EDITORIAL

EU COMPETITION LAW AFTER THE GRAND CHAMBER'S DECEMBER 2023 SPORTS TRILOGY: EUROPEAN SUPER LEAGUE, INTERNATIONAL SKATING UNION AND ROYAL ANTWERP FC

Derecho de la competencia de la UE tras la trilogía deportiva de la Gran Sala de diciembre de 2023: Superliga Europea, Unión Internacional de Patinaje y Royal Antwerp FC

GIORGIO MONTI[1]
G.Monti@tilburguniversity.edu

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On 21 December 2023 the Court of Justice, sitting in a Grand Chamber formation of 15 judges delivered three judgments that address the application of EU competition law, internal market law, and arbitration rules to the organization of sport[2]. The Court did not follow the advice of Advocate General Rantos on many points: I agree with this stance (Monti, 2023). The

[1] Professor of Competition Law, Tilburg University. With thanks to Jorge Piernas for helpful comments. All errors remain mine.

[2] Case C-124/21 P, *International Skating Union v Commission,* EU:C:2023:1012 (hereinafter ISU); Case C-333/21, *European Superleague Company v FIFA and UEFA,* EU:C:2023:1011 (hereinafter ESLC); Case C 680/21, *UL and Royal Antwerp FC v Union royale belge des sociétés de football association ASBL (URBSFA),* EU:C:2023:188 (hereinafter Antwerp FC). This Editorial refers to and quotes from the provisional English language text of the judgments.

main consequence of these judgments is that many rules of sporting organisations will have to be rewritten to ensure that they are compatible with EU Law. This is a discussion that I leave to others. What is equally, if not more, important, is that the Court took these cases as an opportunity to state its current position on some fundamental issues of EU competition law. It is clear that EU competition law is constantly in a state of flux (Monti, 2007; Ibáñez Colomo, 2023). These judgments serve to both consolidate some trends in the Court's recent case-law but also to make significant changes, some of which lead to clear results and some of which open the door to further developments. After a summary of the cases, the impact of these judgments on EU competition law is discussed.

I. THE FACTS AND THE ISSUES AT PLAY

At a high level of generality, all three cases address a setting where regulations are set up by national or international sport federations and are implemented at global, EU or national level. This system of private regulation is effective because sporting federations have economic power allowing them to stipulate and enforce penalties which have a powerful deterrent effect, like prohibiting clubs or athletes from entering certain competitions which they organize. It is worth looking more closely at the specific facts of the three cases before discussing how competition law applies.

The International Skating Union (ISU) is an international association that regulates ice skating competitions and organizes events. Its members are national associations, which in turn have as members national clubs to which athletes must belong to perform at ISU events. Two of its powers were under scrutiny: (i) prior authorization rules, which set out the application procedure by which third parties wishing to organize ice skating events have to go through; (ii) eligibility rules, which included penalties for athletes who participated in ice skating competitions that were not approved by the ISU. These two powers were complementary: absent the power to punish athletes the ISU would not have any means to force organizers of skating competitions to submit applications and organize events at which ISU-registered members could participate. On the one hand, there may be good reasons for the ISU to set up these rules, for example making sure that any event organizer has the requisite safety protocols in place to avoid serious accidents, or to avoid that events are organized to facilitate betting which might damage the image of the sport. On the other hand, since ISU also organizes sporting events in competition with any party which it would authorize, the incentive to suffocate potential rivals cannot be underplayed. According to the Commission's

decision the adoption and enforcement of the prior authorization and eligibility rules were decisions of an association of undertakings which had as their object the restriction of competition that foreclosed market access to rival organisers and there were no countervailing benefits to allow the application of Article 101(3). This was confirmed by the General Court, and the ISU appealed against this finding[3]. There was a cross-appeal brought by two ice skaters and the European Elite Athletes Association against the General Court's annulment of certain aspects of the Commission decision which had established that the arbitration rules were also contrary to Article 101 TFEU.

European Superleague Company SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA) (hereinafter *ESLC*) follows a similar logic. FIFA is the global football regulator, and UEFA is one of the confederations recognized by FIFA. Both associations require the prior approval of matches involving teams that are members of UEFA and FIFA and both may sanction clubs and players who opt to compete in non-authorized events. The case was brought by the ESLC. This company had announced plans to create a European Super League, consisting of a number of popular clubs in the EU. On 21 January 2021, FIFA and all regional confederations (including UEFA) issued a statement by which they refused to recognize the Super League and that clubs and players joining that venture would be banned from competition organized by UEFA and FIFA[4]. This was supplemented by a statement on 18 April 2021 by UEFA and the national football associations where the clubs that would participate in the ESLC project were based confirming that clubs would be banned from any competition and that players may be excluded from playing at the World Cup[5]. The judge in Spain sought a reference for a preliminary ruling to clarify the application of Articles 101 and 102 TFEU as well as the fundamental economic freedoms provided in the TFEU to the conduct complained of.

The case of *UL and SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL* (hereinafter *Royal Antwerp FC*) presents a slightly different factual setup. UL (a football player) and Royal Antwerp FC (the oldest football club in Belgium) took action against a rule set up by UEFA and amplified by the Belgian Football association regarding home-grown players. The UEFA rules stipulated that the team sheet for clubs competing in international inter-club competitions shall include 25 players, including eight

3 Case AT.40208 – International Skating Union's Eligibility Rules (8 December 2017), Case T-93/18, *International Skating Union v Commission,* EU:T:2020:610.

4 *ESLC,* para 30.

5 *ESLC,* para 31.

home-grown players (defined as those who, regardless of nationality "have been trained by their club or by a club affiliated to the same national football association for at least three years between the ages of 15 and 21")[6]. Out of these eight, four must have been trained by the club which lists them[7]. Following this, the Belgian football association set up similar rules for domestic competitions. The claim that these rules infringed Article 101 and 45 (protecting free movement of workers) TFEU was dismissed by the Belgian Court of Arbitration for Sport and the parties appealed to the Belgian courts for annulment of this decision on the basis that the arbitrators had not considered EU Law adequately and had thus issued a decision running counter to public policy. The first instance court was uncertain about the application of EU Law and sought a preliminary ruling from the Court of Justice.

II. EU LAW AND SPORTS

All three judgments open with a general reflection of the applicability of EU law to sport and the activities of sporting associations. The Court recalls that so long as the activity in question is economic, then EU Law applies[8]. To this there is a narrow exception: when rules are adopted (i) solely on non-economic grounds and (ii) they relate to questions "solely of sport per se", then these are treated as falling outside any economic activity. An example of this is the exclusion of foreign players from the composition of national teams participating in competitions between national teams, each of which represents their country[9]. This is a very narrowly cast exclusion[10]. Any rule that has a direct or indirect effect on paid work or the provision of services comes within the scope of the EU's fundamental economic freedoms and within the scope of competition law either because the sporting federation designing the rule is itself an undertaking or because the rule is a decision by an association

6 *Antwerp FC,* para 6.

7 *Antwerp FC,* para 8.

8 *Antwerp FC,* para 53; *ISU,* para 91; *ESLC,* para 83.

9 *Antwerp FC,* para 54, *ISU,* para 92, *ESLC,* para 84. The court also adds this as an example of purely sporting rules: "the determination of ranking criteria used to select the athletes participating individually in competitions". If this is a reference to the judgment in Cases C-51/96 and C-191/97, *Deliège* EU:C:2000:199, then with respect it seems incorrect. The Court there found that EU Law applied, but considered that there was no infringement. See paras 48 (EU Law applies to the facts) and 67 (requiring that the rules are appropriate and that selection is based on these rules).

