The New Testament for sports and EU competition law in European Super League, ISU, and Royal Antwerp

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Common Market Law Review **62**: 577–622, 2025.

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Case C-333/21, *European Super League v FIFA and UEFA*, EU:C:2023:1011, Case C-124/21 P, *International Skating Union v European Commission*, EU:C:2023:1012 and Case C-680/21, *Royal Antwerp Football Club v UEFA and URBSFA*, EU:C:2023:1010

1. Introduction

On 21 December 2023, the attention of the sporting world was focused once again on Luxembourg. That day, the Grand Chamber of the Court of Justice of the European Union rendered no less than three judgments on sports-related matters, in the cases of *European Super League* (*ESL*),[1] *International Skating Union* (*ISU*),[2] and *Royal Antwerp Football Club* (*Royal Antwerp*).[3] *ESL* especially was a high-profile case, the outcome of which was highly anticipated. Most eye-catching was the Court's ruling to invalidate the contested rules by football governing bodies FIFA and UEFA that require prior approval for setting up new interclub football competitions in Europe and control the participation of clubs and players in such competitions. The Court deemed these rules incompatible with Treaty provisions on competition (Articles 101 and 102 TFEU) and free movement (Article 56 TFEU). The *ESL* ruling largely aligns with the findings in *ISU*, where the Court additionally held that the appeal arbitration rules established by the International Skating Union (ISU) failed to comply with the requirements of the principle of effective judicial protection. In *Royal Antwerp*, the Court identified the rules of UEFA and the Belgian football association on 'home-grown players' as restrictive of competition and indirectly discriminatory but deferred to the referring court to verify whether they could be justified. Inevitably, these judgments will yield important repercussions for both sports governance and dispute resolution. Furthermore, the Court clearly issued three principled judgments which read as a kind of *vademecum* that: (a) carefully synthesizes the general principles guiding the interpretation of Articles 101 and 102 TFEU; and (b) applies those principles to sports, outlining the Court's view on how it intends to approach future sports cases. Unmistakably, several of the

1. Judgment, *ESL*.
2. Judgment, *ISU*.
3. Judgment, *Royal Antwerp*.

Court's more innovative statements, in particular concerning the distinction between restrictions by object or effect, the use of the *Wouters* exception or the interpretation of the conditions for benefiting from the exemption under Article 101(3) TFEU, will also have big implications beyond the field of sport, for EU competition law in general.

This case note is structured as follows. First, the factual and legal background of the cases will be sketched (section 2). Subsequently, the Opinions of the Advocates General in these cases will be summarized (section 3), and the most salient aspects of the rulings will be highlighted (section 4). The primary focus will be on the *ESL* judgment, as it is the most elaborate and detailed. Finally, the comments section will analyse, in particular, how the Court reached these verdicts and what changes are needed in sports governance; whether *this* European Super League or an alternative breakaway league will one day see the light; what these judgments mean for future sports competition cases and for EU competition law more broadly; and what the future holds for arbitration as a dispute resolution mechanism in sports (section 5).

2. The legal and factual background of the three cases

2.1. *ESL*[4]

The European Super League is a private initiative, supported by twelve prominent football clubs from England, Italy and Spain,[5] to set up a new interclub competition in Europe. In its original set-up, the European Super League would be a semi-closed league composed of twenty clubs: fifteen participants would be permanent, five others would be invited to compete on a recurring basis. Fixtures would be played during the week, while the participating clubs would regularly continue playing in their domestic leagues during the weekends. This entails that clubs participating in the European Super League would no longer take part in the UEFA European club competitions, the Champions League, the Europa League or the Conference League. The whole idea grew out of discomfort or discontent about the format

4. For more background, see also Stefaan Van den Bogaert, 'The rise and fall of the European Super League: A case for better governance in sport' (2022) 59 CML Rev (Special Issue) 25; 'The European Super League explained' *The New York Times* (May 2021); 'European Super League: UEFA and Premier League condemn 12 major clubs signing up to breakaway plans' (*BBC Sport*, 18 April 2021).

5. The twelve founding clubs were Arsenal, Chelsea, Liverpool, Manchester United, Manchester City and Tottenham from England, AC Milan, Juventus, and Internazionale from Italy and Atletico Madrid, Barcelona, and Real Madrid from Spain.

of these European club competitions: the people behind the Super League project wanted to create a better product with more (high-profile) matches, which would generate more money, which would not only come to the benefit of the participating teams but ultimately also of the entire football world via increased solidarity payments to the different levels of the game, including the grassroots.

The problem was that the statutes of the sports governing bodies (SGBs) provide that they shall have the exclusive right to organize or abolish international club competitions. International tournaments or competitions which are not organized by UEFA but are played in UEFA's territory shall require prior approval of FIFA and/or UEFA.[6] That is to say, in theory, it is possible to set up new competitions which would not be subject to the rules adopted and applied by those two associations. However, as the Court of Justice also recognized, in practice, the monopoly position held by FIFA and UEFA on the market for the organization and marketing of international interclub football competitions is such that 'at the current juncture it is impossible to set up viably a competition outside their ecosystem, given the control they exercise, directly or through their member national football associations, over clubs, players and other types of competitions, such as those organised at national level'.[7] FIFA's and/or UEFA's authorization is thus a *conditio sine qua non* for the creation of the European Super League. This authorization was denied. This denial was to be expected. After all, the European Super League would be a direct competitor to the Champions League, UEFA's sporting crown jewel and principal source of revenue. This does not make it less problematic, however. First, because the regulatory, control, and decision-making powers, which the sporting associations have conferred on themselves, as regards prior approval are virtually unlimited, meaning that FIFA and UEFA have *carte blanche* to decide on the fate of new competitions, without even having to motivate these decisions. And second, because these governing bodies combine their organizational and regulatory role with the commercial role of marketing and exploiting the various rights related to the international interclub competitions they organize. In being both 'legislature and party', FIFA and UEFA manifestly find themselves in a situation of conflict of interest that is 'liable to lead them to use their powers of prior approval and to impose sanctions in such a way as to prevent the setting

6. FIFA Statutes, Arts 22 and 71–73; UEFA Statutes, Arts 49–51, available at FIFA, 'Rules & Reports' <inside.fifa.com/legal/documents> and <www.uefa.com/MultimediaFiles/Download/uefaorg/General/02/56/20/45/2562045_DOWNLOAD.pdf> respectively (all websites visited 6 February 2025).

7. Judgment, *ESL*, para 150.

up of international football competitions not within their system and, therefore, to impede all potential competition on that market'.[8]

Seemingly unfazed by FIFA and UEFA's refusal to give prior approval to the European Super League, its organizers immediately instituted legal proceedings before the commercial court in Madrid and swiftly obtained from the judge a series of protective measures, the purpose of which was, in essence, to prevent any conduct on the part of FIFA and UEFA and the national football associations liable to thwart or hamper the preparations for and the establishment of the Super League and the participation therein of professional football clubs and players, *inter alia*, through any disciplinary measures or sanctions and any threat to adopt such measures or sanctions aimed at clubs or players, and this for the entire duration of the legal proceedings.[9] Considering that for the resolution of this conflict an interpretation of the EU competition rules and the free movement rules was indispensable, the Spanish judge stayed the proceedings and referred six questions for a preliminary ruling to the Court of Justice in Luxembourg. Most of them relate, in essence, to the question of whether Articles 101, 102, and 56 TFEU must be interpreted as meaning that they preclude:

> 'the adoption and implementation of rules by associations which are responsible for football at world and European levels and which pursue in parallel various economic activities related to the organization of competitions, making subject to their prior approval the setting up, on European Union territory, of a new interclub football competition by a third-party undertaking, and controlling the participation of professional football clubs and players in such a competition, on pain of sanctions, where there is no framework for those various powers providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate'.[10]

In addition, the national court wanted to know whether the rules granting FIFA and UEFA total control over the commercial exploitation of the various rights, such as media rights, relating to the competitions under their 'jurisdiction', were compatible with Articles 101 and 102 TFEU.

2.2. *ISU*

Although the commercial context is notably different, the facts, circumstances, and legal issues underlying the *ISU* case are very similar to the

8. Judgment, *ESL*, para 43.
9. Judgment, *ESL*, para 33.
10. Judgment, *ESL*, para 122.

ones in *ESL*. The main distinction lies in the procedure: the *ISU* case is an appeal against a judgment from the General Court. According to its prior authorization and eligibility rules, the ISU is entitled to determine the conditions in which athletes may take part in skating competitions. Athletes participating in competitions not authorized by the ISU expose themselves to a penalty of 'loss of eligibility', entailing a ban from any competition organized by the ISU, whether temporary or permanent.[11] Two professional speed skaters from the Netherlands who were prevented from taking part in a planned ice-skating event in Dubai, not organized by the ISU, filed a complaint with the European Commission against these ISU prior authorization and eligibility rules for violation of the competition rules. In its decision, the Commission stated that these rules indeed had as their object the restriction of competition.[12] It also considered that the ISU arbitration rules, though not in themselves anti-competitive, nonetheless reinforced the restriction of competition, in that they forced athletes to bring disputes with the federation exclusively before the Court of Arbitration for Sport (CAS).[13] And it found that the ISU rules could benefit neither from the *Wouters/Meca-Medina* exception nor from an efficiency defence under Article 101(3) TFEU.[14] To bring the infringement to an end, the Commission considered the ISU should take measures consisting of: first, adopting prior authorization criteria which are objective, transparent, non-discriminatory and proportionate; second, setting up suitable procedures for prior approval and sanctions; and third, amending the arbitration rules so as to ensure the effective review of decisions made at the end of those procedures.[15] The ISU brought an action for annulment against the Commission decision. In its 16 December 2020 judgment, the General Court upheld the decision insofar as it related to the prior authorization and eligibility rules but annulled it in so far as it related to the arbitration rules.[16] By appealing to the Court of Justice, the ISU sought to set aside (in part) the judgment of the General Court. EU Athletes and the complainants responded by cross appealing the General Court's conclusions on arbitration.

11. ISU Communication No 1974 'Open International Competitions' sets out the procedure to follow to obtain advance authorization to organize an international skating competition. It follows from Rule 102(2)(c), Rule 102(7) and Rule 103(2) of the 2014 ISU General Regulations that athletes who participate in a competition not authorized by the ISU and/or the national associations are exposed to a penalty of 'loss of eligibility' or 'ineligibility', entailing a lifetime ban from any competition organized by the ISU.

12. Commission Decision of 8 December 2017 in Case AT.40208 – International Skating Union's Eligibility rules, paras 162–88.

13. ibid paras 268–96.

14. ibid paras 287–348.

15. ibid paras 338–42.

16. Case T-93/18, *International Skating Union v European Commission*, EU:T:2020:610.

2.3. *Royal Antwerp*

The *Antwerp* case is the odd one out. It also involved rules and regulations of SGBs, not concerning prior approval though, but rather concerning 'home-grown players'. Since the 2007/2008 season, the UEFA rules provide that professional football clubs taking part in an international interclub football competition organized by UEFA must include a minimum of eight 'home-grown players' within a match list comprising a maximum number of 25 players.[17] Players are categorized as 'home-grown' when they have been trained by their club or by a club affiliated to the same national football association for at least three years between the ages of 15 and 21.[18] Out of the minimum eight 'home-grown players', at least four must have received their training at the club which lists them (the so-called '4+4' rule). In 2011, the Belgian football federation (URBSFA) also introduced 'home-grown players' rules in its regulations. At the time of the events, they were more stringent and formulated as follows: all professional football clubs playing in the two top divisions must submit a maximum list of 25 players, which must include at least eight trained by Belgian clubs. These eight players must have satisfied all requirements for official match inclusion for at least three full seasons for a club in Belgium before their 23rd birthday; at least three of them must meet the additional requirement of having satisfied that condition before their 21st birthday. If those minimum thresholds are not met, those players cannot be replaced by players who do not satisfy those conditions.[19]

In February 2020, a third-country national professional football player, who also has the Belgian nationality, brought an action before the Belgian Court of Arbitration for Sport (BCAS) seeking a declaration that the 'home-grown players' rule is void on the ground that it infringes the Articles 45 and 101 TFEU. His club, Antwerp, voluntarily intervened in the proceedings. The BCAS rejected the claims of the player and the club. Thereupon, both player and club brought proceedings against the Belgian football federation before the Brussels Court of First Instance, for annulment of the arbitration award on the ground that it infringed public policy within the meaning of Article 1717 of the Belgian Judicial Code.[20] Considering that a breach of Articles 45 and 101 TFEU may be categorized as an infringement of public policy within the meaning of the Belgian Code, the Belgian Court decided that the resolution of

17. Judgment, *Royal Antwerp*, para 8.
18. Judgment, *Royal Antwerp*, para 6.
19. Judgment, *Royal Antwerp*, paras 11–12.
20. Judgment, *Royal Antwerp*, para 19.

the case required an interpretation of those two provisions of EU law and referred the matter to the ECJ for a preliminary ruling.[21]

