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*Let's play: 'Master and Servant' **

A legal analysis (with a little help from economics) of sports governing bodies' purpose and roles, focusing on professional football, and explaining why analyses and solutions in other sports might be different

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Abstract

This Article explores the role of sports governing bodies (SGBs) and elaborates the debate on the combination of SGBs regulatory role and their role as organizer of competitions. This debate is not new. Nonetheless, it makes sense to revisit it now, in view of pending cases on the subject before the Grand Chamber of the Court of Justice of the European Union, especially the International Skating Union (ISU) case and the European Super League (ESL) case. It takes a critical stance towards Advocate General Rantos' opinions in both cases and develops arguments for an alternative approach by the Court. The Article identifies deficiencies in the current governance of SGBs and suggests reform. The Article focuses on professional football in Europe and takes a legal perspective. It tries to be sensitive for differences with other professional sports, allowing different solutions in seemingly similar circumstances, borrowing from economic analysis. The Article includes some observations on the purpose of SGBs too.

Introduction

This Article furthers my talk on *The purpose of sports governing bodies* at the *International Sports Law Journal* Conference 2022. Soon after commencing to write, I realized the title did not entirely tally in with the cargo. Although important, the purpose debate is only part of the equasion; the debate should be on the role of sports governing bodies (SGBs) too, especially on the combination of SGBs regulatory role and their role as organizer of competitions.[1] These debates are not new. Nonetheless, it makes sense to revisit them now, in view of pending cases on the subject before the Court of Justice of the European Union, especially the *International Skating Union* case and the *European Super League* case.[2] The Article identifies deficiencies in the current governance of SGBs and suggests reform. It does so only briefly, as another author elaborates more in detail the reform of football and the role of the EU in that. The Article focuses on professional football in Europe and takes a legal perspective. It tries to be sensitive for differences with other professional sports, allowing different solutions in seemingly similar circumstances, borrowing from economic analysis. The Article kicks off with some observations on purpose.

On purpose

Purpose is a much-discussed concept among organizational law enthusiasts. The core question is towards which interests (corporate) entities must be governed. There are roughly two opinions. The first is that companies exist to create value for their shareholders; the second that companies are vehicles to create value for stakeholders too and that the interests of stakeholders may even prevail

* After the Depeche Mode song. In the analogy with sports and somewhat provocative sports governing bodies would take on the role of master, served by all others.

[1] Also labelled as the legislative role and executive role respectively (Thomas Hoehn, "Governance and governing bodies in sport" in Wladimir Andreff and Stefan Szymanski (eds.), *Handbook on the Economics of Sport* (Edward Elgar Publishing 2006), 229), a terminology I will not use in this Article.

[2] Because of these current events, the Article serves partly as a case study. At the same time, it intends to have broader relevance: its arguments are valid for double hatting in sports and sports governance more in general - therefore transcending the mere case study.

over the interests of shareholders. For not-for-profit entities, such as associations, the line of reasoning can be similar: does the association exist for its members only or for its stakeholders too and can then stakeholder interests take precedence over member interests? The debate is far from settled and scholars trip over each other in support of one or the other opinion.

From the indecisiveness of the debate, we can infer that there is no universally adopted unique model of good stakeholder governance. Differing models and opinions co-exist. This is a valuable observation for SBGs too. SGBs are organized as associations mostly. In view of the sketched purpose debate, their purpose can be to serve the interests of the members solely equally than it can be to serve and let prevail the interests of stakeholders too. Therefore, from an organizational law perspective, it may not be striking that an SGB tends to its own interests above all; that own interest being that of its (combined) members.

An organizational law perspective is, however, in itself not sufficient to approach the purpose of SGBs. This is because sport is deemed special.[3] It is intrinsically rooted in communities - and it performs societal and educational functions, as highlighted in Article 165 of the Treaty on the Functioning of the EU (TFEU). Professional sports is only gradually different. Compared to amateur sport, and dependent on the sport, professional sport is a businesses, intrinsically concerned with matters of economics and finance, but at the same time, expected to 'give back to society' and deliver other benefits, extending beyond the business enterprise of producing and delivering the spectacle of the sport.[4] This special nature of sports has consequences for SGBs' governance models: calls for stakeholder inclusion are stronger and more decisive than for 'ordinary' corporates and associations. Policy briefs make that abundantly clear. Just recently, the 2021 '*Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model*'[5] stressed inclusiveness in the representation of interested stakeholders as a cornerstone of good governance in sports.

Is professional sports living up to expectations? Instrumentally, yes, but normatively, no.[6] The case of professional football illustrates this. Focusing on UEFA, UEFA membership is open to national football associations only[7] and only Member Associations have voting rights in the UEFA Congress, UEFA's supreme controlling body.[8] UEFA's Executive Committee, competent *inter alia* for UEFA club licensing[9], is composed of 20 members: the President, sixteen other members elected by the Congress, two members elected by the European Club Association (ECA) and one member elected by the European Leagues (EL), ratified by the Congress[10]. Hence, at the level of the Congress, stakeholders other than UEFA and its Member Associations are not represented, and at the level of the Executive Committee clubs and leagues have only a small minority representation. For the rest, stakeholder involvement is limited to participation in advisory committees. In fact, stakeholders lack any means to exert real pressure, at least from a legal perspective.[11]

[3] Although a caveat is in place: often the special nature of sport is exagerated and used as an argument without real substance to escape regulation. In that regard, sport is and should not be so special as often portrayed. On this, see elaborate: Stephen Weatherill, *European Sports Law. Collected Papers* (Springer 2014), 245-282.
[4] Annette Greenhow, "Social Responsibility, Stakeholders and Professional Football Clubs: From 'Window-Dressing' to Civic Wealth Creation" in Robby Houben (ed.), *Research Handbook on the Law of Professional Football Clubs* (Edward Elgar Publishing 2023), forthcoming.
[5] [2021] OJ C 501/1.
[6] Richard Parrish, "Organisation of European Professional Football: A Stakeholder Theory Analysis" in Robby Houben (ed.), *Research Handbook on the Law of Professional Football Clubs* (Edward Elgar Publishing 2023), forthcoming.
[7] Article 5 UEFA Statutes (edition 2021).
[8] Articles 7 and 18 UEFA Statutes (edition 2021).
[9] Article 50 UEFA Statutes (edition 2021).
[10] Article 21 UEFA Statutes (edition 2021).
[11] Is it a mitigating factor that professional football clubs and/or professional football leagues are usually part of the governance of Member Associations, and as such have an indirect impact on UEFA's decision-making? It is a factor, but not a decisive one. Said clubs and leagues usually have only a minority position in the governance of their Member Association, alongside *inter alia* representatives of grassroots football and independent persons. Hence, they can certainly weigh on Member Associations' decision-making, but they lack the power to steer it - and rightly so: Member Associations should be the guardians of football as a whole, not of professional football alone.

Under UEFA's governance, where stakeholders are not really represented, can it be expected that UEFA will really consider interests other than its own? The answer to that question lies in a witty quote from Judge Leo Strine of the Delaware Supreme Court. Touching on the core of the purpose debate in organizational law, he asserts that allowing managers to observe other interests than the interests of shareholders, without granting to these other stakeholders voting rights or enforcement rights or any other means to exert real pressure is '*more an exercise in feeling good than in doing good'*.[12]

Stakeholder involvement in professional football is inspired negatively. The explanation is twofold. Firstly, stakeholders have gained some form of - mostly soft - representation within UEFA or FIFA bodies because they were dissatisified and threatened with legal actions or breakaway attempts. Football's governing bodies had to give them something to keep them happy. Paradoxically, and synically, Parrish notices, this *modus operandi*, securing legitimacy and voice within football governance, can simultaneously reduce the relevant stakeholders' powers.[13] This is because gaining formal representation within governance structures rarely comes with veto power.[14] Secondly, "*the integration of stakeholders is designed to secure a more favourable regulatory environment, most notably from the EU. The EU conditions its respect for the autonomy of sport on sports bodies accepting good governance standards, of which stakeholder representation is one*". Therefore, the integration of stakeholders within football governance by FIFA and UEFA is a means of managing an increasingly hostile legal environment[15] - and, thus, to hold off external interference. This explains why stakeholder inclusion is minimal: as long as the appearance of involvement suffices to satisfy policy makers, organizing real involvement seems not necessary.

Can football's stakeholders, other than UEFA and the Member Associations who are already represented, legitimately claim more representation and power in UEFA's governance bodies, so as to allow them to really weigh on decision-making, and to allow a more balanced decision-making within UEFA? It seems that they can. Here are some arguments.

Firstly, in the past few decades, clubs and leagues have become the 'engine' of professional football, replacing nation states.[16] Whereas clubs, players and leagues take centre stage in modern day professional football, it is remarkable that they are represented in football's governing bodies only through a stakeholder-inclusive approach.[17] They are largely absent in the real decision making bodies. UEFA's governance does not reflect this changed landscape and, therefore, is in want of reform.

Secondly, from an organizational law perspective, it makes sense that the ultimate risk bearers of a commercial venture can steer the organization and governance of the venture. In professional football, such logic apparently does not apply. Arguably, clubs and players are the risk bearers of modern football[18], but they cannot steer the commercial venture in which they operate; they do not even have a real say in it. It would make more sense to allocate voting rights in decision-making bodies to clubs and players that adequately reflect their skin in the game or, at least, provide some other means allowing them to exert pressure. Without adequate representation, it is simply too easy for football's governing bodies to claim stakeholder interests are taken into account, whereas in fact they are not or not sufficiently.

Thirdly, in professional football there is no public or state regulator, but only a private regulator, in Europe UEFA. That private regulator also organizes and operates European competitions, both club

[12] Leo Strine, "The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law", University of Pennsylvania Law School, Institute for Law and Economics, Research Paper No. 15-08, 2015.
[13] Parrish (n 6).
[14] *Ibidem*
[15] *Ibidem*
[16] Eg Stephen Morrow, *The People's Game? Football, Finance and Society* (Palgrave Macmillan 2003) 1.
[17] Parrish (n 6). Also see Weatherill (n 3), 302 questioning in particular the absence of clubs in formal decision making.
[18] Eg clubs pay the players and bear the consequences of injuries, weighing on sporting and economic performance of the team, and potentially also that of the league, and of course on the player's physical integrity.

competitions and nation state competitions. As such, UEFA can have competing interests and effectively competes with clubs and leagues, whilst it at the same times regulates clubs, leagues and players, without these having any real say on how they are regulated. Of course, in most other sectors market participants do not decide on the regulation of market entrance and operation. Yet, in those cases, it is normally a government or an entity with powers derived from government that regulates and operates the market; a government that moreover will not compete with the market participants on the relevant market, or, that when it does, cannot claim a privileged position. UEFA is a private regulator, regulating other private actors, which moreover has a privileged position on the market it regulates. It does not really have to take into account the interests of those it regulates; it can subordinate their interests to its own. A more representative composition of UEFA's governing bodies could help to address this imbalance, albeit that the real underlying question is of course whether it is justifiable that UEFA combines the capacity of regulator and operator - a question that is both a legal and political one - and whether it would not be better to have an independent regulator.[19]

Fourthly, as aforementioned, from a policy perspective, the 2021 '*Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model*'[20] emphasized the role of stakeholders and the need to take them into account in the further development of sport in Europe.

