Sports governance (in football) under attack

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Competing interests: Nothing to declare

Abstract

The governance of sports and the role of sports governing bodies is at the centre of contemporary academic debates. This is because the status quo has come under attack in several high-profile court cases, especially those involving the International Skating Union (ISU) and the European Super League (ESL). This article provides a critical reflection on the current state of affairs, as viewed through the lens of these cases, and presents suggestions for reform.

Key words

Sports governing body – Football – Governance – Status Quo – Conflicts of Interest – Reform

1. Introduction

This article scrutinises the current status of sports governance. More specifically, it analyses the purpose and role of sports governing bodies (SGBs), with a focus on the combination of the regulatory role of SGBs with their role as organisers of competitions.[1] Although this topic is not new, it makes sense to revisit it now, in light of pending cases on the subject before the Court of Justice of the European Union, especially those involving the International Skating Union (ISU) and the European Super League (ESL).[2] In this article, I identify deficiencies in the current governance of SGBs and present suggestions for reform. Proceeding from a legal perspective, I focus on professional football in Europe, drawing on economic analysis to adopt an approach that is sensitive to differences with other professional sports, thereby allowing different solutions in seemingly similar circumstances. The article begins with observations concerning the purpose of SGBs.

2. The purpose of sports governing bodies

2.1 Purpose in corporate law

The concept of purpose is the subject of considerable discussion amongst corporate-law enthusiasts. The core question concerns the interests according to which corporate entities should be governed. There are roughly two opinions. The first is that companies exist to create value for their shareholders. The second is that companies are vehicles for creating value for stakeholders as well, and that the interests of stakeholders may even take precedence over those of shareholders. For not-for-profit

[1] Also known as the legislative role and executive role, respectively (Hoehn 2006, p. 229). I do not use this terminology in this article.

[2] The article serves partly as a case study based on these current events. At the same time, it is intended to have broader relevance. More specifically its arguments are valid for double hatting in sports, as well as for sports governance in general, thus transcending the boundaries of the case study alone.

entities (e.g. associations), the line of reasoning can be similar: does the association exist exclusively for its members, or does it also exist for other stakeholders and, if so, could the interests of these stakeholders take precedence over member interests in some cases? The debate is far from settled, and there is no consensus amongst scholars with regard to support for one or the other opinion.[3]

From the indecisiveness of the debate, we can infer that there is no unique, universally adopted model of good stakeholder governance. Differing models and opinions co-exist. This is also a valuable observation for SBGs, which are usually organised as associations. In view of the purpose debate outlined above, the purpose of these entities is just as likely to be serving the interests of the members exclusively as it is to be serving and giving precedence to the interests of stakeholders as well. From the perspective of corporate law, therefore, it need not be surprising for SGBs to prioritise their own interests – in other words, the interests of their membership as a whole.

2.2 The specific purpose of a sports governing body

The perspective of corporate law alone is not sufficient to approach the purpose of SGBs, given the special characteristics attributed to sport.[4] More specifically, sport is intrinsically rooted in communities, and it serves societal and educational functions, as highlighted in Article 165 of the Treaty on the Functioning of the EU (TFEU). Professional sports differ from amateur sports only in degree. Depending on the sport, professional sports are businesses, intrinsically concerned with matters of economics and finance, although they are simultaneously expected to 'give back to society' and to deliver other benefits that extend beyond the business enterprise of producing and delivering the spectacle of the sport.[5] This special nature of sport has consequences for the governance models of SGBs. Calls for stakeholder inclusion in SGBs are stronger and more decisive than they are for 'ordinary' corporates and associations. Policy briefs make that abundantly clear. In a recent example, 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*[6] stresses inclusiveness in the representation of interested stakeholders as a cornerstone of good governance in sports.

2.3 Is stakeholder inclusion real?

Are professional sports living up to expectations? Instrumentally, yes, but normatively, no.[7] This is illustrated by the case of professional football, with a focus on the Union of European Football Associations (UEFA). Membership in the UEFA is open only to national football associations,[8] and only Member Associations have voting rights in the organisation's supreme controlling body, the UEFA Congress.[9] The UEFA Executive Committee, which is competent for matters including UEFA club licensing,[10] is composed of 20 members – the President, 16 other members elected by the Congress, two members elected by the European Club Association (ECA) and one member elected by the

[3] Arguably, the discussion started 90 years ago in the United States with Berle and Dodd (Berle 1932, p. 1365 ff.; Merrick Dodd 1932, p. 1145 ff.). As argued by Milton Friedman, the sole purpose of a company is to make profit for its shareholders (Friedman 1970). Other scholars (e.g. Blair & Stout 1999) have advocated a greater role for stakeholders in the definition of the purpose of a company. The debate is ongoing, and it is reignited from time to time (e.g. by Bebchuk & Tallarita 2021). It is unlikely ever to be settled. The words of Letza, Sun and Kirkbride therefore, remain relevant: 'Both shareholder and stakeholder perspectives claim superiority of their models respectively; however, in reality we have seen a dynamic shift with both models becoming increasingly mutually attractive all over the world in the last two decades. [...] All this implies that the so-called superiority and priority of any model is not permanent and universal, but rather temporary and contextual. The static conceptualisation of shareholding and stakeholding is less compatible with the fluidity and diversity of practical reality. The current dichotomised and static theoretical approach used in corporate governance research, which presupposes two extreme and opposite ideal models, cannot fully explain the complexity and heterogeneity of corporate reality' (Letza, Sun & Kirkbride 2004, p. 257).

[4] A caveat applies here. In many cases, the special nature of sport is exaggerated and used as an argument without any real substance to escape regulation. In this regard, sport is not – and should not be – as special as it is often portrayed. This point is elaborated by Weatherill (2014, 245–282).

[5] Greenhow (2023).

[6] [2021] OJ C 501/1.

[7] Parrish (2023).

[8] Article 5 UEFA Statutes (edition 2021).

[9] Articles 7 and 18 UEFA Statutes (edition 2021).

[10] Article 50 UEFA Statutes (edition 2021).

European Leagues (EL) – and ratified by the Congress.[11] Stakeholders other than UEFA and its Member Associations are thus not represented at the level of the Congress, and clubs and leagues have only a small minority representation at the level of the Executive Committee. Otherwise, stakeholder involvement is limited to participation in advisory committees. At least from a legal perspective, stakeholders actually lack any means to exert real pressure.[12]

Under UEFA governance, in which stakeholders are not truly represented, one could question whether UEFA could actually be expected to consider interests other than its own. The answer to such questions lies in a witty quotation from Judge Leo Strine of the Delaware Supreme Court. Touching on the core of the purpose debate in corporate law, Strine asserts that allowing managers to observe interests other than those of shareholders without granting these other stakeholders voting rights, enforcement rights or any other means of exerting real pressure is 'more an exercise in feeling good than in doing good'.[13]

At present, stakeholder involvement in professional football is minimal and reactive, for two reasons. First, stakeholders have gained some form of representation (in most cases, soft) within the bodies of UEFA or its international counterpart (FIFA), as they have been dissatisfied and threatened with legal actions or breakaway attempts. The governing bodies of football have had to make at least some concession to pacify these stakeholders. As paradoxically (and cynically) noted by Parrish, this *modus operandi* of securing legitimacy and voice within football governance can simultaneously reduce the powers of relevant stakeholders.[14] This is because gaining formal representation within governance structures is rarely accompanied by veto power.[15] Second, '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'. The integration of stakeholders within football governance by UEFA and FIFA is therefore a means of managing an increasingly hostile legal environment,[16] and thus fending off external interference. This could explain the minimal inclusion of stakeholders: as long as the appearance of involvement suffices to satisfy policymakers, it does not seem necessary to organise any true involvement.

2.4 Several arguments for enhancing stakeholder inclusion

Can football stakeholders – other than UEFA and the Member Associations, which are already represented – legitimately claim more representation and power in the governance bodies of UEFA, such that they can actually bear some weight in the decision-making process, thereby allowing more balanced decision-making within UEFA? It seems that they can.[17] Several arguments are presented below.

First, in recent decades, clubs and leagues have come to replace nation-states as the 'engine' of professional football.[18] Whereas clubs, players and leagues have taken centre stage in contemporary professional football, it is remarkable that their only representation in football's governing bodies is based on a stakeholder-inclusive approach.[19] They are largely absent from the true decision-making

[11] Article 21 UEFA Statutes (edition 2021).
[12] It could be questioned whether this is mitigated by the fact that professional football clubs and/or professional football leagues are usually part of the governance of Member Associations and, as such, they have an indirect impact on decision-making of UEFA. This is indeed a factor, but not a decisive one. In most cases, such clubs and leagues have only a minority position in the governance of their Member Associations, alongside parties including representatives of grassroots football and independent persons. As a result, they can certainly exercise influence over the decision-making of Member Associations, but they lack the power to steer it – and rightly so: Member Associations should be the guardians of football as a whole, and not solely of professional football.
[13] Strine 2015.
[14] Parrish 2023.
[15] *Ibidem*
[16] *Ibidem*
[17] See also de Witte and Zglinski (2022, p. 312).
[18] For example, Morrow (2003, p. 1).
[19] Parrish 2023. See also Weatherill (2014, p. 302), particularly with regard to questioning the absence of clubs in formal decision-making.

bodies. The governance of UEFA does not reflect this changed landscape, and it is therefore in need of reform.

