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Ádám Remetei-Filep
Opinion with regard to Case C-333/21
European Super League Company, S.L.

v

Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA)

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1 Introduction

1. The Super League case concerns the application of the EU competition rules and rules related to the internal market to the activities of football governing bodies, FIFA and UEFA concerning their role of authorising third party club competitions combined with their decisions that require exclusivity elements from suppliers on the market. The Super League claims that the football federations acted in breach of Articles 101 and 102 of Treaty on the functioning of the European Union (TFEU) and seeks various orders and injunctions to protect the preparations and launch of its new Pan-European club football competition.
2. The case raises some fundamental issues about the different elements of Articles 101 and 102 TFEU in relation to sports cases and also with regard to general competition policy as such. These include the notion of decision of an association of undertaking, restriction of competition, the application of so-called “Wouters exception”, the benefit of Article 101(3) TFEU and the interpretation of Article 102 TFEU.
3. While the specific questions of the referring court relate only to Articles 101 and 102 TFEU, it is clear that Articles 53 and 54 of the Agreement on the European Economic Area (EEA) would also apply and that it is therefore necessary to interpret those provisions too. This would be all the more necessary as sport as a subject is not part of the EEA Agreement, while it is included in the TFEU. In this regard, the author will elaborate on the issue whether those differences would have any meaningful effect on the outcome of the competition law assessment.
4. The author will not discuss any aspects related to the internal market rules of Articles 45, 49, 56 and 63 TFEU.
5. The author’s approach will be the following. First, the applicability of competition rules to sports cases will be assessed in general, then any possible differences between EEA and EU competition law in relation to sports cases. The author will discuss in detail the applicable framework and the various elements of Article 101 and 102 TFEU in relation to the provisions on the prior authorisation system of FIFA and UEFA combined with provisions that require exclusivity elements from suppliers on the market (first, second, third and fifth question of the referring court).
6. Finally, some limited observations will be made in relation to the FIFA Statutes provisions on rights emanating from competitions (fourth question of the referring court).

2 The questions referred

7. The Madrid commercial court has referred the following questions for a preliminary ruling:

   (1) Must Article 102 TFEU be interpreted as meaning that that article prohibits the abuse of a dominant position consisting of the stipulation by FIFA and UEFA in their statutes (in particular, Articles 22 and 71 to 73 of the FIFA Statutes, Articles 49 and 51 of the UEFA Statutes, and any similar article contained in the statutes of the member associations and national leagues) that the prior approval of those entities, which have conferred on themselves

the exclusive power to organise or give permission for international club competitions in Europe, is required in order for a third-party entity to set up a new pan-European club competition like the Super League, in particular where no regulated procedure, based on objective, transparent and non-discriminatory criteria, exists, and taking into account the possible conflict of interests affecting FIFA and UEFA?

(2) *Must Article 101 TFEU be interpreted as meaning that that article prohibits FIFA and UEFA from requiring in their statutes (in particular, Articles 22 and 71 to 73 of the FIFA Statutes, Articles 49 and 51 of the UEFA Statutes, and any similar article contained in the statutes of the member associations and national leagues) the prior approval of those entities, which have conferred on themselves the exclusive power to organise or give permission for international competitions in Europe, in order for a third-party entity to create a new pan-European club competition like the Super League, in particular where no regulated procedure, based on objective, transparent and non-discriminatory criteria, exists, and taking into account the possible conflict of interests affecting FIFA and UEFA?*

(3) *Must Articles 101 and/or 102 be interpreted as meaning that those articles prohibit conduct by FIFA, UEFA, their member associations and/or national leagues which consists of the threat to adopt sanctions against clubs participating in the Super League and/or their players, owing to the deterrent effect that those sanctions may create? If sanctions are adopted involving exclusion from competitions or a ban on [OR 30] participating in national team matches, would those sanctions, if they were not based on objective, transparent and objective criteria, constitute an infringement of Articles 101 and/ or 102 of the TFEU?*

(4) *Must Articles 101 and/or 102 TFEU be interpreted as meaning that the provisions of Articles 67 and 68 of the FIFA Statutes are incompatible with those articles in so far as they identify UEFA and its national member associations as 'original owners of all of the rights emanating from competitions … coming under their respective jurisdiction', thereby depriving participating clubs and any organiser of an alternative competition of the original ownership of those rights and arrogating to themselves sole responsibility for the marketing of those rights?*

(5) *If FIFA and UEFA, as entities which have conferred on themselves the exclusive power to organise and give permission for international club football competitions in Europe, were to prohibit or prevent the development of the Super League on the basis of the abovementioned provisions of their statutes, would Article 101 TFEU have to be interpreted as meaning that those restrictions on competition qualify for the exception laid down therein, regard being had to the fact that production is substantially limited, the appearance on the market of products other than those offered by FIFA/UEFA is impeded, and innovation is restricted, since other formats and types are precluded, thereby eliminating potential competition on the market and limiting consumer choice? Would that restriction be covered by an objective justification which would permit the view that there is no abuse of a dominant position for the purposes of Article 102 TFEU?*

(6) Must Articles 45, 49, 56 and/or 63 TFEU be interpreted as meaning that, by requiring the prior approval of FIFA and UEFA for the establishment, by an economic operator of a Member State, of a pan-European club competition like the Super League, a provision of the kind contained in the statutes of FIFA and UEFA (in particular, Articles 22 and 71 to 73 of the FIFA Statutes, Articles 49 and 51 of the UEFA Statutes, and any other similar article contained in the statutes of national member associations [and] national leagues) constitutes a restriction contrary to one or more of the fundamental freedoms recognised in those articles?

3 Summary of the facts and proceedings before the referring court

20. According to the request for a preliminary reference, the European Super League Company, S. L. ('ESLC') is a limited liability company whose shareholders are the following founding football clubs: Real Madrid CF, AC Milan, FC Barcelona, Club Atlético de Madrid, Manchester United FC, FC Internazionale de Milano S.P.A., Juventus FC, The Liverpool FC and Athletic Grounds Limited, Tottenham Hostpur FC, Arsenal FC, Manchester City FC and Chelsea FC Plc. ESLC is the sole proprietor of the Super League, the first Pan-European football competition outside UEFA, and it is the parent company of the following companies. SL Sports Co, a company tasked with the oversight and management of the Super League from a sporting, disciplinary and financial perspective; SL Media Co, a company responsible for worldwide marketing and sale of audio-visual rights for the Super League; and SL Commercial Co responsible for the marketing and sale of commercial assets other than audio-visual rights.

21. According to the referring court, the Super League project and its financing is conditional upon the recognition of the Super League by FIFA and/or UEFA as a new competition compatible with their statutes or, alternatively, upon obtaining of a legal protection from courts or competent administrative bodies that would enable the launch of the Super League.[1]

22. The Super League clubs contacted FIFA and UEFA concerning their plans to launch the new competition in January 2021 to which in reaction FIFA and UEFA expressed their refusal to recognise the new league, warned that players and clubs participating would be expelled and stated that all competitions must be organised or recognised by the appropriate bodies. FIFA's and UEFA's former statement was reaffirmed by a new statement in April 2021 when the Super League plans were made public.

23. The new statement was issued besides UEFA also by the English Football Association and the Premier League (English top division), the Royal Spanish Football Federation, La Liga (Spanish top division), the Italian Football Federation and Lega Serie A (Italian top division).[2] The statement gave a new warning concerning the adoption of disciplinary measures in relation to any clubs and players involved in the creation of the Super League and explicitly announced that

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[1] Latter circumstance is also relevant for the preliminary ruling request, as it shows that the judgment of the Court of Justice of the European Union (CJEU) would be still useful for the Super League project, despite the impression that formally only 3 teams remained committed to it.

[2] <https://www.uefa.com/insideuefa/news/0268-12121411400e-7897186e699a-1000--statement-by-uefa-the-english-football-association-the-premier-/> visited 3 October 2021.

the clubs would be excluded from any other competition at domestic, European or world level and that their players could be denied the opportunity to represent their national teams in any competition. The statement also indicates that not only FIFA and UEFA but all other football confederations (responsible for Asia, Africa, South America, North America, Oceania) will impose a ban on teams and players with an effect on any other competition at domestic, European or world level.

24. ESLC lodged an application instituting ordinary proceedings and an ex parte application for interim measures against UEFA and FIFA. In addition, ESCL claimed that FIFA and UEFA should be ordered to cease the anti-competitive conduct with regard to the Super League and should be prohibited from repeating such conduct in the future. Finally, ESLC also applied for an order that FIFA and UEFA eliminate immediately all the effects of the anti-competitive conduct described above which may have occurred before or during the course of these proceedings.

25. ESCL argued that Articles 22, 67, 68, 79, 71, 72 and 73 of the FIFA Statutes, Article 6 of the FIFA Regulations Governing International Matches and Articles 49 and 51 of the UEFA Statutes are incompatible with Articles 101 TFEU and/or 102 TFEU.

26. Article 22 of the FIFA Statutes regulates confederations such as UEFA. Under Article 22(3) the rights and obligations of each federation include among others:

    a. *to comply with and enforce compliance with the Statutes, regulations and decisions of FIFA;*

    b. *[…]*

    c. *to organise its own interclub competitions, in compliance with the international match calendar;*

    d. *[…]*

    e. *to ensure that international leagues or any other such groups of clubs or leagues shall not be formed without its consent and the approval of FIFA;*

27. Articles 67 and 68 of the FIFA Statutes regulate rights in competitions and events. Pursuant to Article 67:

    (1) FIFA, its member associations and the confederations are the original owners of all of the rights emanating from competitions and other events coming under their respective jurisdiction, without any restrictions as to content, time, place and law. These rights include, among others, every kind of financial rights, audiovisual and radio recording, reproduction and broadcasting rights, multimedia rights, marketing and promotional rights and incorporeal rights such as emblems and rights arising under copyright law.

    (2) The Council shall decide how and to what extent these rights are utilised and draw up special regulations to this end. The Council shall decide alone whether these rights shall be utilised exclusively, or jointly with a third party, or entirely through a third party.

    Pursuant to Article 68:

    (1) FIFA, its member associations and the confederations are exclusively responsible for authorising the distribution of image and sound and other

data carriers of football matches and events coming under their respective jurisdiction, without any restrictions as to content, time, place and technical and legal aspects. […]

28. Articles 71, 72 and 73 regulate international matches and competitions. Pursuant Article 71:

(1) The Council shall be responsible for issuing regulations for organising international matches and competitions between representative teams and between leagues, club and/or scratch teams. No such match or competition shall take place without the prior permission of FIFA, the confederations and/or the member associations in accordance with the Regulations Governing International Matches.

(2) […]

(3) The Council shall determine any criteria for authorising line-ups that are not covered by the Regulations Governing International Matches.

(4) Notwithstanding the authorisation competences as set forth in the Regulations Governing International Matches, FIFA may take the final decision on the authorisation of any international match or competition.

29. Pursuant to Article 72:

(1) Players and teams affiliated to member associations or provisional members of the confederations may not play matches or make sporting contacts with players or teams that are not affiliated to member associations or provisional members of the confederations without the approval of FIFA.

(2) Member associations and their clubs may not play on the territory of another member association without the latter's approval.

30. Pursuant to Article 73:

Associations, leagues or clubs that are affiliated to a member association may only join another member association or take part in competitions on that member association's territory under exceptional circumstances. In each case, authorisation must be given by both member associations, the respective confederations) and by FIFA.

31. Article 6 of the FIFA Regulations Governing International Matches says the following:

(1) International Matches may only be authorised by FIFA, a Confederation or a Member in accordance with these regulations.

(2) All International Matches must be authorised by the Members to which the participating teams belong and by the Member on whose territory the match is to be played. Matches involving a Scratch Team must be authorised by the Members with which the players are registered.

(3) […]

(4) FIFA and the Confederation(s) may reject applications not complying with these regulations.

(5) FIFA's authorisation or FIFA's refusal of authorisation is given by the FIFA general secretariat, whose decision shall be final and binding.

(6) […]

(7) *[…].*

32. Article 49 of the UEFA Statutes foresees that:

(1) UEFA shall have the sole jurisdiction to organise or abolish international competitions in Europe in which Member Associations and/or their clubs participate. FIFA competitions shall not be affected by this provision.

(2) The current UEFA competitions shall be:
- *a. […]*
- *b. For club teams:*
  UEFA Champions League
  UEFA Europa League
  UEFA Super Cup
  […]
- *c. The Executive Committee shall decide whether to create or take over other competitions, as well as whether to abolish current competitions.*

(3) International matches, competitions or tournaments which are not organised by UEFA but are played on UEFA's territory shall require the prior approval of FIFA and/or UEFA and/or the relevant Member Associations in accordance with the FIFA Regulations Governing International Matches and any additional implementing rules adopted by the UEFA Executive Committee.

33. Article 51 of the UEFA Statutes regulates prohibited relations when it establishes that:

(1) No combinations or alliances between UEFA Member Associations or between leagues or clubs affiliated, directly or indirectly, to different UEFA Member Associations may be formed without the permission of UEFA.

(2) A Member Association, or its affiliated leagues and clubs, may neither play nor organise matches outside its own territory without the permission of the relevant Member Associations.

34. The referring court also mentioned in its questions besides the above mentioned FIFA and UEFA rules *"any similar article contained in the statutes of member associations and national leagues"*. In this regard, it has to be mentioned that Article 59(1) of the UEFA Statutes requires from each member association (i.e. national associations in Europe) to include in its statutes a provision whereby it, its leagues, clubs, players and officials agree to respect at all times the Statutes, regulations and decisions of UEFA […]. Pursuant Article 59(2) each member association shall

ensure that its leagues, clubs, players and officials acknowledge and accept the obligations arising from the various UEFA rules. Finally, under Article 59(3) each participant of an UEFA competition shall, when registering its entry, confirm to UEFA in writing that it, its players and officials have acknowledged and accepted those same obligations. These provisions on the recognition of the UEFA Statutes reinforce any obligations under the UEFA Statutes, including also Article 49 and 51.

35. Furthermore, the UEFA Statutes create also the national level equivalent of the UEFA's Article 49 rule, when it establishes in Article 7bis(3) that *"leagues or any other groups of clubs at Member Association level shall only be permitted with the Association's express consent and shall be subordinate to it. The Association's statutes shall define the powers apportioned to any such group, as well as its rights and obligations. The statutes and regulations of any such group shall be subject to the approval of the Association."*

36. Finally, while the referring court does not mention expressly the corresponding articles related to sanctions, in question 3 it touches upon those rules and asks for their interpretation. Infringing the above-discussed FIFA and UEFA rules will entail disciplinary measures as set out in the relevant codes of FIFA and UEFA. See in particular, Article 61 of the FIFA Statutes (2019 edition), Article 14 of the FIFA Regulations Governing International Matches (2014 edition), Article 6 of the FIFA Disciplinary Code (2019 edition), Articles 52-54 of the UEFA Statutes (2020 edition) and Article 6 of the UEFA Disciplinary Regulations (2020 edition).

37. Possible disciplinary measure on clubs may include among others fines, disqualification from competitions in progress and/or exclusion from future competitions, withdrawal of a licence.[3] Disciplinary measures on natural persons may include suspension for a specific number of matches or for a specific or unspecified period or ban on taking part in any football-related activity.[4]

4 The author's view

4.1 The applicability of competition law to sports cases

38. This case concerns football, the globe's major sport discipline. However, before discussing in detail the specifics of the case itself, the author provides a general background analysis of the relationship of sport and EU competition law, so that its comments could be better understood.

