INSIGHT

European Super League Company and the (New) Law of European Football

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Abstract: In *European Super League Company* (*ESLC*), the Court of Justice was faced with a challenge against the legality of FIFA and UEFA's prior approval scheme for the creation of, and participation in, breakaway football competitions. The Court's judgment is lengthy and nuanced, and touches on many of the issues which have characterised the ever-growing interaction between EU law and sport. The Court of Justice holds that the lack of a clear, transparent framework for the prior approval of breakaway constitutes a violation of arts 56, 101 and 102 TFEU, but provides indications about how such practices could be justified. Other aspects of the FIFA-UEFA regulatory ecosystem – for example, the framework for the joint sale of broadcasting rights – are found to be justifiable under EU law. The judgment also provides clarifications about how sport-related considerations can feed into the analysis of the TFEU's competition and free movement provisions.

Keywords: EU law – European Super League – sport law – competition law – free movement law – European Sport Model.

I. Introduction

From the Christmas-themed Kirchberg *plateau*, the Court of Justice of the European Union (CJEU) shook the foundations of European football. On 21 December 2023, its Grand Chamber handed down *European Super League Company* (*ESLC*)[1], the latest ruling on the increasingly complex interaction between EU law and sport. The Court's judgment, one of the most widely anticipated in recent years, adds a further piece to the ever-growing saga of EU sport law. Despite the dispute's high stakes, the ruling presents a nuanced picture; one which shows the extent to which the Court's approach to sport has evolved since the early days of European integration, but which shies away from more radical approaches, such as that embraced by Advocate General (AG) Rantos.[2]

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I am grateful to Fundación Ramón Areces for generously funding my doctoral research.

[1] Case C-333/21 *European Super League Company* ECLI:EU:C:2023:1011 (hereinafter *ESLC*).

[2] Case C-333/21 *ESCL* ECLI:EU:C:2022:993, Opinion of AG Rantos.

www.europeanpapers.eu

ISSN 2499-8249
doi: 10.15166/2499-8249/738

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The present *Insight* will proceed as follows. It will begin by briefly setting out the background to the case (section II), after which it will address the Advocate General's Opinion (section III). Section IV will focus on four key aspects of the judgment: the analysis under art. 102 TFEU, that under art. 101 TFEU, the question of broadcasting rights, and the free movement analysis under art. 56 TFEU. Section V will take a step back, exploring the constitutional role of art. 165 TFEU, whether the FIFA-UEFA rules could be justified in practice, and how the so-called "European Sport Model" can apply to the analysis of competition restrictions. Section VI will conclude.

II. Background to the case

The facts of the Superleague dispute are well known. On April 18th, 2021, the European Superleague Company (ESLC), a company incorporated under Spanish law and originally comprising twelve elite football clubs, announced the creation of the European Superleague (ESL), a European football competition which was to exist independently of the regulatory ecosystem set up by the Fédération Internationale de Football Association (FIFA) and the Union of European Football Associations (UEFA), the governing bodies of global and European football. In its original format, the ESL was to be comprised of 20 clubs, of which 15 would be permanent members, with the remaining teams having to qualify on an annual basis. Clubs would play each other, first in a group stage and subsequently in a knock-out format. However, there would be no relegations at the end of each season.

Shortly after this announcement, a statement was released by UEFA and several national football associations, which refused to recognise the ESL and warned of disciplinary measures against clubs and players participating in said tournament: the former could be banned from UEFA-organised competitions; the latter, from representing their national teams.[3] Following UEFA's statement, the ESLC brought proceedings before the Commercial Court in Madrid, arguing that it amounted to a violation of arts 101 and 102 TFEU. The Commercial Court accepted the ESLC's action, issued protective measures to prevent UEFA and FIFA from imposing disciplinary sanctions while the case was being heard, and issued a request for a preliminary ruling from the Court of Justice. The six questions referred to the Court concern, in essence, whether the prior approval system for new competitions and the sanctioning mechanism contained in their respective Statutes are compatible with both competition law (arts 101 and 102 TFEU) and the free movement provisions (arts 45, 49, 56 and/or 63 TFEU).

[3] Union of the European Football Association (UEFA), *Statement by UEFA, the English Football Association, the Premier League, the Spanish Football Federation (RFEF), LaLiga, The Italian Federation (FIGC) and Lega Serie A* www.uefa.com.