3. The Opinions of Advocates General Rantos and Szpunar

3.1. *Advocate General Rantos in ESL & ISU*

At the *ESL* hearing, which took place in July 2022 and lasted for almost two days, an unprecedented number of 22 EU Member States, two EEA States and the European Commission submitted observations. Strikingly, all interveners argued that the contested rules in the FIFA and UEFA Statutes did not amount to a violation of the Treaty competition and free movement rules. The Opinion of Advocate General Rantos was issued on 15 December 2022, not coincidentally precisely 27 years to the day the *Bosman* judgment was rendered, unquestionably still the most important Court ruling in the field of European sports law.[22] The Advocate General took care to refer to this ruling in his opening statement, reminiscing that it had 'sent shockwaves through the football world'.[23] He plainly was also aware of the potential importance of the *ESL* case, stating that 'the future of European football' would turn on the answers given by the Court to the problems related primarily to competition law and to fundamental freedoms.[24]

The general tenor of the Advocate General's Opinion soon became apparent. Even in his preliminary observations, he opined that Article 165 TFEU, which specifies the objectives and means of EU actions in the field of sport, was to be seen as giving expression to the constitutional recognition of the 'European Sports Model', which is characterized by a series of elements common to most sporting disciplines on the European continent: (1) a pyramid structure with amateur sport at its base and, professional sport at the top; (2) equality of opportunities by virtue of a system in which promotion and relegation maintain a competitive balance and give priority to sporting merit; and (3) a financial solidarity regime, which allows the redistribution of revenue at the lower levels of the sport.[25] According to the Advocate General, the protection of this 'European Sports Model' is the *raison d'être* of Article 165 TFEU. This article was not introduced simply to protect amateur sport, but because sport is, at the same time, an area of significant economic activity. The

21. Judgment, *Royal Antwerp*, paras 23–25.
22. Case C-415/93, *Bosman*, EU:C:1995:463.
23. Opinion, *ESL*, para 1.
24. Opinion, *ESL*, para 3.
25. Opinion, *ESL*, para 30.

rationale behind the introduction of Article 165 TFEU is to emphasize the special social character of that economic activity, which may justify a difference in treatment in certain respects.[26]

> 'Article 165 TFEU can be used as a standard in the interpretation and the application of article 101 and 102 TFEU. Within its field, Article 165 TFEU is a specific provision as compared with the general provisions of Articles 101 and 102 TFEU. . . . Furthermore, Article 165 TFEU is, by its very nature, a "horizontal" provision, inasmuch as it must be taken into consideration when implementing other EU policies'.[27]

Moreover, the Advocate General also observed at the outset that the mere fact that the same entity performs the dual roles of regulator and organizer of sporting competitions does not entail, in itself, an infringement of EU competition law. The main obligation on a sports federation is to ensure that third parties are not unduly denied access to the market to the point that competition on that market is thereby distorted.[28] It follows that sports federations may, subject to certain conditions, refuse third parties access to the market, without this constituting an infringement of Articles 101 and 102 TFEU, provided that that refusal is justified by legitimate objectives and that the steps taken by those federations are proportionate to those objectives.[29] And with these observations, the tone was set.

The Advocate General started his analysis of the conformity of the rules on prior approval, participation and sanctions with Article 101 TFEU, 'on account of a more developed line of case-law relating to the decisions of sports associations under Article 101 TFEU'.[30] In his view, it was not clearly established that the UEFA rules at issue have the object of restricting competition; hence, he argued that a complete analysis of its effects must be carried out to determine what impact on competition the UEFA rules are liable to have on the market for the organization of football competitions in Europe.[31]

In the opinion of the Advocate General, the application of what he calls the 'regulatory ancillary restraints' doctrine in the context of sport lies at the heart of the present case.[32] This analysis allows 'the specific characteristics of sport

26. Opinion, *ESL*, para 34.
27. Opinion, *ESL*, para 35.
28. Opinion, *ESL*, para 48.
29. Opinion, *ESL*, para 49.
30. Opinion, *ESL*, para 53.
31. Opinion, *ESL*, paras 63–78.
32. Opinion, *ESL*, para 86. In this context, he referred to Case C-309/99, *Wouters*, EU:C:2002:98, paras 86–94 and 97–110; and Case C-519/04 P, *Meca-Medina*, EU:C:2006:492.

to be "incorporated" into the competition analysis as part of a tricky exercise in which a balance is struck between the "commercial" and the "sporting" aspects of professional football'.[33] First, the Advocate General indicated that it cannot be disputed that most of the objectives invoked by UEFA and FIFA stem from the 'European Sports Model' and are therefore expressly covered by Article 165 TFEU, with the result that their legitimacy cannot be contested.[34] Second, the Advocate General took the view that the non-recognition by FIFA and UEFA of an essentially closed competition such as the European Super League could be regarded as inherent in the pursuit of the legitimate objectives of participation based on sporting results, equal opportunities and solidarity.[35] This is in the first place the case for the prior approval system that appears to constitute 'an essential governance mechanism for European football' in order to ensure the uniform application of the rules and compliance with common standards between the various competitions. Such a system also makes it possible to ensure the coordination and the compatibility of football match and competition calendars in Europe.[36] It could also prove to be necessary to safeguard the current structure of European football and the objective of solidarity.[37] From the perspective of competition law, an undertaking such as UEFA also cannot be criticized for attempting to protect its own economic interests, in particular in relation to such an 'opportunistic' project that would risk weakening it significantly.[38] According to the Advocate General, the intention of those behind the European Super League is not to create a 'proper' closed and independent league (a breakaway league), but to set up a rival competition to UEFA's in the most lucrative segment of the market for the organization of European football competitions, whilst continuing to be part of the UEFA ecosystem by participating in the national championships. 'It would appear that ESLC's founding clubs want, on the one hand, to benefit from the rights and advantages linked to membership of UEFA, without however being bound by UEFA's rules and obligations'.[39] Finally, the Advocate General left it for the referring court to examine the proportionality of the contested rules. He did stress that the examination 'cannot be carried out in the abstract and must take account of the factual, legal and economic context in which those rules will be applied'.[40] Notably, he also added that 'even if the criteria established by

33. Opinion, *ESL*, para 91.
34. Opinion, *ESL*, para 93.
35. Opinion, *ESL*, para 110.
36. Opinion, *ESL*, para 96.
37. Opinion, *ESL*, para 98.
38. Opinion, *ESL*, para 108.
39. Opinion, *ESL*, para 107.
40. Opinion, *ESL*, para 117.

UEFA were not to satisfy the criteria of transparency and non-discrimination, this would not mean that a third-party competition running counter to legitimate sporting objectives should be authorized and that UEFA's refusal to authorize such a competition could not be justified'.[41] Sanctions targeted at football clubs participating in an international competition such as the European Super League appear proportionate to the Advocate General, in particular given the role played by those clubs in the organization and the creation of a competition. By contrast, imposing sanctions on players he did consider disproportionate, in particular as regards their participation in national teams.[42]

In this light, Advocate General Rantos proposed that the Court hold that Article 101 TFEU must be interpreted as not precluding Articles 22 and 71–73 of the FIFA Statutes and Articles 49 and 51 of the UEFA Statutes. On similar grounds, the Advocate General came to the same conclusion concerning the interpretation of the Articles 102, and 45, 49, 56, and 63 TFEU.[43]

In his parallel Opinion in *ISU*, which was rendered the same day, the Advocate General concluded that the General Court had erred in law as regards its classification of the ISU's eligibility rules as a restriction of competition by object and therefore proposed that the judgment of the General Court be set aside in this regard.[44] By contrast, the Advocate General took the view that the General Court was fully entitled to recognize that the use of an exclusive and binding arbitration mechanism was a generally accepted method of resolving disputes and that agreeing to an arbitration clause did not as such constitute a restriction of competition.[45] Accordingly, he concluded that the General Court did not err in law in holding that the exclusive and binding arbitration mechanism could not be classified as a 'reinforcing' element of the restriction of competition found.[46]

3.2. *Advocate General Szpunar in Royal Antwerp*

Advocate General Szpunar limited his opinion in *Royal Antwerp* to the free movement of workers aspect of the case, as requested by the Court.[47] He argued that the contested 'home-grown players' rules are precluded by Article 45 TFEU and thus incompatible with EU law, but only to the extent that they apply to players who were not trained by the specific club in question.

41. Opinion, *ESL*, para 118.
42. Opinion, *ESL*, paras 121–22.
43. Opinion, *ESL*, paras 144–86.
44. Opinion, *ISU*, paras 64–122.
45. Opinion, *ISU*, para 157.
46. Opinion, *ISU*, paras 161–69.
47. Opinion, *Royal Antwerp*, para 2.

First and foremost, the Advocate General recalled that sporting activities forming part of economic life fall within the scope of the fundamental freedoms of the Treaty.[48] He contended that the rules on home-grown players are likely to create indirect discrimination against nationals of other Member States. 'It is a fact of life that the younger a player is, the more likely it is that that player resides in his place of origin. It is therefore necessarily players from other Member States who will be adversely affected by the contested rules'.[49] In any event, the contested rules certainly constitute a (simple) restriction to the free movement of football players.[50]

Such an indirect discrimination may, however, be justified: the Advocate General reiterated that the Court has consistently held, since *Bosman*, that 'in view of the considerable social importance of sporting activities and in particular football in the European Union', the objectives of encouraging the recruitment and training of young players and improving the competitive balance between clubs are 'aims legitimately pursued'.[51]

According to the Advocate General, the contested provisions are, 'by definition', suitable to attain the objective of training and recruiting young players.[52] However, he had certain doubts regarding the general coherence of the contested provisions, as regards the definition of a 'home-grown player'.[53] 'If a club in a national league can "buy" up to half of home-grown players, the objective of encouraging that club to train young players would be frustrated'.[54] As a result, while the Advocate General considered the requirement to include, on a relevant list, a predefined number of home-grown players justified, he failed to see the rationale – from a perspective of training – of extending the definition of a 'home-grown player' to players outside of a given club, but inside the relevant national league.[55] The same considerations applied to the objective of improving the competitive balance of teams. Therefore, he concluded that the 'home-grown players' rules are not suitable for achieving the objective of training young players: 'home-grown players' should not include players emanating from other clubs than the club in question.[56]

48. Opinion, *Royal Antwerp*, para 35.
49. Opinion, *Royal Antwerp*, para 43.
50. Opinion, *Royal Antwerp*, para 45.
51. Opinion, *Royal Antwerp*, paras 56–60; Case C-415/93, *Bosman*, para 106.
52. Opinion, *Royal Antwerp*, para 66.
53. Opinion, *Royal Antwerp*, para 67.
54. Opinion, *Royal Antwerp*, para 68.
55. Opinion, *Royal Antwerp*, para 69.
56. Opinion, *Royal Antwerp*, para 71.

4. The judgments of the Court of Justice

The Opinions of Advocate General Rantos in *ESL* and *ISU* were clearly favourable for the sporting authorities. Things were looking good for FIFA and UEFA, or so it seemed, because although Advocate General Opinions do not bind the Court, in the great majority of cases the Court follows the Opinion of the Advocate General. But then came the Opinion of Advocate General Szpunar in *Royal Antwerp*. How different these cases may have been, the fact remained that in all of them, the conformity of certain rules of SGBs with the EU competition law and free movement provisions was subjected to the Court's scrutiny, and that the two Advocates General recommended that the Court give a different outcome to these assessments. And so, the Opinion of Advocate General Szpunar slightly affected the confidence of the sporting authorities in a good outcome in *ESL* and *ISU*. But when the judgments were long in coming, and it was furthermore announced that the three judgments would be rendered on the same day, suspicion grew that the Court's rulings might be different from what was expected.

The Court gave its verdicts on 21 December 2023. First and foremost, in *ESL*, it decided not to follow the Opinion of Advocate General Rantos and held the contested prior approval and participation rules to be incompatible with the competition rules and the rules on free movement. In *ISU*, the Court ruled along the same lines with regard to the prior authorization and eligibility rules in relation to Article 101 TFEU. Further, the Court also ordered that the judgment of the General Court must be set aside insofar as it annulled the Commission's decision on the arbitration rules, which were held to fall short of the requirements of the principle of effective judicial review. In *Royal Antwerp*, the 'home-grown players' rules were also found to violate Articles 101 and 45 TFEU, unless it was demonstrated, through convincing arguments and evidence, that they can be justified.

It is, of course, essential to determine precisely what the Court has ruled and how it has come to these rulings. In *ESL*, first, and importantly, the Court has confirmed the position of FIFA and UEFA at the top of the football pyramid, recognizing that FIFA and UEFA enjoy legal autonomy which allows them to adopt rules on the organization of competitions in their discipline, their proper functioning and the participation of sportspersons therein. However, it was also quick to add that in doing so, they may not limit the exercise of the rights and freedoms conferred by EU law on individuals.[57] The Court resolutely downplayed the relevance of Article 165 TFEU in this respect, reminding that

57. Judgment, *ESL*, para 75.

it is not a horizontal, cross-cutting provision with general application, contrary to the view expressed by Advocate General Rantos.[58]

Subsequently, the Court determined that both FIFA and UEFA are undertakings to the extent that they carry on economic activity consisting in the organization and marketing of international football competitions and the exploitation of the various rights related to those competitions; and further that they both also hold a dominant position, or even a monopoly, on the relevant market.[59] However, this determination is not problematic as such. In this context, the Court did not find it objectionable that FIFA and UEFA, besides their commercial role, also have regulatory and control powers that they have granted to themselves, and that those rules confer on those two entities not only the power to authorize the setting up and organization, by a third-party undertaking, of a new interclub football competition on European Union territory, but also the power to control the participation of professional football clubs and players in such a competition, on pain of sanctions. The Court found it legitimate to subject the organization and conduct of international professional football competitions to common rules intended to guarantee the homogeneity and coordination of those competitions within an overall match calendar as well as, more broadly, to promote the holding of sporting competitions based on equal opportunities and merit. Ensuring compliance with those common rules through rules on prior approval of those competitions and the participation of clubs and players therein was also considered legitimate.[60]

Be that as it may, the Court stressed it was indispensable to ensure equality of opportunity between undertakings to guarantee the maintenance or development of undistorted competition in the internal market.