10 *Antwerp FC,* para 58, *ESLC,* para 89. This qualification is not found in *ISU.*

of undertakings[11]. More generally, the Court states that these rules "must be drafted and implemented in compliance with the general principles of EU law, in particular the principles of non-discrimination and proportionality"[12]. This somewhat cryptic phrase means the following: if EU Law applies, there must be no discrimination based on nationality; if the sporting rules do discriminate, then there must be a good reason and the discriminatory rule must be the least restrictive way to achieve that good objective. EU Law clearly applies in all three cases[13].

III. THE ROLE OF ARTICLE 165 TFEU – REAL OR RHETORICAL?

Having decided that EU Law applies, should special attention be given to the fact that the markets in question relate to sport? According Article 165 TFEU, sports has a social and educational function and the EU is expected to contribute to the promotion of European sporting issues. This provision was inserted in the Treaty proper in 2009, having earlier been in a Protocol[14]. While AG Rantos had given this provision a wide meaning and argued that the interpretation of EU Law must take into consideration the so-called European Sport Model, the Grand Chamber distances itself from this view. This is a stance to be supported because the AG had given an exaggeratedly generous reading of that provision. However, the Court's interpretation of this provision risks reading Article 165 TFEU out of consideration altogether.

In *ESLC* and *Royal Antwerp FC* the Court first dissects Article 165 TFEU explaining that it confers limited competences to the EU: only to "carry out actions to support, coordinate or supplement the actions of the Member States"[15]. Second, it explains that this Treaty Article does not allow the EU to develop a policy regarding sport, but only to implement actions to support national policies. It follows that this Article "is not a *cross-cutting provision* having general application"[16]. As far as I can tell, this is the first time the Court has used this phrase[17]. It is contrasted with the Articles in the Treaty

11 *Antwerp FC,* paras 55-56, *ISU,* paras 93-94, *ESLC,* 86-87.

12 *Antwerp FC,* para 57, *ESLC,* para 88.

13 *Antwerp FC,* paras 59-61 (Arts 45 and 101 TFEU); *ISU,* paras 95-97 (Art 101 TFEU); *ESLC,* paras 90-94 (Articles 45, 49, 56, 63, 101 and 102 TFEU).

14 Declaration on sport, attached to the Amsterdam Treaty, [1997] OJ C340/136.

15 Article 6(e) TFEU.

16 *ESLC,* para 100, *Antwerp FC,* para 68.

17 Some AGs used it. For example, Case C-515/08 *de Santos Palhota and Others* EC:C:2010:245, Opinion of AG Cruz Villalón, para 51.

found in Part One, Title II (referred to as containing *provisions having general application*). The significance of this finding is that the elements and objectives found in Article 165 TFEU:

> […] need not be integrated or taken into account in a binding manner in the application of the rules on the interpretation of which the referring court is seeking guidance from the Court, irrespective of whether they concern the freedom of movement of persons, services and capital (Articles 45, 49, 56 and 63 TFEU) or the competition rules[18].

It follows, *a contrario,* that Treaty provisions of general application (or cross-cutting provisions, if the two terms are synonyms) must be integrated in the application of Treaty rules. At the same time, the Court explains that Article 165 TFEU is not completely irrelevant in that it recognizes a consensus about the social and educational value of sports. As a result the "specific characteristics" of sports

> may potentially be taken into account along with other elements and provided they are relevant in the application of Articles 45 and 101 TFEU, although they may be so only in the context of and in compliance with the conditions and criteria of application provided for in each of those articles. The same assessment holds true in respect of Articles 49, 56, 63 and 102 TFEU[19].

What are the differences between the two quoted passages? The first clear difference is that if a Treaty provision is cross-cutting then it *must* be considered in the interpretation of Article 101 TFEU while if a provision is not but it is at the same time a Treaty provision which reflects something of importance for the EU or its citizens then this *may* be considered. This reading would be incorrect: the specific characteristics of sport are necessary in order to work out if there is a restriction of competition because they form part of the legal and economic context which is required for determining whether an agreement has as its object or effect the restriction of competition. There is nothing discretionary about this: every time you try and find out if a practice harms competition, you must start with the legal and economic context[20]. The Court is aware of this because it then qualifies

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18 *ESLC,* para 101, *Antwerp FC,* para 69.

19 *ESLC,* para 104, *Antwerp FC,* para 72.

20 The Court in *ISU,* para 96 cites Case C-250/92, *DLG,* EU:C:1994:413, paragraph 31 in support of the "may" proposition. But here the court makes it clear that you must look at the market context: "the compatibility of the statutes of such an association

the passage quoted above by explaining that one 'must' assess the context of the rule in question[21].

The second difference is that a cross-cutting Treaty Article has to be integrated and not just taken into account in the interpretation of EU Law. Taking into account is something the Court explains: we can use the organization of sport to work out whether the rules restrict competition or whether the restrictions may be justified having regard to legitimate objectives "contingent on the specific characteristics of the sport concerned"[22]. This seems to give the Court quite a lot of latitude to interpret EU Law having regard to sport. So, what would the difference be if we had to "integrate" sport instead? The concept has puzzled generations of scholars (Kingston, 2009: chapter 6).

It may help to give an example of the legal consequences of applying one of the clauses of general application and explore what it might mean to integrate it in the interpretation of EU competition law. Article 11 TFEU states that "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities". Suppose you find a horizontal agreement by which the parties reduce emissions while at the same time restricting competition. Does the cross-cutting nature of Article 11 TFEU mean that there is no infringement of Article 101 TFEU?

On one interpretation of integration, the answer could be yes. Remember that Article 101 TFEU condemns restrictive practices when these are "incompatible with the internal market." According to the legal principle of integration, the internal market can be defined as one where we value equally competition and environmental protection and this might suggest that an agreement whose positive impact on environmental protection is larger than its negative impact on competition should be interpreted as not infringing Article 101 TFEU. Arguably this conclusion should only be allowed if there is no less restrictive alternative to achieve environmental protection than the anticompetitive agreement — the various internal market goals have to be optimised. This conclusion might be too strong even for those scholars who have insisted that competition authorities should take sustainability into account in exempting cartels.

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with the Community rules on competition cannot be assessed in the abstract. It will depend on the particular clauses in the statutes and the economic conditions prevailing on the markets concerned".

21 *ESLC,* para 105, *Antwerp FC,* para 73.

22 *ESLC,* para 106 TFEU, *Antwerp FC,* para 74.

A softer variation of integration might be considered, for example that the positive effects on environmental protection should be considered in a decision on whether to exempt that agreement under Article 101(3) TFEU. However, if we treat sustainability as a matter worthwhile only for exemption with a light proportionality assessment, then this seems to differ very little from the legal approach called "taking into account".

Therefore, the only logical meaning that integration must carry is that all cross-sectional clauses must transform the meaning of competition. This makes sense from a policy perspective if we look at the various values embraced by the cross-cutting clauses in the Treaty. In addition to environmental protection, the Treaty also provides for the integration of the following:

— In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women (Art 8 TFEU).
— In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Art 10 TFEU).

Competitive markets must give way to these equality mandates: what society would the EU be if market-created inequalities were tolerated? Of course the extent to which this is achieved may be questioned, but the point remains that these two Treaty provisions, like Article 11 TFEU, mandate the integration of non-market values into the concept of the internal market in EU Law. Conversely other Articles in this part of the Treaty only mandate that the EU take into account certain desirable issues, for example consumer protection (Article 12 TFEU) and the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health (Article 9 TFEU).

Thus, if the concept of integration has to have a meaning, it must be that the cross-cutting clauses which stipulate the duty to integrate policies require a transformation of the interpretation we give of concepts like competition or the internal market. If this is what integration means and if we were to consider Article 165 TFEU as cross-cutting then this would mean that we could consider agreements that restrict competition but improve the social and educational effects of sport as not infringing EU competition law at all. Whatever the Court wanted to say, it is clear that it wanted to avoid this result.

