focused initially on the obligation of SGBs to implement objective, transparent, and non-discriminatory procedures for authorizing third-party contests, the now-ruled fact that athletic regulations can constitute 'by object' restrictions, coupled with the concurrent rejection of the AG-proposed auxiliary restraints exemption for this category of behavior, may present a more enduring difficulty. In the next cases concerning sports governance, rather than the Meca-Medina test, which mirrored the proportionality assessment and open-ended reason from the free movement fundamental freedom, the more rigorous criteria of Article 101(3) TFEU (or the efficiency exemption of Article 102 TFEU) must now be satisfied. This, however, does not imply that all sports governing regulations will be classified as restrictions 'by object'; nonetheless, debates will rise regarding the extent and implementation of this idea in forthcoming disputes, which will loom over the federations. Two judgments issued subsequent to and specifically referencing the December judgments indicate that the Court is resolute in its desire to impose tougher oversight on private regulators²⁴⁴.

Consequently, the ball is in the court of SGBs, which must explicitly provide evidence regarding the manner and degree to which their acts contribute positively to the sports sector as their influence and contributions to sports governance will no longer be assumed without strict evaluation exposing them to a 'culture of justification'²⁴⁵. The judgments also exemplify the practical use of this concept. From now on any limits to third-party contests to safeguard sporting integrity and financial solidarity within the football hierarchy can be acceptable, if SGBs are able to demonstrate that the authorization regulations result in 'authentic, measurable efficiency improvements' (in addition to satisfying the other criteria of Article 101(3) TFEU) and present

²⁴³ Also present in the Court's other two December rulings on sports, the ISU and Royal Antwerp cases

²⁴⁴ See Cases C-128/21 *Lietuvos notary rūmai* and C-438/22 *Em akaunt*

²⁴⁵ Jan Zgliniski (n. 134), p. 478

'persuasive reasons and evidence' to support this claim²⁴⁶. The participation in a centralized sale of broadcasting rights to enhance competitive equilibrium and facilitate economic redistribution may be acceptable, if the undertaking can demonstrate that the profit for each impacted constituency—professional and amateur clubs, supporters, television viewers, and other stakeholders—is 'tangible and substantial' and that no less restricted option exists²⁴⁷. The value of SGBs actions cannot be presumed; it must be substantiated by credible evidence. Promoting the 'principles, values, and standards' that underlie sports, including sporting merit and financial solidarity and serving a valid regulatory function while also pursuing commercial objectives is legitimate; nevertheless, it must ultimately yield material efficiency improvements, as indicated by important aspects of the assessments.

The Court seems to be influenced by a comparable argument in this instance. It did not naively assume that SGBs would operate in the best interests of sports and society. On the contrary, it stated that SGBs must establish frameworks that make it possible to confirm their compliance so that this heightened external control may, indirectly, enhance the quality of internal self-regulation. SGBs will also adapt to prevent their regulations and decisions from being annulled in antitrust litigation in a public relations defeat which already is used by A22 Sports Management, the successor to the ESL company²⁴⁸. The most efficient method will be to adhere to the specified or expected mandates of EU law. As illustrated by the Court. The Court mandates SGBs to contemplate the ramifications of their activities and to ensure that both the resultant advantages and expenses are appropriately considered. In conducting that assessment, they must take into account the concerns of all 'user undertakings' impacted by their decisions. The judges emphasize that this notion includes not only elite athletes, professional clubs, and broadcasters, but also amateur teams, grassroots organizations, and supporters—essentially, the communities that federations typically overlook. Concluding, assuming sufficient public or private enforcement, EU competition legislation may enhance governance standards and promote more participatory decision-making in sports.

2. Is the decision an own-goal for Competition Law?

The potential benefits analyzed above do not imply that there are not hidden risks by the Court's judgment. The increased application of EU competition rules presents challenges that could prove counterproductive for the regulation of sports and valid concerns have been expressed regarding the adequacy of competition law as a normative framework for the regulation of sports²⁴⁹.

Efficiency gains, output levels, consumer choice, and the effects of competition, both pro- and anti-competitive form a very specific conceptual framework, the suitability of which and its underlying goals for the sports sector is not immediately apparent. Football has experienced a significant commercialization recently and the application of a framework centered on products and markets seems rational, as sport has largely evolved into a product and market by its own initiative.