However justified claims for more representation in UEFA's governance might be, it is probable that they will fall on deaf ears. Amending UEFA's governance requires amending the UEFA Statutes with a majority of at least two-thirds of the Member Associations present at the Congress.[21] It requires UEFA to renounce voluntarily part of its powers to the advantage of other stakeholders. UEFA will probably not do that. Parrish rightly notes that: "*In order to retain regulatory control of sport, and hence financial control over it, stakeholder representation is often viewed with zero-sum suspicion - what the stakeholders gain, the governing bodies lose*".[22] Football's governing bodies just have no incentive for reform as stopping to play 'Master and Servant' would limit their powers. They would most likely only do so under serious threat of statutory intervention, a threat that is absent today.

Admittedly, making the governance of professional football more inclusive is not without practical challenges. One challenge is who should represent a certain stakeholder group. It is self-evident that stakeholder involvement is only feasible through representative organisations. Yet, within a group of stakeholders, various subgroups may exist, with potentially differing interests. Should then different representative organisations receive an invitation to the decision making table, and if so which are the criteria, or is there room for only one? Pijetlovic illustrates the issue for clubs. Whereas the European Club Association (ECA) is European clubs' sole representative organisation within the football pyramid, it is not accessible for the vast majority of European professional football clubs. Pijetlovic notes that "*in reality, ECA represents the interests of only about 20 elite clubs*". Furthermore, "*over 900 small and medium sized clubs that embody the lifeblood of European football, do not have a representation of their specific interests at any level of governance*".[23] She continues: "*given the competitive imbalance, and vast differences in financial structures and resources between the clubs, it is not possible for a single organisation to effectively represent both the elite and all other clubs – they are different stakeholders with conflicting interests on vital matters*". [24] Interestingly, as a remedy, a new club organisation called Union of European Clubs (UEC) emerged in 2021 "*gathering unrepresented and inadequately represented clubs whose commercial interests and opportunities are profoundly affected by UEFA rules*".[25] At the time of writing, the UEC did not yet receive UEFA recognition, and it is likely

[19] See hereinafter '*Is a forced separation of roles to be expected*' and '*The rule of law and the role of politicians*'.
[20] [2021] OJ C 501/1.
[21] Article 18 UEFA Statutes (edition 2021).
[22] Parrish (n 6).
[23] Katarina Pijetlovic, "The European football competition model (under stress)" in Robby Houben (ed.), *Research Handbook on the Law of Professional Football Clubs* (Edward Elgar Publishing 2023), forthcoming.
[24] *Ibidem*
[25] *Ibidem*

that it will not receive it any time soon "*due to the political commitments in the Memorandum of Understanding that UEFA has with ECA*".[26] As a result, "*the UEC might be forced to resort to legal challenge to achieve the formal recognition and achieve its objectives*".[27] In the same vein as the UEC, the future might also bring a Super League representative organisation, assuming the backers of the Super League would persevere. Indeed, on the basis of ECA's Memorandum of Understanding with UEFA to '*ensure that none of its member clubs participate with any of its teams in any competition that is not organised or recognised by UEFA/FIFA*', it seems that Super League clubs' interests are not aligned with those of ECA either.[28]

The above puts international football's governing bodies and especially UEFA on the spot. However, governing bodies of other sports should not pride themselves too much for doing better. A similar analysis is likely for most other SGBs. A quick look at the statutes of swimming's and basketball's SGBs supports that intuition.[29] Intuitively, therefore, the issue seems structural - and the real question is how high policy makers want to set the bar for sports: are they content with an instrumental approach towards stakeholder inclusion, or should it be normative too?

On roles

Traditionally, SGBs assume various roles, such as the development, promotion, monitoring and regulation of the sport, the organisation of the sport's competitions, the prevention of fraud, the redistribution of revenue generated by the sport in line with the principle of solidarity, etc. From a legal perspective, the combination of an SGB's regulatory role and its role as organizer of the sport's competitions (so called 'double hatting'), and the conflict of interests such combination can entail, garnered most attention. This is because SGBs often monopolize the market for the organization of competitions and there is a real risk that SGBs make, apply and bend the rules, *they make*, to preserve and optimize that monopoly.[30]

The debate is long lasting, but reignited in the case of two Dutch skaters, Mark Tuitert and Niels Kerstholt, against the International Skating Union (*ISU*) - and soon after took center stage in the case of the European Super League (*ESL*) versus UEFA. These cases are similar: they both relate to a prospective competition organized by someone else than the SGB, for which the SGB - based on its statutes - enjoys a prior approval right, and for which the SGB ultimately denied approval. Claimants in both cases argue that such course of action constitutes an antitrust infraction under EU law. Both cases are currently pending before the Grand Chamber of the European Court of Justice of the EU (CJEU), the former as an appeal against a verdict of the General Court (GC) and the latter following preliminary questions by the Commercial Court of Madrid. Advocate General (AG) Rantos delivered opinions in both cases on 15 December 2022. In his *ISU* opinion, the AG suggests to annul the GC's verdict, arguing that the GC wrongly qualified the ISU's prior approval right as a restriction by object and suggesting to refer the case back to the GC for a further assessment of the 'effects' on competition of the ISU's prior approval right.[31] In the *ESL* opinion, the AG similarly concludes that UEFA's prior approval rights is no restriction by object, yet - different than in *ISU*, because of the different

[26] *Ibidem*
[27] *Ibidem*
[28] Article D.3 of the Memorandum <https://www.uefa.com/MultimediaFiles/Download/uefaorg/General/02/59/04/66/2590466_DOWNLOAD.pdf> accessed 8 January 2023.
[29] Basketball: FIBA General Statutes, edition 3 June 2021, <https://fiba3x3.com/docs/fiba-general-statutes-2021.pdf> accessed 15 December 2022; By-laws of FIBA Europe, as amended from time to time, < https://www.fiba.basketball/europe/ByeLaws-FIBA-Europe.pdf> accessed 15 December 2022. Swimming: FINA constitution, edition 2021 < https://resources.fina.org/fina/document/2022/01/13/f21af7d9-dc04-45f5-90f6-711f67453b61/23_FINA-Constitution_18.12.2021.pdf> accessed 15 December 2022; LEN european aquatics constitutional rules, edition 2022 <https://www.len.eu/about-len/constitution/> accessed 15 December 2022.
[30] As Parrish notes: "*performing both regulatory and commercial functions without conflation, is a temptation too far for many sports bodies*": Parrish (n 6). Along the same lines, Pijetlovic claims that "*empirical evidence strongly suggests that the private commercial considerations will ultimately shape the decisions of regulators and take precedence over the public interests they are mandated to safeguard*": Pijetlovic (n 22). Similarly: Ben Van Rompuy, "The role of EU competition law in tackling abuse of regulatory power by sports associations" (2015) (22(2) Maastricht Journal of European and Comparative Law 174-204.
[31] Case C-124/21 P *Opinion AG Rantos* [2022] ECLI:EU:C:2022:988, paras 123 and 136-137.

procedural background - immediately continues with an assessment on the effects on competition. Because of the broader assessment in *ESL*, the *ESL* verdict will have the better chance of setting the law of the land first. Therefore, hereinafter, I will focus on *ESL*.

Legal framework

In *ESL*, the CJEU is requested to assess whether UEFA (and FIFA)'s prior approval right for new competitions, exercised as at the request for approval by the European Super League, restricts competition in the sense of Article 101 TFEU and/or abuses a dominant position in the sense of Article 102 TFEU. Contrary to its earlier case law in *MOTOE*[32] and *OTOC*[33]*,* Article 106 TFEU is not relevant in this case, nor is it in *ISU* for that matter, as UEFA (or the ISU) is not a public entity, nor does it derive its powers from the state; it is a purely private entity. The Court's assessment occurs against the background of Article 165 TFEU, rightly considered as a summary of established practice, without prejudice to the Court's ability to fully assess the case of UEFA against EU competition law and the free movement principles.[34]

In *MOTOE*, on Article 102 TFEU, and in *OTOC*, on Article 101 TFEU, the CJEU emphasized that a system of undistorted competition, such as that provided by the Treaty, can be guaranteed only if equality of opportunity is secured between the various economic operators.[35] Building on that principle, in *MOTOE* the Court found that entrusting a legal person, which itself organises and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorisation to organise such events, places that entity at an obvious advantage over its competitors.[36] Moreover, the Court continued, a rule which gives a legal person the power to give consent to applications for authorisation to organise motorcycling events without that power being made subject by that rule to restrictions, obligations and review, could lead the legal person entrusted with giving that consent to distort competition by favouring events which it organises or those in whose organisation it participates. Similarly, in *OTOC* the Court held that rules which grant a legal person the power to rule unilaterally on applications for registration or approval submitted with a view to the organisation of training sessions, without that power being made subject by those rules to limits, obligations or a review, could lead the legal person holding such power to distort competition by favouring the training which it organises itself.

From these verdicts it can be inferred that the Court finds the combination of regulatory and operating power not in itself restrictive of competition or an abuse of a dominant position.[37] That combination does however conflict with competition law when access to the market is unduly denied to the point that competition on that market is thereby distorted[38], *i.e.* when there are no limits or restrictions, obligations and power of review over the legal entity performing both functions[39].

After having established that these criteria are not further developed in the Court's case law, AG Rantos argues in his *ESL* Opinion that they should satisfy the following objectives[40]:

[32] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) vs. Elliniko Dimosio* [2008] ECLI:EU:C:2008:376.
[33] Case C-1/12 *Ordem dos Técnicos Oficiais de Contas vs. Autoridade da Concorrência* [2013] ECLI:EU:C:2013:127.
[34] See Stephen Weatherill. 'Football agents', in Robby Houben (ed.), *Research Handbook Professional Football Clubs* (Edward Elgar Publishing 2023) forthcoming. AG Rantos devotes ample attention to Article 165 TFEU in *ESL*, and fundamentally adheres: *whilst the specific characteristics of sport cannot be relied on to exclude sporting activities from the scope of the EU and FEU Treaties, the references to that specific nature and to the social and educational function of sport, which appear in Article 165 TFEU, may be relevant for the purposes, inter alia, of analysing, in the field of sport, any objective justification for restrictions on competition or on the fundamental freedoms*.": Case C-333/21 *Opinion AG Rantos* [2022] ECLI:EU:C:2022:993, paras 27-49 (hereinafter referred to as *ESL Opinion*). On the different stances regarding the meaning of Art. 165 TFEU, see eg Weatherill (n 3) 534.
[35] Case C-1/12 (n 33), para 88; Case C-49/07 (n 32), para 51.
[36] *Ibidem*
[37] Eg Weatherill (n 3), 478 (on *MOTOE*).
[38] As summarized by AG Rantos: *ESL Opinion*, para 48.
[39] Case C-1/12 (n 33), para 91; Case C-49/07 (n 32) para 52. The General Court developed the same line of reasoning in *ISU:* Case T-93/18 *International Skating Union vs. EC* [2020] ECLI:EU:T:2020:610.
[40] *ESL Opinion*, paras 111-117.