> 'To entrust an undertaking which exercises a given economic activity the power to determine which other undertakings are also authorized to engage in that activity and to determine the conditions in which that activity may be exercised, gives rise to a conflict of interests and puts that undertaking at an obvious advantage over its competitors, by enabling it to deny them entry to the market concerned or to favour its own activity and also, in so doing, to prevent the growth of competition therein to the detriment of consumers'.[61]

The Court recalled its settled case law that when such gatekeeping power is conferred through public intervention, it 'must be subject to restrictions,

58. Judgment, *ESL*, paras 95–107.
59. Judgment, *ESL*, para 139.
60. Judgment, *ESL*, para 144.
61. Judgment, *ESL*, para 133.

obligations and review that are capable of eliminating the risk of abuse of its dominant position by that undertaking, so as not to give rise to an infringement of Article 102 TFEU, read in conjunction with Article 106(1) TFEU'.[62] Concretely, this power must be placed within a framework of substantive criteria and detailed procedural rules which are transparent, objective, precise and non-discriminatory.[63] The Court clarified that these equal treatment requirements are 'all the more necessary' when the undertaking's power arises not from the grant of exclusive or special rights by the State, but from its own conduct. In the absence of such a framework, as was the case here, the prior authorization and participation rules, and the sanctions introduced as an adjunct to those rules must, 'by their very nature', be held to infringe Article 102 TFEU inasmuch as they are discretionary in nature.[64]

In the context of Article 101 TFEU, the Court came to the parallel conclusion that the adoption and implementation of the FIFA and UEFA rules on prior approval of new interclub football competitions, accompanied by rules controlling the participation of professional football clubs and players therein, constitute decisions by associations of undertakings having as their object the prevention of competition.[65] It motivated this conclusion on the grounds that those rules make it possible,

> 'by their nature, if not to exclude from that market any competing undertaking, even an equally efficient one, at least to restrict the creation and marketing of alternative or new competitions in terms of their format or content. In so doing, they also completely deprive professional football clubs and players of the opportunity to participate in those competitions, even though they could, for example, offer an innovative format whilst observing all the principles, values and rules of the game underpinning the sport. Ultimately, they completely deprive spectators and television viewers of the opportunity to attend those competitions or to watch the broadcast thereof'.[66]

Having established a *prima facie* violation of both Article 101 and 102 TFEU, the Court proceeded to look carefully into the issue of justification. Importantly, it clarified that, by their very nature, rules and practices that restrict competition cannot invoke a public interest defence under the *Wouters/Meca-Medina* doctrine.[67] The contested provisions could be

62. Judgment, *ESL*, paras 134 and 137.
63. Judgment, *ESL*, paras 135–36.
64. Judgment, *ESL*, paras 147–48.
65. Judgment, *ESL*, para 179.
66. Judgment, *ESL*, para 176.
67. This is discussed in detail in Section 5.3 below.

exempted under Article 101(3) TFEU or justified by objective necessity or efficiencies under Article 102 TFEU, but only if it were demonstrated, 'by means of convincing arguments and evidence', that all of the conditions required for the exemption or the justification are satisfied.[68] Formally, the Court left it for the referring national court to rule on the issue, but it made sure to discard any doubt as to its view on the matter, expressly noting that the contested rules afford the sporting associations 'the opportunity to prevent any and all competition on the market', which 'suffices to rule out the possibility' that these rules can be exempted under Article 101(3) TFEU or held to be justified under Article 102 TFEU.[69]

This ruling is consistent with the principles developed in the *ISU* case. The Court found that the General Court had not committed any error of law or of legal characterization of the facts in finding that the European Commission had correctly classified the prior authorization and eligibility rules as having as their object the restriction of competition within the meaning of Article 101(1) TFEU.[70]

Conversely, the Court decided to set aside the judgment of the General Court insofar as it annulled the part of the Commission decision dealing with the arbitration rules.[71] It reached this conclusion finding that the General Court did commit an error in law in finding, first, 'in an undifferentiated and abstract manner', that the arbitration rules may be justified by legitimate interests linked to the specific nature of sport, insofar as they confer on 'a specialised court' the power to review disputes relating to the prior authorization and eligibility rules, without seeking to ensure that those arbitration rules complied with the requirements of the principle of effective judicial review.[72] While acknowledging that the effectiveness of the arbitration proceedings may justify the judicial review of arbitral awards being limited, the Court nevertheless pointed out that in the context of mandatory and exclusive arbitration, the requirement of effective judicial review must cover the question of whether those awards comply with the fundamental provisions that are a matter of public policy, which include Articles 101 and 102 TFEU; and also entails that the court having jurisdiction to review the arbitration awards must satisfy all the requirements under Article 267 TFEU, so that it is entitled – or, as the case may be, required – to refer a question to the Court of Justice where it considers that a decision of the Court is necessary

68. Judgment, *ESL*, para 191.
69. Judgment, *ESL*, paras 207–208.
70. Judgment, *ESL*, para 156.
71. Judgment, *ESL*, para 204.
72. Judgment, *ISU*, para 199.

concerning a matter of EU law raised in a case pending before it.[73] In the absence of such judicial review, the Court concluded, the use of an arbitration mechanism is such as to undermine the protection of rights that subjects of the law derive from the direct effect of EU law and the effective compliance with Articles 101 and 102 TFEU, which must be ensured.[74]

Second, the Court determined that the General Court also erred in law in holding that the effectiveness of EU law was in any event still ensured in full, by, on the one hand, 'the existence of remedies allowing recipients of a decision refusing to allow them to participate in a competition or of an ineligibility decision to seek damages for the harm caused before the relevant national courts' and, on the other hand, the possibility of filing a complaint with the European Commission or a national competition authority (NCA).[75] Essential as this may be, according to the Court this nevertheless 'cannot compensate for the lack of a remedy entitling that person to bring an action before the relevant national court seeking to have that conduct brought to an end, or where it constitutes a measure, the review and annulment of that measure, if necessary following a prior arbitration procedure carried out under an agreement that provides for such a procedure'.[76]

Finally, in *Royal Antwerp*, the Court stipulated that the 'home-grown players' rules could be contrary to Article 101 TFEU, if it is established that they are liable to affect trade between Member States and that they have either as their object or their effect the restriction of competition between professional football clubs, but it ultimately left this to the determination of the referring court.[77] In any event, it will remain possible for UEFA and the URBSFA to convincingly demonstrate that these rules may be justified.[78] As regards the free movement of workers, the Court held that the rules could be considered to be indirectly discriminatory.[79] But also here, these rules may still be justified if it could be demonstrated that they pursue the objective of encouraging recruitment and training, and that they are proportionate to that objective.[80]

73. Judgment, *ISU*, para 198.
74. Judgment, *ISU*, para 198.
75. Judgment, *ISU*, para 200.
76. Judgment, *ISU*, para 201.
77. Judgment, *Royal Antwerp*, paras 111 and 117.
78. Judgment, *Royal Antwerp*, paras 118–35.
79. Judgment, *Royal Antwerp*, paras 136–40.
80. Judgment, *Royal Antwerp*, paras 141–50.

5. Comments

5.1. *General observations*

The judgments in *ESL, ISU,* and *Royal Antwerp* are meant to be seen as a triptych – a grouping of three interconnected panels that, viewed together, present a comprehensive picture. This is unsurprising for the first two cases, which essentially concern the same subject matter. However, their connection with the *Royal Antwerp* case was less apparent. The 'home-grown players' rule revolved around possible nationality discrimination. In previous case law, the lawfulness of similar sporting rules had consistently been assessed under the free movement provisions. What is more, the Court itself had specifically requested the Advocate General to similarly approach the issue from that perspective only. At some point in the course of the proceedings, the Court must have changed its mind. In the end, the *Royal Antwerp* case has primarily been assessed from a competition law perspective. As will be further explained below, arguably it serves as an extra illustration of the 'new' practice that the Court has 'clarified' in competition law analysis in these three cases, and that consists of determining first whether any given behaviour or measure amounts to a restriction by object or effect. *Royal Antwerp* allowed the Court to also give guidance on a potential effects-based analysis under Article 101 TFEU, in addition to the 'by object' treatment of the rules and practices in *ESL* and *ISU*.

The judgments are extensively motivated and together make for a substantial read.[81] Notably, the Court did not limit itself to concluding that, for instance, the contested FIFA and UEFA rules on prior approval and participation amounted to an abuse of dominance prohibited by Article 102 TFEU, as is its habitual practice, but went on to examine these same rules also from the point of view of their compatibility with Article 101 TFEU (and Article 56 TFEU), only to reach parallel conclusions. These articles may apply simultaneously if their respective conditions of application are met. In this context, the Court repeats its standard formula that the same practice may give rise to an infringement of both Article 101 and 102 TFEU, 'even though they pursue different scopes and have different objectives'.[82] However, it then goes further, stating more explicitly than before that they must, accordingly, be interpreted and applied consistently.[83] Clearly, the Court went to great lengths to offer a full panorama of the guiding principles for the application of the EU

81. The *ESL* judgment counts no less than 258 considerations (in comparison, *Bosman* was 147 considerations long).

82. Judgment, *ESL*, para 119.

83. Judgment, *ESL*, para 186; Judgment, *ISU*, para 128.

antitrust rules in future sports cases, [84] just as *Bosman* did in relation to the free movement rules.[85]

The Court emphasizes, in its preliminary observations, that Article 165 TFEU is 'not a cross-cutting provision having general application'.[86] This means that the different elements and objectives listed in Article 165 TFEU 'need not be integrated or taken into account in a binding manner' in the interpretation of the free movement or the competition rules. More broadly, Article 165 TFEU must also not be regarded 'as being a special rule exempting sport from all or some of the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application'.[87] Undoubtedly, the Court felt the need to clarify this point, in view of the differing views on the inferences liable to be attached to this provision expressed by the parties and a large number of the intervening governments in the procedure, and especially the Opinion of Advocate General Rantos, who regarded Article 165 TFEU as the constitutional recognition of the 'European Sports Model' in the Treaties and the standard for the interpretation and application of the general provisions Articles 101 and

84. It can be observed that the Court's analysis predominantly focuses on the substantive preconditions for applying Arts 101(1) TFEU and 102 TFEU, paying scant attention to the conditions that delineate their personal scope. In *ESL*, this at times leads to reasoning that somewhat lacks conceptual clarity and rigour. For instance, the Court determines that FIFA and UEFA, when they adopt and implement rules on prior approval and participation, are to be regarded as associations of undertakings under Art 101 TFEU. However, for the same activity, FIFA and UEFA are simultaneously treated as undertakings, forming a single economic unit with their members, and acting unilaterally for the purpose of Art 102 TFEU. See eg Judgment, *ESL*, paras 152, 179, 217. For a similar criticism, see Alison Jones, 'The boundaries of an undertaking in EU competition law' (2015) 8 European Competition Journal 301, discussing Case T-139/02, *Piau v Commission*, EU:T:2005:22. In its case law, the General Court did exceptionally find that agricultural cooperations may, at the same time, be classified as an undertaking and as an association of undertakings: Case T-89/22, *Conserve Italia and Conserves France v Commission*, EU:T:2024:574, para 34; Case T-61/89, *Dansk Pelsdyravlerforening v Commission*, EU:T:1992:79, para 50. The Court also finds it 'indisputable' that both entities each hold a dominant position on the market for the organization and marketing of interclub football competitions in the EU. However, since FIFA does not operate in this market, they could only hold a collective dominant position: Judgment, *ESL*, para 117.

85. From the wealth of analysis, see eg Jean-Philippe Dubey, *La libre circulation des sportifs en Europe* (Bruylant 2000); Stefaan Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (European Monographs 48, Kluwer Law International 2005); Stephen Weatherill, 'European football law' in *Collected Courses of the Academy of European Law, Vol VII, Book I* (Kluwer Law International, 1999) 350; or the contributions of Marko Ilesic, Stephen Weatherill, Stefaan Van den Bogaert, and Gianni Infantino and Petros Mavroidis respectively in Luis Miguel Poiares Maduro and Loïc Azoulay (eds), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010) ch 12.

86. Judgment, *ESL*, para 100.

87. Judgment, *ESL*, para 101.

102 TFEU in the specific sporting context. Clearly the Court was not willing to grant such a prominent or formal role to this provision. By the same token, however, the Court did recognize that sporting activity 'carries considerable social and educational importance', and 'undeniably has specific characteristics', which may 'potentially be taken into account along with other elements in the context of and in compliance with the conditions and criteria of application' of the free movement and competition rules.[88] *In casu*, it accepted the need to ensure observance of the values of openness, sporting merit and solidarity in the organization of sporting competitions, as well as the need to integrate new sporting competitions, in a substantially homogeneous and temporarily coordinated manner, in the organized match calendar in sport, as public interest objectives, capable of justifying restrictions of competition or free movement.[89] Seemingly, the main features of the 'European Sports Model' have thus received formal approval and protection under EU law. However, this recognition stems not from Article 165 TFEU, but rather from the jurisprudence of the Court.[90] Arguably, this distinction matters. Had the Court confirmed this 'constitutional recognition' of the main features of the 'European Sports Model', it would become extremely difficult, if not impossible, to introduce new competitions that would not comply with them; now, these features are merely factors – albeit very relevant ones – to be taken into account when considering the application for an alternative competition format.