39. To provide an exact definition of sport seems to be very difficult. Singer sees sport as a human activity that involves specific administrative organisations and historical background of rules, which define the objective and limit the pattern of human behaviour; it involves competition and/or challenge and a definite outcome primarily determined by physical skill.[5] The Council of Europe defined sport as "*all forms of physical activity which, through casual or organised participation, aim at expressing*

[3] See e.g. Article 6(1)(c), 6(3)(i) of the FIFA Disciplinary Code or Article 6(1)(c), 6(1)(o), 6(1)(q) of the UEFA Disciplinary Code.
[4] See e.g. Article 6(2)(a), 6(2)(c) of the FIFA Disciplinary Code or Article 6(2)(d), 6(2)(f) of the UEFA Disciplinary Code.
[5] Singer, R. Physical Education :Foundations (1976), New York: Holt, Rinehart and Winston.

or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels".[6]

40. Sport greatly interests citizens of the EU, the majority of people taking part in sporting activities on regular basis. It generates important values such as team spirit, solidarity, tolerance and fair play, contributing to personal development and fulfilment. It promotes the active contribution of EU citizens to society and thereby helps to foster active citizenship. Sport plays an essential role in European society, it can take place both in amateur structures and at professional level contributing equally to the societal role of sport. In addition to improving the health of European citizens, sport has an educational dimension and plays a social, cultural and recreational role. Accordingly, sport was and still is a growing social and economic phenomenon, which makes an important contribution to the European Union's strategic objectives of solidarity and prosperity.[7]

41. This important role of sport has been recognised in the second part of Article 165(1) TFEU that says "*the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function."*[8]

42. Nevertheless, even before the adoption of Article 165 TFEU in its current form, sport's significance was emphasised in the Amsterdam Declaration on Sport[9] that asked for a special consideration of particular characteristics of amateur sport when important questions affecting sport are at issue. The EU Council, meeting in Vienna on 11 and 12 December 1998, invited the Commission to submit a report to the Helsinki European Council, as a result of which the "Helsinki Report on Sport" has been adopted.[10] Taking note of the Helsinki report, sport was also subject of the Nice Declaration on the "specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies" pronounced at the European Council of Nice on 7-9 December 2000 and annexed to the Presidency conclusions.

43. Sport's social role and importance for the EU has been discussed in the Commission's 2007 White Paper on Sport, the first "comprehensive initiative" on sport by the EU, or the 2011 Commission Communication on Developing the European Dimension in Sport[11]. Also, the European Parliament has followed the various challenges facing European sport with keen interest and has regularly dealt with sporting issues in recent years.[12]

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[6] Council of Europe recommendation No. R (92) 13 REV on the revised European Sports Charter, Article 2(1)(a). This is the definition used by the Commission White Paper on Sport, COM(2007) 391 final.

[7] White Paper on Sport, COM(2007) 391 final, p. 3.

[8] Introduced in 2009 with the entry into force of the Lisbon Treaty.

[9] Declaration 29 to the Treaty of Amsterdam, OJ C340, 10/11/1997 p 136.

[10] Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework COM(1999) 644 final.

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Developing the European dimension in sport COM(2011) 12 final, 18/01/2011.

[12] See more in detail at <https://www.europarl.europa.eu/factsheets/en/sheet/143/sport> visited 3 October 2021.

44. Besides sport's above mentioned and recognised social and educational role for the EU, it undeniably developed an increasingly commercial character over the recent decades turning professional sport into a multibillion euro business. Data estimates under the assumption that no COVID-19 crisis occurred[13] show that in 2020, the direct sport related GDP in the EU was EUR 363 billion or 2.15 % of total GDP. Direct employment in the sport sector equals almost 6.5 million or 2.85% of all employment in the EU. If we include also indirect sport related GDP (i.e. GDP via the supply network), the total is EUR 630 billion or 3.72%, while employment reaches almost 10 million or 4.24%. By comparison, agriculture contributed 1.3% to the EU GDP in 2020.

45. Different sports disciplines represent obviously different levels a commercialisation within the world of sport. Nevertheless, football could be easily considered to be at the top of the list, if we just think about the fact that already in 20 years ago Real Madrid paid EUR 75 million for the transfer of Zinedine Zidane, while in the meantime the highest ever transfer fee was that paid for Brazilian player Neymar with EUR 222 million. By playing football, Lionel Messi earns more than EUR 1 million a week and the top 10 highest earning football players bring home an aggregate of over EUR 5 million a week.[14] According to the 2021 ranking of Forbes for the most valuable football clubs, FC Barcelona takes the first place with USD 4.76 billion, closely followed by Real Madrid CF (4.75 billion) and FC Bayern München (4.22 billion) and even number 10, Tottenham Hotspurs reaches 2.3 billion.[15] According to UEFA's latest, 2019/20 financial report, it had an almost EUR 2.6 billion revenue from media rights and another EUR 418 million from commercial rights.[16]

46. UEFA Champions League Final ticket prices for the current tournament are starting as low as EUR 2600 euros and the more expensive seating options are available at prices ranging up to EUR 6050.[17] Tottenham Hotspur's new football stadium opened in 2019 and had an estimated construction cost of GBP 1 billion, Arsenal's stadium 15 years ago had a total cost of GBP 0.4 billion.[18] Football's top jersey sponsorship deal as of 2021 is the one concluded between Real Madrid CF and Emirates for USD 413 million, followed by the Tottenham Hotspurs' USD 400 million deal with AIA.[19]

47. As can be seen from the above illustrative examples, every aspect of football (player market, broadcasting, ticketing, sponsorship, infrastructure) involves deals

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[13] Mapping study on measuring the economic impact of COVID-19 on the sport sector in the EU – a report to the European Commission written by Ecorys and SportsEconAustria, available at :<https://op.europa.eu/en/publication-detail/-/publication/76b94a58-2f3c-11eb-b27b-01aa75ed71a1/language-en/format-PDF/source-175886302> visited 3 October 2021.

[14] See <https://www.marca.com/en/football/international-football/2021/08/31/612e3f93e2704ee36d8b463e.html> visited 3 October 2021.

[15] Forbes 2021 ranking, available at: <https://www.forbes.com/soccer-valuations/list/#tab:overall> visited 3 October 2021.

[16] UEFA financial report 2019/20, available at: <https://editorial.uefa.com/resources/0268-1215a6daaf78-a6ca16cd1df1-1000/04_uefa_financial_report_2019-20_en.pdf> visited 3 October 2021.

[17] See for example at: <https://www.ticketsmarter.com/uefa-champions-league-final> visited 3 October 2021.

[18] See <https://en.wikipedia.org/wiki/List_of_most_expensive_stadiums> visited 3 October 2021.

[19] See <https://www.statista.com/statistics/1231537/football-club-shirt-sponsorship-deals/> visited 3 October 2021.

of significant financial amounts which proves the economic nature of these activities.

48. Though sport clearly seems to be an economic activity, it has some special characteristics that distinguishes it from other areas of the economy, irrespective of its social or educational functions considered above. From an economic point of view, sport is different as the product to be sold cannot be created by a single club/team/athlete, it requires certain level of cooperation and creates an interdependence between competing adversaries. Sport, as a product, should also involve some level of uncertainty as to the outcome, otherwise spectators would lose interest. Both of these special economic characteristics have the effect that while in normal competition ineffective companies are eliminated from the market, in the sport sector, market participants have some interest also in the economic viability of their counterparts as competitors.[20]

49. A final element that is particular to sport in Europe is that the organisational level of sport is characterised by a monopolistic pyramid structure. Traditionally, there is only one single national sport association for each sport discipline in the Member States, operating under the umbrella of a single continental federation and/or a single global federation. In the case of football, this means a single football association per Member State, UEFA sitting above as the organisation responsible for European football and FIFA overseeing football globally. The pyramid structure is reinforced by the International Olympic Committee for most of the sport disciplines, as it recognises only one international federation for each Olympic sport.[21]

50. The question can be asked whether any of the above mentioned special economic and/or non-economic characteristics would warrant any special handling or even exemption from the general applicability of competition rules (or other areas of EU law related to economic activities) when otherwise restrictive consequences can be observed.

51. In a long line of judgments on internal market rules, the Court of Justice of the European Union (CJEU) dealt with sport related matters and considered on a recurring basis the specificities of sport. While it always considered that sporting rules are subject to the application of EU law in so far as they constitute an economic activity,[22] it also balanced the need to respect the specificities of sport.

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[20] See in this regard the opinion of AG Lenz in case C-415/93 Bosman EU:C:1995:293, para 227 : "*[…] football is characterized by the mutual economic dependence of the clubs. Football is played by two teams meeting each other and testing their strength against each other. Each club thus needs the other one in order to be successful. For that reason each club has an interest in the health of the other clubs. The clubs in a professional league thus do not have the aim of excluding their competitors from the market. Therein lies […] a significant difference from the competitive relationship between undertakings in other markets. It is likewise correct that the economic success of a league depends not least on the existence of a certain balance between its clubs. If the league is dominated by one overmighty club, experience shows that lack of interest will spread.'*

[21] See Article 25 and 26 of the Olympic Charter, available at: <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf> visited 3 October 2021.

[22] Case 36/74 Walrave and Koch v Association Union Cycliste Internationale, EU:C:1974:140, para 4 ; case 13/76 Gaetano Donà v Mario Mantero, EU:C:1976:115, para 12; case C-415/93 Bosman, EU:C:1995:463, para 73; case C-176/96 Jyri Lehtonen, EU:C:2000;201, para. 32; case C-51/96 and C-191/97 Christelle Deliège, EU:C:2000:199, para. 41; case C-519/04 P Meca-Medina,

52. In Walrave, the CJEU held that the prohibition on nationality discrimination *"does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity"*.[23] A similar conclusion was made on nationality rules in the Donà case.[24]

53. In the Bosman case, the CJEU emphasised the considerable social importance of sporting activities and in particular football and accepted the aim of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to the results and of encouraging the recruitment and training of young players as legitimate non-economic grounds for possible restrictions.[25] In another transfer rule related case, Lehtonen, the CJEU acknowledged that setting deadlines for the transfer of players meet the objective of ensuring the regularity of sporting competitions.[26] Late transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole.[27] The Deliège case involved selection rules for sport competitions that the CJEU considered inherent in the conduct of an international high-level sports event, which necessarily involves certain selection criteria to be established for the sake of proper organisation of sport.[28]

54. Despite the above considerations on possible restrictions to the general applicability of the internal market rules, the CJEU stressed repeatedly that any restriction must remain limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity.[29]

55. It was the Meca-Medina case that offered the first opportunity for the Union Courts to decide on whether an approach similar to the above mentioned internal market cases would be applicable also in competition cases. The case concerned a rejection of complaint adopted by the Commission that was related to the application of the anti-doping rules and its consequences for athletes sanctioned under those rules. The General Court referred to the case law of Walrave, Donà and Deliège, emphasising that purely sporting rules are not affected by the Treaty provisions and while those cases were not related to the competition rules, the principles established would be equally valid for the competition rules of Article 101 and 102 TFEU.[30] Based on its assessment, the General Court found that anti-doping rules are based on purely sporting considerations and therefore have nothing to do with any economic consideration in line with the reasoning of Walrave, Donà and Deliège.[31]

EU:C:2006:492, para 22; case C-325/08 Olympique Lyonnais v Olivier Bernard, EU:C:2010:143, para. 27.

[23] Case 36/74 Walrave and Koch v Association Union Cycliste Internationale, EU:C:1974:140, para 8.

[24] Case 13/76 Gaetano Donà v Mario Mantero, EU:C:1976:115, para. 14.

[25] Case C-415/93 Bosman, EU:C:1995:463, para 76 and 106.

[26] Case C-176/96 Jyri Lehtonen, EU:C:2000;201, para. 53.

[27] Ibid para. 54.

[28] Case C-51/96 and C-191/97 Christelle Deliège, EU:C:2000:199, para. 64.

[29] Ibid. para. 43; case 13/76 Gaetano Donà v Mario Mantero, EU:C:1976:115, para 14.

[30] Case T-313/02 Meca-Medina, EU:T:2004:282, para. 42.

[31] Ibid. para 47.

56. Upon appeal, the CJEU came to a different conclusion with relation to the competition rules. Although it repeated the case law of Walrave, it also ruled that the competition rules and the internal market rules should be examined separately and no conclusion can be made solely on the ground that a particular rule was regarded as purely sporting one under the internal market rules.[32] For the application of the competition rules, the CJEU established a framework based on the Wouters exception when it stated that:

"Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (Wouters and Others, paragraph 97) and are proportionate to them."[33]

57. In practice, this means an assessment on a case by case basis, there is no sports rule that can be decided on in abstract without taking into account all the relevant circumstances. One need to consider the context, whether any potentially restrictive behaviour can be found by examining the specific requirements of Articles 101 and 102 TFEU. If the applicability of Articles 101 or 102 TFEU can be established based on the examination whether the sporting rules emanate from an undertaking/association of undertaking, whether latter restricts competition (by object or effect) or abuses its dominant position and whether that restriction or abuse affects trade between Member States, then it should be considered also, whether it can be justified by an objective of general interest and whether those rules are proportionate to the pursuit of that objective.[34]

58. To put it differently, for any sporting rule to escape the general prohibitions established in the competition provisions of Articles 101 and 102 TFEU, it would be necessary to show one of the following two scenarios. Either one of the constituent elements of the competition rules have to be missing or the restriction should serve a legitimate general interest objective in an inherent way without being disproportionate in the light of those objectives pursued.

59. All the specificities of sport described in this section can be dealt with within the regular framework of any competition law analysis either under the assessment of the Wouters exception or under the analysis of Article 101(3) TFEU or that of objective justifications under Article 102 TFEU. There is no general exception to the applicability of the competition rules to sporting activities.

4.2 Is there any difference in the approach of EEA law and EU law with regard to sport cases?

[32] Case C-519/04 P Meca-Medina, EU:C:2006:492, para 27-33.
[33] Ibid para 42.
[34] Ibid para. 30 and 33.

60. Rules of international sports federations with a binding effect on a global or continental basis have inevitably an effect on the whole territory of the EEA and therefore on trade between Contracting Parties as required by the EEA competition rules of Articles 53 and 54 EEA. The EEA competition rules of Articles 53 and 54 EEA have direct effect in EU Member States and can be invoked and relied upon before national courts of Member States.[35] Accordingly, any cases that concern the compatibility of certain sporting rules with the EU competition rules must be assessed also in the light of the EEA competition rules.

61. When interpreting the provisions of the EEA Agreement, rules which are identical in substance to those of the Treaty, must be interpreted uniformly with those of the Treaty ("principle of homogeneity").[36] This means that, if identical, provisions of the EEA Agreement shall, in their interpretation and application, be interpreted in conformity with the relevant rulings of CJEU.[37] Articles 53 and 54 EEA are identical in substance to Articles 101 and 102 TFEU. This suggests that there should be no difference in the interpretation of Articles 53 and 54 EEA in relation to sport cases.

62. However, the various social or educational aspects and the specificities of sport are not mentioned in the EEA Agreement, sport is not subject of the cooperation under EEA law at all. There is no similar provision to Article 165 TFEU on sport, none of the EU initiatives, statements, declarations or communications mentioned in the previous section[38] have any EEA relevance, they do not form part of EEA law. Under those circumstances, one may ask whether the special characteristics of sport should be considered and taken into account in the assessment of sports cases also under Articles 53 and 54 EEA.

63. In this regard, it is important to recognize that the EU had historically no defined policy on sport and up until 2009, there was no provision in the Treaties that mentioned sport specifically. In the early days of European integration sporting activity was not considered as a significant economic activity.[39] Instead, the CJEU triggered an awareness of the special nature of sporting rules and their relationship with EU law.[40] It was the case law of Walrave, Donà or Bosman that recognised the specificities of sport and established the appropriate framework for taking into account those characteristics.