Second, from the perspective of corporate law, it makes sense for the ultimate risk bearers of a commercial venture to be able to steer the organisation and governance of the venture. In professional football, such logic apparently does not apply. Although clubs and players are arguably the risk bearers of modern football,[20] they cannot steer – or even have any real say in – the commercial venture within which they operate. 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 to provide some other means of allowing them to exert pressure. Without adequate representation, it is simply too easy for football's governing bodies to claim to take the interests of stakeholders into account. They are not doing so, at least not to sufficient extent.

Third, professional football has no public or state regulator, only a private regulator (in Europe, UEFA). The private regulator also organises and operates European competitions, both club competitions and nation-state competitions. As such, UEFA can have competing interests and, in effect, it competes with clubs and leagues. At the same time, it regulates clubs, leagues and players, which have no real say concerning how they are regulated. In most other sectors, market participants obviously do not decide on the regulation of market entrance and operation. In those cases, however, it is usually a government or an entity with powers derived from government that regulates and operates the market. Moreover, this government does not compete with market participants on the relevant market or, if it does, it cannot claim any privileged position. As a private regulator, UEFA regulates other private actors, whilst also occupying 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 thus subordinate their interests to its own. Ensuring that the composition of UEFA's governing bodies is more representative could help to address this imbalance. It would not address the underlying questions, however, which obviously concern whether it is justifiable for UEFA to combine the capacity of regulator and operator (a question that is both legal and political) and whether it might be better to have an independent regulator.[21]

Fourth, as mentioned above, 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*[22] emphasises the role of stakeholders and the need to consider them in the further development of sport in Europe.

2.5 Challenges

However justified they might be, claims for more representation in UEFA governance are likely to fall on deaf ears. Amending the governance of UEFA would require amending the UEFA Statutes with a majority of at least two-thirds of the Member Associations present at the Congress.[23] It would also require UEFA to voluntarily relinquish part of its powers to the advantage of other stakeholders, and it is unlikely to do so. As rightly noted by Parrish, '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'.[24] Football's governing bodies simply have no incentive for reform, as terminating the game of 'master and servant'[25] would limit their powers. They would most likely do so only under serious threat of statutory intervention – a threat that is currently absent.

[20] For example, clubs pay the players and bear the consequences of injuries, thereby having an impact on the sporting and economic performance of their teams and, potentially, of the league as a whole, as well as on the physical integrity of players.
[21] As advocated by various scholars, including Weiler et al. (2021). See further elaboration in Sections 3.11 and 4.2 below.
[22] [2021] OJ C 501/1.
[23] Article 18 UEFA Statutes (edition 2021).
[24] Parrish (n 6).
[25] After the song by Depeche Mode. In this somewhat provocative analogy, SGBs would take on the role of master, to be served by all others.

Making the governance of professional football more inclusive would obviously raise a number of practical challenges. One concerns who should represent a certain stakeholder group. It is self-evident that stakeholder involvement is feasible only through representative organisations. Within any group of stakeholders, however, various subgroups may exist, with potentially differing interests. If this is the case, should each representative organisation receive an invitation to the decision-making table – and, if so, according to which criteria – or is there room for only one? Pijetlovic illustrates the issue for clubs. Whereas the European Club Association (ECA) is the sole representative organisation for European clubs within the football pyramid, it is not accessible to the vast majority of European professional football clubs. As noted by Pijetlovic, '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'.[26] Moreover, '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'.[27] Interestingly, as a remedy, a new club organisation known as the 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'.[28] In the same vein, the future might also see the emergence of a Super League representative organisation, assuming that the backers of the Super League would persevere. The memorandum of understanding between the ECA and UEFA includes the objective 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 thus seems that the interests of the clubs in the Super League are also not aligned with those of the ECA.[29]

2.6 Football versus other sports

The discussion above clearly points a finger towards the governing bodies of international football, and especially UEFA. It is important to note, however, that the governing bodies of other sports are unlikely to be doing much better. A similar analysis could apply to most of them as well. A quick look at the statutes of the SGBs for swimming and basketball supports that intuition.[30] The issue therefore seems to be structural, and the real question concerns how high policymakers wish to set the bar for sports. More specifically, are they content to take an instrumental approach towards stakeholder inclusion, or should it also be normative?

3. The role of sports governing bodies

3.1 The various roles of a sports governing body and the legal focus on 'double hatting'

Traditionally, SGBs have assumed a variety of roles, including the development, promotion, monitoring and regulation of their sports, as well as the organisation of competitions, the prevention of fraud and the redistribution of revenue generated by the sport in line with the principle of solidarity. From a legal perspective, the combination of an SGB's regulatory role and its role as the organiser of competitions within the sport (i.e. 'double hatting'), along with the conflict of interests that such a combination can entail, has garnered the most attention. This is because SGBs often monopolise the market for the

[26] Pijetlovic 2023.
[27] *Ibidem*
[28] *Ibidem*
[29] 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.
[30] 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.

organisation of competitions, and there is a real risk that SGBs will make, apply and bend the rules – *which they make* – in order to preserve and optimise that monopoly.[31]

3.2 The debate reignited by the ISU and ESL

The long-standing debate was reignited by the case involving two Dutch skaters – Mark Tuitert and Niels Kerstholt – and the International Skating Union (*ISU*). It was highlighted again shortly thereafter in the case of the European Super League (*ESL*) versus UEFA. These cases are similar, as each relates to a prospective competition organised by an entity other than the SGB, but for which the SGB held the right of prior approval – based on its statutes – and for which the SGB ultimately denied approval. In both cases, the claimants argued that such a 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) Athanasios Rantos delivered opinions in both cases on 15 December 2022. In the *ISU* opinion, the AG suggests annulling the verdict of the GC, arguing that the GC had wrongly qualified the ISU's right of prior approval as a restriction by object and suggesting that the case be referred back to the GC for further assessment of the 'effects' of the ISU's right of prior approval on competition.[32] In the *ESL* opinion, the AG similarly concludes that UEFA's right of prior approval is not a restriction by object.[33] In contrast to *ISU*, however, due to its different procedural background, the AG immediately continues with an assessment of the effects of this right on competition. Given the assessment of a restriction both by object and by effect in *ESL*, this verdict may have a better chance of setting the law of the land first. The remainder of this article therefore focuses on the *ESL*.

3.3 The legal framework: Articles 101 and 102 TFEU

In *ESL*, the CJEU was requested to assess whether the right of prior approval held by UEFA (and FIFA) for new competitions, as exercised in the request for approval by the European Super League, restricts competition in the sense of Article 101 of the TFEU and/or abuses a dominant position in the sense of Article 102 TFEU. Contrary to its earlier case law involving *MOTOE*[34] and *OTOC*,[35] Article 106 TFEU is not relevant in this case. It is also not relevant in *ISU*, as UEFA (or the ISU) is not a public entity, and it does not it derive its powers from the state. It is thus a purely private entity.

In *MOTOE* (on Article 102 TFEU) and in *OTOC* (on Article 101 TFEU), the CJEU emphasised 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.[36] 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.[37] Moreover, as the Court continued, a rule that grants a legal person the power to give consent to applications for authorisation to organise motorcycling events without making such power subject to restrictions, obligations and review could lead the legal person entrusted with giving such consent to distort competition by favouring events that it organises or those in whose organisation it participates. Similarly, in *OTOC*, the Court held that rules that grant a legal person the power to rule unilaterally on applications for registration or approval submitted with a view to the organisation of

[31] As noted by Parrish, 'performing both regulatory and commercial functions without conflation, is a temptation too far for many sports bodies' (Parrish 2023). 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 2023). Similarly: Van Rompuy (2015, pp. 174–204).

[32] Case C-124/21 P *Opinion AG Rantos* [2022] ECLI:EU:C:2022:988, paras 123 and 136–137.

[33] See the very critical argument of a 'by object' restriction: Monti (2023, p. 22–28).

[34] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) vs. Elliniko Dimosio* [2008] ECLI:EU:C:2008:376.

[35] Case C-1/12 *Ordem dos Técnicos Oficiais de Contas vs. Autoridade da Concorrência* [2013] ECLI:EU:C:2013:127.

[36] Case C-1/12 (n 33), para 88; Case C-49/07 (n 32), para 51.

[37] *Ibidem*

training sessions without making that power subject to restrictions, obligations and review could lead the legal person holding such power to distort competition by favouring the training that it organises itself.

From these verdicts, it can be inferred that the Court finds that the combination of regulatory and operating power does not in itself constitute a restriction of competition or an abuse of a dominant position.[38] At the same time, however, this combination does conflict with competition law when access to the market is unduly denied to the point that competition on that market is thereby distorted.[39] In other words, it is distorted when there are no limits or restrictions, obligations and review over the legal entity performing both functions.[40]

After having established that these criteria are not further developed in the Court's case law, in the *ESL* opinion, AG Rantos argues that they should satisfy the following objectives:[41]

- 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, going forward, it can certainly be inspirational for SGBs struggling with access-to-market provisions, both in and outside the world of football, regardless of the outcomes in *ESL* and *ISU*. The only missing element, so it seems, is that reasonable time limits should exist for the decision-making of SGBs within the context of prior approval procedures, both for initial approval and for 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 the prior approval and sanctioning rules of UEFA (and FIFA), taking into account the factual, legal and economic contexts within which these rules are to be applied, thus including the specific characteristics of the ESL. In the latter reference, the AG recalls the semi-closed character of the Super League, a feature that is regarded as being at odds with the European model of sport, according to the AG, thereby glossing over all legal flaws attached to UEFA's rights of prior approval and sanctioning: 'It should be pointed out at the outset that the principles described in points 114 to 116[42] of this Opinion can apply only in relation to independent competitions

[38] For example, Weatherill (2014), p. 478 (on *MOTOE*).
[39] As summarised by AG Rantos: Case C-333/21 *Opinion AG Rantos* [2022] ECLI:EU:C:2022:993 (hereinafter: *ESL Opinion*), para 48.
[40] 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.
[41] *ESL Opinion*, paras 111–117.
[42] These are the aforementioned objectives developed by AG Rantos.