- to establish the framework for the discretion enjoyed by a sports federation by restricting the leeway enjoyed by it and, in particular, that federation's ability to have recourse to arbitrary decisions, refusing the organisation of third-party sporting competitions without justification or on illegitimate grounds;
- to establish clearly, objectively and in as much detail as possible the conditions for access to the market in order to enable any organiser of third-party competitions not only to have sufficient visibility as to the procedure to be followed and the conditions to be satisfied in order to enter the market in question, but also to expect that, if those conditions are met, the federation in question should not be able, in principle, to refuse it access to the market;
- as for the clubs and players concerned, they must be in a position to know in advance the conditions under which they will be able to participate in third-party events and the sanctions incurred should they participate in such events. Beyond their deterrent effect, those sanctions must, moreover, be sufficiently clear, foreseeable and proportionate in order to limit any risk of arbitrary application by the federation in question;
- both the organisers of rival competitions and the clubs and players concerned must have remedies at their disposal that enable them to challenge any refusal decisions or sanctions imposed by the sports federations in question. Furthermore, those remedies must not be restricted to the federation's internal bodies, but must also provide for the possibility of contesting such decisions before an independent body.

This list of criteria makes perfect sense, and, regardless of the outcome in *ESL* and *ISU*, can going forward certainly be inspirational for SGBs struggling with access-to-market provisions, in and outside the world of football. The only missing element, so it seems, is that reasonable time limits should exist for the SGB's decision making in the context of prior approval procedures, both for the initial approval and for a potential appeal.

Interestingly, according to the AG, in *ESL* it is up to the Commercial Court in Madrid to examine, in light of the identified criteria, the proportionality of UEFA's (and FIFA's) prior approval and sanctions rules, taking into account the factual, legal and economic context in which those rules will be applied, including, therefore, the specific characteristics of the ESL. With that latter reference, the AG reminds of the semi-closed character of the Super League, a feature considered at odds with the European model of sport, according to the AG glossing over all legal flaws attached to UEFA's prior approval right and sanctions: "*It should be pointed out at the outset that the principles described in points 114 to 116[41] of this Opinion can apply only in relation to independent competitions which themselves comply with the objectives recognised as legitimate that are pursued by a sports federation. It follows that, even if the criteria established by 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 authorised and that UEFA's refusal to authorise such a competition could not be justified.*".[42] I will explain later why this is an incorrect and disproportionate view.[43]

How to apply this framework to UEFA in ESL?

Similar to *MOTOE* and *OTOC* - and *ISU* for that matter - UEFA is both a regulator and an operator. To assess the legality of its actions, the crux will, hence, be to determine if its prior approval right, exercised as at the request for approval by the ESL, was subject to limits or restrictions, obligations and review.

Arguably, no such limits or restrictions, obligations and review existed. The UEFA Statutes do not include any objective criteria relating to the organization of a third party competition, nor any clear procedural rules setting out the timing of the application procedure, leaving significant discretionary

[41] These are the aforementioned objectives developed by AG Rantos.
[42] Case C-124/21 P *Opinion AG Rantos* [2022] ECLI:EU:C:2022:993, para 118.
[43] See hereinafter '*Legitimate objectives*'.

margin for UEFA to decide as it saw fit. Moreover, one could criticize the review process, especially the exclusive jurisdiction of the Swiss based Court of Arbitration for Sport (CAS).[44] Mandatory arbitration in Switzerland implies that subjects of the Union can be denied access to a EU court even in case of a conflict relating to EU law on EU territory.[45] This is because CAS awards are appealable before the Swiss Federal Supreme Court on limited grounds only, which do not include a violation of EU competition law rules nor a violation of the freedoms of movement.[46] As a result, the Swiss Federal Supreme Court will not sanction the CAS should it have not heard a party's arguments pertaining to compatibility with EU law and it cannot request a preliminary ruling from the CJEU. Hence, even when the CAS or the Swiss Federal Supreme Court interpret principles of European law, they can do so *à la Suisse*. There are no real safeguards on compliance with the European rule of law, as it is applicable within the Union.[47]

In his *ISU* opinion, AG Rantos takes no issue with mandatory arbitration before CAS.[48] Referring to *Achmea*[49] and *PL Holdings*[50], the AG reminds that "*recourse to arbitration may reduce the full effectiveness and uniformity of EU law and the possibility of obtaining effective judicial protection, where the arbitral tribunal is not part of the EU system and is not subject to a full review of compliance with EU law by national courts*". This is the case when on the basis of a Treaty arbitration is imposed on private parties and aims to remove disputes from the jurisdiction of the Treaty making Member States' courts. Another context, AG Rantos reiterates, is commercial arbitration, which is the result of the freely expressed wishes of the parties concerned and involves disputes between parties of equal standing. If parties in commercial arbitration decide freely to submit their cases to a tribunal outside of the EU, they are at liberty to do so. According to the AG, arbitration in sports should be assessed as commercial arbitration. As a result, he rejects the analogy with mandatory arbitration on the basis of a Treaty, because: arbitration in sports applies between private parties and an international sports federation, not with a Member State; and - arbitration in sport does not derive from a Treaty by Member States who want to remove disputes from their own courts. These arguments are of course valid, but formalistic, and not entirely convincing on merit. Although there are certainly good arguments in favor of centralized arbitration in sports[51], it is debated whether the parties' consent to it is actually free (or informed).[52] Arguably, it is not: if clubs, players, athletes ... want to compete in a

[44] Also see on this issue: Antoine Duval, "The Court of Arbitration for Sport and EU Law: Chronicle of an Encounter" (2015) 22 Maastricht Journal of European and Comparative Law 224-255. The Super League managed to escape this via the Commercial Court in Madrid, requesting a preliminary ruling from the CJEU.

[45] Also see the Commission's answer to a parliamentary question in 2006: '*on the subject of recourse to ordinary courts, the Commission took the view that rules prohibiting recourse to courts and imposing compulsory arbitration are prima facie contrary to the EC Treaty, including Articles 81 and 82 of the EC Treaty, inasmuch as the denial of access to the courts may facilitate anti-competitive agreements or conduct*.': Question reference: P-3853/2006.

[46] Article 190 of the Swiss Federal Act on Private International Law. Andrea Cattaneo and Richard Parrish, *Sports Law in the European Union* (Wolters Kluwer 2020) 72. Also see Swiss Federal Court, Arrêt du 20 février 2018, n° 4A_260/2017, 5.2 (available at <https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F20-02-2018-4A_260-2017&lang=de&type=show_document&zoom=YES&> accessed 27 June 2022).

[47] Of course, a party that is malcontent by a CAS award could still travel up to the CJEU afterwards. It could do so in a case on the recognition of the arbitral award: in such event, it could ask the national court to launch a request for a preliminary ruling before the CJEU on the award's compatibility with public policy within the meaning of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Case C-126/97 Eco Swiss China Time Ltd vs. Benetton International NV [1999] ECLI:EU:C:1999:269; Andrea Cattaneo and Richard Parrish (n 46), 72-73). That notion includes EU competition law. Yet, this is quite the detour and it does not alter the fact that the CAS and the Swiss Federal Supreme Court do not have to take EU law as interpreted in the EU into account in the first place. Furthermore, in practice, UEFA or FIFA do not really need to request a national judge to recognise a CAS award - which would then offer the aggrieved party the possibility of raising arguments of public policy – as, in fact, they possess the power to self-enforce their sanctions confirmed by the CAS, eg by closing the club's access to the Transfer Matching System, by retaining payments (from the centralized marketing) or by banning clubs and/or players from their own competitions or even from their domestic competitions.

[48] Case C-124/21 P *Opinion AG Rantos* [2022] ECLI:EU:C:2022:988, para 153 ff. Indeed, mandatory arbitration in Switzerland is common in the world of sports, and thus applies also to skating.

[49] Case C-248/16 *Achmea* [2018] EU ECLI:EU:C:2018:158.

[50] Case C-109/20 *PL Holdings* [2021] ECLI:EU:C:2021:875

[51] Arbitration allows to establish uniform rules to be applied everywhere in the world, taking into account the specificity of sport, as well as the necessity to promote integrity and to safeguard uniformity in the relevant decisions. Courts cannot achieve these aims, at least not to the same extent. Furthermore, in general, arbitration allows more speedy proceedings than court proceedings, which is of utmost relevance in the world of sports, where time can be of the essence.

[52] Eg Van Rompuy (n 30) 174-204; also see Margareta Baddeley, "The extraordinary autonomy of sports bodies under Swiss law: lessons to be drawn" (2020) The International Sports Law Journal, 20 3–17.

sport - *i.e.* the essence of their profession - they have to accept the relevant SGB's rule book, of which mandatory arbitration forms part. This asymmetry of powers between the SGB and the parties governed by it, resembles more the situation of arbitration forced upon private parties based on a Treaty with Member States, than it resembles genuine commercial arbitration between private parties. The AG acknowledges this 'asymmetry of powers', but attaches only subordinate attention to it, in that he argues that provided the independence and impartiality of the CAS are not called into question and recourse to CAS arbitration can be justified by legitimate interests linked to the requirement that sporting disputes be submitted to a specialised body, the arbitration rules are not unlawful according to EU standards. Again, on merit, this argument is quite thin: even after *Mutu and Pechstein*[53], the independence and impartiality of the CAS are regularly and rightfully called into question.[54] In view of the continued critique on CAS's independence, as also voiced by the two dissenting judges in *Mutu and Pechstein*, the CJEU should revisit the matter and might after all take a stricter stance towards the concept of a fair trial in view of Article 6 of the European Convention of Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union than the European Court of Human Rights did. Furthermore, the main issue is not that sports disputes are tried before a tribunal, but before a tribunal *in Switzerland* that can apply EU law if, as and when it sees fit. As a side note, the latter issue could easily be resolved should the CAS also open up shop within the EU[55], because in the EU, the EU rule of law is part of public policy against which national courts can assess the legality of arbitral awards. But, until now, no such EU based hub exists.

Does it matter that UEFA is not a government ?

Is the fact that in *OTOC* and *MOTOE* the CJEU's verdict was based on Articles 101 and 102 TFEU respectively *and* Article 106 TFEU a decisive factor in the case against UEFA, forcing the Court to assess these cases differently? In other words, does it matter that in *OTOC* and *MOTOE* the regulator and operator was a 'public undertaking or an undertaking to which a Member State granted special or exclusive rights', whereas in the current case UEFA is purely a private regulator and operator? It has been argued that it does, and that private parties should be given more leeway to pursue their own interests, even in the event of double hatting, than governments or actors dependent on governments, who should be assessed more restrictively.[56] The rationale is that when there are no statutory rules preventing a competitor from entering the market, but only private rules shielding a private party's position on the market, the competitor can just enter the market and launch a new product competing with the existing product. As such, the reasoning continues, there is no need for competition law to intervene. AG Rantos develops a similar reasoning in his *ESL* opinion, arguing that "*from a (purely) legal perspective*", as FIFA and UEFA are not states, the ESL does not need their authorisation to set up a league of its own outside the FIFA and UEFA ecosystem.[57] Indeed, there is really only a conflict because the ESL wants to remain within that ecosystem, at least whilst preparing the Super League competition.