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[35] See e.g. case 352/13, Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel SA, EU:C:2015:335. The case concerned questions in relation to Regulation (EC) No 44/2001, but no objection was taken to the underlying fact that the German court was applying Article 53 EEA directly. See also case C-819/19 Cartel Stiching and Equilib Netherlands, EU:C:2021:373.

[36] Judgment of 23 September 2003 in Ospelt, Case C-452/01, EU:C:2003:493, paragraph 29: "one of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States. From that angle, several provisions of the abovementioned Agreement are intended to ensure as uniform an interpretation as possible thereof throughout the EEA (see Opinion 1/92 [1992] ECR I2821). It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly within the Member States." See also judgment of 6 October 2009 in Commission v Spain, Case C-153/08, EU:C:2009:618, paragraphs 48 and 49.

[37] See Articles 6, 105, 106 EEA and Article 3 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA").

[38] See paragraph 40-43 above.

[39] See Erika Szyszczak, Competition and Sport, European Law Review (2007) 32(1), p. 96.

[40] Ibid.

64. Later judgments from the Union Courts, such as Lehtonen, Deliège, Bernard or the International Skating Union can be seen as a further developing the above case law and when those judgments referred for example to the Amsterdam Declaration of Sport or the new Article 165 TFEU that can be seen too as consistent with previous case law.[41] Article 165 TFEU and the various EU initiatives, statements, declarations or communications related to the specificity of sport represent a codification and a more detailed explanation of the same phenomenon that was subject to the numerous judgments from Union Courts.

65. Accordingly, Articles 53 and 54 EEA should be interpreted in the same way as Articles 101 and 102 TFEU in relation to sport cases even without any EEA law equivalents for the above mentioned documents on sport, or an EEA Agreement article on sport. This is because of the principle of homogeneity and the corresponding requirement of uniform interpretation in conformity with the CJEU's rulings. Based on the above, in the following, when the author speaks about Articles 101 and 102 TFEU, it would be equally relevant for Articles 53 and 54 EEA too.

4.3 Considerations regarding the first, second and third questions referred to the Court

4.3.1 Preliminary considerations, the framework to be applied

66. The first, second and third question referred to the CJEU all relate to the same factual elements of the case, namely the FIFA/UEFA's rules prescribing a prior approval system for third party competitions combined with exclusivity requirements for suppliers of UEFA and the corresponding sanctions (or the threat of those) on clubs and players not respecting those rules. The first question is related to the assessment of those rules and behaviour under Article 102 TFEU. The second question raises the compatibility of those rules with Article 101 TFEU, while the third question enquires about the Article 101 and 102 TFEU assessment of threatening with the corresponding sanctions for the infringement of those rules. The FIFA/UEFA rules cannot be separated from and assessed without the corresponding sanctions as they form part of the same conduct.

67. The compatibility of the relevant FIFA/UEFA rules should be assessed within the framework established by the CJEU in the Meca-Medina case that is applicable both for Articles 101 and 102 TFEU.[42]

68. This approach accordingly would include the following steps:

Step 1. Is it possible to speak about agreements between undertakings or decisions of association of undertakings?

a) Is the sport association engaged in an economic activity?

b) Is this an autonomous behaviour of private entities or is there any state influence eliminating liability?

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[41] case C-176/96 Jyri Lehtonen, EU:C:2000;201, para. 33; case C-51/96 and C-191/97 Christelle Deliège, EU:C:2000:199, para. 42; case C-325/08 Olympique Lyonnais v Olivier Bernard, EU:C:2010:143, para. 40; case T-93/18 International Skating Union, EU:T:2020:610, para. 78.

[42] See combined paras. 30, 33, 42 and 47 of case C-519/04 P Meca-Medina, EU:C:2006:492.

c) Is there an agreement or decision of association of undertakings?

Step 2. Is there a restriction of competition within the meaning of Article 101(1) TFEU or an abuse of dominant position under Article 102 TFEU?
a) What is the relevant market, what is the theory of harm, is the restriction appreciable?
b) Can the restriction still benefit from the Wouters exception?
- What is the context of the restriction, what are the objectives pursued?
- Are the restrictions inherent in the pursuit of the objectives?
- Are they proportionate to those objectives?

Step 3. Is trade between Member States affected?

Step 4. Are the four conditions of Article 101(3) TFEU satisfied or can the conduct be objectively justified under Article 102 TFEU?

69. Step 4 of the test will be discussed in the section dealing with the fifth question below. Step 3 of the test can be easily established in the case of cross-border international and Pan-European football competitions. It would be also unproblematic to establish an effect on trade between Contracting Parties of the EEA Agreement, therefore no further discussion would be dedicated to these issues.

70. Before the discussion of step 1 and step 2 in more detail, it is important to emphasise that based on the requirements of the Meca-Medina judgment, in step 2 there are two distinct elements that determine whether the prohibition of Articles 101(1) and 102 TFEU applies. For a restriction of competition to be established, it is necessary that both of those elements would be examined separately.[43]

71. The first could be described more like the traditional test for a restriction of competition where there has to be either under Article 101(1) TFEU a restriction of competition by object or effect or under Article 102 TFEU an abuse of dominant position. This would involve determining the relevant markets, setting up a theory of harm, establishing a restrictive object or effect or the abuse of dominant position on that relevant market depending on the legal instrument chosen. If this part of the test does not result in any restrictive conduct, it does not make sense to proceed to the next part examining the possibilities of justifying any restrictions, since there would be none.

72. If, however, the first part of step 2 shows the existence of a restriction of competition or an abuse, one would need to proceed to examine whether those adverse effects could be still justified taking into account the elements of the Wouters exception. This would include examining the overall context and whether there are legitimate public interest objectives pursued by those rules, whether they are inherent in the pursuit of those rules and whether they are proportionate to them.[44]

73. Therefore, a restriction of competition or abuse cannot be established based on the conclusions of the Wouters exception alone that is in the absence of establishing a restriction to the required legal standards in the first place. The application of the

[43] See case 1/12 OTOC, EU:C:2013:127, paras. 61-92 for the analysis under Article 101(1) followed by paras. 93-100 for the Wouters exception.
[44] Case C-519/04 P Meca-Medina, EU:C:2006:492 para. 42.

two tests cannot be conflated even if there would be some common elements in the assessment.

4.3.2 Agreements between undertakings, decisions of association of undertakings

74. The first question that needs to be answered would be whether UEFA and FIFA are undertakings or associations of undertakings when adopting the allegedly restrictive rules. According to the general practice of Union Courts the concept of an undertaking applies to every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.[45] On the other hand, activities in the exercise of official authority are sheltered from the application of the competition rules.[46] Since the notion of an undertaking or an association of undertakings is a relative concept, a given entity may be regarded as an undertaking for one part of its activities while the rest of its activities may fall outside the application of competition rules.[47] This principle was confirmed also in connection to sport.[48] Following this line of argumentation one has to examine the status of an entity always in relation to the particular activity concerned and the qualification of its other type of activities are irrelevant for this assessment. The fact that a sport association pursues an economic activity in certain fields does not turn all their activities into economic activities.

75. The case law related to sport states the following.[49] The General Court, in the Piau case[50] that concerned the status of FIFA, established that national sport associations can be an association of undertakings since their members (clubs, or individual athletes) pursue sport as an economic activity[51] but they can also be undertakings when they carry out an economic activity.[52] Since national associations constitute associations of undertakings and also undertakings, an international association (federation) as an association grouping together national associations, also constitutes an association of undertakings within the meaning of Article 101 TFEU or associations of associations of undertakings.[53]

76. The fact that the national associations are groupings of 'amateur' clubs, alongside 'professional' clubs, is not capable of calling that assessment into question.[54] Moreover, it is also irrelevant if an international federation is not itself an economic operator on the market in question, since it is the emanation of the national associations and the clubs, the actual participants of the market and, therefore operates in this market through its members.[55]

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[45] See for example Case C-41/90 Hofner and Elser v Macrotron GmbH EU:C:1991:161, para. 21.; case C-244/94 Federation franciase des societes d'assurances and other EU:C:1995:392, para. 14.
[46] See for example case 118/85 Commission v Italy, EU:C:1987:283, paras. 6-16
[47] See case C-82/01 P Aéroport de Paris, EU:C:2002:617, para. 74 and also the opinion of AG Jacobs in C-475/99 Ambulanz Glöckner, EU:C:2001:284, para. 72.
[48] Case C-49/07 MOTOE v Elliniko Dimosio, EU:C:2008:376, para. 25.
[49] See also White Paper on Sport Annex I pages. 66-67.
[50] Case T-193/02 Laurent Piau v Commission, EU:C:2005:22.
[51] Ibid. para. 69.
[52] Ibid. para. 71., see also T-46/92 Scottish Football v Commission EU:T:1994:267 or case COMP/33384 and 33378 Distribution of package tours during the 1990 World Cup, OJ [1992] L326/31, paras 52-53.
[53] Case T-193/02 Laurent Piau v Commission, EU:C:2005:22; para. 72.
[54] Ibid. para. 70.
[55] Ibid. paras. 112 and 116.

77. In the Meca-Medina case, the CJEU did not object to the treatment of the International Olympic Committee (IOC) as an undertaking and as an association of international and national associations of undertakings,[56] which adopted the anti-doping rules concerned. In the opinions of Advocate General Cosmas in Deliége, Lenz in Bosman and Alber in Lehtonen treated national judo federations and the EJU[57], football associations,[58] and the Belgian Basketball Federation and FIBA[59] as an association of undertakings, undertakings or associations of associations of undertakings.

78. In the present case, the question would be whether FIFA and UEFA would qualify as undertakings/association of undertakings when adopting the statute provisions in question, i.e. whether they are engaged in economic activity when adopting/enforcing rules on a prior approval system and corresponding sanctions. There is no circumstance, which would indicate any exercise of public authority, neither FIFA, nor UEFA is a public authority, they are fully private entities, constituted under Swiss law, engaged in economic and commercial activities. When they adopt rules, apply their prior approval system and enforce exclusivity arrangements on suppliers, they do nothing more than make decisions with an effect on the market entry of their potential competitors. The underlying activity of organising international football competitions or the self-regulating activities FIFA and UEFA pursue in relation to these football competitions have no characteristics that would point to any other activity than a pure economic one.

79. Therefore, it can be clearly established that both FIFA and UEFA are engaged in economic activities, making them undertakings or association of undertakings for the purposes of applying competition law when they adopt or apply the statute provisions in question.

80. The next relevant question concerns the choice whether to use the concept of undertaking or association of undertakings. Finding FIFA and/or UEFA an undertaking or an association of undertakings would have an effect on the use of Article 101 or 102 TFEU. Qualifying them as an undertaking would have the consequence of using Article 102 TFEU, while opting for the use of an association of undertakings results in the application of Article 101 TFEU.

81. Previous Commission cases have dealt only to limited extent with this question and found that FIFA or UEFA can be associations of undertakings but also undertakings themselves when carrying out their own economic activities, e.g. as organisation of football tournaments and exploitation of football tournaments.[60]

82. FIFA has in theory no economic role in the organization of the Champions League or other European club football tournaments themselves, as it is mainly responsible for international selection team tournaments such as the FIFA World Cup.[61]

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[56] Case C-519/04 P Meca-Medina, EU:C:2006:492 para. 38.

[57] Opinion of AG Cosmas in joined cases C-51/96 and C-191/97 Deliége, EU:C:1999:147, paras. 104-105.

[58] Opinion of AG Lenz in case C-415/93 Bosman, EU:C:1995:293, paras 255-257.

[59] Opinion of AG Alber in case C-176/96 Lehtonen, EU:C:1999:321, para. 103.

[60] See for example case AT.37806 – ENIC/UEFA para. 25, case 33384 and 33378 – Distribution of package tours during the 1990 World Cup, OJ 1992 L326/31, paras. 52 and 53; case 37398 joint selling of commercial rights of the UEFA Champions League, OJ 2003 L291/25, para.106.

[61] FIFA has only one club competition, the FIFA Club World Cup, with a very limited amount of teams playing each other for a few games, see <https://www.fifa.com/tournaments/mens/clubworldcup /qatar2020/match-center> visited 3 October 2021.

However, its statutes require prior approval for international matches and competitions. Nevertheless even in the absence of actual economic activity on the relevant market, it operates through its members making it an association of undertakings.

83. UEFA is clearly an undertaking when organizing the only Pan-European football tournaments, such as the Champions League or the Europa League, however the allegedly restrictive rules are not directly connected to those events. They can be found in the general statutes of UEFA. Therefore, the application of the association of undertaking and decision of association of undertakings must be further explored.

84. In case C-309/99 Wouters, Advocate General Léger explained that an *"association of undertakings' consists of 'undertakings of the same general type and makes itself responsible for representing and defending their common interests vis-à-vis other economic operators, government bodies and the public in general"*.[62] The purpose of the concept of association of undertakings is to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct on the market.[63] In case T-111/08 Mastercard, the General Court upheld the Commission's decision of finding an association of undertakings for two reasons: first, the banks retained decision-making powers within MasterCard after an initial public offering, secondly, there was a commonality of interests between MasterCard and the banks on the issue of the MIF.[64]

85. However, in the case of UEFA, the members are national football associations that are undertakings, though only active on a national level by organizing their respective national championships. UEFA, on the other hand, is not involved in the organization of national championships/leagues, its activities are on a higher, the European level, where it is responsible for the Champions League, Europa League or Europa Conference League.

86. This is a difference compared to the Commission's most recent sports decision, the International Skating Union (ISU) case, where the Commission identified members (national associations) that form the ISU as a group of (potential) competitors that carry out or are capable of carrying out economic activities on the same market, where the ISU was active.[65]

87. Therefore, it could be argued that they are active on different markets, the coordination between UEFA member association by adopting the allegedly restrictive rules are not benefitting them but rather UEFA in a separate relevant market. It can be questioned whether under the circumstances UEFA would be still an association of undertakings and its rules would be a decision of association of undertakings.

88. There can be several arguments why the allegedly restrictive UEFA rules can be still qualified as a decision of association of undertakings. First of all, the rules complained of basically shield UEFA from effective competition as they are in a position to authorize their own competitors. So far, UEFA has been successful of protecting its economic interests and no alternative competition has emerged despite several attempt to create competing products. UEFA's solidarity payments

[62] Case C-309/99, Wouters, EU:C:2001:390, para. 61.
[63] Case C-309/99, EU:C:2001:390, opinion of AG Leger, para. 62.
[64] Case T-111/08, EU:T:2012:260, ara 259.
[65] Case AT.40208 – International Skating Union, para. 150.

resulting from the collective sales of the various competitions' commercial rights directly benefit national associations. Accordingly, national association are directly interested in restricting competition in favor of UEFA and through their decision in the UEFA they can financially benefit indirectly.

89. Another aspect could be that national associations can be at least potential competitors, just like in the ISU case. Accordingly, through the allegedly restrictive UEFA rule they restrict competition both between themselves and UEFA thereby fulfilling the above preconditions of associations of undertakings. This is because, the rule shielding UEFA concerns not only Pan-European competitions, like the Super League, but also any international competition within the jurisdiction of UEFA, i.e. regional initiatives too. Considering the structure of European football, it is perfectly conceivable that smaller nations/national associations might want to create regional leagues to generate more revenue, for example in regions such as the Nordics or the Benelux countries.[66] Accordingly, the UEFA rules can be regarded as collusion between competitors or at least potential competitors, where the effect would be also felt by the national associations as described in the previous paragraph.