Rather than an integrated interpretation, the Court explains that the role of sport is to be taken into account "only in the context of and in compliance with the conditions and criteria of application provided for" in the compe-

tition or internal market rules. In other words, you cannot re-interpret the Treaty rules because of the role sports plays as I discussed above with regard to environmental protection. If so, you then have to wonder if this has any legal significance whatsoever. Consider the case of *TopFit eV and Biffi*: an Italian national who had been living in Germany since 2003 was a member of TopFit (a German athletics association) and used to compete in national senior athletics events in Germany until 2016 when the rules changed limiting the access of non-German nationals. The Court found that Biffi could assert his rights as an EU citizen (Article 18 TFEU) and his rights to free movement (Article 21). Article 165 TFEU was relied upon to strengthen the conclusion that the rule change was probably contrary to EU Law, but the Court would likely have reached the same conclusion even absent Article 165 TFEU[23].

I think the Court wanted to send a message along the following lines: do not use Article 165 TFEU to try and justify restrictive business practices in the name of the social and educational values of sport. One can sympathize with this sentiment. But in executing this the Court's judgment does not explain what you can do with Art 165 TFEU because the Court states that it is relevant in some ways without specifying how. Just like AG Rantos mistakenly interpreted Article 165 TFEU too widely, discovering elements that are not there, so does the Court interpret this poorly, by failing to explain its precise significance and introducing its own term (cross-sectional clauses) without properly delineating the difference between the legal salience of integration and taking into account. The best we can say is that when assessing sport regulations one should look not just at the purely monetary aspect but also at the social and educational functions of sport in carrying out a competition assessment. What this might entail can be seen by the way the Court handles some of the substantive issues discussed below: as will be seen the Court takes sports into account in the legal and economic analysis just like would any other market-specific factual element that you would in any competition case. In this light Article 165 TFEU adds nothing to what is already standard EU competition law. This result might be justified by the Court's reluctance to give any leeway to sports associations in these cases, but it is not desirable to void Treaty rules of meaning.

[23] Case C-22/18, *TopFit e.V. and Daniele Biffi v Deutscher Leichtathletikverband e.V.,* EU:C:2019:497. A similar approach may be found in Case C-447/18, *UB v Generálny riaditeľ Sociálnej poisťovne Bratislava,* EU:C:2019:1098. Where secondary law was interpreted having regard to art 165 TFEU. In the case-law on education, Art 165 is normally used by MS to defend their competences. In Joined Cases C-403/08 and C-429/08, *Football Association Premier League* EU:C:2011:631, Art 165 is used to interpret the scope of justifications to the freedom to provide services.

IV. RESTRICTIONS BY OBJECT – SOME INNOVATIONS, SOME OMISSIONS

1. THE COURT'S APPROACH TO OBJECT RESTRICTIONS

In the application Article 101 TFEU, which was considered in all three cases, the Court takes this occasion to restate, but also expand and perhaps also curtail, its current approach to the concept of object restrictions. It is well-known by now that the Court urges a restrictive interpretation of the scope of the concept of object restrictions. This has two dimensions: first courts and competition authorities should not find every restriction of conduct as a restriction to competition, second proving a restriction by object is not a walk in the park and a demanding analytical framework is required. These steps were taken by the Court in part in response to concerns that many national competition authorities were defining restrictions by object too widely, as well as the move towards a more economic approach which requires greater sophistication before conduct is condemned (Monti, 2023; Monti, 2024). In these judgments the Court does two innovative things.

First, it provides a list of object restraints, which fall in two categories, before after adding a third:

1. Those "particularly harmful to competition, such as horizontal cartels leading to price-fixing, limitations on production capacity or allocation of customers"[24]. This is conduct that "must be considered to be" restrictive by object[25].
2. Those that "[w]ithout necessarily being equally harmful to competition… may also be considered, in certain cases, to have an anticompetitive object. That is the case, inter alia, of certain types of horizontal agreements other than cartels, such as those leading to competing undertakings being excluded from the market, or even certain types of decisions by associations of undertakings aimed at coordinating the conduct of their members, in particular in terms of prices"[26].
3. Later, in explaining the general test for object the Court in *Royal Antwerp FC* also explains that "agreements aimed at partitioning

[24] *Antwerp FC,* para 90, *ISU,* para 103, *ESLC,* para 163.
[25] *Antwerp FC,* para 90, *ISU,* para 103, *ESLC,* para 163.
[26] *Antwerp FC,* para 91*, ISU,* para 104, *ESLC,* para 164.

markets according to national borders" must also be treated as restrictions by object[27].

Having listed the first two elements, the Court recalls that there is no such thing as a list of object cases by explaining that for every case it is "it is necessary to examine, first, the content of the agreement, decision or practice in question; second, the economic and legal context of which it forms a part; and, third, its objectives"[28]. And the characterization of restriction by object must also "disclose the precise reasons why that conduct reveals a sufficient degree of harm to competition such as to justify a finding that it has such an object"[29].

The general proposition about how to test for a restriction by object is in tension with the list provided. As Saskia King noted, sometimes the Court opts for a very formal (as she called it, orthodox) approach to characterizing object (conduct as restrictive by its very nature) and sometimes it adopts a more analytical approach requiring an assessment of the legal and economic context which is nearly as detailed as that for effects cases (King, 2015). After these three judgments, the problem gets even worse when items (1) and (3) of the list above are conduct that must be restrictive (irrespective of the context?) and item (2) of that list which contains two problems: (a) conduct may be restrictive but then this is why we have a general test and not a list; (b) why add a qualifier that the conduct need not be equally harmful to competition? The degree of harm cannot be relevant to determining if it is a restriction of competition by object. Furthermore the identification of the items in (3) does not even fit clearly in the classification provided, which is largely because the Court copy-pasted the same analysis in all three cases and then added a bit more in *Royal Antwerp FC* because the facts necessitated this. The approach in this segment of the judgments will be frustrating to many national judges who seek clarity on what an object assessment requires. It is submitted that the more analytical approach by which one should look at the content of the agreement, its legal and economic context and its objectives is a sufficiently good standard without the need of further embellishment. To this the Court might want to include some presumptions — this might account for the clumsy list above, but unless one understands the clear link between the list and the general definition, this segment of the judgment is disappointing.

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27 *Antwerp FC,* paras 95-97.

28 *Antwerp FC,* para 92, *ISU,* para 105, *ESLC,* para 165.

29 *Antwerp FC,* para 98, *ISU,* para 108, *ESLC,* para 168.

Finally on this first innovation, there is also something missing. In *Generics* the Court held that a defendant can bring up pro-competitive effects to cast doubt on a finding that an agreement restricts competition by object. Pro-competitive effects are "elements of the context of that agreement, be duly taken into account for the purpose of its characterisation as a 'restriction by object'"[30] Is the Court, by failing to refer to this, trying to suggest that this is irrelevant? Admittedly that would be a good move because it only generates confusion as between what positive effects count under Art 101(1) and what falls under Art 101(3) TFEU. But we are left in the dark on whether silence on this point indicates disapproval of earlier case-law.

The second innovation, which is to be welcomed, is in explaining the protective scope of Art 101 TFEU. When discussing the first category of object restrictions the Court explains that: "Those types of conduct are liable to lead to price increases or falls in production and, therefore, more limited supply, resulting in poor allocation of resources to the detriment of *user undertakings* and consumers"[31]. None of the three cases cited in support of this proposition makes reference to 'user undertakings'. What the Court probably means are business customers of the cartel. Of the three cases cited in this passage, only one involves harm to this group: in *BIDS* a cartel among slaughterhouses in Ireland was likely to impact purchasers of beef at the wholesale level before impacting on the prices paid by the final consumer[32]. It is the harm to intermediate purchasers that the Court recognizes. This is a welcome addition to explaining the nature of a competition law restriction: competition law should protect any exercise of economic power that causes harm to trading partners by reducing output or raising prices or reducing innovation (Samuel and Scott Morton, 2022).