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'.[43] Later in this article, I explain why this view is incorrect and disproportionate.[44]

3.4 The relevance of Article 165 TFEU

The Court's assessment occurs against the background of Article 165 TFEU, which is rightly considered a summary of established practice in current legal scholarship, without prejudice to the Court's ability to make a full assessment of the case of UEFA against EU competition law and the principles of free movement.[45]

Interestingly, AG Rantos identifies Article 165 TFEU as the constitutional basis for a European model of sport, for which the private, Swiss-based entities FIFA and UEFA can act as gatekeepers. This is a peculiar stance, as nothing in the design or text of Article 165 TFEU points in that direction.[46] Meanwhile, AG Rantos' colleague, First AG Maciej Szpunar, clearly specifies that AG Rantos' opinion does not reflect a consensus within the Court. In addition, in his own opinion in the case of *Royal Antwerp FC versus UEFA and RBFA* (delivered on 9 March 2023), Szpunar criticises the views of expressed by Rantos.[47] This is peculiar; it is unprecedented for an AG to openly contradict a colleague (in practice, through an *obiter dictum*) in an opinion on a different, albeit substantially related matter. In this opinion, AG Szpunar emphasises that the European Treaties do not grant any privileges to the international and national football federations. Furthermore, the institutions of the EU cannot 'outsource' to UEFA their functions relating to the development of the EU dimension of sport. As a consequence, UEFA cannot be regarded as a gatekeeper for any 'model of sport.' If, based on the Treaty, someone must watch a gate, the EU must do so itself. Moreover, AG Szpunar recognises that national and international federations are private entities, and that they are thus subject to unavoidable conflicts of interest, as they pursue economic objectives, whilst simultaneously claiming the role of regulator ('Put differently, UEFA and the URBSFA [note: the Belgian Football Association] would be behaving irrationally if they attempted to further public objectives which ran directly counter to their commercial interests'). This statement has the merit of uncovering the key systemic error in the governance of contemporary football – an error that is at the root of the legal issues in *ESL*. It focuses the Court's attention to the heart of the matter.

3.5 *MOTOE* and *OTOC* applied 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 key point will thus be to determine whether its right to prior approval, as applied in *ESL*, was subject to restrictions, obligations and review.

Arguably, no such restrictions, obligations and review existed. The UEFA Statutes do not include any objective criteria relating to the organisation of third-party competitions, nor any clear procedural rules setting out the timing of the application procedure, thereby leaving significant discretionary margin for UEFA to decide as it saw fit. Moreover, the review process could be subject to criticism,

[43] Case C-124/21 P *Opinion AG Rantos* [2022] ECLI:EU:C:2022:993, para 118.
[44] See 3.9 below.
[45] See Weatherill (2022, 9); Weatherill (2023). 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' *ESL Opinion*, paras 27-49. On the different stances regarding the meaning of Art. 165 TFEU, see e.g. Weatherill (2014, p. 534).
[46] See in particular Monti (2023, p. 7).
[47] Case C-680/21 *Opinion Szpunar* [2023] ECLI:EU:C:2023:188.

especially the exclusive jurisdiction of the Swiss-based Court of Arbitration for Sport (CAS).[48] Mandatory arbitration in Switzerland implies that subjects of the Union can be denied access to court of the EU, even in the case of conflicts relating to EU law on EU territory.[49] This is because CAS awards are eligible for appeal before the Swiss Federal Supreme Court only on limited grounds, which do not include violations of EU competition law rules or of the freedoms of movement.[50] As a result, the Swiss Federal Supreme Court will not sanction the CAS for not having heard a party's arguments pertaining to compatibility with EU law, and it cannot request a preliminary ruling from the CJEU. Even when the CAS and the Swiss Federal Supreme Court interpret principles of European law, they can thus do so *à la Suisse*. There are no true safeguards on compliance with the European rule of law, as applicable within the Union.[51]

In the *ISU* opinion, AG Rantos takes no issue with mandatory arbitration before the CAS.[52] Referring to *Achmea*[53] and *PL Holdings*,[54] the AG recalls 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, based on a Treaty, arbitration is imposed on private parties, with the objective of eliminating disputes from the jurisdiction of the courts of the signatory States. Another context, AG Rantos reiterates, is commercial arbitration, which results from the freely expressed wishes of the parties concerned and involves disputes between parties of equal standing. If parties in commercial arbitration freely decide 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, the AG rejects the analogy with mandatory arbitration based on a Treaty. This is because arbitration in sports applies between private parties and an international sports federation, and not a Member State. In addition, arbitration in sport does not derive from a Treaty by Member States wishing to eliminate disputes from their own courts. These arguments are obviously valid, albeit formalistic and, with all due respect, not entirely convincing on merit. Although there are certainly good arguments in favour of centralised arbitration in sports,[55] it is open to debate whether the consent of the parties involved is actually free (or informed).[56] Arguably, it is not. If clubs, players, athletes or other entities wish to compete in a sport (i.e. the essence of their profession) they must accept the relevance of the SGB rule book, of which mandatory arbitration is a part. This asymmetry

[48] On this issue, see also: Duval (2015, pp. 224–255) and Weatherill (2022, pp. 6–8). The Super League managed to escape this by requesting a preliminary ruling from the CJEU through the Commercial Court in Madrid.

[49] See also the Commission's response 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.

[50] 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. See also 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).

[51] A party that is not satisfied with a CAS award could still move up to the CJEU thereafter, as a case on the recognition of the arbitral award. In such event, the party could ask the national court to launch a request for a preliminary ruling before the CJEU regarding the compatibility of the award 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; Cattaneo and Parrish 2020, p. 72–73). This notion includes EU competition law. This option would be quite a detour, however, 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 these bodies actually possess the power to self-enforce their sanctions, as confirmed by the CAS. Examples could include closing the club's access to the Transfer Matching System, retaining payments (from centralised marketing) and banning clubs and/or players from their own competitions, or even from their domestic competitions.

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

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

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

[55] Arbitration allows for the establishment of uniform rules to be applied everywhere in the world, taking into account the specificity of sport, as well as the necessity of promoting integrity and safeguarding uniformity in the relevant decisions. Courts cannot achieve these aims, at least not to the same extent. Furthermore, arbitration generally allows more speedy proceedings than a court can. This point is of the utmost relevance in the world of sports, where time can be of the essence.

[56] See e.g. Van Rompuy (2015, pp. 174–204); on the consent to CAS arbitration, see also Baddeley (2020) and Duval (2020).

of powers between the SGB and the parties that it governs bears a greater resemblance to the situation of arbitration forced upon private parties based on a Treaty with Member States than it does to genuine commercial arbitration between private parties. The AG acknowledges this 'asymmetry of powers', but attaches only subordinate attention to it, arguing that the arbitration rules are not unlawful according to EU standards, provided the independence and impartiality of the CAS are not called into question and provided that recourse to CAS arbitration can be justified by legitimate interests linked to the requirement that sporting disputes be submitted to a specialised body. Once again, this argument is quite thin on merit. Even after *Mutu and Pechstein*,[57] the independence and impartiality of the CAS are regularly and rightfully called into question.[58] In view of the continued critique on the independence of the CAS, 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 that they are tried before a tribunal *in Switzerland*, which 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 establish operations within the EU.[59] This is 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. To date, however, no such EU-based hub exists.

3.6 Does it matter that UEFA is not a government?

Is the fact that the CJEU's verdicts in *OTOC* and *MOTOE* were based on Articles 101 and 102 TFEU, respectively *and* on Article 106 TFEU a decisive factor in the case against UEFA, and does this force the Court to assess these three cases in different ways? 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 matter, and that private parties should be given more leeway to pursue their own interests, even in the event of double hatting, than is the case for governments or actors dependent on governments, who should be assessed more restrictively.[60] 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 simply enter the market and launch a new product in competition with the existing product. As such, the reasoning continues, no intervention based on competition law is needed. In the *ESL* decision, AG Rantos develops a similar reasoning, arguing that, 'from a (purely) legal perspective' – given that FIFA and UEFA are not states – the ESL does not need authorisation to set up a league of its own outside the ecosystem of FIFA and UEFA.[61] The conflict actually exists because of the ESL's desire to remain within that ecosystem, at least whilst preparing the Super League competition.