5.2. *The issue of sports governance*

The two sides in the European Super League dispute did not waste any time explaining the judgment in their favour. The Eureoperan Super League promoters celebrated their win, exclaiming 'European club football is free. The near-70-year UEFA monopoly is finally over'.[91] In the afternoon of 21 December 2023, they promptly presented the format for the European Super League 2.0, featuring more teams participating across three divisions (Star League, Gold League, and Blue League) with a promotion and relegation system. The loss in court notwithstanding, FIFA and UEFA appeared untroubled by the judgment. UEFA released a statement saying:

88. Judgment, *ESL*, paras 102–104.

89. Judgment, *ESL*, paras 144 and 253.

90. For discussion, see eg Stephen Weatherill, 'The impact of the rulings of 21 December 2023 on the structure of EU sports law' (2024) 23 The International Sports Law Journal 409; Borja García, 'Down with the politics, up with the law! Reinforcing EU law's supervision of sport autonomy in Europe' (2024) 23 The International Sports Law Journal 416.

91. A22 Sports Management, 'A22 proposes new open European competition', press release of 21 December 2023, <a22sports.com/en/media/press-release-21-december-2023/>.

> 'This ruling does not signify an endorsement or validation of the so-called "super league"; it rather underscores a pre-existing shortfall within UEFA's pre-authorization framework, a technical aspect that has already been acknowledged and addressed in June 2022. UEFA is confident in the robustness of its new rules and specifically that they comply with all relevant European laws and regulation'.[92]

Keeping up appearances may have been the motto of the SGBs, but the undeniable reality is that the judgments constitute another serious slap on the wrist from the Court of Justice, 28 years after *Bosman*. The silver lining for FIFA and UEFA seems to be that the Court did not pronounce on the organization, objectives or even the existence of those two associations, and affirmed their position at the top of the football pyramid. Crucially, it acknowledged their legitimate authority to control access to the market for the organization and marketing of interclub international football competitions, without imposing a structural separation of their commercial activities. The Court attributes this recognition of the need for gatekeeping to the specific nature, structure, and functioning of professional football.[93] But it of course holds significant importance as a clear precedent,[94] which associations from other sports will undoubtedly seek to leverage. However, with great power comes great responsibility. The Court made clear that rules on prior approval of sporting competitions organized by third parties accompanied by rules controlling the participation in these competitions, under threat of sanctions, can only be accepted if a level playing field is guaranteed. To eliminate any potential conflict of interest, the SGB's regulatory, control, and sanctioning powers must be bound by restrictions, obligations, and effective review. Specifically, these powers must be governed by a framework of transparent, objective, and precise substantive criteria and procedural rules, suitable for ensuring that they are not used in an arbitrary, discriminatory or disproportionate manner. In essence, the Court expects strict adherence to what can broadly be labelled as good governance standards and practices. The

92. UEFA, 'UEFA statement on the European Super League case', press release of 21 December 2023, <www.uefa.com/news-media/news/0288-19bf06a5cd26-1e0545be457d-1000--uefa-statement-on-the-european-super-league-case/>.

93. See eg Judgment, *ESL*, paras 142–49, 175, 196, 203. In contrast, in *ISU*, the Court omits any reference to the legitimacy of prior approval and participation rules in the context of speed skating and only confirms that the ISU's *ex ante* system of control was unlawful.

94. In contrast, in its decision on the ISU Eligibility Rules, the European Commission, while noting that various sports federations do not pre-emptively authorize events organized by third party organizers, explicitly did not take a view on the question whether a pre-authorization system can be considered inherent in the pursuit of legitimate objective: European Commission Decision of 8 December 2017 in Case AT.40208 – International Skating Union's eligibility rules, paras 252–54.

Court firmly stated that in the absence of compliance with these minimum requirements, rules on prior approval and participation would be deemed in breach of Articles 101 and 102 TFEU by their very nature.

The Court's reasoning for arriving at this conclusion has proven to be one of the most contentious aspects of the *ESL* and *ISU* rulings. Before considering the practical implications for UEFA and FIFA's role as gatekeepers, the Court's *ratio decidendi* and its consequences for the application of Articles 101 and 102 TFEU will therefore be examined first.

5.2.1. *Extension of the 'equality of opportunity' principle to autonomous gatekeeping power*

From the late 1980s, initially in the context of the liberalization of telecommunications markets, the Court developed a line of case law on the compatibility of structural conflict of interest situations, arising from public intervention, with EU competition law. That case law established rigorous competitive neutrality obligations, rooted in the Ordoliberal idea of equal starting conditions and opportunities (*Startgleichheit*) for all market participants and the duty that the Treaties impose on Member States not to enact or maintain measures that may undermine the effectiveness of the competition rules applicable to undertakings.[95] The Court first invoked the principle of equality of competitive opportunity in its *Telecommunications Terminals* judgment, concerning an action for annulment brought by France against a directive aimed at opening up the terminal equipment markets to competition. This liberalization measure, adopted by the European Commission on the basis of Article 106(3) TFEU, obliged the Member States to entrust regulatory and supervisory functions – drawing up technical specifications, monitoring their application, and granting type-approval certificates for telephones, fax machines, and other terminal equipment – to a body that is independent from telecoms operators.[96] The Commission considered the full separation of these functions and operational activities essential to avoid obvious conflict of interest and distortion of market conditions. The Court upheld the validity of that obligation. Echoing the principles set out in the preambles of the Directive, the Court stressed that a system of undistorted competition, such as that provided for by the Treaty, 'can be guaranteed only if equality of opportunity is secured as between the

95. Art 106(1) TFEU is a specific expression of the duty of loyal or sincere cooperation, set out in Art 4(3) TEU. See eg Case C-323/93, *Société Civile Agricole du Centre d'Insémination de la Crespelle*, EU:C:1994:368, para 15.

96. Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment [1988] OJ L 131/73, Art 6.

various economic operators'.[97] It therefore agreed with the Commission that regulatory responsibilities could not be assigned to a market participant, as this would give that undertaking 'an obvious advantage over its competitors'.[98] Based on this case law, the principle of separation between regulatory and operational functions was further implemented in various other liberalization measures in e.g. the telecom services and postal sectors.[99]

In *RTT/GB-Inno-BM*, the Court reaffirmed its reasoning and applied it to competition law. The facts of that case pre-dated the adoption of the Directive on terminal equipment, but the Court derived the same requirement of independence from Articles 106(1) and 102 TFEU. The conflict of interest on the part of RTT, the incumbent telecoms operator which had been given the exclusive right to approve the equipment of rivals, gave it the ability and incentive to extend its monopoly over the telecommunications network to a related market, which would constitute an abuse of dominance. The Court found that by encouraging such abusive conduct, the State had failed to ensure equality of opportunity and thus acted in breach of Article 106(1) TFEU read in conjunction with Article 102 TFEU.[100] Subsequent case law confirmed that these provisions are infringed when a State measure creates a conflict of interest situation that puts a public undertaking or undertaking given special or exclusive rights (known as a privileged undertaking) at a competitive edge over its rivals – for instance, by assigning it the task to regulate access to a market in which it also competes.[101] The Court further clarified that it is unnecessary to show that the undertaking has taken advantage of the conflict of interest. The distortion of the conditions of competition is not the result of the undertaking's behaviour. It is rather due to the creation of an unequal market structure that enables the undertaking, simply by exercising its legal monopoly, to maintain, strengthen or extend its dominant position.[102] In other words, the mere 'risk' of an abuse of a dominant position triggers liability, without it being necessary that any abuse should actually occur.[103] It is

97. Case C-202/88, *France v Commission*, EU:C:1991:120, para 51.

98. ibid.

99. See eg Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines [1992] OJ L 165/27; Directive 97/67/EC of the European Parliament and of the Council of 15 Dec 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1998] OJ L 15/14.

100. Case C-18/88, *RTT/GB-Inno-BM*, EU:C:1991:474, paras 24–26.

101. It may also occur where the grant of an exclusive or special right creates a conflict of interest between two commercial activities of the undertaking: Case C-193/96, *Criminal proceedings against Silvano Raso and Others*, EU:C:1998:54.

102. See eg Case C-193/96, *Silvano Raso*, para 31; Case C-553/12 P, *Commission v DEI*, EU:C:2014:2083, paras 46–47.

103. Case C-49/07, *MOTOE*, EU:C:2008:376, paras 49–50.

sufficient to identify a 'potential or actual anti-competitive consequence' liable to result from the measure at issue.[104]

Prior to the December 2023 rulings, the conflict of interest case law had applied Article 102 TFEU only in conjunction with Article 106(1) TFEU, as it pertained to undertakings holding a dominant position due to a (former) legal monopoly or statutory privileges granted to them. Consequently, it was generally understood that the principle of equality of opportunity, along with its operational requirements, was only relevant in situations where there is State involvement.[105] The underpinning theory is that precisely because the State intervenes in the market, it is both reasonable and necessary to pre-emptively address the risk of an abuse, given the duty of the Member States to maintain undistorted competition. However, in *ESL* and *ISU*, the Court clarified that it is irrelevant whether the undertaking's gatekeeping power arises from the grant of exclusive or special rights by the State or from its autonomous behaviour. In fact, the Court emphasized that measures to ensure equal opportunities for all market participants are 'all the more necessary' in the latter scenario.[106] Thus, having determined that the conflict of interest case law is similarly applicable to autonomous gatekeeping power, the Court transposed its principles and standards to the standalone application of Article 102 TFEU, as well as Article 101 TFEU. The Court's reasoning is most clearly articulated in *ISU*. A central issue in that case was whether the risk-based liability standard of the conflict of interest case law applied. In its decision on the ISU's Eligibility Rules, the European Commission had found that the pre-authorization system embodied by these rules could inherently foreclose competition. The ISU contested that premise. It argued that its pre-authorization system might only be caught by Article 101(1) TFEU if it were used in an anti-competitive manner in a specific instance. Advocate General Rantos agreed, noting that the 'theoretical capability of undermining competition, on the basis of the broad discretion which a sports federation may have' cannot be sufficient to establish an anti-competitive object.[107] The Court, however, upheld the position taken by the Commission. In a first step, it transposed the liability standard based on mere risk, finding that private regulatory power (such as that assumed by the ISU) must similarly be held to infringe Article 102 TFEU 'by its very existence', unless the risk of the

104. Case C-553/12 P, *Commission v DEI*, paras 46–47.

105. See eg the criticism directed at the General Court's reference to and application of the principle in Case T-612/17, *Google LLC, formerly Google Inc and Alphabet, Inc v Commission*, EU:T:2021:763, paras 180, 616; Édouard Bruc, '*Google Shopping* and Article 106 TFEU: A legal dystopia in the EU constitutional order' (2023) 14 Journal of European Competition Law & Practice 334.

106. Judgment, *ESL*, paras 132, 137; Judgment, *ISU*, para 126.

107. Opinion, *ISU*, paras 70–75, 99.

undertaking exploiting its position is eliminated.[108] In a second step, stressing the need for logical coherence in the interpretation and application of Articles 101 and 102 TFEU,[109] the Court held that such power, if unchecked, may therefore also be viewed as having as its 'object' the restriction of competition within the meaning of Article 101(1) TFEU, 'considered as such and therefore independently of their application'.[110] The Court's application of the equality of opportunity principle and the risk-based liability standard from its conflict of interest case law in a purely private context has attracted two main criticisms. First, the presumption that the mere existence of gatekeeping power, combined with the objective situation of a possible conflict of interest, will inevitably lead to abuse, would be a significant regression from the more recent Article 102 TFEU case law, which requires that anti-competitive effects must be actual or potential, not merely hypothetical.[111] Second, *ESL* and *ISU* would have profound implications for potentially any undertaking dominating a market, as their special responsibility may now include a general obligation to facilitate market entry by competitors.[112]

We believe, however, that the Court's approach is more measured and not as radical as it might seem. The Court's use of 'by object' language in relation to Article 102 TFEU is notable, but not groundbreaking.[113] In their jurisprudence on exclusionary abuse, the Union Courts have set varying evidentiary requirements for determining whether a conduct is capable of producing exclusionary effects. It is clear that, at one end of the spectrum, certain practices continue to be presumptively prohibited as abusive. That means that, given their very nature, it is presumed that they are capable of foreclosing rivals' entry and expansion, without the need to assess their effects.[114] However, the dominant undertaking must still be able to disprove that its conduct is capable of restricting competition, triggering a need for an

108. Judgment, *ESL*, paras 135, 148, 185; Judgment, *ISU*, para 127.

109. See above Section 5.1.

110. Judgment, *ISU*, para 156.

111. For such criticism expressed in relation to the General Court's ISU judgement, see Pablo Ibáñez Colomo, 'Will Article 106 TFEU case law transform EU competition law?' (2022) 13 JECLAP 385–86.

112. ibid; see also Giorgio Monti, 'EU competition law after the Grand Chamber's December 2023 sports trilogy: *European Super League*, *International Skating Union* and *Royal Antwerp*' (2024) 77 Rev Der Com Eur 11; Hans Vedder, 'On thin ice: The Court's judgment in Case C-124/21 P, *International Skating Union v Commission*' (2024) 9 EP 87.