2. THE OBJECT ANALYSIS IN THE THREE CASES

2.1. Royal Antwerp FC – focus on the object of the rule in question

In *Royal Antwerp FC* the Court follows the three steps of the more analytical approach canvassed above. The contents of rules which require the listing of home grown players "limit, by their very nature (sic), the possibility

[30] Case C-307/18, *Generics (UK) Ltd and Others v Competition and Markets Authority,* EU:C:2020:52, para 103.

[31] *Antwerp FC,* para 90, my emphasis, Same text in *ISU,* para 103.

[32] Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd,* EU:C:2008:643.

for those clubs to enter on that sheet players who do not meet those requirements"[33]. Moreover the Court explains that the rules have an impact on two levels: first at the level of the football association (because home grown players may either be trained by the club who nominates them or by another club in the same association) and second UEFA rules also impact each club because they require nomination of home grown players that have been trained by that club[34]. Turning to the legal and economic context, the Court confirms that it is "legitimate for associations such as UEFA and the URBSFA to regulate, more particularly, the conditions in which professional football clubs can put together teams participating in interclub competitions within their territorial jurisdiction"[35]. Moreover, by reference to the social and cultural importance of sport as well as the media interest it generates, the Court explains that competitions are based on sporting merit so that regulators may impose conditions that ensure "a certain level of equal opportunity"[36]. Then when considering the objectives of the regulations, the Court explains possible theories of harm that may result from the rules in question. The Court observes that the rules limit one parameter of competition in which clubs may engage in: the recruitment of talented players. This has an impact on the upstream market (player recruitment) and on the downstream market (interclub football competitions). This distinction, made by the Belgian government, is adopted by the Court[37]. This is the analytical framework which the national court is expected to apply, to which the Court adds a hint: that the proportion of players concerned is a particularly relevant consideration to determine the object of the rules[38].

It then closes by adding a further reflection, which sits oddly with what was there before by creating another list of theories of harm which in part overlaps and in part adds to those identified above: (i) restricting the clubs' access to those resources (which is noted above), (ii) of partitioning or re-partitioning markets according to national borders or of making the interpenetration of national markets more difficult by establishing a form of "national preference" (which was not discussed in the previous passages

33 *Antwerp FC,* para 101. This is a somewhat bizarre use of the phrase "by its very nature" because the court does not seem to use it to conclude that therefore there is a restriction by object as it might have done under the orthodox approach (see King n 33 above).

34 *Antwerp FC,* para 102.

35 *Antwerp FC,* para 104.

36 *Antwerp FC,* para 105.

37 *Antwerp FC,* para 107.

38 *Antwerp FC,* para 109.

assessing the facts)[39]. However, it is vital that the national court is guided on the theories of harm to look into with some precision, if only to avoid further references to the ECJ. The reason this presentation is disjointed is that the first two theories of harm noted (harm to player recruitment, thus harm to the labour market) and harm to interclub football competitions (reducing the economic value of these contests, reducing advertising and merchandising income) are clearly economic, while the concern about partitioning of the market does not fit in an economic frame — in part it is accounted for by the harm to labour markets: if the home-grown rule makes movement of foreign workers harder this is covered by antitrust, but it is not clear if the Court sees a different type of harm solely applicable to the disintegration of the market. This all matters because, as we will see below, if a sports association wishes to raise an Article 101(3) TFEU defence, it must show positive effects in all markets that its conduct affects, so spelling out the theory of harm which identifies all markets where economic loss is caused is vital to afford an appropriate right of defence.

2.2. ISU and ESLC – focus on the risk the rules create

In *ISU*, the Grand Chamber confirms the approach of the Commission and General Court. This has two steps. The first is to import legal principles from a different area of competition law and the second is to interpret these in the domain of sports governance rulemaking. The *ESLC* judgment makes the same points of law and reaches similar conclusions but the legal analysis is absent because it is carried out based on Article 102 TFEU. In this section the focus is on *ISU* drawing attention to where the approach is also found in *ESLC* insofar as Article 101 is concerned. *ESLC*'s Article 102 assessment is discussed below in Section 5.

The first step can be reconstructed by reference to the 1991 judgment of *RTT v INNO*. The Belgian telecom incumbent (who was also regulating markets and was a public undertaking) tried to prevent the marketing of more appealing consumer phones by GB-INNO-BM, a large retail chain. The Court held that RTT's conduct was an infringement of Article 102 TFEU read together with Article 106 TFEU because these two rules together "preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for

[39] *Antwerp FC,* para 110.

that equipment"[40]. This finding was premised on this general principle: "A system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators"[41].

However, the Court did not take the radical step of saying that there must be a structural separation between regulation and market activity. In subsequent cases it confirmed that, at least as far as the Treaty rules are concerned, a Member State can make one and the same body both a regulator of market access and a market player provided there are sufficiently robust procedural safeguards to prevent it from abusing its regulatory power. Without these safeguards, the mere existence of a risk that rivals may be excluded unjustly sufficed to trigger liability on the part of the Member State which had created this risk by conferring regulatory powers on a market actor[42]. At the time, this was one of the key precedents that facilitated a wave of legislation opening utilities markets to competition.

In *ISU*, the Court takes this line of case-law and finds that it also applies to decisions of sporting associations. It states that Articles 101 and 102 TFEU may apply to the same conduct and that "therefore" based on consistency "it must be held that such a power [held by ISU] may be regarded as having as its 'object' the prevention, restriction or distortion of competition, within the meaning of Article 101(1) TFEU"[43]. The Court motivates this by reference to its internal market case-law where it has found that the Treaty provisions defending fundamental economic freedoms (e.g. the free movement of workers and capital) apply not only to states but also to sport associations. By analogy rules of public competition law can be transposed to sports associations. It then gives a credible economic account for why this is a good idea:

> Those rules are thus able to be used to allow or exclude from that market any competing undertaking, even an equally efficient undertaking, or at least restrict the creation and marketing of alternative or new competitions in terms of their format or content. In so doing, they also completely deprive athletes of the opportunity to participate in those competitions, even where they could be of interest to them, for example on account of an innovative format, while observing all the principles, values and rules underpinning the sporting discipline concerned.

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40 Case C-18/88, *Régie des télégraphes et des téléphones v GB-Inno-BM SA,* EU:C:1991:474, para 28.

41 *Ibid.*, para 25, repeated in *ISU,* para 125.

42 *ISU,* paras 126-127.

43 *ISU,* para 128.

> Ultimately, they are such as to completely deprive spectators and viewers of any opportunity to attend those competitions or to watch a broadcast thereof.[44]

Aside from the unfortunate reference to the as efficient competitor which has nothing to do with anything here, the passage illustrates the various relevant markets where harm might occur by the arbitrary exercise of economic power: it harms the supply side (athletes) and the demand side (consumers). This is helpful in showing that even when contemplating an object restriction it is imperative that we have a theory of economic harm and identify in which markets competition is affected adversely.