90. There is also a legal argument for finding an association of undertaking and the corresponding decision of it that the author would consider the most convincing. While earlier case law in fact emphasized the commonality of interest and coordination between members through the association of undertakings, the 2013 judgment of the CJEU in case C-1/12 OTOC[67] might be especially relevant for the Super League case. In that case, the referring court asked specifically whether Article 101 TFEU precludes restrictive rules as decision of association of undertakings, which have no direct influence on the economic activity of the members of that association. The CJEU answered in affirmative, when it considered that even if the concerned regulation did not directly affect the economic activity of the chartered accountants themselves (i.e. members of OTOC), that fact cannot, of itself, remove a decision of an association of undertakings from the scope of Article 101 TFEU.[68] It also found that a decision like that can be such as to prevent, restrict or distort competition within the meaning of Article 101(1) TFEU, not only on the market on which the members of a professional association practice their profession, but also on another market on which that professional association itself has an economic activity.[69]

91. This argument can be directly applied to UEFA. Even if national associations would not be active on the market of organizing Pan-European club football competitions, their decision as an association of undertakings in the form of the UEFA Statutes restricts competition on a market where UEFA itself has an economic activity.

92. From a legal point of view this would make sense, since Article 101 TFEU prohibits not only restrictions by object between direct competitors but also agreements or decisions that restrict competition with third parties. By foreclosing necessary input for alternative football competitions, the concerned rules do exactly that. While this

[66] See for example the initiative for creating the Atlantic League in 2000/2001 or the short lived Royal League from 2004.
[67] Case 1/12 OTOC, EU:C:2013:127.
[68] Case 1/12 OTOC, EU:C:2013:127. para. 44.
[69] Case 1/12 OTOC, EU:C:2013:127. para. 45.

aspect of the OTOC judgment has not been referred to in subsequent EU cases since 2013 that can be explained by the special factual setting of the case.

93. However, it has to be mentioned, that this finding of the OTOC judgment was directly referred to by the Dutch Supreme Court in a similar case. Upon appeal the Supreme Court established a restrictive decision of association of undertakings where the rules did not benefit the members themselves but restricted competition in a distinct relevant market where the association was active.[70] It is important that this approach of the CJEU would be confirmed in the Super League case that can be relevant for cases outside the world of sports as can be seen from the Dutch Supreme Court's judgment.

4.3.3 Is there a restriction of competition or an abuse of dominant position?

94. As described in paragraphs 70-73 above, to establish a restriction of competition or an abuse of dominant position, one needs to examine separately two elements. The first would be, whether there are any restrictive elements either in the form of a decision of association of undertakings or an abuse, and if this can be answered in affirmative, as the second, whether there are any justifying elements according to the Wouters exception as set out by the CJEU.

95. Nevertheless, before any legal analysis of the relevant FIFA and UEFA rules in question, the precise factual circumstances need to be established with regard to those rules. One needs to understand the exact meaning of the rules and also the practice/context of enforcing them.

4.3.3.1 The FIFA/UEFA rules

96. Article 22 of the FIFA Statutes makes it an obligation of confederations, such as UEFA, to ensure that any international league or other group of clubs will be formed only with the consent and approval of FIFA. Article 71 establishes FIFA's prior approval system and refers in this regard to the Regulations Governing International Matches. Latter document details further the system in Article 6 by determining different type of matches and corresponding authorization procedures. International club competitions in Europe would qualify as Tier 2 matches under Article 8 of the Regulations with an authorization procedure under Article 11. Latter article makes it a responsibility of UEFA to authorize international club competitions within Europe, however FIFA may still take the final decision[71]. Article 13(1)(c) prescribes also that a levy is paid after each match that shall be equal to 2% of the gross receipts[72] derived from each match.

97. Article 73 of the FIFA Statutes requires a further authorization for any international club competition, namely that of national associations of clubs participating in the

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[70] See the case of Netherlands Association of Real Estate and Property Experts NVM; ECLI:NL:HR:2014:149.

[71] See Article 71(4) of the Regulations Governing International Matches.

[72] This means ticket sales, advertising rights for television and radio broadcast, film and video rights, etc.

competition and also that of where the competition takes place. However, under Article 73 this is allowed under exceptional circumstances, i.e. as a general rule association, leagues or clubs in the FIFA pyramid are not allowed to do so. This scenario would require an authorization of both UEFA and FIFA.

98. Under Article 72 of the FIFA Statutes, players and teams from the FIFA pyramid may not play matches or make sporting contacts with players or teams outside the pyramid without the approval of FIFA.

99. Under the corresponding UEFA rule of Article 49(3) of the UEFA Statutes, third party international competitions (i.e. those not organized by UEFA) in Europe shall have the prior approval of FIFA and/or UEFA and/or relevant national associations according to the above-mentioned rules of the Regulations Governing International Matches. Furthermore, since pursuant Article 49(1) only UEFA can organize international competitions in Europe for clubs in the UEFA system, no UEFA club would be allowed to participate.

100. The UEFA Statutes also regulate the possibilities of its member associations, leagues or clubs for combinations or alliances and those are not possible without the permission of UEFA.[73] Playing or organizing matches outside the territory of their respective national association, a necessary precondition of any international competition, would also require the permission of the national association.[74]

101. Under the combined effects of the FIFA/UEFA rules in question, a third party club competition in Europe would definitely need approvals from FIFA, UEFA and all national associations concerned. On top of that, no current UEFA league, club would be able to participate in such an initiative because, as a general rule, they are not allowed to do so. Any infringement of the former rules by leagues, clubs and even players and officials may entail sanctions from the respective football entities, i.e. all national associations concerned, UEFA, FIFA and all other confederations concerned[75]. Besides the limitations on participation in a third party competition, it seems that already looser forms, such as combinations or alliances between leagues and clubs, are subject to strict control of UEFA and national associations (called prohibited relations in the statutes). Moreover, even playing matches and making sporting contacts between players and teams coming from the FIFA system on the one hand and outside of it on the other hand, require the approval of FIFA.

102. In other words, based on the text of the provisions, a third party club competition would always need a prior approval from UEFA, which is at the same time its direct competitor on the market to be entered and it would be deprived of the almost totality of the currently available input resources (leagues, clubs, players or officials).

103. When examining the implementing rules related to the prior approval system, it is not entirely clear what is the subject of the prior approval procedure, what it is exactly that UEFA or FIFA wants to assess in the case of third party club competitions. The FIFA Regulations Governing International Matches, that is

[73] Article 51(1) of the UEFA Statutes.
[74] Article 51(2) of the UEFA Statutes.
[75] According to Article 3(a) of the FIFA Statutes each confederation shall have the obligation of complying with and enforce compliance with the Statutes, regulations and decisions of FIFA. In addition, the already mentioned Article 59 of the UEFA Statutes make sure that national associations member in UEFA enforce compliance with the UEFA Statutes, regulations and decisions on the side of its leagues, clubs, players and officials.

referenced also by the UEFA Statutes (Article 49(3)), contains only rather short application forms that should be used by the hosting and the participating parties. In these forms, a description of the competition has to be provided, naming also the responsible party for staging it, the teams participating in it, the date of the event, the location and the referees.

104. As to the practice of enforcing the above-mentioned or similar rules throughout the years, the following elements might be relevant for any assessment. Alternative, third party Pan-European club competition initiatives were so far unsuccessful in European football. Any attempts on a meaningful scale triggered similar reactions from UEFA or FIFA as in the case of the current Super League initiative.

105. The 1998 Media Partners proposal for the establishment of an alternative league, the European Football League, was the first real attempt with a rather detailed business plan how it would look like.[76] FIFA's response to the breakaway discussions was to threaten any participating club with suspension, which would have meant immediate ejection from involvement in existing domestic competitions.[77]

106. In 2003, there were apparently plans to establish the European Golden Cup, a new super league, however it never got realized.[78] On July 27, 2011, there were news on another "European Super League", which in the end did not materialized either.[79] In 2000 and 2001 clubs from Scotland, the Netherlands, Portugal, Belgium Sweden and Denmark tried to establish the Atlantic League hoping for more lucrative broadcasting contracts and attracting more quality players as compared to their previous possibilities.[80] UEFA and the national associations concerned rejected the plan and told the clubs that they would not be able to play in UEFA competitions any longer and the national associations said they would sever all ties with the clubs too.[81]

107. In comparison, successful attempts of international European club competitions had features that seemed to distinguish them clearly from the major Pan-European competitions, potentially putting them in different relevant markets due to non-existing effects at all on UEFA competitions in any way. These competitions were rather limited in terms of the geographical area concerned and length in time, used vacant space in the international match calendar and involved smaller European clubs only.[82] Examples include the Atlantic Cup played between the Icelandic and Faroe Island champion that existed between 2002-2008; the Baltic League (2007-2011); the Setanta Cup with teams from both sides of the Irish border (2005-2014); the Royal League involving Norway, Sweden and Denmark (2004-2006); the CIS Cup involving clubs from the former Soviet Union states.[83]

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[76] See more in Katarina Pijetlovic: EU Sports Law and Breakaway Leagues in Football, ASSER International Sports Law Series, 2015, pages 55-61.
[77] Stephen Dobson and John Goddard: The Economics of Football, Cambridge University Press, 2004, p. 425.
[78] Katarina Pijetlovic: EU Sports Law and Breakaway Leagues in Football, ASSER International Sports Law Series, 2015, page 62.
[79] Ibid pages 68-69.
[80] Ibid page 70.
[81] Ibid.
[82] Ibid. page 72.
[83] Ibid. pages 70-72.

108. Apparently UEFA itself considers that a cross-border competition is conceivable only if the proposal for such a project satisfies the following criteria:[84]

> 1. The cross-border competition must be approved by the respective UEFA member associations;
>
> 2. The cross-border competition must be organised by the respective UEFA member associations;
>
> 3. All clubs planning to participate in the cross-border competition must be affiliated to a UEFA member association (or to a league/regional football association subordinated to such association);
>
> 4. Geographical aspects should be taken into consideration when a cross-border competition is being assessed;
>
> 5. All clubs planning to participate in the cross-border competition must recognise, as a condition of participation, that the ownership of the competition and its core commercial rights belong centrally to the competition organiser - in this case the associations (not the league, clubs, etc.) - not to the individual clubs (same model as the UEFA Champions League);
>
> 6. Minimum standards should be fixed with regards to the levels of solidarity distributions from the commercial rights revenues.
>
> 7. The competition regulations must be in compliance with the UEFA statutes/regulations and need to be approved by UEFA;
>
> 8. Participating clubs must be licensed in accordance with the UEFA Club Licensing System;
>
> 9. The competition regulations must include, among other things, provisions concerning, for example: i. Refereeing; ii. Disciplinary matters; iii. Independence of clubs (integrity of competition); iv. Anti-doping.
>
> 10. The cross-border competition must not conflict with the international match calendar;
>
> 11. The matches of the cross-border competition may not be played on the same day as UEFA club competitions;
>
> 12. The cross-border competition must not replace the national championships and must be arranged around the calendar of the national championship;
>
> 13. Approval of FIFA.

109. As can be seen, in particular from conditions 2, 4, 5, 10, 11 and 12, these arrangements make sure that the new competition represents no real competitive threat for the products of UEFA at all.

110. UEFA is perceived as fiercely opposing the formation of any breakaway league by elite clubs and its rules are designed to impose severe financial and sporting penalties on the teams participating without UEFA's prior approval.[85] UEFA itself stated that it is opposed to "any concept susceptible of having a negative

[84] Ibid pages 73-74.
[85] Ibid. page 54.

influence on the existing domestic and European competitions and of endangering the future of national teams".[86]

111. Considering the above discussed circumstances of the enforcement of the FIFA and UEFA rules in question, it can be raised whether the prior approval system for third party international club competitions is a system with the possibility of approval or in fact there is simply an outright ban on UEFA's potential competitors.

4.3.3.2 Restriction of competition

112. For the restrictive element of the test, it has to be established that the FIFA/UEFA rules in question can be classified as a decision of association of undertakings with a restrictive object/effect (Article 101(1) TFEU) or as an abuse of dominant position (Article 102 TFEU). In that regard, it is worth noting that in accordance with settled case-law, the same practice may give rise to an infringement of both Article 101 TFEU and Article 102 TFEU, even if the two provisions pursue distinct objectives.[87] In case 66/86 Ahmed Saeed, the CJEU held that Article 102 TFEU may also apply to a decision falling within Article 101 TFEU where it simply constitutes the formal measure setting the seal on an economic reality characterised by the fact that an undertaking in a dominant position has succeeded in having its commercial terms accepted and applied by its partners.[88] In the present case, FIFA/UEFA imposes on clubs and players the FIFA/UEFA Statutes, regulations as agreed between their members, therefore the application of both Articles 101 and 102 TFEU can be raised.

113. Any restrictive elements can be discussed only in relation to the properly defined product and geographic markets and those considerations would be equally applicable for the assessment under Article 101 and 102 TFEU as well. The relevant product market can be defined as the market for organisation/organisational services of Pan-European club football competitions. The geographic dimension of this market is Europe as the case concerns the rules of UEFA.

114. This market definition distinguishes between football and other sports disciplines in line with previous case law;[89] between national and international competitions as former are organised on a smaller, national level, where the conditions of competition and market players are also different.[90] It would also make sense to distinguish at the level of international competitions between Pan-European, large-scale competitions and smaller, regionally limited initiatives, as they can be substantially different both from a demand and supply point of view.

115. There can be, in theory, also a separate purchasing market where teams offer their services as an input for the creation of international club football

[86] Ibid.
[87] See, to that effect, case C-307/18, Generics (UK) Ltd, EU:C:2020:52, para. 146; case 85/76, Hoffmann-La Roche, EU:C:1979:36, para. 116, and case C-395/96 P and C396/96 P, Compagnie maritime belge transports and Others, EU:C:2000:132, para. 33.
[88] Case 66/86, Ahmed Saeed, EU:C:1989:140, para. 37.
[89] See for example, para. 87 of Commission decision in case AT.40208 International Skating Union.
[90] See in this regard also Commission decision in case AT.40208 International Skating Union, paras. 106-109.

competitions. Currently the sole buyer on this market is UEFA, which creates to downstream product of international club football competitions.

116. Depending on the factual assessment of FIFA/UEFA's prior approval system, there could be a separate relevant market defined for certification/licensing of organizers of/participants taking part in international football events. FIFA and UEFA have multiple standards/regulations with regard to stadiums, safety, sports equipment, transfers, rules of the game, etc. that can be examined in the case of a potential entrant to the market of organising international football competitions. If the prior approval system in place is in fact a regulatory type of authorization system, where these international federations certify and license organizers/participants taking part in football events based on their rules for the market, this could be considered as a standalone market. FIFA and UEFA would have significant market power/monopoly on this market due to the already mentioned pyramid structure of sport. This market definition would reflect FIFA's and UEFA's regulatory type of powers and separate the assessment of it from the truly commercial type of organization and exploitation activities.

117. Based on the FIFA Regulations Governing International Matches, the football regulatory bodies receive 2% of the gross receipts derived from each match, which could be seen as remuneration for the authorization activities.

118. Downstream markets involve the commercial exploitation and promotion of Pan-European club football competitions.

119. The author examines in detail below the application of Articles 101 and 102 TFEU to the already described factual setting of the case.

4.3.3.2.1 Restrictive decision of association of undertakings (Article 101(1) TFEU)

120. A decision of an association of undertakings such as FIFA or UEFA can be a restriction of competition under Article 101(1) TFEU according the same conditions as in other sectors of the economy, a restrictive object or effect have to be proven.