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

First, the reasoning is strongly dependent on the *ability* of a private actor to enter the market and compete with the existing product. In the case of UEFA and the market for European football, this is factually quite difficult, including because of UEFA's strict stance towards continued participation in domestic competitions and its threats of sanctions against both clubs *and* players. Although only top-ranking teams would stand any chance, owing to their brand value, the severity of sanctions against players still wishing to perform for their national squads could nip even that slight chance in the bud. Furthermore, even top-ranking teams would probably need a quite lengthy transitional phase to

[57] For a brief and up-to-date overview of all court verdicts in this famous case, with further references, see e.g. Tognon and Bortolin (2023).
[58] On this matter, with attention to the opinion of the dissenting judges in the ECtHR's *Mutu and Pechstein* decision precisely on the point of independence of the CAS, see e.g. Duval (2022), Lindholm (2021), Baddeley (2020).
[59] As suggested in Wathelet (2007).
[60] See Ibáñez Colomo (2022, pp. 22–23 and 29–30). Note, however, that the Court in *Wouters* was lenient, although the Dutch bar association was mandated by statutory law.
[61] *ESL Opinion*, paras 74-78.

establish a league of their own. In the meantime, they would be dependent on UEFA for their survival, and the probability of being banned from UEFA competitions during that time could very well lead them to insolvency. For these reasons, this approach seems excessively theoretical and 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'. The AG's opinion stresses this multiple times,[62] primarily to emphasise the semi-closed character of the ESL. This knife cuts both ways, however, and other facts must be considered as well.

This approach could also be considered controversial within the context of professional football, where calls for statutory intervention are increasingly being voiced.[63] This is because of the relatively large scale of the market and the inability of football's governing bodies to regulate it properly. Some do indeed expect a presence of statutory law within this market. As long as politicians do not act, however, 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, it is important to note that, within the sports sector, a private body can assume the tasks of both regulator and operator in a significant market in the EU, whereby double hatting can be used to hide self-interested conduct behind a smokescreen of ostensibly legitimate objectives.[64] The absence of statutory law within this sector is thus arguably an aggravating factor – in contrast to *MOTOE* and *OTOC* – requiring at least the same rigour as in those cases, and perhaps even more.[65]

3.7 An ancillary restraints approach

The compatibility of sporting regulations (e.g. as the prior-approval rights of the ISU and UEFA) with EU competition law is commonly (also) assessed against the *Wouters*[66] test, as developed for sports in *Meca-Medina*[67].

Some read *Wouters* as an extension of the ancillary-restraints doctrine, which is typically applicable to 'purely' commercial transactions.[68] According to this 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* could thus be seen as an ancillary restraint necessary to protect *the profession* of lawyering. Likewise, the anti-doping rules in *Meca-Medina* could be seen as an ancillary restraint necessary to ensure fair competition between athletes *so as to allow a qualitative product* (professional swimming).[69] Along these lines, UEFA's right of prior approval could be seen as an ancillary restraint ensuring the preservation of UEFA's *commercial model* to exclusively produce the product of (European) football. This would require the Court to assess whether the double-hatting model itself is legal under EU competition law, and it could arrive at the conclusion that it is therefore not invalidating the right of prior approval as well, based on the arguments set out above.

3.8 Regulatory ancillarity as a benchmark

A 'pure' commercial ancillary-restraints approach seems unlikely, and the AG does not support it.[70] The common understanding, at least for sports, is that *Wouters* and *Meca-Medina* introduced a specific regulatory framework for ancillary restraints, which should be distinguished from the 'pure' commercial ancillary-restraints approach,[71] as also developed by the AG in the *ESL* opinion.[72] This

[62] *ESL Opinion*, paras 40, 77, 84, 89 and 117.
[63] For example, Weiler et al. (2021); Weatherill (2022, pp. 4–23); de Witte and Zglinski (2022, pp. 286–315).
[64] See also Cattaneo and Parrish (2020, p. 101).
[65] See also (albeit within the context of a different question): Pijetlovic (2015, pp. 194–196).
[66] 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.
[67] Case C-519/04 *Meca-Medina and Majcen vs. EC* [2006] ECLI:EU:C:2006:492.
[68] See the references in Vermeersch (2009, p. 331). See also van de Gronden (2016, p. 476).
[69] For an economics perspective on doping with regard to the sports product, see: Eber (2006).
[70] *ESL Opinion*, paras 85–92.
[71] E.g. Bellamy & Child.
[72] *ESL Opinion,* paras 92 ff.

framework boils down to the following: if the restriction of competition is inherent in the pursuit of legitimate objectives of general interest and proportionate to these objectives, it is legal.[73]

Is UEFA's approach to the ESL underpinned by legitimate objectives?[74] This is a crucial question. In the absence of legitimate objectives, the approach can be justified only according to the ordinary commercial ancillary-restraints doctrine or by Article 101(3) TFEU.[75] It seems that, in order to convince the Court, UEFA must demonstrate the legitimate objectives it pursues, that it is adequately pursuing these objectives and that the Super League would jeopardise them. This is in line with AG Szpunar's opinion in the Antwerp case, in which the AG asserts that the burden of proof for evidence that a rule is proportionate in view of legitimate aims (so that it can be upheld instead of invalidated) lies with the claimant of such exception (in the Antwerp case, UEFA and the RBFA).[76] Vague references to the integrity of sports, ethics, fair play or similar principles should not in themselves suffice to convince the court. In *API*, the CJEU clarified that legitimate objectives should be specific and detailed,[77] in line with the reasoning that the ancillary-restraints doctrine requires restrictive application. This is because it excludes anti-competitive measures from the application of Article 101 TFEU, thereby laying a foundation of EU competition law. This should be limited to exceptional cases only.[78]

At first glance, AG Rantos seems to make contradictory arguments on this point. On the one hand, the AG seems to assign little attention to the reality of the pursuit of legitimate objectives – instead, apparently assuming that they *are* being pursued.[79] On the other hand, the AG adopts a relatively 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'.[80] The latter is perhaps an understatement of the facts. During the hearing, when 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.

3.9 Legitimate objectives

3.9.1 Overview

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 organisation 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, and based on Article 165 TFEU, the list could be supplemented with the promotion of fairness and openness in sporting competitions[81] and cooperation between bodies responsible for sports.

[73] Case T-93/18 (n 39) paras 60 and 77.
[74] This analysis furthers the analysis presented in Houben et al. (2022).
[75] On this point, see Pijetlovic (2018, p. 337).
[76] Case C-680/21 *Opinion Szpunar* [2023] ECLI:EU:C:2023:188, para 61. See our analysis: Houben and Petrović (2023). See also: Monti (2023, p. 24).
[77] 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.
[78] See also van de Gronden (2016, p. 478). With regard to the US and the requirement to provide 'good evidence' in support of restraints, see also: Szymanski (2006, p. 733).
[79] *ESL Opinion,* paras 93–94.
[80] *ESL Opinion*, para 99. The AG 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)'.
[81] The openness of sporting competitions, which allows promotion and relegation, was recently emphasised 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. That notwithstanding, it has recently also been advocated that '[n]othing in the EU competition law as currently interpreted appears to support the proposition that the compatibility of sports

From this list, in *ESL*, the following appear to be 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 organisation and proper conduct of competitive sport, including the protection of the proper functioning of the match calendar.

3.9.2 Openness in sporting competitions

The Super League was apparently introduced as a semi-closed league, at odds with the openness of sport in Europe. As such, this could prove problematic, and AG Rantos effectively assigns considerable weight to it. It actually seems to be the main argument, dismissing all others and thus focusing the case on the ESL instead of on UEFA.[82]

This is problematic for several reasons, but primarily because the referring court's questions relate to the compatibility of *UEFA's* right of prior approval for new competitions (e.g. the Super League). Such questions can obviously not be answered in the abstract, and they must take account of all the facts (including the establishment of the Super League) as well as the lack of a procedural framework[83] and discretionary margin for UEFA to refuse new competitions, embedded within a structural conflict of interest. The Court must therefore also – and primarily (in view of the referring court's questions) – consider the legal flaws of UEFA without making them subordinate to the potential flaws of the ESL or, as suggested by the AG,[84] dismissing them altogether. As such, the Court should condemn on equal footing all wrongs that it establishes.

This brings me to the second point, which concerns the issue of whether any wrong is attached to the ESL. In fact, there may not be. Known facts are few and, as acknowledged by the AG, the project was probably still in a development stage.[85] It is thus quite possible that, through negotiation, the Super League would have developed into a league format that was open (or more open) – or perhaps it was already envisaged as open, but just poorly communicated. Refusing the Super League based on partial information that has yet to be materialised into a definitive proposal,[86] without first entering into dialogue with the backers of the Super League, would seem premature and hardly coherent or proportionate in the pursuit of the protection of a 'European model of sport'. As a result, the AG's opinion seems disproportionate as well.

Moreover, the argument that UEFA's own European competitions (especially the Champions League) actually resemble features of a closed league is also not unheard of. This raises questions concerning whether UEFA itself is succeeding in the pursuit of a European model of sport – and openness of competitions in particular – with UEFA's ignorance of competitive balance[87] as an aggravating factor, as recognised by AG Rantos as another key component of the European model of sport.[88] Even more striking is that, in March 2019, UEFA proposed a reform of its Champions League competition as a semi-closed competition, with 32 guaranteed participants, and only 4 places accessible based on promotion and relegation through domestic leagues. This concept is not too far away from the Super League in its initial design. In a potential new design[89] involving participants from all States, the Super

championships with Articles 101 and 102 TFEU hinges on the introduction of promotion and relegation mechanisms': Ibáñez Colomo (2022, p. 32). In any event, if the openness of competitions means open access based on sportive merit, some current sporting competitions (e.g. the EuroLeague in European basketball and ASO competitions in cycling) might also be difficult to reconcile.

[82] *ESL Opinion*, paras 101–110 and 118–123.