Although at first glance this reasoning has merit, on second thought it seems flawed.

Firstly, the reasoning depends very much on the *ability* of a private actor to enter the market and compete with the existing product, which, in the case of UEFA and the market for European football, is factually impossible, *inter alia* because of UEFA's strict stance towards continued participation in

[53] For a brief and up to date overview of all court verdicts, with further references, in this famous case, see eg Jacopo Tognon and Priscilla Bortolin, "Dispute resolution in professional football", in Robby Houben (ed.), *Research Handbook on the Law of Professional Football Clubs* (Edward Elgar Publishing 2023), forthcoming.

[54] On this matter, with attention for the opinion of the dissenting judges in the Mutu and Pechstein decision of the EctHR precisely on the point of independence of the CAS, see eg Antoine Duval, "Lost in translation? The European Convention on Human Rights at the Court of Arbitration for Sport" (2022) The International Sports Law Journal, 22 132–151; Johan Lindholm, "A legit supreme court of world sports? The CAS(e) for reform" (2021) The International Sports Law Journal, 21 1–5; Margareta Baddeley (n 52).

[55] As suggested by Melchior Wathelet, "La gouvernance du sport et l'ordre juridique communautaire : le présent et l'avenir", in *Les cahiers de droit du sport, Aix-en Provence* (Presses Universitaires d'Aix-Marseille 2007).

[56] See Pablo Ibáñez Colomo, "Competition law and sports governance: disentangling a complex relationship" [2022] 22-23 and 29-30 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130043> accessed 28 June 2022. Note, however, that the Court in *Wouters* was lenient, although the Dutch bar association was mandated by statutory law.

[57] *ESL Opinion*, paras 74-78.

domestic competitions and threats of sanctions as against clubs *and* players. Only top teams, because of their brand value, would stand any chance, but the severity of sanctions against players still wanting to perform for their national squads, could nip even that slight chance in the bud. Furthermore, even top teams would probably need quite a lengthy transition phase to establish a league of their own. In the meantime, they would be dependent on UEFA for their survival and a likely ban from UEFA's competitions during that time could very well lead them to insolvency. Because of these reasons, this approach seems too theoretical and too ignorant of the facts. This is an important observation, as the rules under examination cannot be assessed "*in the abstract, but only as part of a detailed examination of the actual effects of applying those rules*". In his opinion, the AG stresses this multiple times[58], mostly to emphasize the ESL's semi-closed character, but the sword is double-edged and other facts must be considered too.

Moreover, this approach could be considered controversial in the context of professional football, where calls for statutory intervention are increasingly being voiced, because of the - for sports - large scale of the market and the inability of football's governing bodies to regulate it properly. Indeed, this is a market where some expect a presence of statutory law. But of course, as long as politicians do not act, one might argue that the law of the land is still that it is strictly private territory and that this reflects the political consensus. More fundamentally, however, one can argue too that the absence of statutory law, in a sector where a private body assumes both the task of regulator and operator in a significant market in the EU, whereby that double hatting can be used to hide conduct purely in the own commercial interests behind a smokescreen of portrayed legitimate objectives[59], is an aggravating factor in comparison with *MOTOE* and *OTOC*, requiring at least the same rigor as in those cases, and perhaps even more.[60]

An ancillary restraints approach

The compatibility of sporting regulations, such as ISU's and UEFA's prior approval rights, with EU competition law is commonly (also) assessed against the *Wouters*[61] test, developed for sports in *Meca-Medina*[62].

Some read *Wouters* as an extension of the ancillary restraints doctrine, typically applicable to 'pure' commercial transactions.[63] According to that doctrine a restriction of competition is legitimate if it can be justified in view of a broader commercial transaction that in itself is not anti-competitive. The professional bar rule restrictions in *Wouters* would thus be seen as an ancillary restraint necessary to protect *the profession* of lawyering; the anti-doping rules in *Meca-Medina* as an ancillary restraint necessary to ensure fair competition between athletes *so as to allow a qualitative product* (professional swimming).[64] Along those lines, UEFA's prior approval right would be seen as an ancillary restraint ensuring the preservation of UEFA's *commercial model* to exclusively produce the product of (European) football. The Court would then have to assess whether the double hatting model itself is legal under EU competition law, and could come to the conclusion that it is not, as per the arguments set out above, as a result invalidating the prior approval right too.

[58] *ESL Opinion*, paras 40, 77, 84, 89 and 117.
[59] Also see Andrea Cattaneo and Richard Parrish (n 46) 101.
[60] Also see, albeit in the context of a different question: Katarina Pijetlovic *EU Sports Law and Breakaway Leagues in Football* (Springer 2015) 194-196.
[61] Case C-309/99 *Wouters, Savelbergh and Price Waterhouse Belastingadviseurs BV vs. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECLI:EU:C:2002:98.
[62] Case C-519/04 *Meca-Medina and Majcen vs. EC* [2006] ECLI:EU:C:2006:492.
[63] See the references in An Vermeersch, *Europese spelregels voor sport* (Maklu 2009) 331. Also see J.W. van de Gronden, "Europees mededingingsrecht en niet-economische belangen" (2016) SEW, 476.
[64] See for an economics perspective of doping on the sports product: Nicolas Eber, "Doping" in Wladimir Andreff and Stefan Szymanski (eds.), *Handbook on the Economics of Sport* (Edward Elgar Publishing 2006), 773-783.

Regulatory ancillarity as benchmark

A 'pure' commercial ancillary restraints approach seems, however, unlikely, and the AG does not support it.[65] Indeed, the common understanding, at least for sports, is that *Wouters* and *Meca-Medina* have introduced a specific regulatory ancillary restraints framework, to be distinguished from the 'pure' commercial ancillary restraints approach[66], as is also developed by the AG in his *ESL* opinion.[67] This framework boils down to this: if the restriction of competition is inherent in the pursuit of legitimate objectives of general interest and proportionate to those, it is legal.[68]

Is UEFA's approach to the ESL underpinned by legitimate objectives? [69] This is a crucial question, as absent any legitimate objectives, it can only seek justifications in the ordinary commercial ancillary restraints doctrine or in Article 101(3) TFEU.[70] It seems that to convince the Court, UEFA will have to demonstrate the legitimate objectives it pursues, that it adequately pursues those, and that the Super League would jeopardize the objectives pursued. Vague references to the integrity of sports, ethics, fair play or similar principles should not in themselves suffice to convince the court. Indeed, in *API*, the CJEU clarified that legitimate objectives should be specific and detailed[71], in line with the reasoning that the ancillary restraints doctrine requires restrictive application, because it excludes anti-competitive measures from the application of Article 101 TFEU, laying down a foundation of EU competition law - and that should be limited to exceptional cases only.[72]

At first sight, AG Rantos seems to blow hot and cold here. On the one hand, he seems to attach little attention to the reality of the pursuit of legitimate objectives - he seems to assume that they *are* pursued.[73] On the other hand, he takes a rather neutral stance on the objective of solidarity: "*It should, however, be made clear in that regard that, in view of the differing views expressed at the hearing as to the intended purpose and the scale of the funding in question, it is for the referring court to ascertain whether the profit redistribution mechanism provided for by UEFA does indeed allow the objectives pursued to be achieved.*".[74] The latter is perhaps an understatement of the facts. When at the hearing the Judge-Rapporteur asked the Member States to make the dependence on UEFA solidarity in their jurisdictions concrete, not one Member State could answer the question.

Legitimate objectives

In *ISU*, the European Commission rightly noted that the following objectives might constitute legitimate objectives that could justify a restriction of competition by an SGB: the integrity of sport, the protection of health and safety, the organization and proper conduct of competitive sport (including the protection of the proper functioning of the ISU calendar and the protection of uniform rules of sport), solidarity between participants and the protection of the volunteer model of a sport. In line with the AG's *ESL* opinion, on the basis of Article 165 TFEU, the promotion of fairness and

[65] *ESL Opinion*, paras 85-92.
[66] Eg Bellamy & Child, "European Union Law of Competition, Article 101(1)", 2.206-2.210.
[67] *ESL Opinion,* paras 92 ff.
[68] Case T-93/18 (n 39) paras 60 and 77.
[69] This analysis furthers the analysis in Robby Houben, Jan Blockx and Steve Nuyts, "UEFA and the Super League: who is calling who a cartel?" (2022) International Sports Law Journal <https://link.springer.com/article/10.1007/s40318-021-00201-2> accessed 28 June 2022.
[70] See on that Katarina Pijetlovic, "European model of sport: alternative structures", in Jack Anderson, Richard Parrish and Borja Garcia (eds.), *Research Handbook on EU Sports Law and Policy* (Edward Elgar Publishing 2018) 337.
[71] Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, *API – Anonima Petroli Italiana SpA and Others vs. Ministero delle Infrastrutture e dei Trasporti and Others* [2014] ECLI:EU:C:2014:2147, paras 49-57.
[72] Also see J.W. van de Gronden, "Europees mededingingsrecht en niet-economische belangen" (2016) SEW, 478. Also see regarding the US and the requirement to provide 'good evidence' in support of restraints: Stefan Szymanski, "The sporting exception and the legality of restraints in the US" in Wladimir Andreff and Stefan Szymanski (eds.), *Handbook on the Economics of Sport* (Edward Elgar Publishing 2006), 733.
[73] *ESL Opinion,* paras 93-94.
[74] *ESL Opinion*, para 99. He adds: "*The same goes for ESLC's proposal (or commitment) to 'cover' the amounts currently paid by UEFA by means of 'solidarity payments' in order to establish whether such a mechanism would in fact enable the mechanism currently established by UEFA to be replaced (without compromising the current structure of European football)*".

openness in sporting competitions[75] and cooperation between bodies responsible for sports can be added to that list.

From this list, in *ESL*, the following seem legitimate objectives that could potentially justify a restriction of competition by UEFA:

- the promotion of fairness and openness in sporting competitions;
- solidarity between participants; and
- the organization and proper conduct of competitive sport, including the protection of the proper functioning of the match calendar.