121. According to the case-law of the Union Courts, certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.[91] Some forms of conduct can be regarded, by their very nature, as being injurious to the proper functioning of normal competition and, in such cases, the analysis of the economic and legal context in which the conduct occurs may be limited to what is strictly necessary.[92] To determine whether a decision reveals such a sufficient degree of harm to competition that it may be considered a restriction of competition by object, regard must be had inter alia to the content of its provision, the precise objectives it seeks to attain and the economic and legal context of which it forms part.[93]

[91] Case C-67/13 P Groupement des cartes bancaires, EU:C:2014:2204, para. 49.

[92] See case C-286/13 P Dole Food and Dole Fresh Fruit Europe, EU:C:2015:184, para. 114 and the case-law cited; case C-32/11, Allianz Hungária Biztosító and Others, EU:C:2013:160, para. 35; Case C-373/14 P Toshiba Corporation, EU:C:2016:26, para. 29.

[93] Case 67/13 P Groupement des cartes bancaires, EU:C:2014:2204 para. 53; Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others EU:C:2011:631, para. 136;

122. Where, however, the analysis does not reveal the effect on competition to be sufficiently deleterious, the consequences of the decision should then be considered, and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.[94] In this process, competition must be understood within the actual context in which it would occur in the absence of the decision in dispute. For the purposes of establishing a restrictive effect of FIFA's and UEFA's rules on competition, account should be taken of the actual conditions in which it produces its effects, namely the economic and legal context, the nature of the product concerned, the real operating conditions and the structure of the market concerned.[95] This must be an objective analysis of the impact of the decisions on the competitive situation,[96] looking at restraints not in isolation or abstractly, but under the existing conditions for market entry and prevailing market forces[97]. Such an assessment should not be restricted to actual effects alone, it must also take account of the potential effects of the practice in question on competition.[98]

123. Through the combined effects of the Statutes and Regulations in question, FIFA and UEFA set up a prior approval system for football competitions that it linked with an obligation on leagues, clubs and players not to participate in those competitions unless they receive the approval of FIFA, UEFA and the national associations concerned.[99] It seems that those decisions at issue are not among the decisions which it is accepted to be considered, by their very nature, to be harmful to the proper functioning of competition.

124. This is because any anticompetitive nature and consequence of this system, must be seen in the light of FIFA/UEFA's potential market power on the market of organising international football club competitions in Europe and the corresponding economic importance of leagues, clubs and players currently in the UEFA pyramid for potential competitors. Accordingly, even if the relevant decisions could potentially have the effect of restricting the access of UEFA's competitors to the market of organising international football club competitions in Europe, such a fact, if established, does not imply clearly that such decisions prevent, restrict or distort, by their very nature competition on the relevant market.[100]

125. The relevant rules of FIFA and UEFA were adopted as decisions of association of undertakings by member associations that are not active on the same

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case C-501/06 GlaxoSmithKline,:EU:C:2009:610, para. 58; Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others, EU:C:1983:310, para. 25; and case C-209/07 Beef Industry, EU:C:2008:643, paras. 16 and 21.

[94] Case 56/65 Société Technique Minière, EU:C:1966:38, para. 8; case C-32/11, Allianz Hungária Biztosító and Others, EU:C:2013:160, para. 34.

[95] Case T-461/07 Visa Europe Ltd and Visa International Service, EU:T:2011:181, para. 67; Case C-382/12 P MasterCard, Inc. and Others, EU:C:2014:2201, para. 165 and Case C-67/12 P Cartes Bancaires, EU:C:2014:2204, para. 53.

[96] Case T-328/03, O2 (Germany) GmbH & Co. OHG, EU:T:2006:116, para. 77.

[97] Case C-345/14 SIA Maxima Latvija, EU:C:2015:784, paras. 27-28.

[98] Case C-345/14 SIA Maxima Latvija, EU:C:2015:784, para. 30; case C-238/05, Asnef-Equifax EU:C:2006:734, para. 50.

[99] See in similar sense cases AT.40209 International Skating Union and Cases COMP/35.163 — Notification of FIA Regulations, COMP/36.638 — Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship, COMP/36.776 — GTR/FIA others, OJ C169, 13/06/2001, page 5.

[100] To this end, see case C-345/14 SIA Maxima Latvija, EU:C:2015:784, paras. 21-22.

market as UEFA and may have a restrictive effect on the competitive relationship of UEFA with third parties, i.e. new entrants targeting the market for the organisation of international football club competitions.[101]

126. In fact, even if considered to be an outright ban on its suppliers to sell to competitors, the FIFA/UEFA rules concerned can be compared to exclusivity clauses, whereby partners in a vertical relationship undertake not to sell their products/services to competitors of their partners or put it differently they undertake to sell exclusively to UEFA. In the case of UEFA, this means that leagues, clubs or players, each offering their services as input for the organisation of international football club competitions, commit not to sell those services to competitors of UEFA, namely third party organisers. This can be classified as an exclusive supply obligation imposed by the dominant buyer on its suppliers.[102]

127. The possible competition risks are foreclosure of the market to potential competitors of the undertaking with market power and in particular in a dominant position. The capacity of these exclusivity obligations to result in anticompetitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors or new entrants.

128. Such an exclusive supply would be exempted by the Vertical Block Exemption Regulation 330/2010[103] provided the buyer's market share on the relevant market does not exceed 30%. It seems unlikely that this would be the case with regard to UEFA. However, even above that market share threshold it is not presumed that the conduct would be unlawful, an individual assessment has to be carried out. This assessment has to consider both actual and likely effects, whether there is an effect on actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation, or the variety or quality of the goods or services can be expected with a reasonable degree of probability.[104] The likely negative effects on competition must be appreciable. The relevant factors for the assessment are the nature of the agreement, market position of the parties, the competitors, buyers of the contract products, entry barriers, maturity of the market, level of trade, nature of product.[105]

129. More specifically, in the case of exclusive supply the market share of the buyer on the upstream purchase market is important for assessing the ability of the buyer to impose the exclusivity requirements.[106] The importance of the buyer on the downstream market is however the factor which determines whether a competition problem may arise. If the buyer has no market power downstream, then no appreciable negative effects for consumers can be expected.[107] Where a company is dominant on the downstream market, any obligation to supply the products only

[101] See case 1/12 OTOC, EU:C:2013:127, paras. 44-45.
[102] See Commission notice – Guidelines on Vertical Restraints, SEC(2010) 411, recitals 192-201 or the revised though not yet adopted version of it (recitals 303-312) available at: <https://ec.europa.eu/competition-policy/document/download/bff24773-e2b9-4788-8e42-0b10e0f6b28b_en> visited 3 October 2021.
[103] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1–7.
[104] See Commission notice – Guidelines on Vertical Restraints, SEC(2010) 411, recital 97.
[105] Ibid. recital 111.
[106] Ibid. recital 194.
[107] Ibid.

or mainly to the dominant buyer may easily have significant anti-competitive effects.[108] It can be also decisive what is the duration of the exclusivity obligations and what proportion of the supply is tied to the buyer by that obligation.[109]

130. It is important to assess the position and buyer power of competing buyers on the upstream purchase market, whether they can offer suppliers similar sales possibilities.[110] Entry barriers at supplier level could be important in terms of whether vertical integration would be a possible alternative to avoid the foreclosure effects caused by the dominant buyer's behaviour.[111] Countervailing power of suppliers is another factor that can alleviate fears of foreclosure, provided they are in a position to hinder being cut off from alternative buyers.[112]

131. At the moment, it seems the only buyer on the upstream market is UEFA, as it is the sole provider downstream on the market of organisation of international club football competitions. UEFA is also dominant in the commercial exploitation of those competitions downstream. Since national competitions have different conditions, limitations and characteristics, the organisers of those events are not in competition with UEFA on international organisation market or the input market. Anyway, national leagues are also part of the FIFA/UEFA structure, where UEFA is on a higher level in the pyramid structure. This means in practice a market share of 100% both upstream and downstream for UEFA. These market shares are also quite stable as no other alternative competition was allowed over the last decades. The exclusivity is not limited in time and obviously covers the whole market. These factors seem to suggest clearly negative effects.

132. Considering the above aspects, the possible negative effect of the rules in question and the lack of prior approval has to be seen and assessed in the end also in the light of the importance of those suppliers providing input for the organisation of competitions (i.e. leagues, clubs and players). The market power of UEFA on the market of organising international football competitions depends on the barriers to entry and countervailing power of suppliers. The lack of prior approval from FIFA, UEFA or national associations may eliminate potential entry on this market only if it hinders the new entrant in obtaining the services of necessary input providers, i.e. currently those in the FIFA/UEFA pyramid. In this regard, the negative effects would be created by the link between the prohibition on leagues, clubs and players in the UEFA system to participate in third party competitions and the prior approval, and not by a possible rejection or the nature of the approval process itself. This is because even with an approval adopted in a clearly defined, transparent, non-discriminatory and reviewable procedure, a potential entrant would still not be able to access the market provided an exclusive supply clause backed by severe sanctions is still applied on the market by the dominant undertaking, thereby depriving competitors of the necessary inputs needed to provide the services. Therefore, the author considers that for the purposes of establishing a restriction of competition by effect, in the absence of any regulatory functions delegated to FIFA

[108] Ibid.
[109] Ibid. recital 195.
[110] Ibid. recital 196.
[111] Ibid. recital 197
[112] Ibid. recital 198.

and UEFA by a public authority, the case-law of MOTOE,[113] OTOC[114] and ISU[115] would be irrelevant in this case.

133. It would need to be assessed whether the potential competitors of UEFA, such as the ESCL, would be able to find the necessary input providers, such as teams and players in order to enter the market of organising international football competitions. In this regard, it has to be assessed whether the prior approval is in fact only a theoretical possibility that is highly unlikely to be given to a third party competition, and most importantly whether in the absence of an approval, considering the reactions of FIFA, UEFA and the relevant national associations, input providers such as leagues, clubs and players would be still willing to join such a project. Considering that at the moment the FIFA/ UEFA rules are legally relevant for the whole of the global football community, it has to be assessed whether the threat of complete expulsion from the FIFA pyramid or actually enforced sanctions on clubs and also players would be counterbalanced by the benefits of joining the alternative football competition.

134. More specifically, would players still want to join or remain at a club participating or planning to participate in an alternative competition, if they would know that they would be banned from playing in their respective national teams[116] and also at club level in any national league around the world. While there would be for sure certain players ready to join an alternative league knowingly accepting the consequences, it has to be seen whether on balance those players would enable new entrants to compete on equal terms with UEFA or the entrant would be handicapped or hindered by the low availability and/or quality of input providers.

135. If the benefits of joining a new competition on its own would not be enough to offset the negative consequences of FIFA/UEFA's reactions, it would mean that a new entrant would need to replicate at least part of the football pyramid to offer similar possibilities to the input providers, thereby increasing substantially the cost of entering the market or even eliminating the possibility of it. This is the question of barriers to entry, how high are the cost of getting access to those services, and whether teams have the countervailing power by vertically integrating and creating their on league. It is for the referring court to assess any such entry barriers and the possibility or cost of vertical integration. However, in this regard it has to be mentioned that no such entry was ever realised and even in the current case, 9 out of the 12 clubs decided to withdraw from the Super League project and committed to measures with serious actual and potential financial consequences for their operations, including possible fines that UEFA would have never been able to impose under its disciplinary procedures.

136. Considering UEFA's strong and sustained position on the relevant market(s), the history of the market, the perpetual nature of the exclusivity obligations and the fact that it concerns the whole market, entry barriers should be rather low or non-existent and the possibility of vertical integration should be relatively easy if one intends to find no negative effects.

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[113] Case C-49/07 MOTOE v Elliniko Dimosio, EU:C:2008:376, para. 51-52.
[114] See case 1/12 OTOC, EU:C:2013:127, paras. 84-88.
[115] Case T-93/18 International Skating Union, EU:T:2020:610, paras. 75, 88-89.
[116] Irrespective whether at the Olympics, the World Cup, the European Championship or any other relevant continental tournament or even a one off friendly international match.

137. The conduct complained of might also restrict competition in the individual input markets such as the player market when it limits the possibilities of player to offer their services on an even wider basis. Furthermore, as described above it would primarily restrict competition on the market of organising international club football competitions by denying the entry of potential competitors. The complete lack of competition in the downstream market could increase prices, limit choice of available products, lower the quality of those products and hinder innovation. The lack of competition also harms input providers.

138. It remains to be examined whether in the light of the nature of the product and the real operating conditions, any of the above negative effects would materialize. Given the history of the relevant market, there were several real and credible entry plans that never got to the stage of being completed. Also, the Statutes are valid on a general basis, covering all actors in the FIFA pyramid without any distinction to particular type of clubs or players.

139. At the same time, exclusivity requirements may be justified by the need to solve a free-rider problem or the so-called hold-up problem. A free-rider problem may exist, where a potential new entrant may free-ride on the promotion efforts or investments of UEFA made on the relevant market. Under the so-called "hold-up problem", there are client-specific investments to be made by either the supplier or the buyer, and the investor may not commit the necessary investment before particular arrangements are fixed. These arguments are discussed later in section 4.4.1.

140. Finally, it has to be mentioned that the circumstance that the undertaking adversely affected by the decision of the association of undertakings might be itself pursuing an anticompetitive conduct under Article 101 or 102 TFEU on the market or would be infringing the competition rules once allowed to enter the market, is of no relevance to the question whether the decision of association of undertakings constitutes an infringement of those provisions.[117] Accordingly, any alleged competition law infringement arising from the business model of the Super League would not be a justification for FIFA’s and UEFA’s infringements. It is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements.[118]

4.3.3.2.2 Abuse of dominant position (Article 102 TFEU)

141. Under Article 102 TFEU, a dominant position needs to be established in the relevant market or given the specificities of sports regulation a collective dominant position of FIFA and UEFA might be raised as well.

142. The expression ‘one or more undertakings’ in Article 102 TFEU implies that a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity.[119] Three cumulative conditions must be met for a finding of collective dominance: first,

[117] See to that effect case 68/12, Slovenská sporiteľňa a.s., EU:C:2013:71, para. 21.
[118] Case 68/12, Slovenská sporiteľňa a.s., EU:C:2013:71, para. 20.
[119] Case T-193/02 Laurent Piau v Commission EU:C2005:22, para. 110.

each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy.[120]

143. It has to be decided whether in the light of the similar provision in the FIFA and UEFA Statutes, considering also the provisions reinforcing each other's rules, the partly overlapping memberships and the parallel behaviour on the market would justify the classification of FIFA and UEFA as undertakings in a collective dominant position. The collective dominant position might involve even the relevant national associations.

144. The degree of market power normally required for a finding of an infringement under Article 102 is higher than the degree of market power required for a finding of dominance under Article 101(1) TFEU.

145. The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[121]

146. A dominant undertaking has a special responsibility not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the internal market.[122] It follows from the nature of the obligations imposed by Article 102 TFEU that, in specific circumstances, an undertaking in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings.[123]

147. While the anticompetitive effect of a particular practice must not be of purely hypothetical nature, the effect does not necessarily have to be concrete.[124] It is sufficient to demonstrate that by making more difficult, or impossible, the entry of competitors considered to be as efficient as the dominant undertaking onto the

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[120] Ibid. para. 11.

[121] Case C-549/10 P Tomra, EU:C:2012:221, para. 17; Case C-457/10 P AstraZeneca, EU:C:2012:770, para 74.

[122] Case 322/81 Nederlandsche Banden Industrie Michelin, EU:C:1983:313, para. 57; Case C-209/10 Post Danmark A/S, EU:C:2012:172, para. 23; Case C-457/10 P AstraZeneca, EU:C:2012:770, para. 134.

[123] Case 322/81 Nederlandsche Banden-Industrie Michelin, EU:C:1983:313, para. 57; Case T-111/96 ITT Promedia, EU:T:1998:183, para. 139; Case C-413/14 P Intel Corp, EU:C:2017:632, para. 135.