III. The Advocate General's Opinion

In his Opinion, AG Rantos largely sided with UEFA and FIFA.[4] In essence, the Advocate General found that their practice of restricting the creation of breakaway football competitions did not, in itself, breach EU competition law. Although such practices could constitute an anticompetitive practice or an abuse of a dominant position under arts 101 and 102 TFEU respectively, they could be justified and deemed proportionate, as required by Union law.[5]

The Opinion began by addressing the relationship between EU law and sport. According to AG Rantos, sport had undergone a gradual process of constitutionalization over the past decades, a process which was encouraged by judgments such as *Bosman*[6] and which culminated with the incorporation of art. 165 TFEU into primary law through the Lisbon Treaty. In his view, art. 165 TFEU affords "constitutional recognition" to the "European Sport Model" (ESM), a framework "which is characterised by a series of elements applicable to a number of sporting disciplines on the European continent, including football".[7] Three such elements were identified in his Opinion: first, "a pyramid structure with, at its base, amateur sport and, at its summit, professional sport"; second, a system of open competitions based on sporting merit; third, a regime of financial solidary, which allows profits to be redistributed to lower levels of the pyramid.[8] Rather than analysing disputes involving a sporting context "in the abstract", it was in light of these special characteristics, and of the "horizontal" nature of art. 165 TFEU, that they ought to be assessed.[9]

Building on the above, the Advocate General turned to the questions referred to the Court of Justice. In relation to the alleged violations of art. 101 TFEU, AG Rantos equated UEFA's pre-approval and sanctioning rules to a system of "non-competition and exclusivity clauses accompanied by sanctions" which he classed as being restrictive of competition "by effect".[10] He then proceeded to apply to the facts the "ancillary restraints" doctrine, first developed in *Wouters and Others*[11] and subsequently applied to sport in *Meca-Medina*[12]. The non-recognition of the ESL, he argued, could be justified by reference to certain legitimate objectives, namely: "to maintain the principles of participation based on sporting results, equal opportunities and solidarity upon which the pyramid structure

[4] G Íñiguez, 'Constitutionalising European Football: AG Rantos' Opinion in *European Superleague Company* (C-333/21)' (16 December 2022) EU Law Live eulawlive.com/.

[5] J Zglinski, 'Constitutionalising the European Sports Model: The opinion of Advocate General Rantos in the European Super League Case' (16 December 2022) EUROPP blogs.lse.ac.uk.

[6] Case C-415/93 *Bosman* ECLI:EU:C:1995:463.

[7] *ESLC*, Opinion of AG Rantos, cit. para. 30.

[8] ibid. On the 'European Sport Model', see F de Witte and J Zglinski, 'The Idea of Europe in Football' (2022) 1 European Law Open 286.

[9] *ESLC*, Opinion of AG Rantos, cit. paras 34-41.

[10] *Ibid*. paras 64-78.

[11] Case C-309/99 *Wouters and Others* ECLI:EU:C:2002:98.

[12] Case C-519/04 P *Meca-Medina and Majcen v Commission* ECLI:EU:C:2006:492.

of European football is founded".[13] It also prevented the ESLC's founding clubs from free-riding on "the rights and advantages linked to membership and UEFA, without however being bound by UEFA's rules and obligations".[14] In relation to sanctions, however, the Advocate General drew a distinction at the proportionality stage: sanctions could only be deemed proportionate when directed against clubs; conversely, those aimed at footballers playing for such clubs could be disproportionate, since players "were not parties to the decision to set up the ESL" and therefore "do not appear to have engaged in any misconduct vis-à-vis the UEFA rules".[15]

A similar analysis was applied to art. 102 TFEU. After finding that UEFA holds "a dominant position (if not a monopoly)" on the relevant market, the Advocate General "transposed" the analysis developed in relation to art. 101 TFEU.[16] He concluded that no abuse of dominance arose on the facts, because the FIFA-UEFA rules constituted a proportionate means for a legitimate objective and could therefore be justified under the Court's case law.[17] Nor did FIFA and UEFA breach the fundamental freedoms: more specifically, arts 45, 49 and 63 TFEU. In his view, their prior approval mechanism was "appropriate and necessary [...] taking into account the particular characteristics of the planned competition".[18]

IV. The Judgment

The Court's judgment is lengthy and nuanced. Its main findings will set out in this section, which will focus on three aspects: the analysis under art. 102 TFEU (section IV.1.); the assessment under art. 101 TFEU (section IV.2.); and the issue of broadcasting rights under art. 56 TFEU (section IV.3.). This will pave the way for a subsequent (and more detailed) discussion of certain key issues raised by the ruling.