The Super League apparently was introduced as a semi-closed league, at odds with the openness of sport in Europe. As such, that could prove problematic - and AG Rantos effectively gives a lot of weight to it. Actually, it seems to be his main argument dismissing all others, thereby focusing the case on the *ESL* instead of on UEFA.[76] This is problematic, firstly because the referring court's questions relate to the compatibility of *UEFA's* prior approval right of new competitions, such as the Super League. Of course, such question cannot be answered in the abstract, and must take account of all the facts, including the Super League set-up, but the answers must also take account of the lack of procedural framework and discretionary margin for UEFA to refuse new competitions, embedded in a situation of structural conflict of interest. Therefore, the Court must also - and primarily - in view of the referring court's questions - consider UEFA's legal flaws, without making them subordinate to the ESL's potential flaws or, as the AG suggests[77], dismissing them all together. As such, the Court should condemn all wrongs it establishes, on equal footing. This brings me to the second point. Is there even a wrong attached to the ESL? In fact, there may be not. The known facts are very little and, as acknowledged by the AG, the project was probably still in a development stage.[78] Hence, it could very well be that through negotiation the Super League would have developed into a league format that was (more) open - or perhaps it was already envisaged as open, but just poorly communicated. Refusing the Super League on partial information, not yet materialized in a definitive proposal[79], without entering into dialogue with the backers of the Super League first, seems premature and hardly coherent nor proportionate in the pursuit of the protection of the European model of sport. As a result, the AG's opinion seems disproportionate too. Moreover, the argument that UEFA's own European competitions, especially the Champions League, in fact resembles features of a closed league, is not unheard of either, questioning whether UEFA itself succeeds in the pursuit of the European model of sport and openness of competitions in particular - with as an aggravating factor UEFA's ignorance of competitive balance[80], recognized by AG Rantos as a key component of the European model of sport as well.[81] Even more striking is that in March 2019, UEFA itself proposed a reform of its Champions League competition as a semi-closed competition, with 32 guaranteed participants, and only 4 places accessible on the basis of promotion and relegation via domestic leagues. This is a concept that is very similar to the Super League. It seems to reveal that UEFA is actually not opposed to semi-closed formats as such, but only to semi-closed formats organised *by somebody else*.

The solidarity label is put on all kinds of UEFA governed distribution schemes, eg solidarity payments with regard to player transfers, distribution schemes for revenue from media rights, funding of

[75] The openness of sporting competitions, allowing promotion and relegation, was recently emphasized as a key feature of the European model of sport in the Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model [2021] OJ C 501/1. Notwithstanding, it was recently also advocated that '*Nothing in the EU competition law as currently interpreted appears to support the proposition that the compatibility of sports championships with Articles 101 and 102 TFEU hinges on the introduction of promotion and relegation mechanisms*': Pablo Ibáñez Colomo (n 56) 32. In any event, if the openness of competitions means an open access on the basis of sportive merit, some current sporting competitions, such as in European basketball (EuroLeague) and cycling (ASO competitions), might not be easy to reconcile either.
[76] *ESL Opinion*, paras 101-110 and 118-123.
[77] See above '*Legal framework*' *in fine*.
[78] *ESL Opinion*, para 22.
[79] The AG seems to confirm the premature nature of the proposal as at the refusal by UEFA: *ESL Opinion*, para 22.
[80] As evidenced with a fine brush by Pijetlovic (n 23).
[81] *ESL Opinion*, paras 30 and 41.

grassroots football projects, distribution of funds to clubs whose players participate in international tournaments between national member associations, etc. Quite logic, these schemes are brought forward as evidence of UEFA's contribution to solidarity in *ESL* too. For that argument to stick, UEFA should be able to demonstrate that the mechanisms in place effectively contribute to solidarity - and that payments due via solidarity actually reach their beneficiaries. More fundamentally, from an economic perspective, it seems that UEFA must also explain whether the label itself is applied correctly and, hence, that the payments labelled as solidarity are actually not just a remuneration for a service. Anyway, the revenue streams generated under a new third party competition may not be redistributed in the same way as is done in the current football pyramid, because the new redistribution scheme could only apply to participating football clubs of the third party competition.[82] If (all) major football clubs chose to leave the current football pyramid, the current 'solidarity' model could collapse. This risk may, from a UEFA perspective, justify bringing the organization of third party competitions under some form of control by UEFA. Yet, if the new redistribution scheme had sufficient solidarity mechanisms in place, solidarity beyond that with the clubs directly participating in the new competition, UEFA would probably have no reason to refuse such competition.

Protecting the good functioning of the match calendar, to ensure the organization and proper conduct of competitive sport, can be a legitimate objective too. Athletes have to divide their energy between different games throughout the season. Therefore, a healthy balance between rest and matches is essential. To achieve that, football's governing bodies must be able to impose rules with regard to the match calendar.[83] Football competitions, in general, are organized over a longer period of time, eg one month for a standard international tournament between national Member Associations, ten months for a standard domestic club league and ten months for a pan-European club competition. This structure does not leave much room for additional third party competitions. In order to ensure that the current organization of the competitions is unobstructed, for example, by certain clubs being unable to complete all matches due to timing or logistical problems, it could be justifiable to have a pre-authorization system in place. However, the backers of the Super League, who only wanted to replace UEFA club competition games by Super League games and to continue to participate in domestic league games, had anticipated a possible objection to their alternative league on this ground since they envisaged that "*[Super League] Games will be played mid-week*" so that "*all clubs will remain in their domestic leagues*".[84]

In sum, it is not clear whether the Super League would actually jeopardize the pursuit of any of the legitimate objectives in football. As a result, a legitimate objectives defense by UEFA should not be accepted too easily.

Inherency and proportionality

Assuming that the need to control the openness of competitions, the organization and proper conduct of football competitions could, just like the solidarity model of football, serve as legitimate aims to justify UEFA's *ex ante* control system for breakaway leagues, the next step is to assess whether UEFA's prior approval right is *inherent* in the pursuit of these objectives and *proportionate* to them.

This seems a difficult hurdle to surmount. In *ISU*, it was mainly on the aspects of inherency and proportionality that the European Commission and the General Court considered that the ISU's rules faltered. Among others, the European Commission and the General Court took issue with the discretionary margin the ISU had to refuse alternative competitions and the severity of the sanctions with which it threatened.[85] The margin of discretion should be a main concern in the case of UEFA too.

[82] Pijetlovic (n 60) 275 and 280.
[83] Josephine Clausen and Emmanuel Bayle, "Major sport events at the center of International Sport Federations' resource strategy" in Mark Dodds, Kevin Heisey and Aila Ahonen (eds), *Routledge handbook of international sport business* (Routledge 2017) 37–53; Rusa Agafonova, "International Skating Union versus European Commission: is the European sports model under threat?" (2019) 19 International Sports Law Journal 91.
[84] See <https://thesuperleague.com/#who_we_are> accessed 19 July 2021.
[85] Albeit, according to the AG, wrongly in a 'by object' analysis instead of in a 'by effect' analysis.

Article 49.3 of the UEFA Statutes, enshrining UEFA's prior approval right, does not include any objective criteria relating to the organization of a third party competition, nor any clear procedural rules setting out the timing of the application procedure. The criteria that reportedly existed as at the launch of the Super League were not transparent and included discretionary margin for UEFA.

The severity of the threatened sanctions should also prove a stumbling block for the legality of UEFA's actions. FIFA and UEFA announced on 21 January 2021 that clubs and players involved in the Super League would not be allowed to participate in competitions organized by FIFA and its confederations. The exact scope of the sanctions that would be imposed is unclear, but for players even the exclusion from one international tournament could be a severe sanction and would likely be disproportionate. This is also the opinion of AG Rantos.[86]

The analysis of sanctions imposed on clubs may be different, as also suggests the AG.[87] Clubs might just not be impressed by a ban on participating in UEFA competitions, because a breakaway league would replace the latter and generate (more) income too. Furthermore, from an EU (competition) law perspective, nothing prevents clubs from withdrawing from the current football pyramid and forming a breakaway league[88], assuming the latter is itself compatible with EU law principles, as confirmed by AG Rantos.[89] However, as aforementioned, an important practical hurdle would be that such initiative would require a transitional phase wherein clubs are at the mercy of UEFA: setting up a new competition takes time and not being able to play in UEFA competitions in the meantime could lead them to bankruptcy, making the possibility to break away a theoretical one to large extent. Questionably, this factual assessment is not given any weight by the AG, who instead emphasizes that UEFA should have the right to avoid a 'dual membership' scenario which would risk weakening UEFA's position on the market.[90]

Is a forced separation of roles to be expected?

Unlike AG Rantos, because of the reasons developed hitherto, I think UEFA's prior approval right does not stand up to antitrust scrutiny.[91] Should that be correct, what can the Court do?

Similar to *GB-Inno-BM*[92], the Court could potentially go as far as sanctioning the combination of regulatory and operating power in professional football itself. Admittedly, this is a more unlikely scenario, as it lies on the far side of possible outcomes.[93]

AG Rantos recognises a structural separation of roles as a way to eliminate SGBs' conflict of interests too. However, he argues, it is not the only and necessary - and even an undesirable - solution. Better options are available: "*in order to prevent potential conflicts of interests, a federation can also establish*

[86] *ESL Opinion*, para 121.
[87] *ESL Opinion*, para 120 ff.
[88] Pijetlovic (n 60) 260-261; see also Cattaneo and Parrish (n 46) 91.
[89] *ESL Opinion*, para 76.
[90] *ESL Opinion*, paras 76 and 106. See also hereinafter '*Tying neatly with AG Rantos' concerns*', on why dual membership need not necessarily be an issue.
[91] Very much in line with similar procedures at domestic level, in similar cases. Eg the *Fédération Equestre Internationale* ('FEI') was forced by the Belgian Competition Authority (BMA) to amend its rules relating to the approval of new competitions. The BMA ruled that FEI's rules were insufficiently clear and sanctions disproportionate, so that they restricted competition unlawfully (Brussels 3 May 2016, 2015/MR/1, *Fédération Equestre Internationale vs. de Belgische Mededinginsautoriteit*). A similar case, also in equestrian sport, was tried along similar lines in Italy (AGCM 8 oktober 2019, A378E, *Federitalia/Federazione Italiana Sport Equestri (FISE)*). Relating to bodybuilding, the Swedish Konkurrensverket ruled against the national SGB's loyalty rules restricting competition (Marknadsdomstolen 20 december 2012, A 5/11, *Svenska Bilsportförbundet v Konkurrensverket*).
[92] C-18/88 *Régie des Télégraphes et des Téléphones (RTT) vs. GB-Inno-BM SA* [1991] ECLI:EU:C:1991:474, para 19: "*Therefore the fact that an undertaking holding a monopoly in the market for the establishment and operation of the network, without any objective necessity, reserves to itself a neighbouring but separate market, in this case the market for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network, thereby eliminating all competition from other undertakings, constitutes an infringement of Article 86 of the Treaty*".
[93] Also see Weatherill (n 3), 480: "*EU law does not seem to go so far to* demand *the surrender of commercial activities by a sports regulator*".

an approval procedure for third-party competitions by identifying pre-defined approval criteria in an objective and non-discriminatory manner"[94].

Here is where the shoe pinches. In *ESL*, as aforementioned, no objective, transparent, non-discriminatory and verifiable authorization criteria for alternative competitions existed. For that UEFA should be rapped on the knuckles. Restrictions on the organization of alternative competitions, at least in theory, may be permissible, for example to protect the match calendar of UEFA and domestic leagues. Yet, rules should be drawn up to make such a concern explicit and to describe what criteria will be used to determine whether such a concern may prevent the organization of alternative competitions, such as the Super League. Furthermore, UEFA decisions should be made subject to adequate review, which, in my view, on the one hand, means a review that gives access to the CJEU for matters concerning EU law, and, on the other hand, requires a correct (strict) application of the traditional proportionality test.