Having set out a legal standard, the second step is for the Court to apply this to a case of the ISU rules. The Court does not say that ISU is to be forbidden from organizing events or from requiring that organizers of events must seek prior authorization, nor is it forbidden from imposing penalties on skaters who do not comply with its rules. However, there must safeguards placed on ISU:

— **Substantive safeguards:** substantive criteria for those wishing to apply to provide competing sporting events which are transparent, clear and precise preventing their arbitrary use[45]. The criteria may include some which promote the "holding of sporting competitions based on equality of opportunity and merit"[46]. Such criteria must be applied in a non-discriminatory manner to all applicants who wish to organize competing events, and they must not make it de facto impossible for rivals to compete in the market[47]. Any penalties on athletes who infringe these rules must be proportionate[48].
— **Procedural safeguards:** (i) those criteria mentioned above must have been clearly set out in an accessible form, prior to any implementation of the powers that they are intended to circumscribe[49]; (ii) it must be possible to seek review of these criteria (which presumably means that it should be possible for a member or a third party to challenge these criteria in court)[50]; (iii) there must be "non-discriminatory detailed procedural rules, such as those relating to the

44 *ISU,* para 146, *ESLC,* para 176.
45 *ISU,* para 131.
46 *ISU,* para 132.
47 *ISU,* para 133.
48 *ISU,* para 133.
49 *ISU,* para 131.
50 *ISU,* para 134.

applicable time limits for submitting a prior authorisation request and the adoption of a decision on that request"[51].

The same requirements may be found in *ESLC*[52]. The upshot is that both of these sporting organizations will have to rethink their rules so as to allow new entrants to apply for authorization to organize competing events and its rules on penalties to ensure that these are proportionate. But more importantly, and self-regulatory body is now subject to these good governance standards as well. It follows that several associations will have to reconsider their rules to check for compliance under this standard.

V. APPLYING ARTICLE 102 TFEU – CLARIFICATIONS AND INNOVATIONS

In *ESLC* the national judge also asked about the application of Article 102 TFEU to UEFA and FIFA. The question is the same as that under Article 101: whether the adoption of implementation of rules by FIFA and UEFA constitutes an infringement of competition law, in particular having regard to the fact that the two rule-making bodies are also active in the market for competitions and that the procedures in place for approving new rivals lack adequate safeguards. The national judge seemed to take the view that UEFA and FIFA are both undertakings which hold a dominant position. The Court considered this to be "indisputable, especially since FIFA and UEFA are the only associations which organise and market such competitions at world and European levels"[53]. It added that, as is well-established, the same conduct may be considered as both an infringement of Article 101 and 102 TFEI provided the relevant elements are satisfied. Subject to that proviso, the interpretation and application of these prohibitions must be consistent[54].

1. RESTATING GENERAL PRINCIPLES OF ARTICLE 102 TFEU

It seems the Court cannot resist beginning any discussion about Article 102 TFEU without a restatement of the law and repeating, sometimes with slight variations, some of the passages establishing general

51 *ISU,* para 135.
52 *ESLC,* paras 171-179.
53 *ESLC,* para 117.
54 *ESLC,* para 119.

principles from previous cases. In the present case this is a particularly inappropriate exercise as nothing the Court writes in this segment is actually relevant for the case at hand. However, this restatement is important because the Court seems to reposition its approach to Article 102 TFEU in a number of respects.

First, in explaining the purpose of Article 102 TFEU the Court says that it is designed to address conduct which "has the effect of hindering competition on the merits and is thus likely to cause direct harm to consumers, or which causes them harm indirectly by hindering or distorting that competition"[55]. This passage is a bit curious: for the purposes of Article 101 TFEU the Court discovered the category of "user undertakings" as a further class of persons protected, could the same not have been extended here? After all a good number of abuse of dominance, cases affect B2B relations where the foreclosure of rivals in one segment allows the dominant firm to harm its business counterparties.

Second, the Court establishes a menu of options to test whether there is an abuse of a dominant position. Unfortunately, these are not listed systematically but we can identify three:

1) through the use of methods other than those which are part of competition on the merits between undertakings, conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market(s) concerned;
2) through the use of methods other than those which are part of competition on the merits between undertakings, conduct has the actual or potential effect of hindering the growth of equally efficient competitors on those markets, although the latter may be either the dominated markets or related or neighbouring markets;
3) where the conduct "has been proven to have the actual or potential effect — or even the object — of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation"[56].

[55] *ESLC,* para 124.
[56] *ESLC*, para 131.

For the first two approaches, the Court explains that demonstrating such effects "may entail the use of different analytical templates depending on the type of conduct at issue in a given case"[57]. This is a welcome clarification of the fact that there is not a single method for showing anticompetitive foreclosure. The first two categories also make good sense in that they recognise that partial foreclosure suffices: this is logical because a dominant company cannot dictate how much competition there can be on a market[58]. In other words, the dominant company cannot say that its conduct allows some competition and so it is not an abuse when absent that conduct there could be even more entry.

The third approach on this list is somewhat less clear but opens up a range of possibilities which are particularly intriguing given the Commission's current plans for reviewing Article 102 TFEU through Guidelines. Two points stand out:

— It makes no reference to the as efficient competitor standard because it is a setting where there is no existing rival. The passage is not new, but it comes from *Generics*. There the Commission found that each pay for delay agreement between originator and generics producer could be treated as an agreement contrary to Article 101 TFEU under certain circumstances and then that the various settlements were "part of an overall strategy" whose object of delaying market entry[59]. This strategy was the abuse of dominance. Here there was potential competition, but no actual rival. It might suggest that this is the one setting where the as efficient competitor standard need not be satisfied, there being no rival there at all, when the conduct makes no economic sense but for the exclusion of potential competition.
— The Court's intriguing reference to restrictions by object suggests that a revival of this category, which the Commission recently defended by imposing a fine on Intel for naked restraints[60]. In *Generics* the use of the concept of restriction by object was perhaps fortuitous because it had earlier considered whether pay for delay settlements were restrictions of competition by object, and its repetition here might also be the result of the fact that the conduct is also analysed under Art 101 TFEU, but

57 *ESLC*, para 130.

58 "[…] it is not the place of a dominant undertaking to dictate how many viable competitors are to be allowed to compete with it" *Generics* (above n 35), para 161.

59 *Generics* (above n 35), para 155.

60 Case AT.37990, *Intel* (22 September 2023).

it is legitimate to imagine that policymakers will make a lot of this ratification of the existence of naked restraints more generally as shortcuts are sought to apply Article 102 TFEU more aggressively.

2. PUBLIC COMPETITION LAW INTO THE PRIVATE SECTOR

As discussed in section IV above, an abuse of a dominant position is found when the Member State confers on one undertaking the exclusive right to regulate entry into a market where that undertaking also competes. This conferral is contrary to Article 102 read jointly with Article 106 TFEU. Three things are worth noting about this. The first is that in these cases liability is of the Member State: it is its choice that creates a situation where the undertaking abuses its dominant position. The second is that liability of the Member State is based on the sheer existence of the power to exclude rivals, no actual exclusion needs to take place. Third, the undertaking may be found liable when it exercises those powers in an abusive manner. It will be obvious that these three characteristics are atypical to the application of Article 102 TFEU to situations of private power, in particular it is clear that the risk that a firm might abuse its dominant position is not sufficient to trigger liability in any cases so far.

The Court explains that a Member State can escape liability while still granting exclusive monopoly rights to an undertaking to determine who can access markets where it is also present, provided that certain safeguards are in place. These are summarized by the Court in three paragraphs. In brief:

— The grant of exclusive rights must be subject to restrictions, obligations and review that are capable of eliminating the risk of abuse of its dominant position by that undertaking (this is pretty vague)[61].
— The power "is placed within a framework of substantive criteria which are transparent, clear and precise, so that it may not be used in an arbitrary manner. Those criteria must be suitable for ensuring that such a power is exercised in a non discriminatory manner and enabling effective review"[62].
— "The power in question must also be placed within a framework of transparent, non-discriminatory detailed procedural rules relating, inter alia, to the time limits applicable to the submission of an application for prior approval and the adoption of a decision thereon"[63].