IV.1. The analysis under art. 102 TFEU

In relation to art. 102 TFEU, the referring court queried whether this provision precludes the adoption of rules on the prior approval of breakaway competitions, on participation in those competitions, and on sanctions for players participating therein where no framework exists which provides substantive criteria and detailed procedural rules to ensure that these are transparent, objective, non-discriminatory and proportionate.[19]

The Court of Justice begins by finding that both UEFA and FIFA are "undertakings" which "hold a dominant position, or even a monopoly", in the relevant market: namely,

[13] *ESLC*, Opinion of AG Rantos cit. para. 110.
[14] *Ibid.* para. 107.
[15] *Ibid.* paras 118-122.
[16] *Ibid.* paras 129-131.
[17] *Ibid.* para. 144.
[18] *Ibid.* paras 170-186.
[19] *ESLC* cit. para. 122.

that for the "organisation and marketing of international football competitions and the exploitation of the various rights related to those competitions".[20] Moreover, UEFA's public announcements[21] can constitute both an anticompetitive practice (under art. 101 TFEU) and an abuse of a dominant position (under art. 102 TFEU).[22] After reiterating that art. 102 TFEU does not preclude dominance *per se*, "but only the abusive exploitation thereof',[23] and that this assessment cannot be carried out in the abstract, but must instead take into account "all the relevant factual circumstances",[24] the judgment turns to the specific dispute before it.

In principle, the Treaties do not preclude, in themselves, rules by sport governing bodies (SGBs) regarding the prior approval of, and participation in, breakaway competitions.[25] This follows from the "'considerable social and cultural importance" of football in the EU and from the former's "specific characteristics", including the importance of sporting merit in such competitions.[26] Therefore, and in light of the "specific context of professional football", neither rules on prior approval on the creation of such breakaways competitions, nor those on clubs' participation therein, nor those sanctions introduced to enforce these rules, can be classed as abusive of competition "by object".[27]

However, in what is perhaps the most important passage of the ruling, the Court adds that this does not grant SGBs unfettered discretion. Instead, any such framework will have to contain both procedural and substantive safeguards to mitigate the risk that they will be applied in an arbitrary manner. In the Court's own words, art. 102 TFEU will be infringed "where there is no framework for substantive criteria and detailed procedural rules for ensuring that [the rules] are transparent, objective, precise and non-discriminatory".[28] The same reasoning applies to any sanctions introduced to enforce these rules.[29]

Although the judgment leaves it to the referring court to analyse whether the FIFA-UEFA rules comply with the above, it does provide some requirements which they will have to abide by. First, any such rules must be set down in writing "in an accessible form". Second, the decision-making entities (on the facts, UEFA and FIFA) may not subject breakaway competitions (the ESL) to conditions which are harsher than those that apply to their own competitions (such as the UEFA Champions League). Third, such conditions must not be "impossible or excessively difficult to fulfil in practice". Finally, sanctions must

[20] *Ibid.* para. 139.
[21] See section II of this *Insight*.
[22] *ESLC* cit. para. 180.
[23] *Ibid.* para. 129.
[24] *Ibid.* para. 130.
[25] *Ibid.* para. 141.
[26] *Ibid.* para. 144.
[27] *Ibid.* para. 144-146.
[28] *Ibid.* para. 147.
[29] *Ibid.* para. 148.

be proportionate and must be handed down on a case-by-case basis.[30] Where these conditions are not complied with, the legal framework in question may violate art. 102 TFEU.

IV.2. The analysis under art. 101 TFEU

A similar analysis is applied to art. 101 TFEU, which prohibits agreements between undertakings to prevent, restrict or distort competition in the internal market. As set out above, the Court finds that the FIFA-UEFA rules in question constitute a "decision" for the purposes of art. 101 TFEU.[31] This is followed by a lengthy analysis of the relevant rules, which are found to be restrictive "by object".[32] This is the case because, notwithstanding the sport-specific elements which might justify such a framework, these contextual elements do not suffice to "legitimis[e] the absence of substantive criteria and detailed procedural rules" governing how UEFA and FIFA apply this framework. The absence of clear, transparent rules renders the rules vulnerable to abuse by FIFA and UEFA, which become the gatekeepers to the very market in which they compete. In other words: "[…] those rules confer on those entities the power to authorise, control and set the conditions of access to the market concerned for any potentially competing undertaking, and to determine both the degree of competition that may exist on that market and the conditions in which that potential competition may be exercised".[33]

The lack of a clear framework, the Court adds, could potentially allow FIFA and UEFA to ban, without providing adequate reasons, a breakaway competition which offered an innovative format *and* which complied with the "principles, values and rules" underlying European football.[34]

Since the rules in question have been found to be restrictive by object, they can only be justified if they fall under the exemption in art. 101(3) TFEU. However, the Court queries whether they can satisfy the fourth condition: namely, that the agreement, decision or practice does not allow the undertakings in question "to eliminate all effective competition for a substantial part of the products or services concerned",[35] a condition which be assessed by reference to the specific characteristics of the relevant economic sector.[36] On the facts, the absence of a clear and transparent framework "is liable to enable [FIFA and UEFA] to prevent any and all competition on the market for the organisation and marketing of interclub football competitions on European Union territory".[37] Unless all conditions set out in the Court's case law are satisfied, they will therefore will not be able to benefit from art. 101(3) TFEU.