[83] See Monti (2023, p. 14): 'if we decide that rules on procedural fairness are not applicable because the organizers of the competition are not designing the ESL according to the European Sports Model, then we seem to be using the substantive provisions of the defence to undercut the procedural rights of the parties to demonstrate that their approach should be eligible for approval'.

[84] See 3.3. above, *in fine*.

[85] *ESL Opinion*, para 22.

[86] The AG seems to confirm the premature nature of the proposal as at the refusal by UEFA: *ESL Opinion*, para 22.

[87] As evidenced in detail by Pijetlovic (2023).

[88] *ESL Opinion*, paras 30 and 41.

[89] See e.g. <European Super League organizers unveil revamped competition with '60 to 80 teams' | CNN> accessed 5 July 2023.

League could paradoxically prove more open than the Champions League, which, in practice, is not accessible to clubs located in small countries or from countries that host smaller competitions.

3.9.3 Solidarity

For UEFA and FIFA, all kinds of distribution schemes that they govern are labelled 'solidarity', including solidarity payments with regard to player transfers,[90] distribution schemes for revenue from media rights,[91] distribution of funds to clubs whose players participate in international tournaments between national member associations[92] and the funding of grassroots football projects.[93] Quite logically, these schemes are presented as evidence of UEFA's contribution to solidarity in the ESL as well. For this argument to hold, UEFA should be able to demonstrate that the mechanisms that are in place do effectively contribute to solidarity and that payments due through solidarity actually reach their beneficiaries. More fundamentally, and from an economic perspective, UEFA must apparently also explain whether the label of solidarity has been applied correctly and, therefore, that any payments that have been labelled as solidarity do not actually simply constitute remuneration for services. In any case, the revenue streams generated under a new third-party competition may not be redistributed in the same way that it is done within the current football pyramid, as the new redistribution scheme could apply only to football clubs participating in the third-party competition.[94] If some or all major football clubs were to choose to leave the current football pyramid, the current 'solidarity' model could collapse. From the perspective of UEFA, this risk may justify bringing the organisation of third-party competitions under some form of UEFA control. In contrast, if the new redistribution scheme were to have sufficient solidarity mechanisms in place, as well as additional solidarity beyond solidarity with the clubs directly participating in the new competition, UEFA would probably have no reason to refuse such competition.

3.9.4 The match calendar

Protecting the smooth functioning of the match calendar to ensure the organisation and proper conduct of competitive sport can also be a legitimate objective. Athletes must divide their energy between several games throughout the season. For this reason, a healthy balance between rest and matches is essential. To achieve this, football's governing bodies must be able to impose rules with regard to the match calendar.[95] In general, football competitions are organised over longer periods of time (e.g. one month for a standard international tournament between national Member Associations, 10 months for a standard domestic club league and 10 months for a pan-European club competition). This structure does not leave much room for additional third-party competitions. To ensure that the current organisation of the competitions is unobstructed (e.g. by the inability of some clubs to complete all matches due to timing or logistical problems), it could be justifiable to have a pre-authorisation system in place. Nevertheless, the backers of the Super League, who sought only to replace UEFA club competition games with Super League games and to continue to participate in domestic league games, had anticipated a possible objection to their alternative league on these grounds, as they envisaged that '[Super League] Games will be played mid-week' so that 'all clubs will remain in their domestic leagues'.[96]

3.9.5 Conclusion

[90] See the 'Training compensation and Solidarity Mechanism' included in the FIFA Regulations on the Status and Transfer of Players <Regulations-on-the-Status-and-Transfer-of-Players-March-2023-edition.pdf (fifa.com)> accessed 4 July 2023.
[91] See e.g. the references to 'solidarity' in UEFA's Annual Reports, e.g. <uefa_annual_report_2021-22.pdf> accessed 4 July 2023, and UEFA's financial reports, e.g. <uefa_financial_report_annex_2021-22_en.pdf> accessed 4 July 2023.
[92] Ibid.
[93] For example, through the HatTrick Programme, which has been labelled as solidarity: <UEFA HatTrick development programme | Inside UEFA | UEFA.com> accessed 4 July 2023.
[94] Pijetlovic (2015, p. 275 and p. 280).
[95] Clausen and Bayle (2017); Agafonova (2019, p. 91).
[96] See <https://thesuperleague.com/#who_we_are> accessed 19 July 2021.

In summary, it is not clear whether the Super League would actually jeopardise the pursuit of any legitimate objectives in football.[97] As a result, a legitimate-objectives defence by UEFA should not be accepted too easily.

3.10 Inherency and proportionality

Assuming that the need to control the openness of competitions, the organization and proper conduct of football competitions and the solidarity model of football, could serve as legitimate aims to justify UEFA's *ex ante* control system for breakaway leagues, the next step should be to assess whether UEFA's right of prior approval 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. Amongst other problems, the European Commission and the General Court took issue with the discretionary margin that the ISU had to refuse alternative competitions, as well as with the severity of the sanctions with which ISU threatened.[98] The margin of discretion should be a main concern in the case of UEFA as well. Article 49.3 of the UEFA Statutes, which enshrine UEFA's right of prior approval, does not include any objective criteria relating to the organisation of a third-party competition, nor does it contain any clear procedural rules setting out the timing of the application procedure. The criteria that reportedly existed at the launch of the Super League were not transparent, and they included a wide discretionary margin for UEFA.

The severity of the threatened sanctions should also prove a stumbling block to the legality of UEFA's actions. On 21 January 2021, FIFA and UEFA announced that clubs and players involved in the Super League would not be allowed to participate in competitions organised by FIFA or UEFA. Although the exact scope of the sanctions that would be imposed is unclear, for players, exclusion from even one international tournament could be a severe – and likely disproportionate – sanction. This is also the opinion of AG Rantos.[99]

The analysis of sanctions imposed on clubs may be different, as also suggested by the AG.[100] It could be that clubs would simply not be impressed by a ban on participating in UEFA competitions, as a breakaway league would replace the latter and generate income as well (and perhaps even more). Furthermore, from the perspective of EU competition, nothing prevents clubs from withdrawing from the current football pyramid and forming a breakaway league,[101] as long as the latter is compatible with the principles of EU law, as outlined by AG Rantos.[102] As mentioned above, however, one important practical hurdle is that such initiatives require a transitional phase in which 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 cast them into bankruptcy, rendering the possibility of breaking away largely theoretical.[103] For some reason, the AG does not assign any weight to this factual assessment, instead emphasising that UEFA should have the right to avoid a 'dual membership' scenario that would risk weakening its position on the market.[104]

[97] See also the considerations in de Witte and Zglinski (2022, p. 307).
[98] Albeit wrongly, according to the AG, in a 'by object' analysis instead of in a 'by effect' analysis.
[99] *ESL Opinion*, para 121.
[100] *ESL Opinion*, para 120 ff.
[101] Pijetlovic (2015, pp. 260–261); see also Cattaneo and Parrish (2020, p. 91).
[102] *ESL Opinion*, para 76.
[103] Is this contradicted by the large amount of money JP Morgan had in store for the ESL? Probably not. Most likely, such money flows were linked to adequate protection of the investment and return on investment. The stance of FIFA and UEFA towards the ESL made this impossible, raising the threat of *immediate* sanctions and preventing the development of the ESL in practice. There was obviously also fierce opposition from the fans of most clubs involved, as well as from politicians. The extent to which this opposition was fuelled by the strong communication of UEFA and FIFA and the relatively poor communication of the ESL is uncertain. In any event, such opposition made it clear that there is currently no societal support for a closed league in football. It is for this reason that the ESL is currently developing into an open model.
[104] *ESL Opinion*, paras 76 and 106. See also Section 5.4 below, on why dual membership need not necessarily be an issue.

3.11 Is a forced separation of roles to be expected?

Unlike AG Rantos, and for the reasons developed hitherto, I think the concrete design of UEFA's right of prior approval does not stand up to antitrust scrutiny.[105] Should that be correct, what can the Court do?

Similar to *GB-Inno-BM*,[106] the Court could potentially go as far as sanctioning the combination of regulatory and operating power within professional football as a whole. Admittedly, this scenario is unlikely, as it lies at the far end of the spectrum of possible outcomes.[107]

Whilst recognising a structural separation of roles as a way to eliminate conflicts of interests for SGBs, AG Rantos argues that such separation is not the only solution, that it is not a necessary solution and that it could even be an undesirable solution. Better options are available: 'in order to prevent potential conflicts of interests, a federation can also establish an approval procedure for third-party competitions by identifying pre-defined approval criteria in an objective and non-discriminatory manner'.[108]

This is the point of friction. As mentioned before, *ESL* contains no objective, transparent, non-discriminatory and verifiable authorisation criteria for alternative competitions. For this, UEFA deserves a reprimand. At least in theory, restrictions on the organisation of alternative competitions may be permissible (e.g. to protect the match calendars of UEFA and domestic leagues). Rules are nevertheless needed in order to make such concerns explicit and to describe the criteria that will be used to determine whether such a concern may prevent the organisation of alternative competitions (e.g. the Super League). Furthermore, UEFA decisions should be made subject to adequate review, which, in my view, would entail a review that provides access to the CJEU for matters concerning EU law, whilst also requiring a strict application of the traditional proportionality test. For instance, legitimate objections should not simply be assumed, but should also be proven and shown to be pursued by the SGB invoking them.[109]

The question nevertheless remains whether it is at all possible for SGBs to *develop objective* procedures and subsequently *apply and supervise* them *objectively*, in a context within such application could harm its monopoly. In this respect, AG Szpunar's opinion in the case of Royal Antwerp FC, which was tried at the same pace as that of the ESL and that will also influence the ESL debate is of the utmost importance. The AG emphasises that, because of double hatting by football governing bodies, 'conflicts of interest are bound to arise' and that football governing bodies 'would be behaving irrationally if they attempted to further public objectives which ran directly counter to their commercial interests'.[110] The design error is thus systemic, and arguably only a new design can really fix it. More specifically, only a structural separation of regulatory and operating power can truly solve the SGB's inherent conflict of interest.