Nevertheless, the question remains valid whether it is at all possible for an SGB to *develop* an *objective* procedure*,* and subsequently to *apply and supervise* it *objectively*, in a context wherein such application could harm its monopoly. It is not without reason that the principle *nemo iudex in causa sua* - no person can judge a case in which it has an interest - is considered a principle of natural justice. It seems that only a structural separation of regulatory and operating power can really solve the SGB's inherent conflict of interest. The newly developed UEFA rules on alternative competitions perhaps illustrate this point, and demonstrate that UEFA's conflict of interests makes it very hard - if not impossible - for it to develop truly objective procedures, let alone apply and supervise them objectively. Anticipating defeat, UEFA adopted on 10 June 2022 a set of Authorization Rules for alternative competitions[95], which are now public and include procedural steps. These rules still do not seem to pass the bar. UEFA still has the power to refuse new competitions at will - and the risk is real that it will continue to do so *vis-à-vis* new competitions threatening its monopoly. Anyway, an *ex ante* refusal of a new competition such as the Super League is already made explicit, as the new rules include the provision that a new competition may not adversely affect the good functioning of the UEFA Champions League. This prohibits the best teams from participating in an alternative competition, making such initiative less appealing, both from a sporting and from a commercial perspective - thereby *de facto* serving it off. Furthermore, the new rules continue to show disregard for the application of the EU rule of law via mandatory arbitration in Switzerland.[96]

Reform

Arguing an SGB's malfunctioning, begs the question how to do better - and who should make it better. I develop this for professional football.

Policy context

From the outset, the European Commission underlined that the autonomy of sporting organisations is subject to compliance with laws and good governance principles, including stakeholder representation. Against that benchmark, UEFA underperforms. As aforementioned, stakeholders (such as clubs, leagues and players) are largely excluded from the decision-making process and lack any real means to exert pressure. UEFA's supreme body, the Congress, is comprised of a majority of non-EU countries, including those considered undemocratic, as well as very small states (eg Andorra, Gibraltar,

[94] *ESL Opinion*, paras 133-136.

[95] The rules, which according to UEFA 'codify existing practices and procedures', are applicable to competitions or tournaments involving a series of football matches between a number of competing clubs which is:

(i) played on UEFA's Territory by clubs affiliated to different Member Associations and which is not organized by UEFA; and/or

(ii) played on the territory of one Member Association but involving clubs affiliated to other Member Associations.

Not in scope are cross-border club competitions merging or replacing existing national leagues and/or national cup competitions across two or more Member Associations.

[96] For a seemingly similar sentiment, also see Jean-Christophe Breillat and Frank Lagarde, "The specificity of sport and European Community law: the example of nationality" in Wladimir Andreff and Stefan Szymanski (eds.), *Handbook on the Economics of Sport* (Edward Elgar Publishing 2006), 735 and 737 - and Simon Kuper and Stefan Szymanski, *Soccernomics* (Harper Collins Publishers 2018), 115.

Liechtenstein), all with the same voting power as states with strong football traditions and/or competitions. UEFA's double-hatted structure creates conflicts of interest between UEFA and its stakeholders. Illustrative for the belittling of good governance is also that UEFA license criteria are themselves not particularly well developed on the point of corporate governance.[97] Since corporate governance is on the agenda in many sectors, one could imagine that UEFA would give this subject more attention in its licensing regulations.[98]

The rule of law and the role of politicians

Real change is not to be expected from within: there is just no incentive to do so, as change means giving up privilige and power. Furthermore, the courts can only do so much. Their ability to uphold the rule of law depends on the eventuality of a case making it to court. The outcome of the case depends on the facts and the legal questions presented. Therefore, it seems that structural solutions require enacting statutory law, and, hence, the intervention of politicians. As Weiler et al. sharply phrase it: '*Football is probably the best example of the absence of the rule of law in a private system stretching over a substantial part of the internal market. The European Union cannot allow the current state of affairs to go on. ... Change can't be done from within. It is only the EU that can generate the needed reforms. Let the rule of law come also to sport!*'.[99]

Obviously, action should be European[100], allowing unified and performant rules for professional football throughout the EU, and via the 'Brussels effect[101], also beyond. It makes little sense to regulate professional football - which does not confine to national markets - along national lines. On the contrary, domestic standalone initiatives would only contribute to unlevelled regulatory playing fields, which could very well be at odds with what the internal market requires, without solving anything material.

A legislative role for the EU is not inconceivable: "*The EU could as a public regulator choose to respond to the type of market failures and inequities considered above as matters on the agenda of a governing body as a private regulator*", Weatherill asserts.[102] Legal grounds for legislative action are readily available: dependent on the case, Articles 53, 59, 62 and 114 TFEU can be of service.[103] All these TFEU connecting factors result in EU legislation adopted in accordance with the ordinary legislative procedure, enhancing practical feasibility.[104]

What it really boils down to is political will.[105] Currently, this is absent: the massive support for UEFA at the Court hearing in *ESL* made that abundantly clear.[106] However, a condemnation of UEFA in *ESL*,

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[97] WJM Van Veen, "Professional football club licensing in Europe" in Robby Houben (ed.), *Research Handbook on the Law of Professional Football Clubs* (Edward Elgar Publishing 2023), forthcoming.
[98] *Ibidem*
[99] Joseph Weiler, Miguel Poiares Maduro, Petros C. Mavroidis and Stephen Weatherill: "Only the EU can save football from itself" (12 November 2021) <https://www.euronews.com/2021/11/12/only-the-eu-can-save-football-from-itself-view> accessed 16 June 2022. Similarly: Robby Houben, "The future of professional football in view of Super League vs. UEFA - How 15 judges may change the face of the world of football" (8 September 2022) <https://www.football-legal.com/content/the-future-of-professional-football-in-view-of-super-league-vs-uefa-nbsp-how-15-judges-may-change-the-face-of-the-world-of-football> accessed 15 October 2022.
[100] Also see Joseph Weiler, Miguel Poiares Maduro, Petros C. Mavroidis and Stephen Weatherill (n 99).
[101] This means that the European regulatory context is relevant beyond the EU and that in practice the EU's norms can become global norms: eg Weatherill (n 34).
[102] On the regulation of agents, but the reasoning is more widely relevant (Weatherill (n 34)).
[103] Weatherill (n 34). Also see extensively: Robby Houben and Steve Nuyts, *A new deal for professional football in the EU* (Intersentia 2021) 52 p.
[104] See Articles 289 and 294 TFEU. Houben and Nuyts (n 103) 30-36; Weatherill (n 34).
[105] Weatherill (n 34), Houben (n 99).
[106] A record numer of Member States - more than 20 ! - intervened, almost unanimously in support of UEFA. Furthermore, what Szymanski writes about the IOC and FIFA is true for UEFA too: "*No one dares to offend institutions that have the power to deliver the world's most popular sporting events*" (Stefan Szymanski, *Playbooks and checkbooks. An introduction to the Economics of Modern Sport* (Princeton University Press 2009) 173. In other work, Szymanski elaborates the context (in the US) sharply as follows: "*Sport is not a big industry in financial terms, but it is one that grips the imagination of a large fraction of voters, and politicians take arms against sports leagues at their peril. Given the substantial investments that local governments are prepared to make to attract and retain major leagues franchises, they are unlikely to quibble over relatively smallscale monopoly profits in order to retain the goodwill of these positive image generators. Legislators*

on top of governance flaws and increased public expectations from professional football after subsidization following COVID-19, alongside a World Cup in Qatar overshadowed by a myriad of human rights violations, might just be the necessary tipping point for real reform, and a basis for progressive EU football stakeholders and EU politicians to design and implement a new architecture for (European) professional football. In the words of Dutch football player Cruyff: '*Often something needs to happen, for something to happen*'.[107] Furthermore, more is still to come from the judiciary front. At the time of writing, on top of *ESL*, no less than two other cases are pending before the CJEU, with another one well underway, all relating to professional football, and all claiming the illegality of football governing bodies' (governance) rules in view of the EU rule of law.[108]

That said, what should the EU regulate? Here is my take.[109] Firstly, the EU legislator should introduce basic standards for clubs and agents to access the market of professional football: clear standards regarding good governance (noticeably financial), transparency and compliance, all under supervision and with the ultimate threat of sanctions. Secondly, access of new leagues to the football market via objective and transparent criteria should be ensured. Doing so, the EU would open up the market and create a *Bosman* for clubs and leagues, allowing them to truly benefit from internal market freedoms. This could be the key to a more competitive football sector in Europe, whereby top football is not confined to only a few countries. Thirdly, an independent regulator should supervise the sport. That could be UEFA, provided it no longer functions as market operator, or that at least it has a solid functional separation between its regulatory and operating role, effectively under EU law oversight.[110] Whether under the hypothesis of full separation, it would be factually feasible or desirable for UEFA to act as regulator in view of its long term commitments as an operator *vis-à-vis* contracting parties, is another matter. The independent supervisor could also be an existing EU body or a new body created by the EU, or any other trustworthy body that can be supervised under the rule of law, whereby UEFA would become an operator only.[111]

The potential of collective bargaining for reform

In addition to statutory reform, collective bargaining could fuel change too.

In the US, collective action in sports is common.[112] It stands the test of US antitrust law because it concerns labour related issues and labour law has priority over antitrust law. Hence, labour law encourages the kind of collective action that antitrust law would otherwise ban.

have consistently refused to condemn monopolistic league practices, and in one case have been willing to introduce legislation to overturn antitrust legislation" (Stefan Szymanski (n 72), 732).

[107] Free English translation of "Vaak moet er iets gebeuren voordat er iets gebeurt".

[108] *Diarra* (Case C-650/22 on the legality of the transfer system) and *RAFC* (Case C-680/21 on nationality discrimination in the context of home grown player rules) are pending before the CJEU. In *Swift Hesperange* (on league football being confined to national borders) the Luxembourg-Ville Tribunal d'arrondissement is requested to ask preliminary questions to the CJEU (case number: TAL - 007716).

[109] As developed in more detail in Houben (n 99).

[110] In his opinion, AG Rantos elaborates a separation of functions as part of his analysis on SGBs' conflicts of interest caused by double hatting (also see above '*Is a separation of roles to be expected*' and below '*Tying in neatly with AG Rantos' concerns*'). He voices concerns from a solidarity perspective: "*a ('forced') separation of the 'regulatory' and the 'commercial' activities carried out by a sports federation would risk falling foul of the 'European Sports Model', in particular in the case of sporting disciplines for which the pyramid structure plays a key role, like football. In the context of such sporting activities, the regulatory and economic functions are linked and interdependent, since the revenue from the commercial exploitation of the competitions organised under the aegis of those federations is redistributed with a view to developing the sport concerned.*" (*ESL Opinion*, paras 133-136, para 137). The concern is valid, yet it seems that double hatting is not necessary to address it. Other structures can serve just as well to redistribute funds throughout the football pyramid, eg a framework wherein UEFA would regulate and supervise the redistribution of funds generated by competition organisers or a framework wherein such oversight would be entrusted to an indepedent body, existing or to be created.

[111] In this context, Pijetlovic emphasizes that "*any competition model that might take place in the future in which UEFA retains its commercial role, would … immensely benefit from a proper administrative supervision and depoliticization of EU competition law enforcement. The Commission's hands-off approach and preference for ineffective negotiated policy solutions over formal investigations means that UEFA regulatory rules and agreements with ECA never faced administrative scrutiny*": Pijetlovic (n 23).