[30] *Ibid.* para. 151.
[31] *Ibid.* para. 118.
[32] *Ibid.* para. 179.
[33] *Ibid.* para. 176.
[34] *Ibid.*
[35] *Ibid.* para. 191.
[36] *Ibid.* para. 200.
[37] *Ibid.* para. 199.

A further striking difference between the Court's judgment and the AG's Opinion relates to the so-called "ancillary restraints doctrine", a notion which, as set out above, was central to the Advocate General's reasoning.[38] The Court of Justice took a different view: in relation to art. 102 TFEU, it concluded that this notion cannot be invoked where the conduct in question "by its very nature infringes art. 102 TFEU"; in relation to art. 101 TFEU, it cannot apply to "conduct which [...] has as its very 'object' the prevention, restriction or distortion of competition".[39] As Zglinski has rightly suggested, the Court's approach to the ancillary restraints doctrine constitutes a "significant jurisprudential shift": one which, although not overruling *Meca-Medina*, radically narrows its scope, requiring SGBs to justify their practices either by reference to art. 101(3) TFEU or to the objective justifications developed under art. 102 TFEU.[40]

IV.3. Freedom to provide services

By its sixth question, the referring court asks whether the UEFA-FIFA rules are precluded by the freedoms of movement: more specifically, by arts 45, 49, 56 and 63 TFEU.[41] In addressing this question, the Court engages in its traditional analysis under the free movement provisions. It first begins by identifying the relevant freedom, namely that to provide services (art. 56 TFEU). Given that the rules in question are deemed to "constitute an obstacle to the freedom to provide services",[42] the Court turns to their possible justification and to their proportionality. On the former, it holds that the adoption of such rules may be justified, in principle, by two public interest objectives: first, that any new football competitions will observe "the principles, values and rules of the game underpinning professional football"; second, that any such competition will "integrate into the "organised system" of national, European and international competitions".[43] However, these public interest objectives cannot justify a regulatory framework unless the latter is "based on objective, non-discriminatory, criteria which are known in advance", in a way that limits the exercise of the SGB's discretion.[44] Since this is not the case on the facts, the rules at issue "do not appear to be capable of being justified" in accordance with art. 56 TFEU.[45]

V. Analysis

The previous section has set out the Court's main findings in relation to the competition law provisions (arts 101 and 102 TFEU) and to the freedom to provide services (art. 56 TFEU).

[38] Section III of the present *Insight*.
[39] *ESLC* cit. paras 185-186.
[40] J Zglinski, 'Can competition law save sports governance?' (2024) International Sports Law Journal 1, 3.
[41] *Ibid.* para. 242.
[42] *Ibid.* para. 250.
[43] *Ibid.* para. 253.
[44] *Ibid.* para. 254.
[45] *Ibid.* paras 256-257.

The *Insight* will take a step back by focusing on two further issues which the judgment raises: the constitutional role of the European Sport Model (ESM) and the possible justifications for the FIFA-UEFA conduct. It will conclude by addressing the joint sale of broadcasting rights, which provides an example of how the ESM can feed into the Court's analysis.

V.1. What role for the "European Sport Model"?

Perhaps the key question underlying *European Super League Company* is what role – if any – the ESM can play in the interpretation of the Treaty's economic provisions. Section II of this *Insight* has set out the approach adopted by AG Rantos, according to whom art. 165 TFEU enjoys a "horizontal" status in Union law. This stands with the assessment embraced by Advocate General Szpunar in Royal Antwerp,[46] which can be labelled the "orthodox" approach to EU sport law. In essence, the latter holds that "while the peculiarities of sport can feed into its internal market analysis, providing both objective justifications and proportionality-related considerations [...] the lex sportiva is not immune from the TFEU's fundamental freedoms", nor can it be afforded a special status under Union law.[47]

In *ESLC*, the Court firmly rejects the interpretation advanced by AG Rantos.[48] art. 165 TFEU, it argues, "confer[s] a supporting competence on the Union", allowing it to pursue not overarching policies, but a number of "actions" in the area of sport.[49] Although sport-related considerations can feed into the Court's analysis of a given case, art. 165 TFEU "is not a cross-cutting provision having general application":[50] in other words, it does not grant sport a special constitutional role. Thus, although the Union institutions "must take account of the different elements and objectives listed in art. 165 TFEU", such elements and objectives "need not be integrated or taken into account in a binding manner in the application of the rules".[51]

Two arguments can be advanced to support the Court's approach: an internal, Treaty-based one; and an external, policy-related one. From an internal point of view, there is nothing either in the *travaux prépáratoires* or in the Treaty itself to indicate that sport should be afforded any special status within Union law. Indeed, in reaching this conclusion, the Court embraces a textual, almost originalist perspective. Reference is made to the provision's "insertion in Part Three of the [TFEU]", which stands in contrast with those

[46] S Weatherill, 'Is Sport "Special"?' (24 January 2024) EU Law Live eulawlive.com.