113. It is also not unprecedented. In *Generics*, the Court of Justice noted that the settlement agreement at issue 'had, if not as their object, at least the effect of delaying the market entry of generic medicines': Case C-307/18, *Generics (UK) Ltd and Others v Competition and Markets Authority*, EU:C:2020:52, para 155.

114. In its draft Guidelines on the application of Art 102 TFEU to abusive exclusionary conduct by dominant undertakings, the European Commission defines a separate category of such 'naked restrictions', but the practices can best be understood as existing on a continuum.

effects analysis.[115] In its previous conflict of interest case law, the Court did always formulate a theory of harm, linking the situation of inequality of opportunity with a specific type of exclusionary abuse as its likely outcome.[116] This is no different in *ESL*, where the potential harm to competition is far from hypothetical. The Court makes numerous references to the specific (commercial) context of professional football and highlights, amongst other things, the EU-wide scope of the market that is being foreclosed. In different situations, the risk of eliminating any and all competition may be less apparent.[117] Notably, the Court in *ISU* does not exclude that instances of unchecked private regulatory and control power over market access, which result in inequality of opportunity, would not be characterized as a 'by object' restriction under Article 101(1) TFEU. In contrast to its statements in *ESL*, the Court adds that, in cases where no restriction is found, 'that power may, at least, be regarded as having the "effect" of preventing, restricting or distorting competition'.[118] This further suggests that also under Article 102 TFEU contextual elements will ultimately determine the probative value of the presumption of illegality.

Regarding the second criticism, it is correct that in *ESL* and *ISU*, the Court does not clearly specify the circumstances in which an undertaking is obligated to ensure equality of opportunity. When discussing the scope of the conflict of interest case law, the Court generally refers to undertakings that place themselves in a position 'to deny potentially competing undertakings competing access to a given market'.[119] It then adds that this 'may be the case' when the undertaking 'has regulatory and review powers and the power to

For discussion see Pablo Ibáñez Colomo, 'The (second) modernisation of Article 102 TFEU: Reconciling effective enforcement, legal certainty and meaningful judicial review' (2023) 14 JECLAP 608.

115. See, by analogy, Case C-413/14 P, *Intel Corp v Commission*, EU:C:2017:632, para 138; Case C-680/20, *Unilever Italia*, EU:C:2023:33, paras 47–48; Case C-48/22 P, *Google Shopping*, EU:C:2024:726, para 265.

116. For examples where the Court of Justice identified the potential or actual abusive behaviour for which the undertaking would have been liable, had it not been induced by the State measures, see Case C-18/88, *RTT/GB-Inno-BM*, para 24; Case C-462/99, *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission, and Mobilkom Austria AG*, EU:C:2003:297, paras 85–87. In *ELS* and *ISU*, the Court, with reference to GB-Inno-BM, relies on this point to support the view that the principle of equality of opportunity applies not only in situations involving State intervention but also when control over market access arises from private power.

117. See eg Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, EU:C:2013:127.

118. Judgment, *ISU*, para 129.

119. Judgment, *ESL*, para 137. This aligns with the broad conception of the envisaged gatekeeping power as the ability to determine whether (and possibly on what conditions) other undertakings are authorized to compete: Judgment, *ESL*, para 132.

impose sanctions enabling it to authorise or control that access', which are means that are different from competition on the merits.[120] This casts a fairly wide net. Undoubtedly, this broad framing will encourage claimants and enforcers to test the precise boundaries of the gatekeeping power to which the Court refers.[121] Yet it is submitted that *ESL* and *ISU* should be seen for what they essentially are – a logical extension of the conflict of interest case law to capture (monopolistic) private regulators, such as SGBs, which are de facto in a position comparable to undertakings granted an exclusive right or other regulatory privilege by the State to govern access to a market in which they also compete, such as the undertakings in *MOTOE*, *RTT/GB-Inno-BM* or *OTOC*.

The Court not only adapted the threshold for determining an infringement of the competition rules, but also the measures required to address and mitigate an inherently abusive conflict of interest. In the Court's conflict of interest case law, as well as in the European Commission's decision-making practice, two competing approaches can be observed. In *RTT/GB-Inno-BM*, the combination of the regulatory and commercial activities in itself was deemed unlawful. Therefore, resolving the conflict of interest situation required a structural separation.[122] The Court later clarified that mere functional unbundling within the same public or private entity was insufficient to ensure independence.[123] In *Silvano Raso*, the finding of an infringement also required the Member State to withdraw the exclusive right that had the potential to give rise to a conflict of interest.[124] Similarly, the European Commission insisted on structural remedies in its antitrust proceedings

120. Judgment, *ESL*, para 137.

121. The European Commission has already been referring to the equality of opportunity principle when addressing self-preferencing practices of digital gatekeepers under Art 102 TFEU. See European Commission Decision of 18 December 2017 in Case AT.39740 – Google Search (Shopping); European Commission Decision of 20 December 2020 in Cases AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box.

122. See also Cases C-69/91, *Criminal proceedings against Gillon, née Decoster*, EU:C:1993:853; Joined Cases C-46/90 & C-93/91, *Procureur du Roi v Lagauche and Others*, EU:C:1993:852; Case C-91/94, *Criminal proceedings against Tranchant and Téléphone Store SARL*, EU:C:1995:374. Similarly, in the absence of a regulatory function, the combined application of Arts 106(1) and 102 TFEU required the Member State to withdraw the exclusive right or structure that enabled the dominant undertaking to leverage its market power into a downstream market. See eg Case C-193/96, *Silvano Raso*.

123. Case C-69/91, *Criminal proceedings against Gillon, née Decoster*, paras 21–22.

124. The case concerned national rules granting dock-work companies an exclusive right to provide temporary labour to terminal operators and other undertakings authorized to operate at Italian ports, while also allowing the same dock-work companies to compete with them in the dock services market. This created a conflict of interest situation. During periods of high demand, the authorized undertakings were obliged to use the temporary labour supplied by the dock-work company.

against the Fédération Internationale d'Automobile (FIA), which were closed in 2001 after reaching a settlement.[125] Following FIA's notification of certain regulations and commercial arrangements, the Commission had issued a Statement of Objections and taken the preliminary view that FIA 'was using its regulatory powers to block the organization of races that competed with the events promoted and organized by FIA (that is, those events from which FIA derived a commercial benefit)'. FIA agreed to divest itself of its commercial interests in Formula One and committed to significantly modifying or removing the contested rules and terms of contract in order to avoid any confusion of its commercial and regulatory roles and to increase more transparency.[126] However, a few years later, in another sports-related case, the Grand Chamber of the Court suggested that procedural safeguards within a regulatory pre-authorization framework might be sufficient to eliminate the risk of abuse. The *MOTOE* case concerned Greek legislation requiring ministerial approval for the organization of motorcycling events on public and private roads, contingent on the consent of the national governing body for motorcycling recognized by FIA – at that time the Automobile and Touring Club (ELPA). The Court of Justice did not object to the fact that ELPA, which itself organizes and commercially exploits motorcycling events, was entrusted with the power to decide which events may take place. It did consider, however, that ELPA had the means to prevent rivals from entering the Greek market or otherwise favour its own events. To ensure equal conditions of competition, the exercise of ELPA's power to authorize events should therefore be 'made subject to restrictions, obligations, and review'.[127] Similarly, in *OTOC*, the Court identified a conflict of interest wherein a professional association of chartered accountants acted simultaneously as a regulator and an operator in the same market. National legislation tasked OTOC with putting into a place a system of compulsory training for its members, granting it full discretion. The Court did not question OTOC's authority to govern an approval procedure for the organization of such training to ensure service quality, but it insisted that such a system of prior authorization must be organized based on 'clearly defined, transparent, non-discriminatory, reviewable criteria' to guarantee equal access to the market for third parties.[128]

125. Commission, Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.361 – Notification of FIA Regulations, COMP/36.638 – Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship, COMP/36.776 – GTR/FIA & others [2001] OJ C 169/5, 8.

126. Commission Press release IP/01/1523, 'Commission closes its investigation into Formula One and four-wheel motor sports'.

127. Case C-49/07, *MOTOE*, paras 51–53.

128. Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, paras 89–92, 99.

These are the substantive and good governance standards that the Court also demands from the SGBs in *ESL* and *ISU*.

5.2.2. *Practical implications for governance reform*

The paramount question now is how SGBs will tackle the conflict of interest conundrum. UEFA, for its part, seems confident that it has already met the standards of good governance imposed by the Court. In 2022, it introduced Authorisation Rules for International Club Competitions, modelled after the pre-authorization framework adopted by the ISU after its compliance discussions with the European Commission following the prohibition decision.[129] It is highly doubtful, however, that these new rules meet the Court's requirements for ensuring equal opportunity.[130] UEFA's authorization criteria, particularly those related to sporting merit, emphasize the protection of 'the sporting merit of UEFA Champion Club Competitions, the good functioning of the international calendar as well as the health and safety of players'. To this end, the 'authorisation of an International Club Competition shall be subject to the following cumulative conditions so that it shall not adversely affect the good functioning of UEFA Champion Club Competitions …'.[131] In *ESL*, however, the Court made clear that in order to be non-discriminatory, the substantive criteria and procedural rules:

> 'should not make the organisation and marketing of third-party competitions and the participation of clubs and players therein subject to requirements which are either different from those applicable to competitions organized and marketed by the decision-making entity, or are identical or similar to them but are impossible or excessively difficult to fulfil in practice for an undertaking that does not have the same status as an association or does not have the same powers at its disposal as that entity and accordingly is in a different situation to that entity'.[132]

Subjecting the approval of a new international club competition to the condition that it cannot adversely affect the functioning of UEFA's already existing three international club competitions – thereby clearly prioritizing these – appears irreconcilable with the principle of equal opportunity.

It is evident that UEFA must go back to the drawing board. Devising a framework that eliminates the risk of abuse, as demanded by the Court, will not be a straightforward exercise. The conflict of interests inherent in the dual

129. UEFA, 'Authorisation rules governing international club competitions' (2024).

130. See also Stephen Weatherill, 'Football revolution: how do the Court's rulings of 21 December 2023 affect UEFA's role as a 'gatekeeper'?'(*EU Law Analysis*, 4 January 2024).

131. UEFA (n 129) Art 7(4).

132. Judgment, *ESL*, para 151.

role of regulator and commercial operator remains the Achilles heel of any possible solution. How can FIFA and UEFA be expected to objectively and neutrally consider an application for a new international club competition that is likely to compete head on with their own most lucrative competitions? This resembles an impossible dilemma. Given that FIFA and UEFA are unlikely to contemplate relinquishing control over the organization of competitions and the participation of clubs and players – resulting in a free-for-all scenario – the solution must either lie in a structural separation of their commercial activities or in the implementation of a pre-authorization system capable of fully mitigating potential conflicts of interest. The former will be considered only as a solution of last resort. Consistent with the rigorous competitive neutrality obligations advanced in the early case law of the Court, this would require more than administrative unbundling ('Chinese walls'). FIFA and UEFA would have to choose: (a) to limit their role as regulator of their sport; or (b) to retain their commercial role while delegating the gatekeeping function to an external, independent agency tasked with authorizing new competitions.

Although the Court suggests that adherence to good governance standards and practices could potentially be achieved through a framework of substantive criteria and detailed procedural rules, it remains uncertain whether this alone will prove sufficient to eliminate the risk of abuse of regulatory power entirely. On the one hand, it could be argued that once a system of transparent, precise, objective, non-discriminatory and proportionate rules is in place, in accordance with the statements from *MOTOE*, the rules on prior approval and participation no longer 'by their very nature' infringe competition law. If this interpretation holds, and when potential or actual anti-competitive effects have been established, such rules could arguably fall within the scope of the broader public interest defence under the *Wouters/Meca-Medina* doctrine. This would provide SGBs with greater latitude to justify refusals of authorization in a given case. On the other hand, however, it could also be argued, as also suggested by Weatherill,[133] that even with such a framework of substantive criteria and detailed procedural rules in place, the prior approval rules still make it possible, by their very nature, to restrict the creation of alternative or new competitions, and thus 'completely deprive professional football clubs and players of the opportunity to participate in them', even though they could offer an innovative format, and 'spectators and television viewers to attend them or watch the broadcast thereof'.[134] If this is so, the pre-authorization system could only qualify for an exemption under the narrowly defined conditions of an efficiency defence under Article 101(3) or Article 102 TFEU. This would require FIFA and UEFA

133. Weatherill (n 130).
134. Judgment, *ESL*, para 176.

to demonstrate, with convincing arguments and evidence, that the exclusionary potential of this gatekeeping power is offset by genuine and quantifiable efficiency gains, which positively impact all users, and that all restrictions are essential to achieve those benefits. This is such a formidable hurdle to take, that a structural separation of regulatory and commercial roles might not be such an improbable solution after all.

Without diminishing the importance of this caveat, one cannot fail to notice the irony in the fact that FIFA and UEFA in all likelihood would have been entitled to deny authorization to the European Super League in its original form, and avoid much of all this trouble, had they simply had in place a proper system of good governance. And this because the original Super League failed to observe some of the core principles, values and rules of the game characterizing professional football in Europe, in particular the values of openness and participation based on sporting merit, which have been recognized by the Court as legitimate objectives. This is an act of negligence for which they can only blame themselves. Future international club competitions in Europe will likely need to be based on equal opportunities, sporting merit, and solidarity. If they do, it will not be easy for FIFA and UEFA to deny them authorization. All in all, alternative or new competitions seem thus destined to appear in the near future. Having said this, one must also be careful not to expect too much from EU competition law. When a difficult choice has to be made, the solution cannot always be found in the procedure, especially in a market where a level playing field for all is unattainable due to the scarcity of opportunities. Be that as it may, the new football season has kicked off again, with the UEFA Champions League, Europa League and Conference League all having a new look, quite similar to the Super League format.