²⁴⁶ *European Superleague Company* (n. 3), paras 196 and 205.

²⁴⁷ *Ibid*, para 236

²⁴⁸ A22 Sports Management, Press release 27 May 2024 - MADRID COURT ISSUES RULING – ERA OF UEFA/FIFA MONOPOLY IS OVER

²⁴⁹ Jan Zgliniski (n. 134), p. 479

Nonetheless, sport, particularly in its European form through the EMoS concept, encompasses more than mere commercial interests. The system serves numerous social, educational, redistributive, and health-related functions, raising questions about the capacity of competition rules to effectively accommodate these diverse needs. Advancing public policy goals via EU competition law has always been a complicated issue²⁵⁰ and the shift towards a more economic approach since the mid-2000s has exacerbated challenges²⁵¹. In addition, various methods exist for integrating non-economic considerations into competition proceedings, particularly within the framework of the Article 101(3) TFEU assessment and the efficiency clause of Article 102 TFEU; which as stated above generally need to be converted into measurable economic benefits, a not-so-simple task. Therefore, policy objectives with significant economic implications that are quantifiable, such as solidarity payment levels, can be integrated into the framework of EU competition law with relative simplicity.

Objectives that are less overtly economic and quantifiable, such as the promotion of opportunity equality, should be reinterpreted as mechanisms for securing consumer interest or other sources of procompetitive advantages. This approach is shared also on a trans-Atlantic level. Recently, in the US Supreme Court's ruling on *Alston*²⁵², regarding the principle of amateurism applicable to college athletes, the US Supreme Court implemented a similar competition law analysis and prevented the NCAA, the governing body for college sports, from justifying its principles on educational, social, or cultural grounds, which are typically relevant in such cases. Although the sports models in North America and Europe are well-known for their differences, as are the antitrust regulations, the December judgment indicates potential emerging similarities in European sports law.

Deregulation may also be a potential risk associated with increased application of competition law in the sports sector. The legal framework established paves new avenues for litigation and enforcement through the expansion and intensification of competition scrutiny. This approach may increase the likelihood of overturning sporting rules and will correspondingly heighten the desire to contest them not only by the Commission but also by private actors and NCAs. The influence of such big steps in future cases and cases already pending in the Court is easily foreseeable. Preliminary references are currently pending before the CJEU regarding the legality of the FIFA Football Agent Regulations and certain aspects of the transfer regime in football²⁵³ and there has been interest in contesting the regulations regarding financial sustainability, club ownership, and the geographical segmentation of leagues across national borders²⁵⁴.

The outcomes of these disputes will ultimately depend on the application of competition rules by European and national courts, but the overall trajectory suggests a probable elimination of current sporting regulations. As competition law serves primarily as a mechanism for negative integration, the possibility of sports facing a gradual erosion of regulations as an increasing number of rules are invalidated through legal challenges is actual. The new framework, while expanding

²⁵⁰ See Giorgio Monti, 'Article 81 EC and Public Policy', *Common Market Law Review*, Issue 5, 2002, p. 1057-1099,

²⁵¹ Jan Blockx, 'The Limits of the 'More Economic' Approach to Antitrust', *World Competition*, Issue 4, 2019, p. 495

²⁵² US Supreme Court, 594 U.S. 2147, *NCAA v. Alston*

²⁵³ Cases C-650/22 *FIFA*, C-209/23 *RRC Sports* and C- 428/23 *ROGON*

²⁵⁴ See Bundeskartellamt Press Release, '50 + 1 proceeding – current stage of the proceeding' and the latter rule challenged by FC Swift Hesperange in Luxembourg; the local Court intends to obtain a preliminary reference ruling from the CJEU

opportunities for litigation and enforcement, may paradoxically fail to address several critical issues in sports governance²⁵⁵.