[47] G Íñiguez, 'Wherein lies "home" for "home-grown" players? AG Szpunar's Opinion in *Royal Antwerp Football Club* (C-680/21)' (20 April 2023) EU Law Live eulawlive.com

[48] *ESLC* cit. paras 95-107. See B García, 'Down with the politics, up with the law! Reinforcing EU law's supervision of sport autonomy in Europe' (2024) International Sports Law Journal 1, 2.

[49] *Ibid.* para. 99. The same reasoning was embraced in case C-680/21 *Royal Antwerp* ECLI:EU:C:2023:1010, para. 67.

[50] *ESLC* cit. para. 100.

[51] *Ibid.* para. 101.

provisions of general application contained in Part One.[52] Similarly, the judgement refers to “the drafters of the Treaty”, who did not intend to go beyond this. Although García and Weatherill’s analysis has shown that “engaging with the EU in order to soften its intrusive effect was the principal strategy deployed directly and indirectly by sports organizations in the process of negotiation that led from the Convention on the Future of Europe to the Treaty of Lisbon”,[53] their success was mixed. The inclusion of art. 165 TFEU *did* afford sport a special status of sorts, but SGBs did not achieve their ultimate objective, namely the complete exclusion of sport from the scope of Union law.[54]

On top of the above, however, there is a second, *external* argument which supports the Court’s findings: namely, the absence of a single, uniform “European model” of sport. In understanding the ESM, De Witte and Zglinski have argued that “a difference must be drawn between the model’s cultural and governance aspects”.[55] In relation to the former, there is undoubtedly a “European” conception of sport, one rooted in “the local” and in which sporting merit, solidarity and indeed “Europe” all play a central role.[56] This can contrasted with the “North American” model: one comprised of franchises, which lacks Europe’s pyramid structure, and which is premised on closed systems of competition with no promotions or relegations.[57] In relation to the second, governance dimension identified by the authors, however, it can be queried whether there exists single governance model for European sport: after all, not all widely-practiced sports feature the key characteristics identified by AG Rantos, with cycling, basketball,[58] or indeed ice-skating[59] providing examples of alternative models. Nor is it clear that the practice of football governance itself,[60] or indeed the structure of the current Champions League,[61] live up to the ESM’s (affective) expectations.

[52] *Ibid.* para. 68.

[53] B García and S Weatherill, ‘Engaging with the EU in order to minimize its impact: sport and the negotiation of the Treaty of Lisbon’ (2012) Journal of European Public Policy 238, 239.

[54] *Ibid.*

[55] F de Witte and J Zglinski, ‘The Idea of Europe in Football’ cit. 287.

[56] *Ibid.* 290–298.

[57] See JAR Nafziger, ‘A comparison of the European and North American models of sports organisation’ (2008) International Sports Law Journal 100.

[58] On the recent dispute in European basketball, see M Montejo, ‘FIBA/Euroleague: Basketball’s EU Competition Law Champions League – first leg in the Landgericht München’ (15 June 2016) Asser International Sports Law Blog www.asser.nl.

[59] As demonstrated by the judgment in Case C-124/21 P *International Skating Union* ECLI:EU:2023:1012.

[60] See for example: B García, ‘Luis Rubiales as a Symptom of Spanish Sport Poor Governance Standards’ (2024) Managing Sport and Leisure 1; F de Witte and J Zglinski, 'The Idea of Europe in Football' cit.; S Weatherill, ‘Saving Football from Itself: Why and How to Re-Make EU Sports Law’ (2022) CYELS 4.

[61] M Poiares Maduro, ‘Can EU law save European football?’ (25 May 2023) Europa Felix www.europafelix.eu.

To conclude, *ESLC* does not depart from the Court's orthodoxy on the application of EU law to sport.[62] Instead, it consolidates a line of case law which has long held that sport is subject to Union law "in so far as it constitutes an economic activity";[63] that the former's specific characteristics can play a role in the Court's analysis of such disputes;[64] and that "certain specific rules which were adopted solely on non-economic grounds and which relate to questions of interest solely to sporting per se" – for example, on national teams or raking criteria – can fall outside the scope of the TFEU.[65] In doing so, *ESLC* further illustrates that art. 165 TFEU is "both revolutionary and trivial".[66] It is revolutionary because, for the first time, if expressly confers upon the Union a competence in the field of sports, thereby contradicting SGBs' long-held view that they could derogate from the scope of the Treaties.[67] Conversely, however, the Court's interpretation of this provision has drastically reduced its practical significance.