5.3. *The competition law assessment of private regulatory restrictions*

The three December 2023 rulings are also a game changer for the substantive appraisal of regulatory restrictions under Articles 101 and 102 TFEU, with potentially far-reaching consequences, not only in the field of sports, but also more generally. The fundamentals have not changed: the Court continues to recognize that the performance of public interest functions by private regulators, such as SGBs, may justify special treatment under the *Wouters/Meca-Medina* line of case law. However, the Court clarified that rules and practices that restrict competition by their very nature cannot invoke public interest justifications, even if they also serve legitimate objectives in

the public interest.[135] Those restrictions must be caught by the prohibitions under Article 101(1) and Article 102 TFEU, unless they exceptionally satisfy the conditions for a 'traditional' defence based on efficiencies under Article 101(3) TFEU (or the equivalent defence under Article 102 TFEU).

Previously, sporting disputes were analysed markedly differently under EU competition law. In its *Bosman* ruling, in the context of free movement, the Court adopted a determined yet sensitive approach that has guided the assessment of sporting rules and practices under EU law ever since. Given the commercial context in which they operate, most, if not all, sporting rules and practices have economic implications, so the Court refused to a priori exclude them from the scope of application of the free movement rules. It recognized a clear need to subject SGBs' private regulatory power, susceptible to potential abuse if unchecked, to public oversight.[136] However, at the same time, the Court was mindful to give SGBs sufficient latitude to defend their regulatory choices within a framework receptive to sports-specific considerations and justifications. In *Meca-Medina*, the Court translated this approach to an antitrust context. Unlike the European Commission and the General Court, who considered the contested anti-doping regulation to be a non-economically motivated ('purely sporting') matter falling outside the reach of the competition rules, the Court clarified that Article 101 TFEU was generally applicable to self-regulatory measures intended to regulate the exercise of an economic activity.[137] The Court was also convinced that the regulation at issue appeared, on the face of it, to constitute a restriction of competition. Yet it did not reach that conclusion and then revert to Article 101(3) TFEU to consider the justifications raised by the parties. Instead, the Court followed the unorthodox route it had taken in its earlier *Wouters* judgment – inspired by the test used in EU free movement law to scrutinize the rationality and reasonableness of publicly-imposed regulatory restrictions. Premised on the principle that the compatibility of sporting rules and practices 'cannot be assessed in the abstract', the Court similarly allowed for the consideration of public interest objectives – not rooted in competition law – at the Article 101(1) TFEU stage of the analysis.[138] The Court repeated the formula that Article 101(1) TFEU does not necessarily prohibit every decision of an

135. It is well-established case law that the fact that the conduct can also be rationalized by legitimate aims does not preclude the finding that it has an anti-competitive object. See eg Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd*, EU:C:2008:643, para 21; Joined Cases C-96/82 to C-102/82, C-104/82, C-105/82, C-108/82 & C-110/82, *NV IAZ International Belgium and Others v Commission*, EU:C:1983:310, para 25.

136. Ben Van Rompuy, 'The role of EU competition law in tackling abuse of regulatory power by sports associations' (2015) 22 MJ 179.

137. Case C-519/04 P, *Meca-Medina*, para 27.

138. ibid paras 42–55.

association of undertakings (or agreement) that restricts the freedom of action of undertakings. When the legal and economic context of that decision indicates that public interest issues are at stake, it must be examined whether the decision's consequential adverse effects on competition are inherent in the pursuit of legitimate objectives and do not go beyond what is necessary. Provided that these requirements are met – and in the case at hand the Court found that this was so – the decision cannot be considered a restriction of competition at all and therefore falls outside the prohibition laid down in Article 101(1) TFEU. This *Wouters/Meca-Medina* test became the cornerstone of the substantive analysis of the regulatory rules and practices of SGBs in an antitrust context. If an SGB could convincingly demonstrate that the requirements were satisfied, no further assessment was needed. Conversely, if it failed to meet these requirements, similar justifications would also fail to meet the conditions for a defence under Article 101(3) TFEU. Consequently, in practice, little attention was ever given to that traditional justification framework.

In *ESL*, *ISU*, and *Royal Antwerp*, the Court has thoroughly reshuffled the cards, the 'competition standpoint' now being the ace in the pack. Presumably, the Court had reservations about the *Wouters/Meca-Medina* line of defence being interpreted and applied too liberally. So far, case law in this area has remained scant, leaving significant ambiguity regarding the precise boundaries and implementation of the doctrine. As noted by Advocate General Rantos in his Opinion in *ESL*, this posed a risk of undue circumvention of the antitrust rules.[139] A central topic of discussion has for example been whether collaborations between competitors aimed at achieving (industry-wide) sustainability goals would be able to invoke the exception.[140] However, the Court was likely more preoccupied with several pending requests for preliminary rulings on the *Wouters/Meca-Medina* doctrine. Some of these were sports-related and less controversial: German courts questioned whether the test also applies when SGBs are not regulating their internal affairs, thus not their sport and its organization directly, but are instead imposing restrictions on the economic activities of third parties that are peripheral to the sport.[141] Two other cases undoubtedly raised more concern. Here, national

139. Opinion, *ESL*, paras 87–91.

140. See eg Giorgio Monti and Jotte Mulder, 'Escaping the clutches of EU competition law: pathways to assess private sustainability initiatives' (2017) 42 EL Rev 5; Justus Haucap and others, *Competition and Sustainability: Economic Policy and Options for Reform in Antitrust and Competition Law* (Edward Elgar 2024) 56–70.

141. Cases C-209/23 and C-428/23. In *Piau*, the General Court considered that rules adopted by FIFA governing football players' agents' services could not be justified by a public interest, as the activity does not pertain to 'the specific nature of sport': Case T-192/02, *Piau*, para 105.

courts sought guidance on the application of the *Wouters/Meca-Medina* case law to straightforward instances of horizonal price-fixing by professional associations, potentially allowing these self-evidently harmful practices to escape the prohibition laid down in Article 101 TFEU.[142]

In *ESL, ISU*, and *Royal Antwerp*, the Grand Chamber of the Court seized the opportunity to address the scope of application of the enigmatic doctrine. In one respect, the Court extended the reach of the *Wouters/Meca-Medina* line of case law by stipulating, for the first time, that it can be invoked not only as a defence under Article 101 TFEU, but also under Article 102 TFEU. The European Commission and national enforcers had already taken this view.[143] Yet it is helpful that the Court has explicitly affirmed this point, which once more reflects its recognition of the need for a consistent analytical framework for Articles 101 and 102 TFEU.[144] Otherwise, however, the Court mostly confined the doctrine's availability. First, it stressed that the *Wouters/Meca-Medina* case law particularly pertains to 'rules adopted by an association' regulating the 'exercise of a professional activity'. This could be interpreted as limiting its wider application, such as in the context of sustainability agreements.[145] Second, when describing the conditions for satisfying the *Wouters/Meca-Medina* test, the Court introduced a new requirement, essentially absorbing the fourth criterion of Article 101(3) TFEU. It stressed the need to assess whether the inherent anti-competitive effects do not exceed what is necessary, 'in particular by eliminating all competition'.[146] Taken alone, it is difficult to comprehend the rationale of this limitation. Within the framework of a cost-benefit analysis, it makes sense to consider that short-term efficiency gains are likely outweighed by longer-term losses when the competitive process is ended.[147] But in the pursuit of public interest objectives, a rule would not necessarily fail the proportionality test

142. Shortly after the three December judgments, the Court delivered its preliminary rulings on these cases, drawing on the principles it had just established: Case C-128/21, *Lietuvos notarų rūmai and Others*, EU:C:2024:49; Case C-438/22, *Em akaunt BG EOOD v Zastrahovatelno aktsionerno druzhestvo Armeets AD*, EU:C:2024:71.

143. European Commission, White Paper on Sport, COM(2007)391 final, Annex I, 64–69. See also eg Bundeskartellamt, Decision pursuant to Section 32b GWB Public version, B-226 /17 (25 Feb 2019).

144. See above, Section 5.1.

145. Judgment, *ESL*, para 183; Judgment, *ISU*, para 111; Judgment, *Royal Antwerp*, para 113. For a contrary view, see Monti (n 113) 11–43.

146. Judgment, *ESL*, para 185.

147. European Commission, Guidelines on the application of Art 81(3) of the Treaty [2004] OJ C 101/105, para 105.

simply because it eliminates competition.[148] The change, however, appears connected to the third, and principal, limitation of the scope of the *Wouters/Meca-Medina* case law, namely the Court's clarification that the exception cannot be available for conduct that is self-evidently harmful to the proper functioning of competition.

The Court could have just acknowledged that it was changing course. Instead, it asserted that the limited availability of the *Wouters/Meca Medina* exception was already 'implicitly but necessarily apparent' from its case law.[149] This is not convincing. The Court referred to its judgement in *MOTOE*, but it is difficult to see how the omission of a reference to the *Wouters/Meca-Medina* case law could have been interpreted this way.[150] Furthermore, on this point, the previous case law was, at best, ambiguous. For instance, in *API* and *CHEZ Elektra Bulgaria*, dealing with national legislations allowing for horizontal price setting, the Court stated that the measures could escape the prohibition laid down in Article 101(1) TFEU if the conditions of the *Wouters/Meca-Medina* test were met, despite rendering mandatory a decision of an association of undertakings 'which has the object or effect of restricting competition'.[151] The Court left it to the national court to determine whether the conduct restricted competition by object or effect, but without linking this to the exception's applicability.[152] Even a comparison with the ancillary restraints doctrine under Article 101(1) TFEU, which only applies in cases where the main transaction 'is not anti-competitive in nature', would not have implied this change in direction.[153] There are conceptual similarities between the doctrines, but also differences. In *MOTOE*, there were no restraints to appraise in relation to the purpose and objective needs of a main operation, the mere creation of the situation of conflict of interest carried with it the risk of abuse.[154] Furthermore, ancillary restraints may be restrictive

148. Moreover, the rule of reason test under the free movement provisions, which is otherwise conceptually aligned with the *Wouters/Meca-Medina* test, does not include such an upper limit (based on competition concerns).

149. Judgment, *ESL*, para 185.

150. For one thing, the Union Courts had never previously applied the exception to (State-imposed) unilateral conduct.

151. Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 & C-208/13, *API and Others v Ministero delle Infrastrutture e dei Trasporti and Others*, EU:C:2014:2147; Joined Cases C-427/16 to C-428/16, *CHEZ Elektro Bulgaria*, EU:C:2017:890.

152. The Court has now 'clarified' its earlier judgment: Case C-438/22, *Em akaunt BG EOOD v Zastrahovatelno aktsionerno druzhestvo Armeets AD*, paras 28–34.

153. AG Rantos made the comparison in his Opinion in *ESL*. See also eg Pablo Ibáñez Colomo, 'On Superleague and ISU: the expectation was justified (and EU competition law may be changing before our eyes)' (*Chillin'Competition*, 21 December 2023). See also Case T-680/14, *Lupin Ltd v Commission*, EU:T:2018:908, para 143.

154. See above, Section 5.2.

'by object', whereas the main transaction should not affect competition at all.[155] It is therefore unsurprising that the Court has never linked the doctrines.

Regardless, the statement of the Court that rules and practices tainted with an anti-competitive object cannot claim the *Wouters/Meca-Medina* exception is unequivocal and here to stay. Such rules and practices are therefore liable to be caught by the prohibitions under Articles 101(1) and 102 TFEU, unless they can satisfy the conditions for a 'traditional' defence based on objective necessity or efficiencies. The Court has also made it perfectly clear that this will be an uphill struggle. In its guidance to the national courts on the four cumulative requirements for exemption under Article 101(3) TFEU (or the equivalent defence under Article 102 TFEU), the Court adheres to strict substantive and evidentiary standards. This especially affects the interpretation of the two first requirements, which, unlike the other two conditions, are distinct from the *Wouters/Meca-Medina* test, and, by the Court's own admission, 'are more stringent'.[156] The first condition requires, according to settled case law, that the conduct yields 'appreciable objective advantages' that outweigh the disadvantages it causes to competition.[157] While the European Commission has favoured a narrow interpretation focused on economic efficiencies in its post-modernization guidelines, the Court had never circumscribed the relevant types of benefits under Article 101(3) TFEU.[158] In *ESL* and *Royal Antwerp*, however, the Court seemingly aligns itself with the Commission's economic approach. It consistently refers to 'efficiency gains' and insists that these must be genuine and quantifiable.[159] Regarding the second condition, requiring a fair share of the profit to be reserved for consumers, the Court reiterates that this involves proving that the efficiency gains have a 'positive impact on all users' in the different sectors or markets concerned. Despite the large array of stakeholders involved in professional sport (in addition to direct and indirect consumers), the Court interprets this requirement strictly. For instance, in *ESL*, the Court stresses, in relation to the rules on prior approval and participation, that the user groups must include, amongst others, 'national football associations, professional or amateur clubs, professional or amateur players, young players and, more

155. Case C-331/21, *Autoridade da Concorrência and Others v Ministério Público*, EU:C:2023:812, paras 87–94.

156. Judgment, *ESL*, para 189; Judgment, *Royal Antwerp*, para 118.

157. See eg Cases 56 and 58/64, *Consten and Grundig*, EU:C:1966:41; Case C-382/12 P, *MasterCard*, EU:C:2014:2201.

158. For discussion, see Or Brook, *Non-Competition Interests in EU Antitrust Law An Empirical Study of Article 101 TFEU* (Cambridge University Press 2022); Ben Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU* (Kluwer Law International 2012).