Lastly, strictly in terms of establishing a breakaway in European football, practical consequences may be minimal. All the original participating teams of ESL have dropped the idea of participating in a private European football league after great fan backlash and pledged allegiance to UEFA even entering a ‘rehabilitation program’. In theory, however, the Court’s judgment may resurrect such plans should an opportunity arise²⁵⁶. Article 101 TFEU requires an agreement between undertakings or a decision by associations of undertakings that restricts competition by object or effect and impacts intra-EU trade. Article 102 TFEU pertains to a dominant undertaking that abuses its position. Will the new “ESL” as an undertaking have a dominant position on the market of organizing football tournaments especially considering that the founding clubs, by guaranteeing their positions in the ESL without any competitive risk and considering the expected rise in television rights and sponsorships, will enhance their already great market power?²⁵⁷ Moreover, it is improbable that possible human rights violations perpetrated by competing entities will be encompassed by these provisions, such as gender disparities in decision-making bodies, or non-sustainable organization of tournaments in countries known for their poor human rights record. Will a refusal by an SGB to allow third-party organization of such events count as anti-competitive and thus require justification on the basis of the Court’s ruling in ESL and ISU? Such governance failures do not present competition-related concerns but signifies that competition law may hinder the enhancement of standards in this context and the restricted capacity of competition law to advance public policy.

Concluding, it is difficult to find a single judgment introducing such a number of innovations that can influence matter even beyond the scope of sports-governance related law. Focusing on sports governance, however, it is the first time that Court tried to broaden and strengthen the application of competition law in sports-related cases. While there is potential in this context of sports regulation, there are also significant risks involved. Competition law is not always a complete and adequate regulatory instrument. As competition law is driven by distinct economic objectives and characterized by a de-regulatory approach, it must be complemented by or integrated with additional legislation on a case-by-case basis. Similar dynamics have been observed in other sectors, particularly in digital services with the DMA. A European sports act that establishes governance requirements and substantive rules for SGBs would facilitate the systematic and coherent regulation of sports.²⁵⁸

²⁵⁵ Jan Zglinski (n. 134), p. 480

²⁵⁶ As stated above, A22 is the company behind projects for a new “ESL”. At the time of the writing of this dissertation aside from a statement by Florentino Perez and a lukewarm endorsement by Napoli, no other major clubs have expressed their willingness to participate in the newly formed league

²⁵⁷ See Rupert Macey-Dare, ‘A League of Their Own – Logic of the Super League’, 2021 and Andreas Stephan, ‘Do Plans for a European Super League Breach Competition Law?’, Competition Policy Blog, 2021

²⁵⁸ Jan Zglinski (n. 134), p. 480; see also Stephen Weatherill, ‘Saving football from itself: why and how to remake EU sports law’, Cambridge Yearbook European Legal Studies, 24:4–23, 2022 and Miguel Poiarés Maduro, ‘EU Law and Sports: A Match Made in Hell or in Heaven?’, University Press, Oxford, p. 237-238

D. Conclusion

The recently issued judgment issued by the CJEU regarding the European Super League case brought again in the spotlight the complex relationship between Sports and EU Law. Starting from the European Model of Sport (EMoS) concept, a hierarchical structure that promotes sporting merit and social integration through a system of sports "solidarity" characterized by a 'one-federation-per-sport' principle, with only one governing body allowed at a national and continental level is a central part of European sporting culture. The EMoS stands on the opposite side of the ESL concept in terms of basic organization. However, the non-binding nature of the EMoS, the intense commercialization of sports, and the coexistence of heterogeneous systems across member states raise doubts regarding a shift towards a unified European sports model.

The European Treaties introduced Article 165 TFEU, which grants the Union the authority to support Member States' efforts in sport. This article emphasizes the specificity of sports, their voluntary activity, and their social and educational roles. It also requires the Union to safeguard athletes' integrity and promote transparency and fairness in athletic contests. The Court, however, found this interpretation excessive and rejected the concept of a uniform EMoS.

The Court defines an 'undertaking' as any entity involved in economic activity, regardless of its legal status or financing method. SGBs can function as undertakings or associations of undertakings, requiring at least a portion of members to participate in such activities. Competition law investigations often focus on the provisions within SGB statutes, which govern multiple domains, including participation rules, game regulations, and internal organizational protocols. Initially, SGBs are responsible for setting rules governing the game, conditions for participation, and disciplinary measures. However, certain provisions aim to achieve economic objectives, such as exclusive marketing of television rights, regulations governing player agents, and regulations related to the sale of tickets for sporting events.