As will be explored in Section v.3, however, the discrepancy between the Court of Justice and AG Rantos is much more rhetorical than it is practical: although the former strips the specific characteristics of sport of the quasi-constitutional symbolism which the latter affords them, they both agree, to a large extent, on the mechanism – if not the outcome – of its application to the facts of the case.

v.2. Can the UEFA/FIFA rules be objectively justified?

Having discussed the analytical framework set out by the Court of Justice, it is worth focusing on the key question discussed in the judgment: even if deemed a breach of Union law, can the UEFA-FIFA rules be justified? This question will be addressed in two steps: first, by looking at the rules on creation and participation; second, by focusing on the sanctions framework.

a) The competition law analysis

Once it is established that the UEFA-FIFA rules constitute a violation of arts 101(1) and 102 TFEU, the burden of proof shifts to the defendants, who must justify that their conduct is nonetheless compliant with those provisions. This can arise in two scenarios: on the one hand, where it can fall within the scope of the art. 101(3) exemption; on the other, where it can be objectively justified under art. 102 TFEU.

[62] As acknowledged by Weatherill, according to whom the Court's approach 'is largely – though not entirely – consistent with its own previous practice in the application of EU internal market law to the practices of governing bodies in sport': see S Weatherill, 'The impact of the rulings of 21 December 2023 on the structure of EU sports law' (2024) International Sports Law Journal 1.

[63] Case 36/74 *Walrave and Koch* ECLI:EU:C:1974.140, para. 4.

[64] *Bosman* cit.

[65] On the latter, see *Walrave and Koch* cit. para. 8, and *Bosman* cit. paras 76 and 127.

[66] S Weatherill, *Principle and Practice in EU Sports Law* (OUP 2017) 155.

[67] On which, see S Weatherill, 'Saving Football From Itself' cit.

In relation to art. 101 TFEU, the Court emphasises the risk posed by the fact that there is no clear and transparent framework setting out the rules on prior approval, participation and sanctions.[68] Although the referring court may, in its assessment, take account of "the principles, values and rules of the game underpinning professional football", such as the importance of sporting merit, merely referring to these objectives will not suffice to exempt UEFA and FIFA from art. 101(1) TFEU. On the contrary, the latter will have to show, on the basis of convincing evidence, that all requirements are actually satisfied. According to the Court, however, the absence of the aforementioned framework makes it unlikely that the fourth condition – namely, that the decision in question does not enable the undertakings in question "to eliminate all effective competition" for a substantial part of the market[69] – will be complied with.

A similarly high bar is set in relation to art. 102 TFEU. For a dominant undertaking to benefit from the justification under this provision, it must demonstrate either that its conduct is objectively necessary, or that any exclusionary effects it produces are counterbalanced by efficiency advantages which benefit the consumer.[70] In relation to the former, the Court of Justice is very blunt: whatever the justifications put forward by FIFA and UEFA, the "discretionary nature" of their rules means that they can "in no way be regarded as being objectively justified by technical or commercial necessities".[71] In practice, the absence of such a framework means that their rules have the aim of precluding the emergence of alternative competitions, and therefore "entai[l] the risk of eliminating any and all competition from third-party undertakings".[72] Nor is the Court convinced that FIFA and UEFA will be able to avail themselves of the second possibility: namely, that relating to the efficiency advantages. For this to be the case, the dominant undertaking has to satisfy, "using convincing arguments and evidence", four cumulative requirements: first, that its conduct creates actual efficiency gains; second, that those gains counteract any harmful effects on competition and consumer welfare; third, that the conduct is necessary to achieve those gains; and fourth, that it does not eliminate effective competition.[73] The Court of Justice it makes it clear, however, that FIFA and UEFA are unlikely to satisfy the fourth condition: its own words, its rules "afford those entities the opportunity to prevent any and all competition" on the relevant market.[74]

In order to understand the implications which this passage of the judgment might have in practice, a helpful distinction is drawn by Weatherill, according to whom three possible future scenarios can be envisaged: first, a *closed* breakaway competition;

[68] For example, at para. 199.
[69] *Ibid.* para. 190.
[70] *Ibid.* para. 202, citing case C-209/10 *Post Danmark* ECLI:EU:C:2012:172, para. 40.
[71] *ESLC* cit. para. 203.
[72] *Ibid.*
[73] *Ibid.* paras 204-205.
[74] *Ibid.* para. 207.

second, one which is identical to UEFA's existing Champions; third, one which is similar to the Champions League, but not owned by UEFA.[75]