61 *ESLC,* para 134.
62 *ESLC,* para 135.
63 *ESLC,* para 136.

These passages set out good governance principles by which a firm present in markets may be lawfully tasked with powers to also regulate access of rivals. Structural separation may be preferable but this is not something that may be required because of the principle of proportionality (code of good conduct is less intrusive and equally effective) and the prerogatives of states to organize their economies. Observe that this is a procedural solution to a competition risk, not a remedy we normally find in competition law applied to private undertakings[64].

Given that both the reason for finding an infringement and the remedy have to do with states organizing markets, it seems that one would want some fairly strong justification before transposing this to the exercise of private power. For the Court, one paragraph is sufficient!

> Requirements identical to those recalled in the three preceding paragraphs [i.e. the three bullet points above] … are all the more necessary when an undertaking in a dominant position, through its own conduct and not by virtue of being granted exclusive or special rights by a Member State, places itself in a situation where it is able to deny potentially competing undertakings access to a given market…. That may be the case when that undertaking has regulatory and review powers and the power to impose sanctions enabling it to authorise or control that access, and thus a means which is different to those normally available to undertakings and which govern competition on the merits as between them[65].

This passage is surreal coming from the Court. The joint application of Articles 102 and 106 TFEU discovered by the Court has allowed it to establish very aggressive competition law standard precisely because we were dealing with Member States exercising legislative power to close markets down to new entrants. It is odd that many years after that case-law was used expansively that the Court now realizes that this liability standard is "all the more necessary" when we find manifestations of private power. It is different if an academic were to encourage the Court to take the step it did — but even an academic would recognize that this requires a record-breaking hop, skip and jump to get from the premises of the original rule in *RTT v INNO* to applying it to any and all dominant firms. Nor does the Court try and limit this to sporting organisations even if this would have been a logical move for it to

64 An exception relates to the licensing of standard essential patents when the patent holder has made a FRAND commitment where the Court in Case C-170/13, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH* EU:C:2014:2391 set out a procedural framework to be followed to avoid a finding of abuse.

65 *ESLC,* para 137.

make. Just like sporting organizations are subject to the discipline of the internal market rules, the Court could have said that the rules of public competition law that it has designed apply to sporting associations, by more or less paraphrasing from the Walrave and Bosman line of case-law, along the following lines: the theory of abuse developed based on a joint reading of Articles 102 and 106 TFEU not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating an economic activity in a collective manner. The abolition as between Member States of obstacles to competition would be compromised if the abolition of State restrictions of competition could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law.

In contrast, the very open-ended extension of the Article 106 TFEU case-law creates a hook for enterprising policymakers and litigants to cite the judgment to suggest that other dominant firms not only have a special responsibility not to abuse their dominant position, but they now have ex ante duties to facilitate entry. This might have been necessary had there been no Digital Markets Act — now the Act seems like small beer compared with what this general liability rule could achieve. This is not to object to the development of more aggressive standards for abuse. But to do so by dint of a single paragraph without more justification is unconvincing. It raises questions about its possible scope, raising questions about what kind of dominant position is required to trigger this new approach: must the dominant firm have a genuine stranglehold on the market? And what sorts of obligations arise from holding this power?

Having made this leap, the conclusion follows ineluctably: even after conceding that sport is special, and so generally writing rules on prior approval and participation and designing sanctions are not in themselves an abuse of a dominant position[66], the absence of the substantive and procedural safeguards detailed above suggest that UEFA and FIFA are committing this newly found abuse. Even here the phrasing used by the Court is going to create problems:

— When it comes to the implementation of rules on prior approval and participation the problem arises when these are "not subject to restrictions, obligations and review that are capable of eliminating the risk of abuse of a dominant position and, more specifically, where there is no framework for substantive criteria and detailed procedural rules for ensuring that they are transparent, objective, precise and non-discriminatory, when they confer on the entity called on to implement

66 *ESLC,* paras 140-140.

them the power to deny any competing undertaking access to the market. *Such rules must be held to infringe Article 102 TFEU*"[67].

— But when it comes to the "absence of substantive criteria and detailed procedural rules ensuring that the sanctions introduced as an adjunct to those rules are transparent, objective, precise, non-discriminatory and proportionate, such sanctions must, *by their very nature*, be held to infringe Article 102 TFEU inasmuch as they are discretionary in nature. Indeed, such a situation makes it impossible to verify, in a transparent and objective manner, whether their implementation on a case-by-case basis is justified and proportionate in view of the specific characteristics of the international interclub competition project concerned"[68].

The Court cannot be unaware that the phrase 'by its very nature' has a specific meaning in antitrust as shown above: it means a restriction by object. The absence of a similar characterization for the rules on prior approval and authorization can only raise questions about whether here the abuse by object approach cannot be applied and if there is a different standard. Logically there should not be: if one agrees with the normative position the court has come up with then both rules should be vetted using the same standard, so why then make the analysis slightly different?

VI. DEFENCES

1. SCOPE OF THE *WOUTERS* RULE

In 2002 the Court did something new in competition law: in *Wouters*, it was faced with a rule of the Dutch Bar association which prohibited joint practices between lawyers and accountants[69]. It held that this decision of an association whose anticompetitive nature seemed clear, was not one to which Article 101 TFEU would apply if there is a public interest justification. Provided the rule is proportionate, then liability is avoided. What was innovative about this? Article 101 has its own justification provision in Article 101(3) but the Court elected to find a case-law based defence that applies to restrictions of competition.

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67 *ESLC,* para 147 (my emphasis).

68 *ESLC,* para 148 (my emphasis).

69 Case C-309/99, EU:C:2001:390.

This might have been surprising to those who only read competition cases, but this is a move the Court has made also in its economic freedom case-law[70]. An example of how the application of this approach in the context of the economic freedoms is found in *Royal Antwerp FC*[71]. Here the home grown players rule had indirectly discriminatory effects against players coming from other Member States, contrary to Article 45 TFEU. Can these restrictions be justified? One basis for justification might be found in Article 45(3), which allows limitations justified on grounds of public policy, public security and public health, but it may also be justified without reference to that provision "if it is proven, first, that their adoption pursues a legitimate objective in the public interest that is compatible with that treaty and *which is therefore other than of a purely economic nature* and, second, that they observe the principle of proportionality, which entails that they are suitable for ensuring the achievement of that objective and do not go beyond what is necessary for that purpose"[72]. Here a possible justification is the aim "of encouraging the recruitment and training of young professional football players"[73]. As can be seen the structure of the justification for the purposes of internal market law is the same as that used in *Wouters* for the purposes of EU competition law.

In this trilogy the Court gives some additional explanation about the scope of this rule. The Court starts with a clarification by setting out three elements, the last of which I am not clear about. The restrictions found in the rules of the association must be

1) justified by the pursuit of one or more legitimate objectives in the public interest which are not per se anticompetitive in nature;
2) that the specific means used to pursue those objectives are genuinely necessary for that purpose;
3) that, even if those means prove to have an inherent effect of, at the very least potentially, restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition[74].

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70 Case C-120/78 *Rewe-Zentral AG,* EU:C:1979:42 (often referred to as Cassis de Dijon).

71 In *ESLC* a similar approach is applied to the freedom to provide services, see paras 248-49 (finding the infringement in terms more or less like those used for Arts 101 and 102), paras 251-252 listing the two conditions for the defence to apply.

72 *Antwerp,* para 141.

73 *Antwerp,* para 144.

74 *ESLC,* para 183, *Antwerp*, para 113.