159. Judgment, *ESL*, para 196.

broadly, consumers, be they spectators or television viewers'.[160] The Court has recognized in previous case law that not all categories (and each of its users) must benefit to the same extent.[161] Nonetheless, the rule or practice must have an overall favourable impact on each group.[162] This is a very demanding proposition, not only from an evidentiary standpoint, but also because restrictive sporting rules or practices will at times inevitably adversely impact some users to produce positive externalities benefiting the overall community.[163]

The practical consequences of this fundamental change in analysis are not to be underestimated. As a matter of principle, it is difficult to dispute the Court's resolute position that no special treatment should be afforded to private regulatory restrictions that are blatantly anti-competitive and thus, in principle, unlawful under Article 101 and/or 102 TFEU. A parallel could be drawn to the concept of direct discrimination within the framework of the fundamental freedoms, which, according to the orthodox view, can only be justified with express Treaty exceptions, excluding the wider category of the overriding requirements in the general interest.[164] However, from a practical standpoint, the distinction between the *Wouters/Meca-Medina* line of defence and an efficiency defence extends beyond the types of justifications that can be invoked. As noted, the Court has set the bar high for the possibility of exemption under Article 101(3) TFEU. In comparison, the *Wouters/Meca-Medina* means-end test seems to be more lenient and flexible, and the proportionality assessment is conducted at a more abstract level. Additionally, under the *Wouters/Meca-Medina* framework, the evidential burden shifts in favour of the defendant, affording it a degree of discretion.[165] While the defendant must prove that the conditions of the test are met, the party alleging the infringement still carries the burden of demonstrating that a rule or practice falls within the prohibitions of Articles 101(1) and 102 TFEU. In contrast, once a restriction of competition or *prima facie* abuse has been

160. Judgment, *ESL*, para 195.

161. Case C-382/12 P, *MasterCard*, at para 248; Case C-238/05, *Ausbanc*, EU:C:2006:734, paras 68–70.

162. Judgment, *ESL*, para 194; Judgment, *Royal Antwerp*, para 123.

163. For similar reasons, this interpretation of the pass-on requirement poses difficulties for appreciating the magnitude of (collective) benefits of collaborative sustainability initiatives for non-users.

164. 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*, 7 February 2024); Ian Forrester, 'Where law meets competition: is Wouters like Cassis de Dijon or a platypus?' in Claus Dieter Ehlermann and Isabella Atanasui, *European Competition Law Annual 2004: The Relationship Between Competition Law and the (Liberal) Professions* (Hart Publishing 2006) 271.

165. See eg Case C-89/11 P, *E.ON Energie AG v Commission*, EU:C:2012:738, para 72.

established, the defendant carries the full burden of demonstrating, 'by means of convincing arguments and evidence', that all the conditions for an efficiency defence are satisfied.[166] Given the high stakes, it becomes all the more important to be able to determine precisely what constitutes a restriction of competition by object. The practical consequence is that the primary focus of the analysis resolutely shifts to the determination of the nature of the alleged restriction of competition or abuse.

And it is precisely here that the shoe pinches. Particularly in an area with limited precedent, the classification of sporting rules and practices as either 'by object' or 'by effect' is inherently uncertain. The three December 2023 judgments underscore this point. The *ISU* case focused on this very question, and in all three cases the Court, the Advocate General, and/or the European Commission arrived at different conclusions.[167] Admittedly, the Court did recall that the concept of restriction of competition 'by object' must be interpreted strictly. It is reserved for the most harmful restrictions of competition.[168] The Court also reaffirms its settled case law that the object assessment cannot be made in the abstract but requires an examination of the content of the rules, the aims they seek to achieve 'from a competition standpoint', and their legal and economic context. This is all standard fare.[169] When dealing with regulatory restrictions, a careful examination of the content of the contested rules and the objectives they pursue, and especially the legal and economic context in which they operate, which generally serves as a 'basic reality check' to verify that the unique circumstances of the case do not cast doubt on the presumed harmful nature of the practice, [170] becomes all the more important. This is where public interest considerations can and should still be accounted for, especially for regulatory restrictions that otherwise might too easily be perceived as inherently problematic 'from a competition law perspective'. The Court does generally recognize this in the December 2023 cases, highlighting the need to consider 'the nature of the goods or services concerned, as well as the real conditions of the structure and

166. Council Regulation (EC) 1/2003 of 16 Dec 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] OJ L 1/1, Art 2. See also eg Case 42/84, *Remia*, EU:C:1985:327, para 45.

167. In *ISU*, the AG and the Court arrived at opposite conclusions. In *Royal Antwerp*, the European Commission contested that the home-grown player rules could constitute a restriction by object. And contrary to the Court's findings in *ESL*, the decision-making practice of the European Commission and NCAs consistently found that the joint selling of football media rights constituted an arrangement restrictive by effect, rather than by object.

168. Judgment, *ESL*, paras 161–62; Judgment *Royal Antwerp*, paras 88–89.

169. The Court provided an intriguing list of object restrictions; however, its significance is limited as the list is merely indicative.

170. Opinion of AG Rantos in Case C-298/22, *Banco BPN/BIC Português, SA and Others v Autoridade da Concorrência*, EU:C:2024:638, paras 43–44.

functioning of the sectors or markets in question', with reference to the unique characteristics of sports and sports governance.[171]

If the Court really practises what it preaches about the need for a restrictive and contextual approach, the relative ambiguity surrounding the distinction between object and effect would not be so problematic. Unfortunately, the three December 2023 judgments provide little assurance that sporting rules and practices will only be treated as anti-competitive by object in exceptional circumstances. At best, when the Court applies its own guiding principles to the rules at issue, it sends mixed signals to the national courts and competition authorities. On the one hand, it is difficult not to agree with the Court's uncompromising stance regarding the rules on prior approval and participation in *ESL* and *ISU*. The SGBs, entangled in a conflict of interest, were pertinently unwilling to give up the possibility to put self-serving commercial interests over public interests. When private regulatory power is exercised in such a self-evidently anti-competitive way, it is unlikely to have redeeming features. The Court's conclusion in *ESL* that the rules granting FIFA and UEFA total control over the commercial exploitation of rights emanating from their competitions constitute a 'by object' infringement, is also uncontroversial. Traditionally, the European Commission and NCAs have assessed the joint selling of media rights as a restriction of competition by effect.[172] However, the Court advances a theory of harm that places greater emphasis on the elimination of competition between the football clubs and on the cumulative impact of these practices and the rules on prior approval and participation.[173] The joint and exclusive exploitation of media rights is also a good example of a situation where sporting justifications can be translated into economic parameters and empirically substantiated, allowing the Court to reasonably conclude that the cumulative conditions for an exemption under Article 101(3) TFEU appear *prima facie* satisfied, subject of course to confirmation by the national court.[174] The European Commission has always carefully avoided engaging with the merits of the argument that joint selling promotes horizontal financial solidarity, but the Court has now acknowledged this as a relevant efficiency benefit.[175] On the other hand, however, the Court's

171. See eg Judgment, *ESL*, paras 105, 166, 175–76; Judgment, *Royal Antwerp*, paras 103–106.

172. See eg European Commission Decision of 23 July 2003 in Case COMP/C.2-37.398 – Joint selling of the commercial rights of the UEFA Champions League.

173. Judgment, *ESL*, para 230 ('That holds all the more true when such rules are combined with rules on prior approval, participation and sanctions, such as those that were the subject matter of the preceding questions').

174. Judgment, *ESL*, paras 231–40.

175. European Commission Decision of 23 July 2003 in Case COMP/C.2-37.398 – Joint selling of the commercial rights of the UEFA Champions League, paras 131, 164–67. Because

assessment of the contested 'home-grown players' rules in *Royal Antwerp* is cause for concern. Admittedly, ultimately, the Court left it to the national court to determine whether the rules are a restriction of competition by object or effect. This is not unusual in preliminary rulings on the object versus effect dichotomy. Yet, it is unfortunate that the Court refrained from ruling that these 'home-grown players' rules are to be classified as restrictions of competition by effect, and even seemed to suggest the contrary. This notwithstanding the fact that the circumstances in *Royal Antwerp* presented the Court with an opportunity to do what it prescribes, namely interpret the concept of 'by object' restrictions strictly and classify the contested 'home-grown players' rules as restrictions of competition by effect, to which the *Wouters/Meca-Medina* doctrine still applies. However, the Court let it slip away, interpreting the contested rules too rigidly 'from a competition standpoint', and not paying enough attention to the actual content of the rules and the context in which they were adopted. As regards the former, the purpose of the 'home-grown players' was to encourage clubs to recruit and train young players, rather than restrict clubs' access to the market of players, let alone the partitioning or repartitioning of markets according to national borders. As regards the latter, to be fair, the Court did indicate that the proportion of players concerned by the rules is 'particularly relevant' in this regard, but it refrained from drawing any conclusions therefrom, instead of the logical one, that this observation sufficed to trigger the need for an examination of the effects of the rule. If it is not clear beyond doubt that the object of a given rule or practice is to harm competition, it should be classified as a restriction of competition by effect. This is a missed opportunity. While it remains possible for the national court to reach this conclusion, additional guidance from the Court would have been helpful. Now the referring national court is confronted with this hot potato. A difficult decision lies ahead and the outcome is uncertain, potentially leading to inconsistent applications.

It is submitted that the technical complications and their associated risks yielded by this fundamental change of analysis are unnecessary and could have been avoided or at least minimized by simply sticking to the *Wouters/Meca-Medina* doctrine in all circumstances. It is perfectly feasible to weigh the potential or actual harm to competition as a pertinent factor in the application of the test. Ironically, the Court's preoccupation with the objective aims of the conduct is not even all that helpful. The finding that the conduct restricts competition by object means that anti-competitive effects are

UEFA's amended joint selling arrangement could be justified on other economic efficiency grounds (the creation of a single point of sale, the creation of a packaged league product, and the branding of content by a single entity) the Commission concluded that 'it is not necessary for the purpose of this procedure to consider the solidarity argument any further'.

presumed, but that does not necessarily indicate that the restrictive effects are particularly harmful.[176] Be that as it may, it is no use crying over spilled milk. In January 2024, in two cases concerning horizontal price fixing decisions or arrangements of private professional organizations, the Court firmly held that these were to be classified as restrictions of competition by object, as a result of which they could only be exempted under Article 101(3) TFEU.[177] This clearly confirms *ELS, ISU*, and *Royal Antwerp* as the new law of the land.

5.4. *EU public policy and the Court of Arbitration for Sport*

In *ISU*, the Court of Justice addressed, for the first time, the relationship between EU law and the use of mandatory arbitration clauses, found in the statutes and regulations of many international SGBs, conferring exclusive jurisdiction on the CAS. This is another highly consequential yet underexplored aspect of the December 2023 rulings. In *ESL*, the Court repeated multiple times that, to comply with EU law, the private gatekeeping power of FIFA and UEFA must be made subject to restrictions, obligations, and *review*. Yet it is only in *ISU* that the Court elaborated on the standards required for such review.

The CAS, based in Lausanne, Switzerland, is a private arbitral tribunal dedicated to the settlement of international sports-related disputes. It is often referred to as the supreme court of the world of sport because it primarily functions as an appeal body with exclusive competence to review the final decisions of SGBs that impose, through their statutes and regulations, a CAS arbitration clause on their members. Unlike most commercial arbitration, the CAS appeal arbitration procedure is non-consensual in nature. Athletes who want to participate in their sport, have no choice but to accept the applicable regulations.[178] This lack of consent is commonly justified by the need to uphold the CAS' founding purpose: to keep international sports disputes out of the domestic courts and provide an alternative, specialized global forum that can handle international disputes more swiftly, inexpensively, and consistently across jurisdictions.[179] At the same time, it is clear that mandatory

176. See eg C-201/19 P, *Servier and Others v Commission*, EU:C:2024:552, paras 153–54.

177. Case C-128/21, *Lietuvos notarų rūmai and Others*; Case C-438/22, *Em akaunt BG EOOD v Zastrahovatelno aktsionerno druzhestvo Armeets AD*.

178. The European Court of Human Rights has recognized that the acceptance of CAS jurisdiction by athletes 'must be regarded as "compulsory" arbitration': ECtHR, *Mutu & Pechstein v. Switzerland* App nos 40575/10 and 67474/10, paras 109–15.