Were UEFA faced with a proposal for a *closed* breakaway competition – such as the original proposal presented by ESLC – it would likely, argues Weatherill, be able to ban it. In this scenario, and provided that UEFA based its decision on a clear and transparent framework, the ESM would come into play, its underlying principles – including that of sporting merit – providing a set of objective criteria upon which to base this refusal. Things would get more difficult, however, were the competition facing UEFA either identical to an existing tournament (such as the Champions League) or virtually identical; in other words, where it complied with the ESM but had a commercial structure which excluded (or limited) UEFA's involvement. In such cases, it would be hard to justify that a prohibition was based on non-economic, sport-related grounds, rather than on the simple desire to protect UEFA's commercial position in the market.[76] Such a scenario would be precisely the very situation which triggers the applicability of the TFEU's rules: one in which a sporting context provides a façade for a naked violation of the Treaty's rules on competition law and on free movement. Far from merely restating the Court's existing case law, therefore, *ESLC* takes the latter one step further, clarifying the duties of gatekeepers such as FIFA and UEFA and setting clear limits to their discretion.

b) The sanctions

In relation to the sanctions enacted to enforce the FIFA-UEFA rules, and as mentioned above, AG Rantos had drawn a distinction between those sanctions imposed against *clubs* partaking in breakaway competitions and those aimed at *players*. In his view, only the former were justifiable. Conversely, those aimed at *players* could not be deemed proportionate. Nor would sanctioning players be proportionate towards national teams, who were also not parties to the decision to break away from the UEFA ecosystem but who, by being deprived of said players, would indirectly suffer the consequences of said ban.[77]

This section of the Opinion is unfortunately not expressly addressed by the Court of Justice. In its judgment, however, the latter makes it clear that any sanctions imposed by UEFA and FIFA cannot be purely discretionary. Instead, they must be backed by "substantive and detailed procedural rules" which ensure that they are "transparent, objective, precise, non-discriminatory and proportionate".[78] In the absence of such a framework, they will be held to infringe both art. 102[79] and art. 101 TFEU.[80] In practice, this requirement implies two things. First, it prevents UEFA and FIFA from issuing threats of *ex ante*

[75] S Weatherill, 'Football Revolution: How Do the Court's Rulings of 21 December 2023 Affect UEFA's Role as a "Gatekeeper"?' (4 January 2024) EU Law Analysis eulawanalysis.blogspot.com.

[76] *Ibid.*

[77] *ESLC*, Opinion of AG Rantos cit. paras 118-122.

[78] *ESLC* cit. para. 148.

[79] *Ibid.*

[80] *Ibid.* paras 172-179.

blanket bans on players. Second, and in other words, such sanctions will have to comply with certain procedural requirements (by following from a clear and transparent framework) and will have to be evaluated on a case-by-case basis. In other words, any such framework will have to comply with the principle of effective judicial protection. As this author has argued in a previous piece, this distinction between clubs, who may decide, at their own risk, to partake in a breakaway competition; and players, who will have no choice but to comply with their employer's decision, is welcome.[81]

V.3. Broadcasting rights, or how to apply the European Sport Model

The section on broadcasting rights is perhaps the most favourable towards UEFA and FIFA. It is also one of the most interesting sections of the judgment, and one which illustrates how art. 165 TFEU applies in practice. In essence, the referring court had asked whether Union law precluded the current ownership framework, under which UEFA and FIFA own all the rights related to football competitions organised in Europe, including for competitions organised by third parties; and which also confer on them "an exclusive power to market those rights".[82] The Court is unequivocal in finding that the existing framework may be regarded as a "by object" restriction under art. 101(1) TFEU and an "abuse" under art. 102 TFEU.[83] However, it then proceeds to set out how – subject to the referring court's analysis – such practices could be justified. In doing so, it provides an illustration of how the ESM can shape the analysis of EU competition law.

The first argument adduced by the Court is purely economic in nature, and involves the likely efficiency gains derived from the joint exploitation of broadcasting rights. Their joint sale is not only likely to bring down transaction costs; it may also "allow actual and potential buyers to have access … to rights which are infinitely more attractive than what would be proposed to them jointly by clubs participating in one or another match", both because such sales would benefit from the FIFA-UEFA brand image and because they would cover the entirety of the relevant competitions.[84] Although this line of reasoning has been disputed by some commentators,[85] it seems compelling: from the point of view of the ultimate consumers of football, a package which contains all the games of any given tournament is arguably more attractive than one which requires them to purchase individual games, presumably at a higher overall price.

It is following this point, however, that the ESM comes into play. Before the Court, the defendants had raised the "solidarity redistribution" argument. In other words, they had

[81] G Íñiguez, 'Constitutionalising European Football' cit.

[82] *ESCL* cit. para. 210.

[83] *Ibid.* para. 230.

[84] *Ibid.* para. 232.