In the past two decades, there has been increased interest in examining the compatibility of sports associations' rules with European law and the Court has issued a series of judgments regarding the application of EU Competition Law in the Sports regulating sector. The Court also applies competition law to resolve these conflicts, focusing on the existence of authorization requirements for competing organizers and sanctions for members to protect their position as organizers with the most notable cases being the European Super League and international Skating Union.

After the formation of the ESL as a European football competition that offers an alternative to the existing framework, immediately a legal battle with the current football SGBs commenced over the SGBs measures aimed at blocking the initiative.

The Court found that the prior authorization rules set by FIFA and UEFA give them the power to authorize, control, and set conditions of access to the market for any potentially competing undertaking. This allows them to determine not only the degree of competition on the European football market but also the conditions in which that potential competition may be exercised. Additionally, the Court added the consumer protection element by affirming that the practices of FIFA and UEFA can deprive spectators and television viewers of the opportunity to attend competitions or watch games broadcast.

However, the Court does not explicitly say that FIFA and UEFA cannot set prior authorization rules or that it is forbidden to impose penalties and sanctions on parties that do not comply with these rules. The key difference lies in the novelty of substantive and procedural safeguards that must be followed by SGBs regarding this issue. These safeguards should include transparent, clear, and precise criteria for parties interested in providing competing sporting event organization, principles of non-discrimination and proportionality regarding sanctions, and non-discriminatory procedural rules.

The Court introduced novelties regarding the interpretation of restrictions 'by object' and the application of the Wouters and Meca-Medina doctrine in the 'by object' assessment process. Additionally, The Court of Justice (CJEU) has introduced a new order of 101 (3) analysis, focusing on fundamental competition law questions and the evaluation of a rule's nature concerning competition restrictions. The changes acknowledge that competition rules are not overridden by sporting characteristics; rather, the effect of the rules prevails, and the characteristics may only be considered within the framework of competition law. However, the modifications have faced criticism, particularly regarding the general exclusion of 'by object' restrictions, which may be unnecessary and could be more effectively assessed through a case-by-case analysis within the framework of the proportionality test. The uncertainty surrounding the application of the Wouters doctrine persists due to varying interpretations of the rules. New standards have been established to assess applicability, shifting focus from the essential inquiry regarding the legitimacy of sport governance objectives of SGBs to a competition law-oriented examination of which measures implemented by SGBs inherently restrict competition.

The court found that both UEFA and FIFA are undertakings with a dominant position in the relevant market, which includes organizing and marketing international football competitions and exploiting various rights related to those competitions. Their conduct can constitute both an anticompetitive practice under Article 101 TFEU and an abuse of a dominant position under Article 102 TFEU. The CJEU asserts that actions intended to eliminate all competition from third-party entities cannot be justified by objective necessity and are subject to the prohibition established in Article 102 TFEU

The Court's revised legal framework may result in heightened external regulatory supervision and potentially enhance internal governance procedures. However, the Court's re-interpretation of competition statutes implies that a wider array of sporting rules may be subject to review and undergo more rigorous assessment. The Court also emphasizes the importance of adhering to EU law mandates for SGBs to consider the ramifications of their activities and consider the concerns of all 'user undertakings' impacted by their decisions. This includes not only elite athletes, professional clubs, broadcasters, amateur teams, grassroots organizations, and supporters, which are typically overlooked by federations. EU competition legislation may enhance governance standards and promote more participatory decision-making in sports, assuming sufficient public or private enforcement.

The Court's judgment on the application of EU competition rules in sports governance presents challenges that could potentially counterproductively affect sports regulation. The framework focuses on efficiency gains, output levels, consumer choice, and the effects of competition, both pro- and anti-competitive. However, the sports sector, particularly in Europe through the EMoS concept, encompasses various social, educational, redistributive, and health-

related functions, raising questions about the capacity of competition rules to effectively accommodate these diverse needs.

Deregulation may also be a potential risk associated with increased application of competition law in the sports sector. The legal framework established paves new avenues for litigation and enforcement through the expansion and intensification of competition scrutiny. The outcomes of these disputes will ultimately depend on the application of competition rules by European and national courts, but the overall trajectory suggests a probable elimination of current sporting regulations.

Competition law is not always a complete and adequate regulatory instrument, and it must be complemented or integrated with additional legislation on a case-by-case basis. A European sports act that establishes governance requirements and substantive rules for Sports Governance Groups would facilitate the systematic and coherent regulation of sports.

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