[105] Very much in line with similar procedures in similar cases at the domestic level. For example, the Belgian Competition Authority (BMA) forced the *Fédération Equestre Internationale* ('FEI') to amend its rules relating to the approval of new competitions. The BMA ruled that the FEI's rules were insufficiently clear and that its sanctions were disproportionate, such that they imposed unlawful restrictions on competition (Brussels 3 May 2016, 2015/MR/1, *Fédération Equestre Internationale vs. de Belgische Mededingingsautoriteit*). A similar case, also in equestrian sport, was tried along similar lines in Italy (AGCM 8 October 2019, A378E, *Federitalia/Federazione Italiana Sport Equestri (FISE)*). In relation to bodybuilding, the Swedish Konkurrensverket ruled against the national SGB's loyalty rules on the grounds that they restricted competition (Marknadsdomstolen 20 December 2012, A 5/11, *Svenska Bilsportförbundet v Konkurrensverket*).

[106] 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'.

[107] See also Weatherill (2014, p. 480): 'EU law does not seem to go so far to demand the surrender of commercial activities by a sports regulator'.

[108] *ESL Opinion*, paras 133–136.

[109] See also Case C-680/21 *Opinion Szpunar* [2023] ECLI:EU:C:2023:188, para 61. For a rigorous analysis and call for a strict application of competition law, including a plea to the Court to go as far as to overthrow its case law based on *Meca-Medina*, see: Loozen (2019).

[110] Case C-680/21 *Opinion Szpunar* [2023] ECLI:EU:C:2023:188, para 58.

The newly developed UEFA rules on alternative competitions perhaps illustrate this point, demonstrating 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, on 10 June 2022, UEFA adopted a set of Authorisation Rules for alternative competitions,[111] which are now public and include procedural steps. These rules do not seem to pass the bar, however, as UEFA still has the power to refuse new competitions at will, and there is a real risk that it will continue to do so with regard to new competitions that threaten its monopoly. In any case, the *ex-ante* refusal of a new competition (e.g. the Super League) has already been 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 initiatives less appealing, from both a sporting and a commercial perspective, thus in effect writing it off. Furthermore, the new rules continue to show disregard for the application of the EU rule of law by imposing mandatory arbitration in Switzerland.[112]

4. A case for reform

Arguments concerning malfunctioning on the part of SGBs logically raise questions concerning how they could do better – and who should make their functioning better. In this section, I elaborate on this for the context of professional football.

4.1 Policy context

From the outset, the European Commission has underlined that the autonomy of sporting organisations is subject to compliance with laws and good governance principles, including stakeholder representation.[113] With regard to this benchmark, UEFA is underperforming. As mentioned previously, stakeholders (e.g. clubs, leagues and players) are largely excluded from the decision-making process, and they lack any real means with which to exert pressure. The supreme body of UEFA, the Congress, is composed of a majority of non-EU countries, including those considered undemocratic, as well as very small states (e.g. Andorra, Gibraltar, Liechtenstein), all of which have the same voting power as states with strong football traditions and/or competitions. The double-hatted structure of UEFA creates conflicts of interest between the association and its stakeholders. Another illustration of the minimisation of good governance is that the UEFA licensing criteria are not particularly well developed with regard to corporate governance.[114] Given the relative importance of corporate governance in many sectors, UEFA could logically be expected to devote greater attention to this matter in its licensing regulations.[115]

4.2 The rule of law and the role of politics

True change is unlikely to emerge from within. There is simply no incentive to do so, as change would mean relinquishing privilege and power. Furthermore, the courts can do only so much. Their ability to uphold the rule of law depends on the eventuality of a case making it to court. The outcome of a case depends on the facts and the legal questions presented. Structural solutions thus seem to require the enactment of statutory law, and thus the intervention of politicians. As sharply stated by Weiler et al.: '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

[111] 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 organised by UEFA; and/or

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

Cross-border club competitions that merge or replace existing national leagues and/or national cup competitions across two or more Member Associations fall outside the scope of these rules.

[112] For a seemingly similar sentiment, see also Breillat and Lagarde (2006, p. 735 and p. 737) and Kuper and Szymanski (2018, p. 115).

[113] Notably: European Commission, White Paper on Sport, 2007, COM/2007/0391 final.

[114] Van Veen (2023).

[115] *Ibidem*

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!'.[116]

Action should obviously be European,[117] allowing unified and effective rules for professional football throughout the EU, and even beyond, through the 'Brussels effect'.[118] It makes little sense to regulate professional football – which is not confined to national markets – along national lines. On the contrary, stand-alone domestic initiatives would only contribute to unlevelled regulatory playing fields, which are quite likely to be at odds with the requirements of the internal market, without solving anything material. Moreover, as Weatherill notes, the EU is in a good position because it 'does not possess its own sports team, so it has a resistance to sanctioning that no single state enjoys'.[119]

A legislative role for the EU is not inconceivable. As Weatherill asserts, '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'.[120] Legal grounds for legislative action are readily available. Depending on the case, Articles 53, 59, 62 and 114 TFEU could be of service.[121] All these TFEU connecting factors result in the adoption of EU legislation in accordance with the ordinary legislative procedure, thereby enhancing practical feasibility.[122]

What it really boils down to is political will.[123] Currently, this is absent. This was made abundantly clear in the massive support for UEFA at the Court hearing in *ESL*.[124] In addition to governance flaws and increased public expectations from professional football after subsidisation following the COVID-19 pandemic, however, alongside a World Cup in Qatar that was overshadowed by a myriad of human-rights violations, a condemnation of UEFA in *ESL* might just be the necessary tipping point for true reform, thereby providing a basis for progressive EU football stakeholders and EU politicians to design and implement a new architecture for professional football (at least in Europe). In the words of the Dutch football player Johan Cruyff: 'Often something needs to happen, for something to happen'.[125] Furthermore, more is still to come from the judicial front. At the time of writing, in addition to *ESL*, no fewer than three other cases are pending before the CJEU, with another well underway, all relating to professional football, and all claiming the illegality of the governance rules of football governing bodies in view of the EU rule of law.[126]

That said, what should the EU regulate?[127] First, EU legislators should introduce basic standards for clubs and agents to access the market of professional football: clear standards regarding good governance (most notably financial), transparency and compliance, all under supervision and with the

[116] Weiler et al. (2021).
[117] See also Weiler et al. (2021); Weatherill (2022, p. 17).
[118] This means that the European regulatory context is relevant beyond the EU and that, in practice, the EU's norms can become global norms: e.g. Weatherill (2023).
[119] Weatherill (2022, p. 17).
[120] With regard to the regulation of agents, although the reasoning is more widely relevant (Weatherill 2023).
[121] Weatherill (2023). For an extensive discussion, see also: Houben and Nuyts (2021); Weatherill (2022, pp. 17–19).
[122] See Articles 289 and 294 TFEU. Houben and Nuyts (2021, pp. 30–36); Weatherill (2023).
[123] Weatherill (2023); Weatherill (2022, pp. 19–22).
[124] A record number of Member States (more than 20) intervened, almost unanimously in support of UEFA. Furthermore, what Szymanski writes about the IOC and FIFA holds for UEFA as well: 'No one dares to offend institutions that have the power to deliver the world's most popular sporting events' (Szymanski 2009, p. 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 small-scale monopoly profits in order to retain the goodwill of these positive image generators. Legislators have consistently refused to condemn monopolistic league practices, and in one case have been willing to introduce legislation to overturn antitrust legislation' (Szymanski 2006, p. 732).
[125] Loose English translation of '*Vaak moet er iets gebeuren voordat er iets gebeurt*'.
[126] *Diarra* (Case C-650/22 on the legality of the transfer system) and *RAFC* (Case C-680/21 on nationality discrimination within the context of home-grown-player rules) are pending before the CJEU, in addition to a case on FIFA's new regulations for football agents (Case C-209/23). In *Swift Hesperange* (on league football being confined to national borders), the Luxembourg-Ville Tribunal d'arrondissement has been requested to pose preliminary questions to the CJEU (case number: TAL - 007716).
[127] In addition to governance measures, Weatherill suggests also putting into place a framework to protect and promote a European sports model. If that were to happen, it would mean the end of some existing competitions, as in the case of basketball. See Weatherill (2022, p. 20). Similarly: de Witte and Zglinski (2022, p. 312).

ultimate threat of sanctions. Second, the ability of new leagues to access the football market should be ensured through objective and transparent criteria. In this way, 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, with top-level football not being confined to only a few countries. Third, an independent regulator should supervise the sport. This regulator 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 roles, effectively under the oversight of EU law.[128] Aside from the hypothesis of full separation, another matter concerns the extent to which it would be either feasible or desirable for UEFA to act as regulator, given its long-term commitments as an operator in relation to contracting parties. The independent supervisor could also be an existing EU body, a new body created by the EU or any other trustworthy body that could be supervised under the rule of law, such that UEFA would become an operator only.[129]

4.3 The potential of collective bargaining for reform

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

In the US, collective action in sports is common.[130] Such action stands the test of US antitrust law, as it concerns labour-related issues, and labour law takes precedence over antitrust law. Labour law thus encourages the kind of collective action that antitrust law would otherwise ban.