[85] See for example C-P Heller, S Sudaric and A-C Winkler, 'The centralised sale of football media rights in Europe' (2023) European Competition Journal 449.

argued that the extra profit derived from the joint sale of rights could be reinvested into European football, benefitting “amateur clubs, professional players, women’s football, young players and other categories and stakeholders in football”, as well as, ultimately, consumers and supporters.[86] This argument is accepted by the Court of Justice, which highlights that “the proper functioning, sustainability and success of [football] competitions depend on maintaining a balance and preserving a certain equality of opportunity as between participating professional football clubs”.[87] Finally, the judgment highlights the “solidarity role of football”, which “as long as it is genuine, serves to bolster its educational and social functions within the European Union”.[88] In light of the above, the legal framework in question may be justified, albeit only if the profit generated by the central sales of the rights are “proven to be real and concrete” and if the framework is deemed proportionate.[89]

The Court’s analysis of this issue illustrates two things. First, it highlights one of the central paradoxes which underlies the sport industry: namely, that competition is not only important, but also *necessary* for the very survival of clubs. As Weatherill has put it: ”a sausage-maker dreams of the profits to be made as the world’s only supplier of sausages, but football clubs need opponents”.[90] This observation, *ESLC* demonstrates, has very real implications for sport’s analysis under Union law. Second, this passage showcases how sport-related considerations can play out in practice. On the one hand, these shape the outer contours of the Court’s analysis – for example, by dictating what falls within (and outside) the scope of the TFEU. On the other, such considerations affect the detailed analysis carried out by the Court: for example, by providing legitimate justifications or criteria for the proportionality analysis conducted under competition or free movement law.

VI. Conclusion: What next for European sport law?

As the dust begins to settle on the Court’s judgment, one fundamental question arises: who emerges as the ultimate winner of the high-stakes Super League drama? The answer is hard to tell.

Legally, the *ESCL*’s is more pyric than may seem at first sight. Although the Court is unequivocal about the monopoly-like conduct of FIFA and UEFA, and will require both governing bodies to review some of their restrictive practices, it also offers them a way out, providing a framework through which to justify some of their practices. Nor is the ruling, as Maduro has highlighted, “a vindication of the Superleague”.[91] Indeed, its immediate practical

[86] *ESLC* cit. para. 234.
[87] *Ibid.* para. 235.
[88] *Ibid.*
[89] *Ibid.* paras 236-238.
[90] S Weatherill, ‘Is Sport “Special”?’ cit.
[91] M Poiares Maduro, ‘Is the Superleague judgment a game changer?’ (24 December 2023) Europa Felix www.europafelix.eu.

consequences are by no means clear: at the time of writing, no new major clubs – with the possible, albeit lukewarm, exception of Napoli[92] – have publicly endorsed the breakaway competition.[93] Therefore, if the *ESLC* judgment was meant to sound the death knell for football's governing bodies, its impact may have been far less drastic.

The dispute will now return to the referring court in Madrid, where it is likely to be embroiled in several more years' worth of legal battles,[94] potentially making its way back to the Court of Justice at a subsequent appellate stage. It could also constitute a bargaining chip in the broader negotiation – on the broadcasting rights, the football calendar, and the creation of new tournaments – which football's numerous stakeholders, including FIFA, UEFA, clubs, and domestic leagues, will have to conduct in the coming years.

From a systemic point of view, however, *ESLC* demonstrates that sport remains fertile ground for EU law scholarship. Its social uniqueness, its economic peculiarities, and its unquestionable political relevance all make it a fascinating area of study – one which illustrates the limits of Union law, but which also demonstrates its ability to adapt to, and regulate, complex, global economic industries. In the coming years, the number of pending cases concerning sport is likely to increase. In these disputes[95] – *RRC Sports*, which concerns the FIFA Agents Regulation; *Diarra*, which challenges the player transfer system; and *FC Swift Hesperange*, which addresses several structural aspects of the football governance framework –, the legal principles developed in the *Superleague* judgment are likely to play a central role. All of them could provide *Bosman*-like moments, radically reshaping how EU law interacts with as powerful a global industry as football. Rather than closing the floodgates, therefore, *ESLC* may have flung them wide open.

[92] 'Napoli's De Laurentiis pushes for change after Super League verdict' (22 December 2023) Reuters www.reuters.com.

[93] Although Bernd Reichart, CEO of Superleague organiser A22, has repeatedly claimed that several clubs have privately warmed to the idea: see for example J Barco, 'Bernd Reichart, CEO de la Superliga, en "El Larguero"' (22 December 2023) Cadena SER cadenaser.com.

[94] The oral hearing before the referring court was held on 14 March 2024, with the case pending judgment at the time of writing.

[95] Discussed in G Íñiguez, 'Agent Fees, Player Transfers, and Transnational Leagues: What Lies Ahead for EU Football Law?' (29 January 2024) EU Law Live eulawlive.com.