The third requirement starts by speaking about proportionality: in other words, the anticompetitive rule is the least restrictive way of achieving the public interest. It does not follow that competition cannot be eliminated. What if the only way to achieve the public interest is to eliminate effective competition? The requirement that competition should not be eliminated could be said to be an additional requirement, not a corollary of proportionality. Nor is it clear that the case-law supports the statement of the Court: for example while it is true that in *OTOC* the Court considered that the foreclosure of rivals eliminated competition, the Court held that this elimination could not be seen to be necessary to guarantee the quality of the service — it did not say that because they are eliminating competition then the defence does not apply[75]. In other words the correct view is that the more restrictive the regulation is the more carefully the Court will look to see if the regulation is truly necessary and proportionate.

Then the Court explains the potentially wide reach of the Wouters rule: it "*applies in particular* in cases involving agreements or decisions taking the form of rules adopted by an association such as a professional association or a sporting association, with a view to pursuing certain ethical or principled objectives and, more broadly, to regulate the exercise of a professional activity"[76]. This leaves it open for the defence to apply to other factual settings and confirms the view that this is not limited to instances of self-regulation by professional bodies (contra van Rompuy, 2024)[77].

Finally, the Court takes the view that the *Wouters* defence cannot apply if it is proven that the agreement is restrictive by object[78]. There is no precedent to support this and the position is illogical. The protection of the public interest (i.e. the first element of the *Wouters* defence) is part of the legal and economic context that a court or competition authority has to take into account in order to determine if the restriction of competition is restrictive by object or not. A decision-maker might take the view that a restriction which appears like a naked restraint might (i) not be justified because the public interest is not legitimate or (ii) protect a legitimate interest but be dispropor-

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75 Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência,* EU:C:2013:127, para 98.

76 *ESLC,* para 183, my emphasis, *Antwerp,* para 113.

77 However, he seems to omit the italicized segment of the Court's judgment (in particular) which leaves it open for more applications.

78 *ESLC,* paras 185-186. It is not clear how the Court finds support of this by citing the conclusion of the judgment in Case C-49/07, *MOTOE,* EU:C:2008:376. The case is about the joint application of Articles 102 and 106 TFEU. See also *Antwerp,* para 115, but *MOTOE* is not cited here.

tionate or unnecessary. Having examined the application of the *Wouters* defence and found it inapplicable, the court can then conclude that it is a restriction by object. But you cannot ex ante exclude *Wouters* because it is a restriction by object — the analytical framework works the other way around. Consider the *OTOC* case. The regulator denies market access to some providers, reserving that market to it: surely without more we might strongly suspect that this is a restriction by object. But here the Court explains that it is possible for the organization to make a case that the *Wouters* defence applies. The court finds that the restrictions cannot be justified because of a lack of proportionality: there were less restrictive way of protecting the quality of the services[79]. Moreover, the Court's approach departs from that taken in *CHEZ Elektro Bulgaria*. In that case the Court was faced with a national law that empowered lawyers to set minimum rates for their legal services, it was thus applying Article 101 TFEU together with Art 4(3) TEU and asking if the state was requiring an anticompetitive agreement. Having found that this was so, it still applied *Wouters* stating that this defence was applicable whether the national law had the object or effect to restrict the freedom of action of individuals[80].

In sum, by requiring that the defence only applies when there is no elimination of competition and only if the agreement is not self-evidently anticompetitive, the Court rejects some of the generous constructions of earlier judgments and tightens up the scope of application of the defence (Weatherill, 2024). The Court might be keen to make these moves to curtail the abuse of self-regulatory powers that could not be controlled by the concept of proportionality. This move might have been explained with more clarity, explaining which of the Court's earlier judgments are now no longer good law.

2. ARTICLE 101(3) TFEU

The Court states that the application of Article 101(3) requires the satisfaction of conditions that are more stringent than those of the *Wouters* defence, without explaining in what ways this is so[81]. The strictness manifests itself in

[79] *OTOC,* above n 74, para 100.

[80] Joined Cases C-427/16 and C-428/16, *„CHEZ Elektro Bulgaria" AD v Yordan Kotsev and „FrontEx International" EAD v Emil Yanakiev,* EU:C:2017:890, para 53. The Court cites 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 v Ministero delle Infrastrutture e dei Trasporti and Others,* EU:C:2014:2147, para 46 which makes exactly the same point.

[81] *ESLC,* para 189, *Antwerp FC,* para 118.

two ways: first there are some additional hurdles to be satisfied, second the evidentiary burden is much higher than for the *Wouters* defence. The manner in which the Court interprets the first and the second condition is particularly consequential and is discussed below.

The first condition is rephrased slightly from the way it appears in the Treaty: the agreement makes it possible "to achieve efficiency gains, by contributing either to improving the production or distribution of the products or services concerned, or to promoting technical or economic progress"[82]. By interpreting this as solely focused on efficiency gains (and if we follow this economic reading of the terms then we can rely on allocative efficiency (better distribution), productive efficiencies (better production) and dynamic efficiency (technical and economic progress))[83], then the Court finally confirms the shrinking of Article 101(3) that the Commission had advocated in 2004 when it wrote the Article 101(3) TFEU Guidelines. Suffice it to say that this rephrasing, based on an overly literal reading of the provision deviates from decades of Commission practice and might well also frustrate the recent drive to sustainability. The Court moves on to confirm that the efficiency gains must be large enough to compensate for the anticompetitive effects[84]. But it does a chieve a rationalisation of sorts: efficiency defences are under Article 101(3) while any non-economic public interest justification falls to be considered under *Wouters*.

The second condition is rephrased even more radically by translating the French text: "an equitable part of the profit resulting from those efficiency gains is reserved for the users"[85]. The original text in the English language version of the Treaty reads: "allowing consumers a fair share of the resulting benefit". It is not clear what the Court wishes to achieve by this. Perhaps the point is clarified by the Court explaining that the agreement must have "a positive impact on all users, be they traders, intermediate consumers or end consumers, in the different sectors or markets concerned"[86]. This means that the agreement must confer a fair share an all sectors of the market where the agreement has an anticompetitive impact[87]. Looking specifically at the claim

82 *ESCL,* para 190, *Antwerp,* 119.

83 I disagree with Odudu (Odudu, 2006) who claimed that an infringement of Art 101(1) requires a showing of a reduction in allocative efficiencies, which could be saved under Art 101(3) by a showing of countervailing productive efficiencies.

84 *ESLC,* para 192, *Antwerp FC,* para 121.

85 *ESLC,* para 190, *Antwerp FC,* para 119. The French version in the Treaty reads: en réservant aux utilisateurs une partie équitable du profit qui en résulte.

86 *ESLC,* para 193, *Antwerp FC,* para 122.

87 *ESLC,* paras 193-194.

in *ESLC*, the Court explains that the rules on prior authorization and the sanctions may affect at least the following groups, each of which must obtain a favourable gain if this condition of Article 101(3) TFEU is to be satisfied:

— national football associations,
— professional or amateur clubs,
— professional or amateur players,
— young players and,
— consumers, be they spectators or television viewers[88].

Looking at the rules in *Royal Antwerp FC*, it must be shown that there are compensating benefits to three actors: football clubs, football players, the public[89]. For the public the question is whether consumers prefer watching matches that include home-grown players.

This interpretation of the first two conditions of Article 101(3) TFEU reveals a daunting task for both plaintiff and defendant: the plaintiff must prove harm to these categories — even in an object case the plaintiff must reveal a theory of harm that connects the rules in question with the possible effect on a group of users. The defendant then will have to demonstrate countervailing benefits bringing to the table as the Court explains "genuine, quantifiable efficiency gains"[90]. This may be a *probatio diabolica* in object cases because the plaintiff is not bound to quantify the harm, leaving it impossible for the defendant to prove that the benefits outweigh a harm that has not been measured! Moreover, proving that a rule contributes to inter-club solidarity or contributes to create a framework where the spirit of the sport is respected are difficult to quantify in economic terms: we can see this in some US cases where the courts explored the extent to which labour market restrictions could be justified by reference to preserving amateurism in college sports[91].