Similarly, in the EU, and as acknowledged by the Court,[131] collective bargaining agreements that pursue social policy objectives are exempt from the prohibitions of EU competition law.[132] Collective action could therefore have a significant impact in Europe as well. It is still in its infancy, however, and only one agreement has been adopted (in 2012), covering minimum requirements in standard players' contracts.[133] Substantially, a vast range of matters fall within remit, including the status and transfer of players, contractual issues, the protection of minors, solidarity payments, the international match calendar, doping, image rights and pension funds.[134] Procedurally, social partners can enter into autonomous agreements, outside the formal structures of international football governance, to the detriment of the traditional hierarchical self-governance, thereby reshaping the football pyramid and weakening the role of the football authorities operating within it.[135] If collective bargaining were to be adopted by the relevant stakeholders,[136] it could lead to the Americanisation of the European model of football, with collective agreements becoming as prevalent as they are in the US. Moreover,

[128] In this opinion, AG Rantos elaborates a separation of functions as part of the analysis of SGB conflicts of interest caused by double hatting (see also Section 3.11 above and Section 5.4 below). The AG 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). Although the concern is valid, it seems that double hatting is not necessary to address it. Other structures cou8ld serve just as well to redistribute funds throughout the football pyramid. Examples could include a framework in which UEFA would regulate and supervise the redistribution of funds generated by competition organisers, or a framework in which such oversight would be entrusted to an independent body, whether existing or to be created.

[129] Within this context, Pijetlovic emphasises 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 (2023).

[130] Berry and Morris (2023).

[131] See Case C-67/96 *Albany* [1999] ECLI:EU:C:1999:430, paras 59 ff.

[132] Cattaneo and Parrish (2020) pp. 150–151.

[133] Parrish (2023).

[134] *Ibidem*

[135] *Ibidem*

[136] The recent agreement between the players' representative organisation (FIFPRO) and the 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 the situation in which collective bargaining may soon gain importance in professional football within and beyond the EU < https://www.worldleaguesforum.com/en/media/globallaboragreement> accessed 13 October 2022.

traditional SGBs might witness the erosion of their modern functions and a return to their traditional regulatory roles.[137]

From a legal perspective, the exclusive claim of football's governing bodies to regulate and enforce typical matters of labour law – including the premature termination of contracts (within the context of transfers) or holidays and rest (within the context of the match calendar) – is remarkable. Worker-related matters are typically the stronghold of the legislature,[138] which regulates these matters itself or leaves statutory room for representative organisations of employers and workers to regulate them through collective bargaining. Football's governing bodies are not legislative entities, nor are they representative organisations of employers or workers. Current practice therefore seems to resemble a globally tolerated 'illegality'. This nevertheless does not prevent it from making perfect sense for a football governing body to develop rules that can be applied in a uniform manner across the globe. This is because, in a global market such as football, labour-related issues are highly transnational, and the transnational level is therefore well-equipped to address these issues. In legal terms, however, if a legislature or – within the boundaries of the law – social partners wish to deviate from these rules, they should be able to do so, and football's governing bodies apparently cannot legally prevent this. As such, the labour-related rules of football's governing bodies serve – and should continue to serve – the role of international benchmarks *as default rules*, subordinated to statutory law or collective agreements deviating from them. Taken together, this means that there is vast unexplored space for reform in professional sports in general, and football in particular, especially through the European social dialogue, as guaranteed by Articles 152–155 TFEU. The European or, even better, the global level is best suited to making such agreements, as domestic approaches would actually partition the market to such an extent that the baby would be thrown out with the bathwater. If football employers' representative organisations (e.g. Europe ECA and/or the UEC, or even the ESL)[139] could join forces with a workers' representative organisation (e.g. the global organisation FIFPRO), they could enforce their agreements in relation to FIFA and UEFA, and/or inspire them to do better themselves. As such, they could contribute to reform from within the eco-system, thereby disrupting the traditional top-down model (which is still very much present) and enforcing more stakeholder inclusion themselves. The transfer system would probably look different from its current form, and tournaments such the UEFA Nations League and, potentially, a FIFA World Cup for Clubs would probably never see the light of day.

5. Professional football versus other sports

The analysis above focuses on professional football in Europe. It argues that problematic conflicts of interest are embedded within the governance of UEFA, that this governance is at odds with the EU rule of law and that it is in need of reform. This leads to questions about the situation with other sports. Are the legal analyses and potential solutions the same? Intuitively, the answer is no: 'curling is not football'.[140] In this section, I try to explain why it may be justifiable to treat different sports differently, even when circumstances are relatively similar. In most sports, the SGB wears 'double hats' and monopolises competitions. The reasoning is rooted in economic theory concerning monopolies.

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[137] Parrish (2023).

[138] See also the Court's *obiter dictum* in *PIAU* on rule-making by the football governing body 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.

[139] See above '*On purpose*'.

[140] To paraphrase an intervention at the ISLJ 2022 annual conference.

5.1 Economic considerations on monopolies

A monopoly exists when there is only one supplier for a certain good or service.[141] Monopolies are considered harmful to consumers, as monopolists can set prices and quantities of goods and/or services as they see fit, without yielding the maximum surplus for consumers and producers.[142] Such monopolies can result in '*naked exclusion*': 'conduct unabashedly meant to exclude rivals, for which no one offers any efficiency justification'.[143] In themselves, however, monopolies are not a bad thing. This is the case for 'natural monopolies', which exist 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 number 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. For this reason, natural monopolies are perceived to result in social benefits and to improve social welfare.[144]

These basic economic considerations are of legal relevance. Whereas 'ordinary' monopolies are regarded with suspicion from the perspective of antitrust law, natural monopolies are considered compatible. According to Laudati, 'once a market is termed a natural monopoly, lawful acquisition of monopoly power is virtually assumed'.[145] 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'.[146] 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 – that is, that they are inefficient. Rules designed to promote consumer appeal or to achieve efficiencies are lawful'.[147]

5.2 The concept of minimum efficient scale

The considerations outlined above clearly demonstrate the legal-reasoning importance of minimum efficient scale relative to aggregate market size. A monopolist's actions are normally considered lawful when the minimum efficient scale more or less equals or exceeds the aggregate size of the market. In contrast, exclusionary actions must be sanctioned with the full rigour of the law when a monopolist attempts to shield the market when the minimum efficient scale is substantially lower than the aggregate market size.[148] In the latter context, the monopolist uses exclusionary agreements to prevent competitors from achieving a minimum efficient scale, even though there is ample room for competitors on the market.

As such, legal reasoning must rely upon economic analyses. In a similar vein, Laudati invites courts to use the work of economists to identify and allow the realisation of scale, in order to assess what does and does not constitute beneficial economic behaviour.[149]

In this respect, it is interesting to note that the General Court recently seems to have adopted the concept of minimum efficient scale as a relevant factor for assessing whether an exclusionary practice is abusive (i.e. whether it has the potential to foreclose a competitor). This became apparent in the

[141] On these principles, see e.g. De Borger et al. (2015, pp. 226–235 and pp. 261–267).
[142] On the disadvantages of monopolies within the context of (US) sports, see e.g. Ross (2003), Ross (1989), Farzin (2015, p. 75).
[143] Rasmussen et al. (1991, p. 1137).
[144] In the US: Laudati (1981, p. 801).
[145] Laudati (1981, p. 787).
[146] Laudati (1981, p. 788).
[147] Ross and Szymanski (2006, p. 244, fn. 105).
[148] For a more general plea for an ambitious enforcement of competition law to monopolistic behaviour in sports, see: Ross (2003, pp. 569–584).
[149] Laudati (1981, p. 801).

Google Android case,[150] in which the Commission established that Google had committed a number of abuses. One example required mobile-phone manufacturers wishing to use the Android operating system to commit to not installing any general search apps other than Google Search (this commitment was contained in '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 is almost automatically the case. If they cover a more limited part of the market, it is not necessarily the case. The underlying intuition is that, if agreements cover only 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.[151]

5.3 Relevance for SGBs: Different solutions for different sports

These considerations can also be relevant for SGBs, which often monopolise the organisation of sporting competitions, at least in Europe.[152] They are relevant because they seem to allow a different assessment of behaviour on the part of a monopolist SGB, depending on the minimum efficient scale relative to the aggregate market of the sport concerned, even if the actual behaviour is similar.[153] More concretely, if the minimum efficient scale of an SGB operating a sport equals or exceeds the market size for that sport, that SGB tends to be a natural monopolist, the behaviour of which (including exclusionary behaviour) is likely to support market efficiency, and the existence or absence of exclusive agreements would have little effect on competition. At least in theory, such a situation actually leaves room for only one organiser of competitions: the SGB.[154] Intuitively, this is likely to apply to sports that are not too mediatised and monetised and those that have fewer high-quality athletes or players (e.g. curling). On the other hand, if the minimum efficient scale is (substantially) 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, as they 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, which can also achieve minimum efficient scale.[155] In that case, denying new competitions access to the market is likely to be inefficient, and it should therefore fall within reach of sanctions under antitrust laws.[156] As the world's largest, most mediatised and most monetised sport, with multiple high-quality players and clubs, professional football is probably the prime example of a sport that falls into the latter category.[157]

[150] 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).