[112] William W. Berry III and William N. Morris, " Scoring Across the Pond—A Comparison of Football Governance Models" in Robby Houben (ed.), *Research Handbook on the Law of Professional Football Clubs* (Edward Elgar Publishing 2023), forthcoming.

Similarly, in the EU, as acknowledged by the Court[113], collective bargaining agreements pursuing a social policy objective are exempt from the prohibitions of EU competition law.[114] Therefore, collective action could have significant impact in Europe too. Nevertheless, it is still in its infancy, with only one agreement, in 2012, covering minimum requirements in standard players' contracts.[115] Substantially, a vast territory of matters are within remit, such as the status and transfer of players, contractual issues, protection of minors, solidarity payments, the international match calendar, doping, image rights and pension funds.[116] Procedurally, the social partners can enter into autonomous agreements, outside the formal structures of international football governance, to the detriment of the traditional hierarchical self-governance, reshaping the football pyramid, and weakening the role of the football authorities operating within it.[117] If collective bargaining were to be picked up by the relevant stakeholders[118], European football could be seeing the Americanisation of the European model in which collective agreements become as prevalent as in the US and traditional sports governing bodies might be witnessing the erosion of their modern functions and a return to their traditional regulatory role.[119]

From a legal perspective, football's governing bodies' exclusive claim to regulate and enforce typical labour law matters such as early termination of contracts (in the context of transfers) or holiday and rest (in the context of the match calendar) is remarkable. Indeed, worker related matters are a typical stronghold of the legislator[120], regulating these matters himself or leaving statutory room for representative organisations of employers and workers to regulate these matters through collective bargaining. Football's governing bodies are not legislators, nor representative organisations of employers or workers. Therefore, current practice seems to resemble a globally tolerated illegality. This does, however, not prevent that it makes perfect sense for a football governing body to develop rules that can be applied accross the globe in a uniform manner - after all, the game is not confined to domestic borders and uniformity of rules adds value. But, legally, if a legislator or, within the boundaries of the law, social partners deviate from these rules, they should be able to do so, and it seems that football's governing bodies cannot legally prevent that. As such, football's governing bodies labour related rules serve and should continue to serve the role of international benchmark *as default rules*, subordinated to statutory law or collective agreements deviating therefrom - a principle the CJEU is requested to confirm in the pending cases of Diarra[121] and RAFC[122]. This all means that there is giant unexplored space for reform in professional sports and football in particular, especially through the social dialogue as guaranteed by Articles 152-155 TFEU. The European - and even better, the global - level is most suited to make such agreements, as in fact domestic approaches would partition the market so much that the baby would be thrown out with the bathwater. If in football employer

[113] See Case C-67/96 *Albany* [1999] ECLI:EU:C:1999:430, paras 59 ff.
[114] Cattaneo and Parrish (n 46) 150-151.
[115] Parrish (n 6).
[116] *Ibidem*
[117] *Ibidem*
[118] The recent agreement between players' representative organisation FIFPRO and leagues' representative forum World Leagues Forum to promote the use of collective bargaining as a tool to shape further the future of professional football, exemplifies that collective bargaining may soon gain importance in professional football, in the EU and beyond < https://www.worldleaguesforum.com/en/media/globallaboragreement> accessed 13 October 2022.
[119] Parrish (n 6).
[120] Also see the Court's *obiter dictum* in *PIAU* on football governing body rule-making in areas peripheral to the sport: *"With regard to FIFA's legitimacy, contested by the applicant, to enact such rules, which do not have a sport-related object, but regulate an economic activity that is peripheral to the sporting activity in question and touch on fundamental freedoms, the rule-making power claimed by a private organisation like FIFA, whose main statutory purpose is to promote football (see paragraph 2 above), is indeed open to question, in the light of the principles common to the Member States on which the European Union is founded.*
The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sports associations by a private-law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties.
In principle, such regulation, which constitutes policing of an economic activity and touches on fundamental freedoms, falls within the competence of the public authorities" (Case T-193/02 *Piau vs. European Commission* [2005] ECLI:EU:T:2005:22, paras 76 ff.
[121] Case C-650/22.
[122] Case C-680/21.

representative organisations - such as in Europe ECA and/or the UEC[123] and/or perhaps an ESL club representative organisation - and worker representative organisations - particularly global organisation FIFPRO - would join forces, they can enforce their agreements upon FIFA and UEFA - and/or inspire them to do better themselves - and as such contribute to reform from within the eco-system, disrupting the traditional top-down model that is still very much present today, and enforce more stakeholder inclusion themselves. The transfer system would probably look different than it looks today, and tournaments such the UEFA Nations League and potentially a FIFA World Cup for Clubs would probably never see the light of day.

Professional football versus other sports

The above analysis focuses on professional football in Europe. It argues that UEFA's governance problematically embeds conflicts of interests, is at odds with the EU rule of law and in need of reform. What about other sports? Are the legal analyses and potential solutions the same? Intuitively, the answer is no: "*curling is not football*".[124] In this section, I try to explain why a different treatment of sports may be justifiable, even when circumstances are relatively similar: in most sports, the SGB puts on 'double hats' and monopolizes competitions. The reasoning is rooted in economic theory on monopolies.

Economic considerations on monopolies

A monopoly exists when there is only one supplier of a certain good or service.[125] Monopolies are considered to harm consumers, as the monopolist can set prices and quantity of goods and/or services as he sees fit, without yielding the maximum surplus for consumers and producers.[126] Such monopolies can result in '*naked exclusion*': "*conduct unabashedly meant to exclude rivals, for which no one offers any efficiency justification*."[127] However, monopolies are not a bad thing *per se*. This holds true for so-called natural monopolies. These are monopolies existing because the minimum efficient scale is approximately equal to or greater than demand in a given market. This means that, because of the high level of production costs, only one party, or a very limited amount of parties, will be able to operate in the market. Because of the monopolist's investments, consumers and producers are able to benefit from the goods and/or services delivered. Therefore, natural monopolies are perceived to result in social benefits and to improve social welfare.[128]

These basic economic considerations are of legal relevance. Whereas 'ordinary' monopolies are regarded with suspicion from an antitrust law perspective, natural monopolies are considered compatible. In fact, according to Laudati, "*once a market is termed a natural monopoly, lawful acquisition of monopoly power is virtually assumed*".[129] Furthermore, "*maintaining a natural monopoly also is presumed legal. The natural monopolist may defend against potential competitors and use the benefits of the natural monopoly to enter new markets through vertical integration or horizontal expansion*".[130] Along similar lines, Ross and Szymanski argue that: "*[US] antitrust law does not forbid the exercise of monopoly power, only its illegal maintenance. … To prove illegal monopoly maintenance, a plaintiff must establish not only that rules are exclusionary, but also that they are unnecessarily so –*

[123] See above '*On purpose*'.
[124] To paraphrase an intervention at the ISLJ 2022 annual conference.
[125] On these principles see eg Bruno De Borger et al., *Algemene economie* (de boeck 2015), 226-235 and 261-267.
[126] See on the disadvantages of monopolies in the context of (US) sports eg: Stephen F. Ross, "Competition law as a constraint on monopolistic exploitation by sports leagues and clubs" (2003) Oxford Review of Economic Policy, Vol. 19, No. 4, 569-570; Stephen F. Ross, "Monopoly Sports Leagues" (1989) Minnesota Law review, Vol. 73, Iss. 643; Leah Farzin, "On the Antitrust Exemption for Professional Sports in the United States and Europe" (2015) *Jeffrey S. Moorad Sports Law Journal*, Vol. 22, Iss. 1, Article 2, 75.
[127] Eric B. Rasmussen, J. Mark Ramseyer and John S Wiley Jr., "Naked Exclusion" (1991) The American Economic Review, Vol. 81, No. 5, 1137.
[128] In the US: Laraine L. Laudati, "Economies of Scale: Weighing Operating Efficiency when Enforcing Antitrust Law", Fordham Law review 1981, Vol 49, Iss. 5, 801.
[129] Laudati (n 128) 787.
[130] Laudati (n 128) 788.

that is, that they are inefficient. Rules designed to promote consumer appeal or to achieve efficiencies are lawful".[131]

The concept of minimum efficient scale

From the above, the importance for legal reasoning of minimum efficient scale relative to aggregate market size becomes apparent. A monopolist's actions will normally be considered lawful when the minimum efficient scale more or less equals or exceeds the aggregate size of the market. On the other hand, exclusionary actions must be sanctioned with the full rigor of the law when the monopolist attempts to shield the market when the minimum efficient scale is (much) lower than the aggregate market size.[132] In the latter context, there is ample room for competitors on the market, but through exclusionary agreements, the monopolist prevents competitors from achieving a minimum efficient scale.

As such, legal reasoning becomes indebted to economic analyses. Similarly, Laudati invites courts to use the work of economists to identify and allow realization of scale economies, so as to assess what constitutes beneficial economic behavior and what is not.[133]

In this respect, it is noteworthy that recently the General Court seems to have adopted the concept of minimum efficient scale already as a relevant factor to assess whether an exclusionary practice is abusive, *i.e.* has the potential of foreclosing a competitor. This becomes apparent in the Google Android case.[134] In that case, the Commission established that Google had committed a number of abuses, one of which was a commitment by mobile phone manufacturers wishing to use the Android operating system that they would not install other general search apps than Google Search (this commitment was contained in so-called portfolio-based revenue sharing agreements). The Commission argued that such agreements covered a significant part of the market and that they were therefore capable of foreclosing competitors. The General Court annulled this finding on the facts and ruled that what matters is whether the exclusionary agreements deprive rival firms of sufficient opportunities to compete on the merits. If agreements cover a significant part of the market, this will almost automatically be the case. If they cover a more limited part of the market, this is not necessarily the case. The intuition behind this is that, if agreements cover a small part of the market, there can still be sufficient room for competitors to compete on the merits – at least if the minimum efficient scale is sufficiently low.[135]

Relevance for SGBs: various solutions for various sports

These considerations can be relevant for SGBs too, who often monopolize the organization of sporting competitions, at least in Europe.[136] They are relevant because they seem to allow a different assessment of a monopolist SGB's behavior, dependent on the minimum efficient scale relative to the aggregate market of the sport concerned, even if the behavior as such is similar.[137] Concretely, if the minimum efficient scale of an SGB operating a sport equals to or exceeds the market size for that sport,

[131] Stephen F. Ross and Stefan Szymanski, "Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations" (2006) Marquette Sports Law Review, Vol 16. Iss. 2, 244, footnote 105.

[132] See more in general a plea for an ambitious enforcement of competition law to monopolistic behaviour in sports: Ross (n 111 (2003)) 569-584.

[133] Laudati (n 128) 801.

[134] Case T-604/18 *Google v Commission* [2022] ECLI:EU:T:2022:541, especially para 696 (currently subject to appeal before the Court of Justice).