[124] Case C-52/09 TeliaSonera Sverige, EU:C:2011:83, para. 64; Case T-336/07 Telefónica EU:T:2012:172, para. 268, confirmed on appeal in Case C-295/12 P, EU:C:2014:2062, para. 124; Case T-398/07 Spain, EU:T:2012:173, para. 90; Case C-457/10 P AstraZeneca, EU:T:2012:770, para. 112; Case C-23/14 Post Danmark A/S, EU:C:2015:651, para. 66.

market concerned, there is an anticompetitive effect that may potentially exclude those competitors.[125]

148. The exclusivity elements of FIFA's and UEFA's Statutes, if adopted by a dominant undertaking, would be liable to hinder market entry on the relevant market concerned, especially that their current market position is almost a monopoly. Therefore, the analysis under Article 101(1) TFEU provided in the previous section would be relevant also for the application of Article 102 TFEU. The issues of barriers to entry and countervailing power would be relevant here as well. In this regard, it has to be assessed, whether in the absence of an approval, considering the reactions of FIFA, UEFA and the relevant national associations, input providers such as leagues, clubs and players would be still willing to join an alternative international club football competition. Considering that at the moment the FIFA/UEFA rules are legally relevant for the whole of the global football community, it has to be assessed whether the threat of complete expulsion from the FIFA pyramid or actually enforced sanctions for clubs and also players would be counterbalanced by the benefits of joining the alternative football competition.

149. The fact that a sports federation seeks to protect its own economic interest is not in itself anticompetitive and considered to be different from competition on the merits.[126] The countermeasures of a dominant undertaking should be proportionate to the threat taking into account the economic strength of the undertakings confronting each other.[127] It needs to be assessed whether the threat to UEFA from the Super League really justified the reaction from FIFA, UEFA, all other confederations and all national associations with regard to the clubs involved and especially with regard to the players of those clubs.

150. With regard to the anticompetitive effects of the FIFA/UEFA rules in question, it has to be emphasised that those are general rules, applicable universally and not just being adopted for the case of certain specific potential entrant, such as the Super League. Accordingly, a monopoly's practice to require full exclusivity from its suppliers, may represent an abuse of dominant position where it can be demonstrated that by making more difficult, or impossible, the entry of competitors, considered to be as efficient as the dominant undertaking, onto the market concerned, there is an anticompetitive effect that may potentially exclude those competitors.

4.3.3.3 Application of the Wouters exception/regulatory ancillarity

151. If it can be established according to the required legal standards that the FIFA and UEFA rules in question can have restrictive effects or could be an abuse of dominant position, it should be examined, as a separate issue, whether there are

[125] Case C-280/08 P Deutsche Telekom, EU:C:2010:603, para. 177, 178, 253 and 254; Case C-52/09 TeliaSonera Sverige, EU:C:2011:83, para. 63 and 64; Case T-336/07 Telefónica, EU:T:2012:172, para. 271 and 275, confirmed on appeal in Case C-295/12 P, EU:C:2014:2062, para. 124; Case T-398/07 Spain, EU:T:2012:173, para. 93; Case C-209/10 Post Danmark A/S, EU:C:2012:172, para. 25, 36, 40 and 44; Case C-23/14 Post Danmark A/S, EU:C:2015:651, para. 31, 65 and 66; Case C-413/14 P Intel Corp., EU:C:2017:632, para. 136.

[126] See to that effect case 27/76, United Brands, EU:C:1978:22, para. 189-190.

[127] Ibid.

element justifying those restrictions and therefore still removing them from the scope of the general prohibitions to be found in Articles 101 and 102 TFEU. This is the concept of regulatory ancillarity (called also Wouters exception) that was developed by the CJEU in the Wouters case[128] and set out in the Meca-Medina judgment for sports cases[129].

152. In essence, the application of the regulatory ancillarity framework would mean that there are no rules, even if "purely sporting ones", that would be automatically removed from the scope of the EU/EEA competition rules once they have an established adverse effect on competition. Therefore, regulatory ancillarity cannot be interpreted as a general, blanket exemption to all restrictions without any examination simply because there may be some legitimate objectives claimed by any party. The logic of regulatory ancillarity and the Wouters exception also means that a certain practice will not become restrictive as a result of failing particular elements of the Wouters test, rather it will not be removed from the scope of the competition rules and therefore would still fall within the prohibitions laid down in Articles 101 and 102 TFEU. One has to assess whether in the light of the overall context of the conduct with an anticompetitive effect there could be overriding legitimate objectives that it pursues and whether the negative effects are inherent and proportionate to those objectives. This is done strictly on a case-by-case basis with reference to the specific restriction, considering all relevant circumstances, therefore no conclusion can be drawn in abstract by referring to general arguments only. All three elements of the test have to be examined specifically, where vague, loosely related objectives cannot justify measures that go beyond what is necessary to achieve those objectives.

153. Since the regulatory ancillarity concept creates an exception from the general prohibitions laid down in the competition rules, it has to be interpreted narrowly keeping in mind the goal of undistorted competition. The fact that the regulatory function of international sports federations lacks the public authorisation element, makes this aspect even more important. Due to the dual role of sports federations as a regulator and at the same time commercial operator on the market they regulate, it cannot be assumed that public interest considerations were properly taken into account or the balancing of concurring public interest objectives was done in the same way as in the case of public authorities.

154. Another important aspect concerns the burden of proof. It is for the party arguing the application of regulatory ancillarity, to prove the existence of legitimate objectives, the inherent nature of the restriction and the proportionality.*[130]* In the case of the FIFA and UEFA rules, this means that those federations bear the burden of proof to provide acceptable justifications and to show proportionality, where the other party has already shown a restriction of competition.

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[128] Case C-309/99, Wouters and others, EU:C:2002:98, para. 97.

[129] Case C-519/04 P Meca-Medina, EU:C:2006:492, para 42.

[130] The problem is similar to the issue of objective justification in the case of Article 102 TFEU, where the General Court expressly said in case T-201/04 Microsoft, EU:T:2007:289, para. 688 that 'it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence'.
In this regard see also case T-144/99, Institute of Professional Representatives before the European Patent Office,EU:T:2001:105. para. 77-78. See also Commission decision 1999/276/EC of 7 April 1999 (IV/36.147 EPI Code of Conduct).

155. If the possible restrictive effects of FIFA's and UEFA's rules in question can be proven, one would need to answer the question whether the exclusion of any meaningful competition for UEFA's football events by foreclosing inputs needed for market entry, can be justified by any non-competition arguments. More specifically, is there any public interest objectives that can be identified for the foreclosure of any potential entry on the market of organising international club football competitions in Europe. If such objectives can be identified, is the foreclosure of any potential entry on the market of organising international club football competitions in Europe inherent in the pursuit of those objectives? Finally, provided the rules are inherent in the pursuit of those legitimate objectives, are they proportionate to those objectives?

156. If the FIFA and UEFA rules in question fail under the assessment of any of the above three questions of the Wouters exception, they would remain a restriction of competition or abuse of dominant position, there would be no way to avoid the full application of the prohibitions laid down in Article 101(1) and 102 TFEU.[131]

4.3.3.3.1 The overall context, legitimate objectives

157. As a starting point of the assessment, it has to be noted that the context in which the rules of FIFA and UEFA were adopted, at first glance, does not necessarily indicate specific circumstances that would make the restriction anything else then a pure economic decision that serves to protect the economic interest of those entities involved.[132] Hindering the entry of potential competitors by the dominant undertaking through foreclosing the necessary inputs needed to provide the services on the market is, in most of the cases, not directly connected to the organisation and proper conduct of competitive sport, it is not a sporting rule that at the same time might also have an effect on competition.

158. This is not an anti-doping regulation that serves the purpose of ensuring equal chances for athletes and protecting their health, which at the same time might have negative effects when athletes get excluded from the market by disciplinary decisions.[133] It is also not a regulation that could serve the purpose of ensuring the uncertainty of sports competitions' results and the regularity of competition that indirectly can also affect service providers in the player market.[134] It is also not a restriction arising out of the inherent need to limit the number of participants in a sports event in some form that could, at the same time, foreclose certain athletes

[131] See case T-93/18 International Skating Union, EU:T:2020:610, paras. 61 and 103.
[132] While protecting its own economic interest is not in itself anticompetitive (see Case T-93/18, International Skating Union, EU:T:2020:610, para. 109.), if it is done by an undertaking with significant market power or in a dominant position eliminating potential competition, it can be a restriction of competition under Article 101 or 102 TFEU as discussed above. This aspect should be considered under the notion of restriction of competition and not regulatory ancillarity.
[133] See Case C-519/04 P Meca-Medina, EU:C:2006:492; or Case COMP/39471 Certain joueur de tennis professionnel /Agence mondiale antidopage, ATP Tour Inc. et Fondation Conseil international del'arbitrage en matière de sport available at:
http://ec.europa.eu/competition/antitrust/cases/decisions/39471/fr.pdf
Appealed in case T-508/09, Cañas, EU:T:2012:152 ; case C-269/12 P Cañas, EU:C:2013:415.
[134] Case C-176/96 Jyri Lehtonen, EU:C:1999:321, opinion of AG Alber.

from providing their services.[135] The FIFA and UEFA rules are not having adverse effects indirectly due to the need of establishing certain criteria in order for a sport club/team to participate in professional leagues or to be promoted to a higher league, or through the organisation of a sport on the basis of the "home and away match" criteria ensuring the equality of chances.[136] Finally, the FIFA and UEFA rules do not seem to serve the purpose of guaranteeing the integrity of sport competitions by limiting the multiple ownership of sports clubs/teams and thereby excluding certain market participants,[137] or ensuring that sport competition between national teams/selections include only nationals from those respective nations, thereby excluding national from other Member States[138]

159. The FIFA and UEFA rules in question seem to produce their adverse effects directly as a result of the parties' documented goal of protecting their own economic interest combined with their market position enabling them to exclude successfully new entrants from the market. In this situation, none of the specific characteristics of sport seems to be relevant in the assessment.[139] The fact that on a relevant market there are competing sport related products, does not affect the result uncertainty aspect of those products that should be rather understood and interpreted within the particular sport products only, such as a football competition. In the case of football, the interdependence between competing adversaries is also only relevant within one league/tournament/competition, it is difficult to see how the lack of competition on an inter-league level would help the creation of a football product. Finally, the pyramid structure of sport also does not necessarily offer an explanation, as a uniform regulatory framework is not inevitably in conflict with the existence of competing products, in fact this is the standard is most other parts of the economy. Not even the pyramid structure of competitions from grassroots to elite level would be in contradiction with competing products, as for example already today, there are several Pan-European football competitions run by UEFA in parallel with connections to each other.

160. However, it cannot be ruled out in abstract that those sports related legitimate public interest objectives cannot be linked, at least indirectly, to the restriction at hand, namely the exclusion of potential competition by foreclosing the necessary inputs needed to provide the services on the market. Therefore those arguments have to be discussed and, based on the burden of proof, should be presented by the sports federations concerned. These arguments should be specifically connected to the relevant restriction at hand, namely the exclusion of potential competition by foreclosing the necessary inputs needed to provide the services on the market.

161. In practice, this would mean that FIFA and UEFA need to present arguments, why the elimination of competition on the market of organising international club

[135] Case C-51/96 and C-191/97 Christelle Deliège, Opinion of AG Cosmas EU:C:1999:147, paras. 89-114.
[136] Case COMP/36851 C.U. de Lille/UEFA (Mourscron).
[137] Case AT.37806 – ENIC/UEFA.
[138] See as an analogy case 36/74 Walrave and Koch v Association Union Cycliste Internationale, EU:C:1974:140
[139] Compare that with case C-325/08 Bernard, EU:C:2010:143, para. 40; Case T-93/18, International Skating Union, EU:T:2020:610, para.79; or recital 211 of case AT.40209 – International Skating Union.

football competitions in Europe would be connected to the overall objective of organisation and proper conduct of competitive sport in the form of ensuring:

a. fair sport competitions with equal chances for all athletes/teams;
b. the uncertainty of results;
c. the protection of the athletes' health;
d. the encouragement of training of young athletes;
e. the financial stability of sport clubs/teams;
f. organised solidarity mechanisms between the different levels and operators; or
g. the uniform and consistent exercise of a given sport (the "rules of the game").

162. A link between the restriction of competition and the above objectives of sports regulations can be made if the argument would say that competition in the relevant market should not be allowed because the competing product would not be provided under the same regulatory framework and the competitors would not follow or would not follow each and every one of those values. In this regard, it has to be emphasised that allowing competing products in sports markets does not inevitably mean that the competitor would renounce the currently existing regulatory framework and act without giving considerations to the special characteristics of sport. The regulatory and commercial aspects on sports markets can be separated, just as it happens in other segments of the economy.[140] The existence of a competing sport product can be an independent issue from the regulatory framework that applies to those products. In fact, even the Super League was planned to be organised as a competition compatible with the FIFA/UEFA regulatory system and the participating teams were also willing to remain part of the national championships that are organised according to the FIFA/UEFA rules. Nevertheless, it can be still argued that the restriction can be indirectly connected to the above objectives, therefore we discuss them more in detail below.

Solidarity

163. At the time of its formation in 1954, UEFA stated that its initial aim was to foster and develop unity and solidarity among the European football community and to organise competitions at a European level.[141] To preserve football's social functions UEFA operates a solidarity mechanism redistributing financial resources from the professional to amateur levels of sport and also from the wealthiest teams of the big football nations to the smaller UEFA member associations and their clubs. The role of sport federations played in ensuring solidarity was included also in the Nice Declaration on Sport.[142] The solidarity element is what differentiates European

[140] As an example from the world of sport, in its investigation of the similar rules of the Federation Internationale d'Automobile (FIA), the Commission reached a settlement in 2001, whereby the sports governing body for motor sports would limit its role to that of a sport regulator. In this case the Commission even defined a separate market for certification and licensing, which concerned FIA's role as part of self-governance. See XXXIst Report on Competition Policy 2001, para. 221 et seq.

[141] Katarina Pijetlovic: EU Sports Law and Breakaway Leagues in Football, ASSER International Sports Law Series, 2015, pages 269-270.

[142] Nice Declaration on the "specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies" pronounced at the European Council of Nice on 7-9 December 2000 and annexed to the Presidency conclusions.

football from a purely commercial activity, where the interest of the biggest, wealthiest and most successful clubs prevails without any control. Solidarity in European football has a horizontal and a vertical aspect.

164. Solidarity contributions are paid out to: national associations to develop infrastructure, to co-finance some of their statutory tasks; and as incentives to clubs eliminated in the preliminary stages of the UEFA Champions League and UEFA Europa League; to top-division clubs that do not qualify for UEFA's main competitions, etc..[143] Solidarity payments can represent a substantial amount reaching several hundred million euros.[144] It is also argued that the financial redistribution system indirectly benefits socio-cultural functions of football such as social integration, promotion of health, education and culture. The solidarity goal also includes redistribution of income to professional and amateur clubs involved in the training of young players.

165. The concept of solidarity as a non-competition element that can justify the non-application of the competition rules is accepted by case law, there is a long line of judgments where the CJEU accepted this, usually in relation to health care services and social security structure.[145] Accordingly, solidarity can be an legitimate objective to be followed by the different rules of FIFA and UEFA.

Uniform and consistent exercise of a given sport

166. The proper organisation of sport is secured by the pyramid structure with regard to regulatory functions, which is the supreme way to organise sport in terms of uniformity of the rules and regulations, institutional hierarchy and clarity of responsibilities. In practice, this means that in order to have football played according to the same rules with the same amount and quality of supervision from Ireland to Cyprus, from Gibraltar to Finland, it is useful to have only one federation responsible for those regulatory tasks and to have those regulatory powers over every football competition in Europe irrespective of when and how those are created. This is a legitimate goal and there seems to be not too much controversy about it.