179. ibid para 98.

recourse to CAS arbitration also serves as a strategy to preserve sporting autonomy.[180]

In its decision on the ISU Eligibility Rules, the European Commission took a rather ambiguous stance on CAS arbitration, mirroring the approach it had taken in earlier decisions.[181] It determined that the ISU had infringed Article 101 TFEU by adopting and enforcing the eligibility rules in the field of speed skating. The ISU's appeal arbitration rules were not part of that infringement. Yet in a separate section of the decision, following its conclusions on the application of Article 101(1) TFEU, the Commission chose to address the issue 'for the sake of completeness'.[182] On the one hand, it reaffirmed that arbitration is a generally accepted method of dispute resolution and that 'agreeing on an arbitration clause as such does not restrict competition'.[183] On the other hand, it stressed that compulsory recourse for athletes to CAS arbitration may de facto serve to shield anti-competitive ineligibility decisions of the ISU from effective judicial protection. CAS awards are final and binding and only the Swiss Federal Tribunal is competent to review them on a limited number of grounds. These grounds include incompatibility with Swiss public policy, but the Federal Tribunal takes the view that this does not encompass EU (competition) law.[184] Since SGBs can impose disciplinary sanctions for non-compliance, it is generally unnecessary to seek enforcement of a CAS award. This does not prevent athletes from challenging the recognition and enforcement of an award on grounds of public policy before a Member State court, but the Commission considered this too difficult and burdensome in practice.[185] Consequently, the Commission found that the ISU's arbitration rules 'reinforce' the restrictions of competition caused by the eligibility rules. In that event that the ISU were to choose to maintain a pre-authorization system, it could only effectively bring the infringement to an

180. Stephen Weatherill, *Principles and Practices in EU Sports Law* (Oxford University Press 2017) 10–37; Antoine Duval, 'The Court of Arbitration for Sport and EU law: chronicle of an encounter' (2015) 22 MJ 224.

181. Antoine Duval and Ben Van Rompuy, 'Taking EU (competition) law outside of the Court of Arbitration for Sport (Case C-124/21 P International Skating Union v Commission)' (*EU Law Live*, 12 February 2024). See eg European Commission Decision of 1 August 2002 in Case AT.38158 – Meca Medina+Majcen/Comité International Olympique; European Commission Decision of 12 October 2009 in Case AT.39471 – Certain joueur de tennis professionnel/Agence mondiale antidopage + ATP + CIAS.

182. Case T-93/18, *International Skating Union v Commission*, para 132.

183. European Commission Decision of 8 December 2017 in Case AT.40208 – International Skating Union's eligibility rules, para 269.

184. Swiss Federal Tribunal, *Tensaccia v Terra Armata*, judgment of 8 March 2006, 4P.27 8/2005.

185. In accordance with Art V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. European Commission Decision of 8 December 2017 in Case AT.40208 – International Skating Union's eligibility rules, paras 270–77, 284.

end if it also substantially amended its arbitration rules.[186] The Commission's designation of such a 'reinforcing factor' is unprecedented.[187] In past decisions, the Commission had found that arbitration rules limiting access to ordinary courts could exacerbate the effects of anti-competitive practices, but those restrictions were deemed integral to the infringement.[188] In the *ISU* case, this was not so, yet the Commission still called for remedial action. Without a legal basis for such a requirement, the General Court annulled the decision's operative part that made the legality of the ISU's pre-authorization system contingent on changes to the CAS arbitration rules.[189] The General Court even went one step further and determined that the Commission had in any event been wrong to consider the arbitration rules as reinforcing the restriction by object created by the ISU eligibility rules.[190] These findings were the subject of the cross-appeal brought by the complainants in the case, along with EU Athletes.

There is no doubt that the Court of Justice wanted to pronounce on the merits of the cross-appeal, which it essentially rephrased as concerning the European Commission's complaint of 'the legal immunity enjoyed by the ISU in the light of EU competition law'.[191] First, the Court disregarded that the Commission can only require the identified infringement to be brought to an end,[192] and found a way to consider the primary ground of appeal admissible.[193] Second, the Court not only set aside the part of the General Court's judgment pertaining to arbitration but chose to give final judgment on the matter, dismissing the ISU's appeal that had prevailed before the General Court. Third, while the Commission had taken issue with the specific interplay of CAS arbitration and the enforcement of the ISU eligibility rules, the Court elevated this issue to a broader, more general concern. Its focus, however, remained limited to the last-instance review of CAS awards by the Swiss Federal Tribunal, as the Commission had not questioned the legitimacy or

186. ibid para 339.

187. The novelty of the concept resulted in confusion during the appeal procedure. Because the European Commission argued in its defence that it could have regarded the arbitration rules as an 'aggravating circumstance' for determining fines, the General Court conflated the two concepts.

188. See eg European Commission Decision of 2 December 1977 in Case IV.147 – Centraal Bureau voor de Rijwielhandel.

189. Case T-93/18, *ISU v Commission*, para 177.

190. ibid paras 154–63.

191. Judgment, *ISU*, para 184.

192. Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] OJ L 1/1, Recital 5, Art 2; Judgment, *ISU*, paras 228–29.

193. Judgment, *ISU*, paras 179, 183.

independence of the CAS or its role in reviewing SGB's internal decisions.[194] A pending preliminary reference may still provide the Court with a chance to weigh in on these points.[195]

In *ISU*, the Court clarified that rules on prior approval and participation, and more generally all sporting rules and practices falling within the scope of Articles 101 and 102 TFEU (and other norms that are matters of EU public policy, which arguably also includes the EU free movement provisions),[196] must be made subject to 'effective judicial review'.[197] That requirement has implications for the use of arbitration as a dispute resolution mechanism, especially when its use is mandatory and exclusive. The Court recognized that CAS appeal arbitration rules are unilaterally imposed by SGBs on, for instance, athletes, rendering effective judicial review 'particularly necessary' to safeguard the protection of their rights underlying the competition rules.[198] This is where CAS arbitration falls short. As the Commission had established, the Swiss Federal Tribunal cannot confirm compliance of CAS awards with the EU competition rules and, being a court external to the EU's judicial system, it cannot make preliminary references under Article 267 TFEU, as required by the *Eco Swiss* jurisprudence.[199] The Court again left open the appropriate standard of judicial review, though it did point out that it cannot be 'excessively limited in law or in fact'.[200] In that context, the Court reprimanded the General Court for suggesting that the possibility of claiming *ex post* damages for the harm caused could compensate for this lack of effective judicial review.[201] The full effectiveness of EU law, the Court stressed, requires the ability to seek interim injunctive relief from national courts, which may be particularly significant for 'persons practising professional sport, whose career may be especially short'.[202]

194. Judgment, *ISU*, paras 184, 191.

195. Case C-600/23, *Royal Football Club Seraing: Request for a preliminary ruling from the Cour de cassation (Belgium)*, lodged on 2 October 2023.

196. The Court has repeatedly referred to the free movement provisions as fundamental provisions within the EU legal order. See eg Case C-168/20, *BJ and OV v Mrs M and Others*, EU:C:2021:907, para 105; Case C-514/12, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH v Land Salzburg*, EU:C:2013:799, para 34; Case C-49/89, *Corsica Ferries France v Direction générale des douanes françaises*, EU:C:1989:649, para 8.

197. Judgment, *ISU*, paras 193–97.

198. ibid.

199. Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, EU:C:1999:269, paras 35–40.

200. Judgment, *ISU*, para 202.

201. Judgment, *ISU*, para 201.

202. In its decision, the European Commission pointed out that according to the procedural rules of the CAS, parties waive their rights to request interim relief from national courts: European Commission Decision of 8 December 2017 in Case AT.40208 – International Skating Union's eligibility rules, para 274.

The *ISU* judgment has significant implications for the resolution of international sports disputes, as it empowers European athletes and other applicants to bypass the CAS and seek protection of the rights they derive from EU competition law before the Member State courts. Previously, when athletes brought an action before a national court, SGBs would typically respond by invoking their arbitration rules to contest the competence of that court.[203] That jurisdictional hurdle is now cleared. The fact that the requirements for effective judicial review cannot be met by the Swiss Federal Tribunal effectively 'impeaches' the validity of CAS appeal arbitration rules.

Even though the *ISU* ruling may be limited to sporting disputes where EU rules of public policy may be applicable, the prospect of greater involvement of national courts might be a cause of concern for SGBs. To date, the CAS has never found a sporting rule or practice to violate Articles 101 and/or 102 TFEU.[204] National courts are expected to be much less deferential to the autonomy of SGBs than the CAS as well as the Swiss Federal Tribunal, which maintains a minimalist approach to public policy review that focuses on procedural irregularities and only extremely rarely interferes with CAS awards.[205] This may even be more so now that the Court in its December 2023 rulings, by restricting the availability of the *Wouters/Meca-Medina* exception, has de facto increased the evidentiary burden on SGBs to defend their decisions. This may result in more successful EU competition law challenges against sporting rules and practices. Furthermore, even when a decision of an SGB has been appealed before the CAS, the *ISU* ruling will help claimants to obtain a full review of the merits of the award before national courts if its compliance with EU competition law is in question.[206] In terms of effective legal protection and judicial review, more involvement of the national courts is undoubtedly a good thing, although it also inevitably increases the risk for forum shopping and diverging decisions.

203. Duval and Van Rompuy (n 181). For instance, in 2016, the highest civil court in Germany considered the private damages action initiated by speed skater Claudia Pechstein inadmissible because the ISU's appeal arbitration rules exclude ordinary jurisdiction: Bundesgerichtshof, Urteil des Kartellsenats vom 7.6.2016 – KZR 6/15, para 57.

204. Antoine Duval, 'Seamstress of transnational law: How the Court of Arbitration for Sport weaves the lex sportiva' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021) 260.

205. Phillip Landolt, 'Judicial control of arbitral awards in Switzerland' in Larry A DiMatteo, Marta Infantino and Nathalie M-P Potin (eds), *The Cambridge Handbook of Judicial Control of Arbitral Awards* (Cambridge University Press 2020); Antonio Rigozzi, 'Challenging awards of the Court of Arbitration for Sport' (2010) 1 Journal of International Dispute Settlement 217.

206. Most EU Member State courts follow a maximalist approach to the judicial review of arbitral awards. See Assimakis Komninos and Maria Kamvysi, 'Arbitration and EU competition law: latest developments' in Christophe Lemaire and Francesco Martucci (eds), *Liber Amicorum Laurence Idot, Concurrence et Europe, Volume 1* (Concurrences 2022) 415.

So far, however, SGBs have mostly adopted a 'wait and see' attitude. In February 2024, following the ISU's example,[207] UEFA amended the arbitration rules in its statutes, adding the (completely unnecessary) disclaimer that the finality and bindingness of CAS awards is without prejudice to the right to challenge the enforcement or recognition of the award on grounds of public policy in domestic courts. In June 2024, UEFA went one step further. Since then, its pre-authorization rules provide for the possibility to assign Dublin as an alternative seat for CAS arbitration.[208] This could technically provide an adequate answer to the *ISU* ruling: while the proceeding may in practical terms still take place in Lausanne, the CAS award will be subject to appeal before the Irish High Court, which can ensure protection of the rights individuals derive from the EU competition rules and which satisfies all the requirements under Article 267 TFEU. However, two issues remain. First, it may be argued that the availability of judicial review solely in Ireland still creates practical and legal hurdles.[209] Second, by assuming that the requirement of effective judicial review pertains only to rules on prior approval and participation, UEFA clearly fails to fully acknowledge the Court's concerns. A necessary next step will be an amendment to the general CAS appeal arbitration rules to incorporate the option of electing a seat within the EU whenever Articles 101 and 102 TFEU (and/or the free movement provisions) are considered applicable. This, in turn, will then hopefully serve as a strong incentive for the CAS to engage more seriously with EU law, thus positioning itself as a credible private enforcer of the EU competition rules in the world of sport. Such a development would be a great living legacy of the *ISU* judgment.

6. Concluding remarks

The rulings in *ESL, ISU* and *Royal Antwerp*, which especially invalidated FIFA and UEFA's prior authorization rules for third-party international

207. In view of the Commission's prohibition decision, the ISU introduced a similar disclaimer in 2018. It further made a narrowly focused amendment to its CAS appeal arbitration rules, allowing access to ordinary courts solely for appeals against decisions refusing the authorization of Open International Competitions on grounds unrelated to ethical, technical, and sporting criteria: ISU, *Constitution* (2018 edition) Art 26, paras 2(e) and 6.

208. UEFA (n 129) Art 16.3.

209. For instance, in a recent decision, the Spanish competition authority found that Booking.com abused its dominant position by imposing unfair trading conditions on hotels located in Spain, including an exclusive jurisdictional clause in favour of the Dutch courts. It reasoned that this created unfair legal and financial obstacles for Spanish hotels: Comisión Nacional de los Mercados y la Competencia, 'The CNMC fines Booking.com €413.24 million for abusing its dominant position during the last 5 years', press release of 30 July 2024.

football club competitions for non-compliance with the Treaty competition and free movement rules, undoubtedly represent the most important intervention by the Court of Justice in sporting matters since *Bosman*. They call for action from the SGBs in terms of both governance reform and dispute resolution. The Court has clearly drawn some red lines in this respect, but it has also continued to show respect for the legal autonomy of the sporting associations, granting them some leeway to come up with solutions (in *ESL* and *ISU*) or justifications (in *Royal Antwerp*). The ramifications of the rulings extend well beyond the realm of sports. The Court has meticulously mapped how it will approach future competition law challenges against private regulatory restrictions, but the emphasis on the need for consistency in the application of Articles 101 and 102 TFEU, the limitation of the *Wouters/Meca-Medina* doctrine to 'by effect' restrictions of competition or abuses, or the strict economic interpretation of Article 101(3) TFEU unmistakably have general relevance. Whether a new European Super League will eventually be held on the football fields across Europe remains to be seen. However, for EU competition law and sports, *ESL*, *ISU*, and *Royal Antwerp* mark the arrival of a New Testament.

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