[135] Note that the court has clarified in a number of cases that there is no precise threshold below which exclusionary agreements are not abusive. Any agreement which has an exclusionary effect on a significant part of the market will be viewed as problematic. See eg C-549/10 P *Tomra v Commission* [2012] ECLI:EU:C:2012:221, para. 46 and C-23/14 *Post Danmark II* [2015] ECLI:EU:C:2015:651, para. 73.

[136] Farzin (n 126) 79; Kuper and Szymanski (n 96), 115 (on FIFA); Frédéric Bolotny and Jean-François Bourg, "The demand for media coverage" in Wladimir Andreff and Stefan Szymanski (eds.), *Handbook on the Economics of Sport* (Edward Elgar Publishing 2006), 125. AG Rantos makes explicit that FIFA and UEFA have a monopoly as regards the authorisation and organisation of international professional football competitions in Europe: *ESL Opinion*, paras 10 and 13.

[137] Such a reasoning seems to underly Ross' analysis on monopoly sports leagues too, although his analysis is focused on sports that are certainly not natural monopolies: Ross (n 126 (1989)). A reference to the concept of 'minimum viable scale' can also be found in Ross (n 126 (2003)).

such SGB tends to a natural monopolist, whose (even exclusionary) behavior is likely to support market efficiency, and the existence or absence of exclusive agreements would have little effect on competition. In such event, there is really only room for one organizer of competitions, the SGB. Intuitively, this is likely true for most sports that are not heavily mediatized and monetized and with fewer high-quality athletes or players (curling!). On the other hand, if the minimum efficient scale is (much) smaller than the aggregate market size of the sport, multiple parallel competitions are possible and exclusivity agreements will have a much more significant effect on competition since they will effectively exclude the formation of rival competitions. In the latter event, the exclusionary effect of exclusivity agreements is real, as there *is* room on the market for competing leagues, who can achieve minimum efficient scale too.[138] In such event, denying new competitions access to the market is likely to be inefficient, and should therefore be within reach of antitrust laws' sanctions.[139] Professional football, as the world's largest, most mediatized and monetized sport, with multiple high quality players and clubs, is probably the prime example of a sport falling in the latter category.[140]

Tying in neatly with AG Rantos' concerns

Summarizing, it is possible that in some sports a desirable natural monopoly exists, whereas in other sports the monopoly is undesirable, because it prevents competition in a market where there is space for competition. To assess which sport fits into which category requires an in depth analysis on a case-by-case basis.

This ties in with AG Rantos' opinion that an SGB's prior approval right for new competitions is not a restriction of competition *by object*[141], but that instead it must be assessed, considering all the facts, if it has *the effect* of restricting competition. In that analysis, the concept of minimum efficient scale can be instrumental to focus the sword of competition law to real market inefficiencies in sports.

Such approach would also meets AG Rantos' concern on a possible separation of functions of SGBs. In his *ESL* opinion the AG notes that "*requiring a structural separation would effectively prohibit sports federations in the same position as UEFA and FIFA from engaging in any economic activity, a situation which is difficult to reconcile with the fact that, notwithstanding their particular characteristics, they are also undertakings for which, like any other undertaking, the pursuit of economic objectives is inherent in their activity and is not anticompetitive per se*". A minimum efficient scale approach does not preclude SGBs to organize competitions; they just cannot shield of the market for competitions if there is room for other competitions too, organised by others. That said, in an ideal world, the better solution for professional football's governance seems to separate regulatory power from organisational power, as this is the cleanest and safest way to structurally solve conflicts of interest

[138] See some considerations on rival leagues targeting top clubs in big cities and the viability of such initiatives: Ross and Szymanski (n 131) 245, footnote 105. Some sports are living proof that multiple competitions, organised by various organisers, can co-exist: basketball, cycling and tennis are among the examples.

[139] As Salop notes more in general: "*It is important for competition policy to maintain effective competition by protecting nascent and potential competitors. These competitors often are the leading edge of competition to undermine the monopoly power of the dominant firms. And because monopoly profits exceed duopoly profits, the deck is stacked against these competitors. The dominant firm's incentive to spend is greater than the entrant's because the dominant firm is spending to protect its monopoly profits while the entrant is spending to achieve the lesser, competitive duopoly profits*": Steven C. Salop, Potential Competition and Antitrust Analysis (10 May 2021), available at <https://one.oecd.org/document/DAF/COMP/WD(2021)37/en/pdf> accessed 8 December 2022.

[140] In fact, FIFA's initiative to create a World Cup tournament for club teams in 2025, a new competition, clearly illustrates this point (eg <https://www.espn.com/soccer/fifa-club-world-cup/story/4832860/fifa-to-launch-new-club-world-cup-with-32-teams-in-2025> accessed 23 December 2022). This World Cup for club teams would constitute a new competition, on top of other competitions, and hence once again an example of a football SGB's desire to generate additional revenue, without considering the interests of clubs and their players, in need of rest from time to time too. Also see an analysis in the US on why neither baseball nor American football is a "natural monopoly" and that no persuasive evidence suggests that rival leagues cannot exist in those sports: Ross (n 126 (1989)) ("*Baseball and football are not natural monopolies; two or more rival leagues can compete in each sport. There is no apparent economic reason why stable competition cannot exist. That single leagues historically have monopolized these sports does not suggest they are natural monopolies*"). This is indicative for professional football too, as arguably professional football's market size is at least comparable with that of baseball and American football.

[141] *ESL Opinion*, paras 63-78 and Case C-124/21 P *Opinion AG Rantos* [2022] ECLI:EU:C:2022:988, paras 123 and 58-124.

tainting current governance - in such scenario, the SGB might not even be an undertaking any more in the sense of EU competition law, and even if it would still be, the risk of abuse would be minimised.[142]

Furthermore, a minimum efficient scale analysis helps to refine views on dual membership. AG Rantos stance is strict: "*it is my view that UEFA's refusal may be objectively justified both in sporting terms, having regard to the legitimate objectives pursued by that federation, and economically in order to combat free riding or a 'dual membership' scenario liable to weaken the position of UEFA and FIFA on the market.*".[143] Yet, if there is room for competition on the market of professional club football, and hence, multiple organisers can reach minimum efficient scale, dual membership as such is less of an issue, as in such a scenario the SGBs can still trade efficiently - and moreover, the entrance of new competitors can create market efficiencies, as also argued by Stephen Ross in the context of major US sports.[144] This can be an important observation in the ESL context, as the ESL's design is to keep playing domestic club football within the traditional football eco-system, yet to play European football in a competition other than the existing UEFA competitions. To the extent this would boil down to dual membership, a minimum efficient scale analysis could have as a result that this is not per se problematic. Adding to that, factually, UEFA has little to say on participation in domestic competitions - this is mostly a domestic matter - and only really comes into play once a club qualifies for participation in a UEFA competition. Historically, even its control over European football is somewhat of an anachronism, as UEFA and FIFA first opposed the "Coupe d'Europe" as set up by clubs, to assume the role of organizer of European club competitions in 1955 only after realising their potential (and threat).[145] Either way, claims of an inseparable link between participation in domestic competitions and UEFA competitions, seem to be accepted as a given too easily, whereas in fact there is room for more grey in the discussion and conceptually different models could exist alongside each other. If footballs' SGBs nevertheless would oppose dual membership, assuming minimum efficient scale relative to the size of the market, at the very least transitional measures should be developed, facilitating the transition from the traditional football eco-system to a new eco-system, without, therefore, having to reward transition.[146]

Conclusion

This Article elaborates the purpose and roles of SGBs. Its main finding is that sports governance is not in the best shape. In spite of increasing calls for stakeholder inclusion, stakeholders are involved in SGBs' decision making only instrumentally, not normatively. Furthermore, SGBs' combination of a regulatory role and a role as organizer of competitions embeds conflicts of interests. Dependent on the minimum efficient scale for organising competitions in a given sports market, competition law should take that seriously, particularly in the context of SGBs' prior approval rights for new competitions. Overall, professional sports governance is in need of reform, and, at least in professional football, a separation of roles can be part of the solution towards a better governance.

In this process towards reform, the courts can only do so much. Structural solutions for professional football lie in the hands of EU based clubs, *i.e.* the undertakings that produce professional football, and of EU politicians and political will to act. Although politicians should not feel dependent on the Court, the judgement in *ESL* could be a catalyst for that - especially because the Super League case is

[142] Weatherill (n 3), 480.
[143] *ESL Opinion*, para 143.
[144] Ross (n 126 (1989)).
[145] See eg https://blog.lequipe.fr/histoire/2-avril-1955-lequipe-cree-la-coupe-deurope-de-football/#:~:text=Depuis%2C%20le%2014%20d%C3%A9cembre%201954,d'Europe%20des%20clubs%20%C2%BB.
[146] These thoughts seem in keeping with existing case law on dual membership developed in *Gøttrup-Klim* In this case a prohibition of membership in two distinct cooperatives active in the agricultural sector was found compatible with antitrust law on the basis of market efficiency considerations. Such considerations could perhaps lead to the opposite result - the possibility of dual membership - in the case of *ESL*, as market efficiency could perhaps benefit from dual membership in this case. Additionally, in *Gøttrup-Klim* the Court emphasized that a prohibition on dual membership, considered lawful in the case at hand, should be "*restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers*" - stressing proportionality (Case C-250/92 [1994] ECLI:EU:C:1994:413, paras 33 ff).

not an isolated case. At more or less the same time, the CJEU will have to rule on three other cases initiated by football stakeholders, all with their own specificities, but with as a common denominator that the plaintiffs are malcontent with the current set-up of professional football and consider (aspects of) it illegal. Ideally, the judgement in the Super League case provides a sound legal basis for progressive EU clubs and EU politicians, monitored by a pro-active European Commission, to design and implement a new architecture for European professional football. This could very well include a true EU League, most likely with several divisions, open-minded to an articulation with domestic leagues and receptive to clubs with sound projects regardless of the size of the Member State in which they are located. Such a League structure, aligned with the European model of sport, would arguably take away many of the objections against the initial semi-closed set-up of the Super League brought forward by the AG in his opinion of 15 December 2022.[147] Therefore, innovators should not be wary of redesigning the set-up of the Super League and relaunching it, even if the Court would eventually rule against the Super League in the pending case.[148] After all, "*how things have always been done is not how things* should *always be done*. *The beautiful game is willful in its ignorance. The beautiful game is a game ripe for change*".[149]

[147] Also see Steven A. Bank, "The Emerging Battle for Control of Global Football" (UCLA School of Law, Public Law & Legal Theory Research Paper No. 22-10), 41 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4038568> accessed 15 December 2022 ("*If the major legal justification for restricting clubs and players from joining the European Super League is that it would be a hybrid closed league, that suggests that revising the league to be open, or at least more open, would undercut efforts to prevent it legally*").

[148] "*Innovative systems of organizing sporting competition and effective government regulation to prevent monopolistic abuses should know no boundaries*": Ross (n 126 (2003)) 583. This quote dates back long before the Super League, and relates to monopolistic behaviour more in general, but nevertheless fits neatly.

[149] Chris Anderson and David Sally, *The Numbers Game* (Penguin Books 2014), 1. This book relates to the use of numbers and data in football, but a similar conclusion is valid from a legal perspective .