167. However, as discussed above, the acknowledged need for regulatory "monopoly" in the world of sport in no way requires the same structure with regard to the separate commercial operations. This aspect of sport shows similarities with standardisation agreements, where independent entities define technical or quality requirements between each other with which current or future products or services comply.[146] While standardisation agreements produce significant positive effects, they cannot be used to exclude actual or potential competitors.[147] This also shows that a similar monopoly or the creation of it on the product market is neither accepted nor supported by the horizontal guidelines.

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[143] Katarina Pijetlovic: EU Sports Law and Breakaway Leagues in Football, ASSER International Sports Law Series, 2015, pages 273.
[144] See the different UEFA Financial Reports at UEFA's website.
[145] See for example the cases C-205/03, FENIN, EU:C:2006:453; case C-180/98, Pavlov and others, EU:C:2000:428; case C-67/96, Albany, EU:C:1999430; case C-116/97, Brentjens, EU:1999:434.
[146] See in this regard section 7 of the Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C11/1.
[147] Para. 273.

Protection of athletes' health

168. The protection of athletes' health, especially those of young players, is also recognised as a legitimate goal that can be pursued and that is one of the reasons behind the anti-doping rules adopted in every sports discipline. Athletes' health is also a concern with regard to the number and frequency of matches played for example in football.

4.3.3.3.2 Inherent in the pursuit of the objectives?

169. If the assessment can identify legitimate objectives pursued, the next issue would be to consider whether the effects restrictive of competition are inherent in the pursuit of those objectives.[148] In practice, this would mean whether the restriction in question could be regarded as necessary for the implementation of the legitimate objectives.[149]

170. Put it differently, it needs to be assessed whether the exclusion of potential competition by foreclosing the necessary inputs needed to provide the services on the market for organising international club football competitions is necessary to maintain European football's solidarity mechanism, to ensure the uniform and consistent exercise of football and the protection of athletes' health.

171. In any discussion on the inherency of the restriction concerned, the specificities of European football could be raised. It can be argued that football is different because a league or championship is not like a single tennis tournament or speed skating event that is limited in time and can be compatible with multiple other sporting events of the same discipline. One could say that a football competition, such as the Champions League, is an annual event, comprising the major football teams of the continent, and it can be difficult to see it co-existing with other events such as the Super League, which would be the same type of "all consuming" product just in a different packaging. Therefore, one might think that allowing the Super League would not create extra competition, it would simple replace the Champions League and recreate a similar monopolistic environment.

172. First of all, it is not given that the Super League would replace the UEFA Champions League. Out of the top 5 football nations only the UK, Spain and Italy were represented with teams in the Super League project, no French or German teams participated. Furthermore, the Champions League is not the only Pan-European club football competition, UEFA organizes also the Europa League and the Europa Conference League, both with similar group stage and knock-out phases as the Champions League. All of these tournament have been continuously developed and substantially expanded over the years and further expansions were already announced by UEFA.

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[148] Case C-309/99, Wouters and others, EU:C:2002:98, para. 97; Case C-519/04 P, Meca-Medina, EU:C:2006:492, para. 42; Case 1/12 OTOC, EU:C:2013:127, para. 93; case C-136/12, Consiglio nazionale dei geologi, EU:C:2013:489, para. 54.

[149] Case C-136/12, Consiglio nazionale dei geologi, EU:C:2013:489, para. 56; Case 1/12, OTOC, EU:C:2013:127, para. 96.

173. It seems, UEFA so far successfully fended off challenges from alternative competitions and every time expanded its event portfolio in response. It can be argued that the current status of the market is not really the one that would exist under competitive circumstances and this should be taken into account in the assessment.

174. With regard to the solidarity objective, it has to be emphasised that in the case of football, the solidarity mechanism is not a pre-determined and clearly defined system. There is no exact amount, the redistribution of which satisfies the solidarity objective. Over the last 8 years, UEFA's solidarity payments ranged between EUR 159.8 million and EUR 1.16 billion, latter reached exceptionally in 2016, a year when the European Championship took place resulting in substantially higher revenues for UEFA.[150] Besides the variation in absolute amounts, there are also varying figure if we see the percentages of solidarity payments compared to the revenues. Those figures ranged between 7.1% and 25.4% but in most of the years they were between 7 and 10% and not even increasing continuously over those years.

175. Accordingly, when examining whether the particular restriction of competition concerned is inherent in the pursuit of the solidarity objective, it would be also difficult to argue that it necessarily has to be only UEFA that can ensure the fulfilment of this objective since also UEFA fulfils this task differently from year to year. It has to be assessed whether indeed competition on the relevant market would substantially lower or even eliminate solidarity payments on an aggregate level.

176. In this assessment, it has to be taken into account for example that the current Super League plans also include solidarity payments,[151] just as the old 1998 Media Partners proposal. Latter proposal apparently included multiple times higher amounts compared to UEFA's own solidarity payments at the time, and the amount was fixed at 5% of the net annual revenues to be channelled into the development of European football through then existing institutions.[152]

177. As to the objective of ensuring the proper organisation of sport, it seems difficult to comprehend why the existence of any alternative (i.e. non-UEFA) competitions would hinder the proper organisation of sport or why the proper organisation of sport would make it necessary that only UEFA could pursue commercial activities in the market of international club football competitions in Europe. In fact, in other sectors of the economy regulators can make sure that each market player abides to the common rules set by the regulator. There seems to be no circumstance that would require that only the regulator as a commercial operator can guarantee that the rules of the marketplace are applied uniformly.

178. There are examples even from the world of sport, where alternative commercial operators exist next to the international federation that has also the regulatory role. For example in tennis, the International Tennis Federation (ITF) is the global governing body for the sport discipline that controls the game as a sport, deciding on rules, promoting the sport or preserving tennis' integrity through anti-doping and anti-corruption programs. The ITF organizes also team competitions

[150] UEFA Financial Report 2019/2020, page 11.
[151] See < https://thesuperleague.com/> visited 3 October 2021.
[152] Katarina Pijetlovic: EU Sports Law and Breakaway Leagues in Football, ASSER International Sports Law Series, 2015, pages 58-59.

(for example Davis Cup, Hopman Cup), organizes and sanctions the Grand Slam tennis tournaments or professional tours for both men and women (ITF Men's World Tennis Tour, ITF Women's World Tennis Tour). At the same time, the highest level tennis events are organized by the Association of Tennis Professionals (ATP) for men and the Women's Tennis Association (WTA) for women. Both of these entities are affiliated to ITF.

179. While the application of Wouters exception is a case-by-case exercise, and every sport might have distinctive features compared to other disciplines, FIFA and UEFA would need to show the direct link between the lack/elimination of competition on the relevant market and the proper organisation of football as an objective. This would be especially important since the Super League was intended to be operated with the recognition of FIFA and/or UEFA as a competition compatible with their statutes. Therefore, it would need to be shown why hindering market entry would be still the only way to guarantee the uniform application of rules throughout the sport, despite the willingness of a potential new entrant to adhere to the rules.

180. The protection of athletes' health has two dimensions to discuss. The first one relates to the enforcement of anti-doping rules that forms part of the regulatory framework of sport based on its specificities. Anti-doping rules represent no different issues than those of the need for the uniformity of rules. Therefore, it seems difficult here as well to see why the lack of competition can guarantee only the application of the anti-doping rules.

181. The other dimension of the protection of athletes' health can be the issue of the number and frequency of matches played by the athletes in a season. The argument can be made that allowing alternative competitions would further increase the number of matches threatening the health of football players that are already at the limits of their performance, therefore the FIFA and UEFA rules in question are inherent in the pursuit of the health objective.

182. First of all, the possibility that out of the currently existing 3 Pan-European international club football competitions one could be organised by a third party or they would launch a forth one does not in itself increase the workload of players. They would be still able to play only in one season-long competition. Moreover, as indicated earlier, even with only FIFA organising competitions, the various tournaments were expanded continuously over the years and further expansions are already in sight, so there is no direct link between the lack of competition and safeguarding players' health. Accordingly, if earlier entry initiatives would have been successful, the same expansions could have been undertaken in the form of alternative competitions.

4.3.3.3.3 Proportionate in relation to the objectives?

183. The final question of regulatory ancillarity is whether the restriction that follows legitimate objectives and which is inherent in the pursuit of those objective, is also proportionate to those objectives. This means that the restriction imposed should be limited to what is necessary to ensure the attainment of the objective and

do not go beyond those.[153] Even if assuming that the restriction in question might be in theory able to achieve the above-mention public interest objectives, foreclosing the market completely would definitely fail on the proportionality test.[154]

184. It is also the sanctioning connected to the FIFA and UEFA rules that would probably fail under the proportionality criteria, especially in relation to players. Based on the public reactions of FIFA, UEFA and the national associations, they were all ready to impose overly severe sanction on both the clubs involved in the Super League project and their players. This would have included the immediate exclusion of teams from domestic, European or world competitions and a ban on players to play in their respective national teams in any competition organised by the football governing bodies.

185. These sanction can be imposed based on the various provisions of the FIFA and UEFA Statutes, disciplinary regulations, there do not seem to be any limitation on this possibility based on objective, transparent, non-discriminatory criteria, FIFA and UEFA both have a wide discretion in deciding on the sanctions.

186. It also has to be emphasised that FIFA's and UEFA's reaction was made in response to the announcement of the Super League and the parent company, ESLC's approach to FIFA and UEFA. In theory, if there would be a legitimate possibility to get prior approval for competitions not organized by UEFA, such a reaction without any substantial assessment would be disproportionate. It is not clear whether ESLC in fact submitted a request for a prior approval. Still, those severe sanctions were announced.

187. Among the sanctions on the teams, while some of UEFA's reactions with regard to club competitions could be under specific circumstances proportionate considering the announced plans' effect on its competitions, the similar acts of FIFA and the national associations concerned could be definitely considered disproportionately severe. Furthermore, the announced sanctions on players seem to be seriously disproportionate considering their "role" and involvement in setting up an alternative football competition. In their case, the sanctions seem to have no connection to their behaviour and serve no other purpose than punishing potential competitors by simply depriving them of the most important input, player talent. The ban on national team appearances imposed also by other confederations has not even any link to club football in Europe, the actual subject matter of the dispute between ESLC and UEFA, therefore they would pass the proportionality test with great difficulties.

188. From a proportionality point of view, the approach of UEFA to the 9 teams that abandoned the Super League project is also noteworthy. UEFA approved so-called reintegration measures based on those clubs' "Club Commitment Declarations".[155] In its press release concerning those commitments, the nine reintegrating teams recognise that the Super League project *"would not have been authorised under UEFA Statutes and Regulations"*. This seems to suggest that there was no prior approval procedure and that UEFA and the other federations

[153] Case C-519/04 P Meca-Medina, EU:C:2006:492, para. 47; case 1/12 OTOC, EU:C:2013:127, para. 97; Case C-136/12, Consiglio nazionale dei geologi, EU:C:2013:489, para. 54.
[154] See in this regard case 1/12 OTOC, EU:C:2013:127, para. 98.
[155] See <https://www.uefa.com/insideuefa/mediaservices/mediareleases/news/0269-123871bd86ca-d9571aa78f72-1000--uefa-approves-reintegration-measures-for-nine-clubs-involved-in/> visited 3 October 2021.

threatened with those severe sanctions simply based on the assumption that the authorisation process, that supposed to be legal and represent no infringements, would have had a negative outcome. From a legal point of view, it seems problematic to sanction or "quasi" sanction clubs for asking a prior approval according to a pre-authorisation system that supposed to be legitimate, whatever the outcome would or could be.

189. Finally, it has to be mentioned that in these commitment declarations UEFA was able to secure from the 9 teams an aggregate donation of EUR 15 million, a 5% withholding of the revenues the teams would have received from UEFA competitions for one season and agreements that UEFA would impose on them fines of EUR 100 million if they "seek to play in such unauthorised competition" and EUR 50 million for any breach of the commitment declaration. These reintegration measures are all the more remarkable since under the disciplinary codes of either FIFA or UEFA the maximum amount of fine cannot be more than CHF 1 million and EUR 1 million.

4.3.4 Assessment of the threat to adopt sanctions

190. As discussed, the FIFA/UEFA rules cannot be separated from and assessed without the corresponding sanctions and the (potential) use of those sanctions as they form part of the same restriction aiming to eliminate potential entry by foreclosing the necessary input needed to provide services on the relevant market. As discussed earlier,[156] the sanctions that can be imposed on leagues, clubs and athletes play an intrinsic role in backing up the exclusivity obligation set out in the Statutes of FIFA and UEFA. These type of sanctions combined with the possible market power / monopoly of those entities make sure that that new entrant will not find input providers willing to join any alternative competitions.

191. The fact that no breakaway league has been expressly approved so far, but none has been subject of the disciplinary measures either[157], despite several serious attempt, shows that already the existence of these type of sanctions and the serious threat of using them could have similar effects to those of actually using them. The concerted reactions of FIFA, UEFA, other confederations and all national associations concerned, if combined with proven market power, leave little room for alternative market outcomes.

192. The reintegration measures adopted for the nine teams quitting the Super League project, discussed above, seem to show the true effect of any possible disciplinary measures from FIFA, UEFA and national associations since they secured the same market outcome of potential entry being hindered successfully and a lot more. Those measures further cemented FIFA's and UEFA's position against potential entrants in the future. It seems unlikely that these clubs that are often publicly listed companies would voluntarily make such offerings going against shareholder interests without any those threats perceived as an even worse option for them. Under the circumstances and given the clear reaction of FIFA, UEFA and national associations, it would seem disproportionate to require the existence of

[156] See in particular paragraphs 132-134 above.

[157] Katarina Pijetlovic: EU Sports Law and Breakaway Leagues in Football, ASSER International Sports Law Series, 2015, page 73.

actual disciplinary decisions or a rejection of the prior approval request to associate any competition law consequences to the FIFA and UEFA measures in question.

193. Accordingly, the threat to adopt sanctions against clubs and players participating in alternative football competition initiatives has legal relevance and qualifies as part of the restriction of competition, if latter can be proven in the underlying national procedure. It is not a separate infringement, nor would it be the disproportionate sanctions against players involved. Those circumstances would only contribute to the establishment of the restriction of competition, namely the exclusion of potential competition by foreclosing the necessary inputs needed to provide the services on the market for organising international club football competitions, by showing that the Wouters exception cannot apply.

4.4 Considerations regarding the fifth question referred to the Court

194. Since the fifth question relates to the same factual setting and potential restriction of competition as the first, second and third question, it is more appropriate to discuss the issue of possible exemption under Article 101(3) TFEU and objective justifications under Article 102 TFEU right after the first, second and third question.

4.4.1 Article 101(3) TFEU

195. Pursuant to Article 101(3) TFEU, the prohibition contained in Article 101(1) TFEU may be declared inapplicable in the case of any decision of association of undertakings, which:

a) contribute to improving the production or distribution of goods or to promoting technical or economic progress,
b) while allowing consumers a fair share of the resulting benefit, and
c) which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objects; and
d) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

196. Consequently, under Article 101(3) TFEU, FIFA and UEFA can show that besides the restrictive effects, the decisions in question also produce pro-competitive effects, which outweigh the former. This balancing of anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3) TFEU. According to Article 2 of Regulation 1/2003 the burden of proof under Article 101(3) rests on the undertaking(s) invoking the benefit of the exception rule, therefore it should be FIFA and UEFA that present such arguments.