[151] Note that, in a number of cases, the court has clarified that there is no precise threshold below which exclusionary agreements are not abusive. Any agreement that has an exclusionary effect on a significant part of the market will be viewed as problematic. See e.g. 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.

[152] Farzin (2015, p. 79); Kuper and Szymanski (2018, p. 115) (on FIFA); Bolotny and Bourg (2006, p. 125). As explicitly stated by AG Rantos, FIFA and UEFA have a monopoly with regard to the authorisation and organisation of international professional football competitions in Europe: *ESL Opinion*, paras 10 and 13.

[153] Such reasoning seems to underly Ross' analysis of monopoly sports leagues as well, although that analysis focuses on sports that are definitely not natural monopolies: Ross (1989). A reference to the concept of 'minimum viable scale' can also be found in Ross (2003).

[154] The assumption is obviously that 'normal' market conditions apply. The framework is thus theoretical to some extent, especially in view of the Arabic peninsula's focus on sports and unlimited resources to back up that focus.

[155] For considerations on rival leagues targeting top-ranking clubs in big cities and the viability of such initiatives, see: Ross and Szymanski (2006, p. 245, footnote 105). Some sports are living proof that multiple competitions, organised by a variety of organisers, can co-exist. Examples include basketball, cycling and tennis.

[156] As more generally noted by Salop: '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': Salop (2021).

[157] In fact, FIFA's initiative to create a World Cup tournament for club teams, a new competition, in 2025 clearly illustrates this point (e.g. <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, in addition to other competitions. This is yet another

5.4 Tying in with the concerns of AG Rantos

In summary, it could be desirable for a natural monopoly to exist in some sports, whereas it would be undesirable in other sports, as it would prevent competition in a market where there is space for competition. Assessing which sports fit into which category calls for in-depth analysis on a case-by-case basis.

This ties in with the opinion of AG Rantos that an SGB's right of prior approval for new competitions does not constitute a restriction of competition *by object*,[158] but that it should be assessed, in light of all the facts, if it has *the effect* of restricting competition. In such an analysis, the concept of minimum efficient scale could be instrumental in focusing the application of competition law to real-life market inefficiencies in sports.

Such an approach would also meet AG Rantos' concern regarding a possible separation of functions for SGBs. In the *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 from organising competitions. It simply means that they cannot shield off the market from competitions if there is also room for other competitions organised by other parties. That said, in an ideal world, a better solution for the governance of professional football would apparently be to separate regulatory power from organisational power, as this would be the cleanest and safest way to arrive at a structural solution to conflicts of interest that taint current governance. In such a scenario, the SGB might even cease to be an undertaking in the sense of EU competition law and, even if it were to remain an undertaking, the risk of abuse would be minimised.[159]

An analysis based on minimum efficient scale could also help to refine views on dual membership. The stance taken by AG Rantos 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'.[160] If there is room for competition on the market of professional club football, however, such that multiple organisers could achieve a minimum efficient scale, dual membership is less of an issue. This is because, in such a scenario, the SGBs could still trade efficiently. Moreover, the entrance of new competitors could create market efficiencies, as also argued by Stephen Ross within the context of major US sports.[161] This could be an important observation within the context of the ESL, as that organisation is designed to keep playing domestic club football within the traditional football eco-system, whilst also playing European football in competitions other than the existing UEFA competitions.

Is there in fact a scenario of dual membership in which a club could be a 'member' of the competitions of both the UEFA and the ESL? In the abstract, and from the perspective of European competitions,

example of the desire of a football SGB to generate additional revenue without considering the interests of clubs and their players, who also need rest from time to time. For an analysis based in the US concerning why neither baseball nor American football is a 'natural monopoly' and the absence of persuasive evidence to suggest that rival leagues cannot exist in those sports, see Ross (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 also characteristic of professional football, as its market size is arguably at least comparable with that of baseball and American football.

[158] *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. Compare: Monti (2023, pp. 22–28).

[159] Weatherill (2014, p. 480). Also: Weatherill (2022, p. 22). A separation scenario would naturally invoke novel questions (e.g. how the regulator would be financed and how competitions would be taxed). The answers to these questions are not very difficult to conceive, however, as developed by for instance Monti (2023, p. 29).

[160] *ESL Opinion*, para 143.

[161] Ross (1989).

such a scenario could not exist. A club must be a participant in either UEFA competitions or ESL competitions. From the perspective of domestic competitions, however, such a scenario could exist. More specifically, ESL clubs may wish to continue to play in their domestic competitions, and their respective leagues will eventually wish for them to do so as well (for example, try to imagine La Liga without Real Madrid and FC Barcelona). In such a scenario, because of – and to the extent of – their participation in the domestic league, ESL clubs could be seen as 'members' of the UEFA scheme as well, operating under UEFA supervisory auspices. As a counter-argument, however, UEFA has little to say regarding participation in domestic competitions – this is mostly a domestic matter. It is not until a club qualifies for participation in a UEFA competition that UEFA comes into play – and this is what ESL clubs will no longer do (or want to do).[162] In any case, the disentanglement of UEFA's double hatting would solve any potential issues relating to dual membership. If UEFA were to be a regulator only, instead of being an organiser of competitions as well, all clubs would all fall under UEFA oversight, whilst being member of different organisers, including the ESL.

To the extent that participating in the ESL would result in dual membership, an analysis based on minimum efficient scale might indicate that this situation would not necessarily be problematic, as the pie would probably be large enough for both UEFA and the ESL. Moreover, claims of an inseparable link between participation in domestic competitions and UEFA competitions seem to be accepted as a given too easily, whereas the discussion actually includes more grey area, and it is possible for conceptually different models to exist alongside each other. Nevertheless, if football's SGBs were to oppose dual membership, assuming minimum efficient scale relative to the size of the market, at the very least, transitional measures should be developed to facilitate the transition from the traditional football eco-system to a new eco-system, without the necessity of rewarding transition.[163]

6. Conclusion

In this article, I elaborate on the purpose and roles of SGBs. The main finding is that sports governance is currently not optimal. Despite increasing calls for stakeholder inclusion, the decision-making processes of SGBs allow for stakeholders to be involved only instrumentally, and not normatively. Furthermore, the combination of a regulatory role and a role as organiser of competitions results in inherent conflicts of interests for SGBs. Depending on the minimum efficient scale for organising competitions in a given sports market, competition law should take this matter seriously, particularly within the context of SGBs' right of prior approval for new competitions. Overall, professional sports governance is in need of reform, and – at least in professional football – a separation of roles could be part of the solution leading towards better governance.

In this process towards reform, there is only so much that the courts can do. Structural solutions for professional football lie in the hands of Europe-based clubs (i.e. their enterprises that produce professional football), of EU politicians and their political will to act, and of supporting players and fans alike. Although politicians should not feel dependent on the Court, the judgement in *ESL* could be a catalyst for action – especially because the case is not an isolated one. At more or less the same time, the CJEU will have to rule on three other cases initiated by football stakeholders, each with its own specificities, but with the common denominator that the plaintiffs are dissatisfied with the current

[162] In addition, even its historical control over European football could be regarded as somewhat accidental, as UEFA and FIFA initially opposed the '*Coupe d'Europe*' as it had been set up by clubs. It was only after realising the potential (and threats) of European club competitions that they assumed the role of organiser for such competitions. See e.g. 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.

[163] These thoughts seem to be in keeping with existing case law on dual membership, as 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 based on considerations of market efficiency. In *ESL*, such considerations could potentially lead to the opposite result – the possibility of dual membership, as market efficiency could perhaps benefit from dual membership in this case. Additionally, in *Gøttrup-Klim* the Court emphasised that a prohibition against dual membership, which is 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', thus stressing proportionality (Case C-250/92 [1994] ECLI:EU:C:1994:413, paras 33 ff). In addition, note Monti's comment on why the cases might be different, with reference to UEFA as an organisation with considerable market power on its own, as opposed to the individual farmers in *Gøttrup-Klim* (Monti 2023, p. 22).

governance structure of professional football and consider at least some aspects of it illegal. Ideally, the judgement in *ESL* would provide 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 to articulation with domestic leagues and receptive to clubs with sound projects, regardless of the size of the Member States in which they are located. Such a league structure, aligned with the European model of sport, would arguably eliminate many of the objections to the initially semi-closed set-up of the Super League advanced in the AG's opinion of 15 December 2022.[164] Innovators should thus not be wary of redesigning the structure of the Super League and relaunching it, even if the Court should eventually rule against the Super League in the pending case.[165] In this regard, it is important to recall that 'how things have always been done is not how things should always be done. The beautiful game is wilful in its ignorance. The beautiful game is a game ripe for change'.[166]

[164] See also Bank (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'.

[165] 'Innovative systems of organizing sporting competition and effective government regulation to prevent monopolistic abuses should know no boundaries': Ross (2003, p. 583). Although this quotation dates back long before the Super League, and although it relates to monopolistic behaviour more in general, it nevertheless fits neatly within the current discussion.

[166] Anderson and Sally (2014, p. 1). This book relates to the use of numbers and data in football, but a similar conclusion is valid from a legal perspective.

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