Finally, it is worth noting that, even if the first and the second conditions are met and even if it is demonstrated that the agreement is necessary and no less restrictive alternative is available, the Court in *ESLC* is extremely sceptical about the likelihood that the agreement under scrutiny will pass the fourth condition (no elimination of competition). In light of the absence of an adequate substantive and procedural framework in place to select which competing football competitions may participate, the decision in question "is

88 *ESLC,* para 195.
89 *Antwerp FC,* para 130.
90 *ESLC,* para 196.
91 *NCAA v Alston* 594 U. S. (2021).

liable to enable entities having adopted those rules to prevent any and all competition on the market for the organisation and marketing of interclub football competitions on European Union territory"[92]. Note that this conclusion relates to the infringing arrangement — it means that if a sports association can design adequate rules as detailed above then the exclusion of rivals becomes legitimate because this would not breach Article 101 TFEU. It is not impossible that an Article 101 TFEU compliant set of rules eliminates a lot of would be entrants in this market.

3. DEFENCES TO ABUSE OF DOMINANCE

Finally on competition law defences, the Court in *ESLC* examines what defendants might plead if there is an abuse of dominance and the *Wouters* defence is unsuccessful. Under Article 102 TFEU, there are two defences: (i) objective justification/objective necessity and (ii) efficiencies[93]. The first of these is of limited application — for example a refusal to continue to supply because there is a shortage and the dominant firm has no capacity. This is akin to a force majeure event. The Court might be willing to entertain the application of objective justification to the rules in question when these were designed adequately and contained satisfactory procedural safeguards, however as noted above if these criteria were met then there would be no abuse in the first place.

The efficiency defence is interpreted in a manner that is very similar to Article 101(3) except that there is no need to prove that users secure an equitable share of the positive effects of the agreement[94]. This confirms some alignment of efficiency defences in EU competition law.

4. THE ECONOMIC FREEDOMS – JUSTIFICATIONS AND A CATCH 22 SETTING?

In Royal *Antwerp FC* it was suggested that the home grown players rule had indirectly discriminatory effects against players coming from other Member States. Can these restrictions be justified? As discussed above, the answer can be in the affirmative[95]. The Court also explains that the evidence to adduce the justification does not have to be quantitative: "that objective

92 *ESLC,* para 199.
93 *ESLC,* para 202.
94 *ESLC,* para 204.
95 Above n 80.

may, in certain cases and under certain conditions, justify measures which, without being designed in such a way as to ensure, in a certain and quantifiable manner in advance, an increase or intensification of the recruitment and training of young players, may nonetheless create real and significant incentives in that direction"[96].

The interesting aspect of this for the purposes of football regulations is that if a measure is found to both infringe EU competition law and the economic freedoms then the catch is that the parties cannot possibly justify this measure based on Article 101(3), for the reason that the Court itself has set out: that the first condition is about efficiencies. As an economic justification a successful plea means the parties escape the prohibition of Article 101(3) but by the same token they fail to justify the restriction to the economic freedoms. Is this the result desired by the Court? The Court seems to have put itself in a difficult position which will need to be untangled in future judgments. The one way to do so is to read the *Wouters* defence widely to allow it to address the same kinds of justifications as are found in the internal market case-law.

VII. CONCLUSION

In these three judgments there is so much that is intriguingly novel in the way the Court approaches many foundational concepts of EU competition law. I have suggested that not all elements of these judgments are convincing but the Court has created space for debate on a number of fronts. In particular:

— A position on restrictions by object which (i) intermingles the orthodox and more analytical approaches in even more confusing ways than before; (ii) omits the point about the defendant being able to raise pro-competitive effects to cast doubt on the object characterisation. This creates further space for discussing the proper scope of the concept of object restrictions, and it would be helpful if the Court had provided clarification rather than creating further doubts, not least as national courts remain confused.
— A position under Article 101 TFEU where harm to consumer welfare includes harm to intermediate parties. This is helpful in revealing the concept of competition law harm, however it is an approach which is strangely absent when the Court discusses Article 102.

[96] *Antwerp FC,* para 145.

— An extension Article 101 and 102 TFEU to the design of rules that create a risk of anticompetitive effects, drawing on the case law applied in the application of competition law to state actions. This is controversial and not as self-evident as the Court would like us to think. In the specific domain of self-regulation this extension is to be welcomed, but it risks spilling over into other kinds of cases, especially when considering the conduct of some dominant players, potentially amplifying the scope of both exclusionary and exploitative abuses.
— A clarification that *Wouters* applies beyond self-regulation by professions (it applies to these 'in particular') and some awkward narrowing of the doctrine, which seems to be driven by a mistrust in the capacity of self-regulation.
— A rephrasing of Article 101(3) which makes application clearer but also more challenging: Hancher and Lugard would say — honey, the Court has now also shrunk the article! (2004:410).
— A position on the nature of abuse of dominance that confirms the role of the as efficient competitor standard when there are rivals but suggests that there may be different approaches when the dominant company suffocates potential competitors, including a space for abuses by object in this context.
— An alignment of defences, which helps when it comes to Articles 101 and 102, but whose consequences when the same conduct falls under EU competition law and internal market law are to eliminate the possibility of applying Article 101(3) TFEU. This makes it all the more necessary to preserve the *Wouters* line of defence.

It is hard to find a single judgment that contains so many innovations. For some of these, we can understand them retrospectively. It was preparing the ground for later judgments: the widening of the examples of restrictions by object was referred to recently in condemning price fixing by bar associations[97]. For others, like the widening of Article 102 TFEU, the Court may be sending a signal about the continued importance of this provision in light of concerns that some of the Court's case-law might have reduced its bite[98]. Just as the Commission embarks on another effort to write Guidelines on Article 102 TFEU, the Court opens up new ways of applying this provision.

[97] Case C-438/22, Em akaunt BG, EU:C:2024:471, Case C-128/21 Lietuvos notary rumai, EU:C:2024:49.

[98] Case C-377/20, Servizio Elettrico Nazionale, EU:C:2022:379, Case C-680/20 Unilever Italia Mkt. Operations, EU:C:2023:33.

Insofar as the so-called field of sports law is concerned the judgments are surely also important: sports associations must revise their rules when these are likely to affect competition. It does not mean that UEFA, FIFA and the ISU must now authorize the organization of any event but that they must have clear criteria for authorization and the right procedures to consider these applications, as summarized above. Any restrictions have to be justified by evidence to explain why rivals are excluded from the market. It does not mean that these associations cannot rely on the public interest to limit competitions. For example some numerical restriction seems inevitable if only to protect the health of athletes, but the risk to heath has to be demonstrated.

Finally, I would like to end on a more polemical note: one of the would be competitors to ISU had proposed to hold a skating event in Dubai. According to Google, the month with the lowest average temperature there is January (low 14 °Celsius, high 24 °Celsius). I assume that keeping an ice rink frozen when this is the outside temperature is likely to need a fair amount of energy. In an epoch characterized by climate crisis, is opening skating competitions to the market without any restraints sensible? Would an antitrust agency consider anticompetitive a rule by which a sporting association decided to prohibit events for reasons of environmental sustainability? Or what if an association were to prohibit the organization of sporting events for men unless the organizer also created opportunities for women in that sport? Would the EU market order shudder at an attempt to inject gender equality by private regulation? Hopefully, at least the *Wouters* defence applies here. However, in my view, such conduct should not be seen as a restriction of competition but as an adequate way of reconceptualising the scope of legitimate markets under EU law: a market is not tolerated when it fuels the climate crisis, nor when it is complicit in gender discrimination.

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