197. According to settled case law the four conditions of Article 101(3) are cumulative, therefore they must all be fulfilled for the exception rule to be

applicable[158] and should the parties fail to prove the fulfilment of any of the above conditions, the application of the exception rule of Article 101(3) cannot take place[159]. In individual cases, it may be appropriate to consider the four conditions in a different order.[160] It is also settled case law that Article 101(3) does not exclude a priori certain types of agreements from its scope. As a matter of principle, all restrictive agreements that fulfil the four conditions of Article 101(3) are covered by the exception rule,[161] accordingly even if the FIFA and UEFA rules would qualify as a restriction by effect, they could in theory still benefit from Article 101(3) TFEU. Goals pursued by other provisions of the TFEU can be taken into account to the extent that they can be subsumed under the four conditions of Article 101(3).[162]

198. Considering the above principles and the factual elements of the case described already, should the referring court establish an infringement of Article 101(1) TFEU by finding that the relevant provisions exclude potential competition by foreclosing the necessary inputs needed to provide the services on the market for organising international club football competitions, the fourth condition of Article 101(3) TFEU would be the first to examine followed by the second condition, fair share to consumers. This is because as a result of the conduct even potential competition is eliminated in this market and not just in respect of a substantial part of the products.

4.4.1.1 The fourth condition of Article 101(3) TFEU: no elimination of competition

199. According to the fourth condition of Article 101(3) TFEU the decision must not afford the association of undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned. Ultimately, the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains, which could result from restrictive decisions.[163] The last condition of Article 101(3) TFEU recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation.

200. Whether competition is being eliminated within the meaning of the last condition of Article 101(3) TFEU depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, i.e. the reduction in competition that the agreement brings about.[164] The more competition is already weakened in the market concerned, the slighter the further reduction required for competition to be eliminated within the meaning

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[158] See e.g. case T-185/00 Métropole télévision SA (M6) and others, EU:T:2002:242, para. 86; case T-17/93, Matra Hachette SA, EU:T:1994:89, para. 85; joined cases 43/82 and 63/82, VBVB and VBBB, EU:C:1984:9, para. 61.
[159] See case T-213/00, CMA CGM and others, EU:T:2003:76, para. 226.
[160] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27/04/2004 p. 97, para. 38.
[161] Case T-17/93, Matra Hachette SA, EU:T:1994:89, para. 85.
[162] Case 26/76, Metro (I), EU:C:1977:167, para. 43; see also 2000/475/EC: Commission Decision of 24 January 1999 , case IV.F.1/36.718.CECED, OJ L 187, 26/07/2000 p. 47.
[163] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27/04/2004 p. 97, para. 105.
[164] Ibid. para 107.

of Article 101(3) TFEU.[165] The application of the last condition of Article 101(3) TFEU requires a realistic analysis of the various sources of competition in the market, including both actual and potential competition, the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on this competitive constraint. Both actual and potential competition must be considered.[166]

201. Provided the relevant FIFA and UEFA rules infringe Article 101(1) TFEU by excluding potential competition through the foreclosure of the necessary inputs needed to provide the services on the market, satisfying the fourth condition of Article 101(3) TFEU seems to be very difficult. This is because the conduct complained of is undertaken in a market where the degree of competition is non-existing and it targets potential competitors/entrants, who are the only remaining source of competition in the market. By successfully eliminating even this source of competition, the conduct most likely fails under the fourth condition of Article 101(3) TFEU. In this way, even a slighter further reduction qualifies as an elimination within the meaning of Article 101(3) TFEU. In the light of the principle that protection of rivalry is given priority over potentially pro-competitive efficiency gains, which could result from restrictive decisions, also any arguments related to the possible monopoly nature of league competitions would fail the test.

202. The argument can be made whether the above reasoning would be legitimate considering the Commission's exemption decision back in 2003 that authorised UEFA's joint selling scheme of football rights.[167] In that regard it has to be noted that the case concerned only the Champions League, i.e. one international tournament organised by UEFA, while the provisions examined in this case are generally applicable to all tournaments and competitions without any limitation. Furthermore, in its decision, under the fourth condition of Article 101(3) TFEU, the Commission dealt with media rights and even in that case it imposed further conditions to reinforce competition.[168]

4.4.1.2 The second condition of Article 101(3) TFEU: fair share to consumers

203. According to the second condition of Article 101(3) TFEU consumers must receive a fair share of the efficiencies generated by the restrictive agreement. The concept of "fair share" implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition. In line with the overall objective of Article 101 TFEU to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement.[169] The impact of the restriction of competition depends on the intensity

[165] Ibid.
[166] Ibid. para. 108.
[167] Case 37398 joint selling of commercial rights of the UEFA Champions League, OJ 2003 L291/25.
[168] Ibid. section 8.
[169] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27/04/2004 p. 97, para. 85.

of the restriction and the degree of competition that remains following the restriction.[170]

204. The circumstance that a restriction of competition by UEFA would mean excluding potential competition through the foreclosure of the necessary inputs needed to provide the services on the market, would make any pass-on to consumers more difficult. This is because in the case of new and improved products, should they be proved to arise from the elimination of all competition, prices can still rise off-setting some of the value of those benefits. On the other hand, cost efficiencies would be passed on taken into account also the characteristics and structure of the market and the degree of residual competition. Therefore, in the absence of any actual or potential competition, the undertakings concerned would be less incentivized to pass-on any efficiencies.

205. Accordingly, even if the argument would be made that international club football competitions are natural monopolies, therefore it should be only UEFA on the market, it cannot be taken for granted that any cost efficiencies would be passed-on or qualitative efficiencies would not be off-set by higher prices.

4.4.1.3 The third condition of Article 101(3) TFEU: indispensability

206. According to the third condition, the decision of association of undertakings (FIFA, UEFA) must not impose restrictions, which are not indispensable to the attainment of the efficiencies.[171] It is required first that the decision, as such, must be reasonably necessary in order to achieve the efficiencies.[172] The decisive factor is whether or not the decision makes it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the decision or the restriction concerned; and whether more efficiencies are produced with the decision or restriction than in the absence of it.[173] Efficiencies should be specific to the decision, no other economically practicable and less restrictive means should be available for the achievement of the efficiencies.[174] The parties must only explain and demonstrate why such seemingly realistic and significantly less restrictive alternatives to the decision would be significantly less efficient.[175] A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the decision or make it significantly less likely that they will materialise.[176]

207. The third condition of Article 101(3) TFEU could be satisfied only if the UEFA could prove that the market of international club football competition is a natural monopoly, therefore eliminating competition enables either the creation of new or improved products or substantial cost efficiencies. In every other scenario, UEFA would clearly fail to show why the creation of a monopoly would be indispensable for the attainment of the efficiencies claimed.

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[170] Ibid. para. 91.
[171] Ibid. para. 73.
[172] Ibid.
[173] Ibid. para. 74.
[174] Ibid. para. 75.
[175] Ibid.
[176] Ibid. para. 79.

4.4.1.4 First condition of Article 101(3) TFEU: efficiency gains

208. It follows from the case law that only objective benefits can be taken into account as efficiencies.[177] This means that efficiencies are not assessed from the subjective point of view of the parties. The purpose of the first condition of Article 101(3) TFEU is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second and third conditions of Article 101(3) TFEU.[178] The aim of the analysis is to ascertain what the objective benefits created by the decision of association of undertakings are and what is the economic importance of such efficiencies.[179] Given that for Article 101(3) TFEU to apply, the pro-competitive effects must outweigh its anti-competitive effects, it is necessary to verify what is the link between the conduct and the claimed efficiencies and what is the value of these efficiencies.[180]

209. Accordingly all efficiency claims must therefore be substantiated so that the following can be verified:[181]

a) The nature of the claimed efficiencies;
b) The link between the decision and the efficiencies;
c) The likelihood and magnitude of each claimed efficiency; and
d) How and when each claimed efficiency would be achieved.

210. Therefore, efficiency claims cannot be made successfully based on abstract and non-verifiable arguments, it is the task of the parties to explain each of the above elements in detail concerning all the efficiencies referred to. Efficiencies can be either cost efficiencies or qualitative efficiencies. In general, efficiencies stem from an integration of economic activities whereby undertakings combine their assets to achieve what they could not achieve as efficiently on their own or whereby they entrust another undertaking with tasks that can be performed more efficiently by that other undertaking.[182]

211. With regard to sports, efficiencies can be of the same economic nature as in other industries or they can be of qualitative nature, connected to the legitimate public interest objectives discussed already in connection with the Wouters exception, provided they can be subsumed under the first condition of Article 101(3) TFEU. For example, maintenance of the uncertainty of results or the preserving of a certain equality between clubs can improve quality of the sport as they make the product more exciting and therefore more attractive in the eyes of the consumer. A uniform set of rules for the game and consistent application of them could be also considered as an economic benefit by improving the product.

212. Player transfer rules for example that were not inherent in the pursuit of the objective proper conduct of sport so as to justify the application of the Wouters exception might be still exempted under Article 101(3) TFEU, provided the beneficial effects of them outweigh their restrictive effects. However, most of those efficiencies would not be relevant for this case at all, as uncertainty of results or

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[177] See e.g. joined cases 56/64 and 58/66, Consten and Grundig, EU:C:1966:41.
[178] Guidelines on the application of Article 81(3) of the Treaty, para. 50.
[179] Ibid.
[180] Ibid.
[181] Ibid. para. 51.
[182] Ibid. para 60.

equality between clubs should be interpreted within one league / tournament / competition and cannot justify the elimination of competition between different league/tournament/competition products.

213. For the purposes of the current case, we rather considers here the efficiencies directly related to the exclusivity elements that the relevant FIFA and UEFA rules represent.

214. These types of restrictive arrangements can solve a free-rider problem on the market.[183] For example, they can safeguard UEFA's promotion and development efforts of the sport, players or infrastructure from competitors that do not invest in those efforts similarly just want to attract consumers by free-riding on the investments of UEFA. Exclusivity type of restraints can help to overcome these problems. To acknowledge any efficiencies connected to free riding, there needs to be a real free-rider issue. This depends on many factors that necessitate a fact specific assessment by the referring court.

215. Exclusivity arrangements may have beneficial effects also in the form of addressing so-called "hold-up problems", where there are client-specific investments to be made by either the supplier or the buyer and the investor may not commit the necessary investments before particular supply arrangements are fixed.[184] With regard to hold-up problem the risk of under-investment has to be real or significant. The investment must be relationship-specific it must be a long-term investment that is not recouped in the short run and it must be asymmetric. General or market specific investments in capacity are normally not relationship-specific, it has to be created specifically linked to the operations of a particular partner.

216. A specific hold-up problem may arise in the case where substantial know-how is transferred. The know-how, once provided, cannot be taken back and the provider of the know-how may not want it to be used for or by his competitors.[185]

217. It is for the referring court to investigate whether in the case of the UEFA rules these benefits of the restrictions exist and can be sufficiently proven. Concerning the Champions League, there is a description of the roles of UEFA and the football clubs in the Commission's decision concerning joint selling rights,[186] which can give some guidance whether UEFA in fact invests that heavily or transfers any know-how that has to be safeguarded.

218. UEFA may forward also arguments that the elimination of competition would be necessary because it creates cost efficiencies since due to the market conditions it is efficient that only a single undertaking supplies the entire market. This would be the case where average costs decline over the entire range of relevant output levels or called natural monopoly. Economies of scale could be so great that having even two competing producers would not be viable, therefore cost efficiencies arise out of elimination of competition. It could be argued that sustained rivalry between sports leagues is a historical anomaly.[187] Not even in the United States were there

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[183] See more in Commission notice – Guidelines on Vertical Restraints, SEC(2010) 411, recital 107(1).
[184] Ibid. recital 107(4).
[185] Ibid. recital 107(5).
[186] Case 37398 joint selling of commercial rights of the UEFA Champions League, OJ 2003 L291/25, paras. 13-17.
[187] See Stephen F. Ross, Anti-competitive aspects of sports, (1999) 7 Competition & Consumer Law Journal, page 11. See also Walter C. Neale, The Peculiar Economics of Professional Sports: A

co-existing rival leagues for an extended period of time in any major sport. However, there is no agreement whether the lack of sustained rivalry is necessary evidence for the natural monopoly nature of sports leagues.[188]

219. Again, it would be for UEFA to present any such fact specific and detailed arguments and for the referring court to verify the validity of those arguments.

4.4.2 Objective justification and efficiency defence under Article 102 TFEU

220. It is open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under Article 102 TFEU.[189] In particular, such an undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary, or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers.[190] It is for a dominant undertaking to raise any plea of objective justification or efficiency defence and to support it with arguments and evidence.[191]

221. In order to benefit from an objective justification, the dominant undertaking must prove that its conduct pursues a legitimate objective (other than efficiencies) and is necessary and proportionate to the pursuit of such an objective. Examples of such objectives are health and safety considerations, or technical or commercial requirements relating to the product or service in question. In its Article 102 Guidance Paper, the Commission relates objective necessity to factors external to the undertaking and the only examples given are health and safety reasons. [192]

222. While the objective justification defence under Article 102 TFEU shows strong similarities to the essence of the Wouters exception, it seems more appropriate to deal with the specificities of sport under latter test and not in the form of objective necessity.

223. With regard to an efficiency defence, a dominant undertaking must demonstrate that four cumulative conditions are met:

> (1) The efficiency gains likely to result from the conduct in question counteract any likely negative effects on competition;
>
> (2) Those gains have been, or are likely to be, brought about as a result of the conduct;

Contribution to the Theory of the Firm in Sporting Competition and in Market Competition, The Quarterly Journal of Economics, Vol. 78, No. 1 (Feb., 1964), pp. 1, page 14.

[188] See Stephen F. Ross, Anti-competitive aspects of sports, (1999) 7 Competition & Consumer Law Journal, page 11.

[189] Case 27/76, United Brands, EU:C:1978:22, para. 184; case C-209/10 Post Danmark A/S v Konkurrencerådet, EU:C:2012:172, para. 40.

[190] Case C-209/10 Post Danmark A/S v Konkurrencerådet, EU:C:2012:172, para. 41.

[191] Case T-201/04 Microsoft Corporation v Commission, EU:T:2007:289, paragraph 688; case C-209/10 Post Danmark A/S v Konkurrencerådet, EU:C:2012:172, para. 42; case C-23/14 Post Danmark A/S v Konkurrencerådet, EU:C:2015:651, para. 49.

[192] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, para. 29.

(3) The conduct is necessary for the achievement of those gains in efficiency; and

(4) The conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

224. For the efficiency considerations under Article 102 TFEU, our findings under Article 101(3) TFEU could be equally relevant. By eliminating even potential competition on the relevant market, it seems UEFA would fail several of the four conditions.

4.5 Considerations regarding the fourth question referred to the Court

225. The fourth question asks whether the FIFA Statutes rules in Article 67, establishing exclusive ownership for FIFA, it member associations and confederations, such as UEFA, of all of the rights emanating from football competitions coming under their respective jurisdiction are compatible with the EU competition rules. These rights include financial rights, audio-visual and radio recording, reproduction and broadcasting, multimedia rights, marketing and promotional rights and incorporeal rights. The relevant sport federations also claim exclusive responsibility under Article 68 for authorising the distribution of the image and sound of football matches.

226. These provisions, if proven to infringe the competition rules, cannot in themselves inevitably hinder market entry for alternative Pan-European club football competition providers, however they can make entry less likely by substantially diminishing the financial attractiveness of any entry scenarios. In this way, UEFA may exercise a certain level of control over its competitors should it decide to let them enter the market. The same approach can be seen from the already discussed preconditions, UEFA considers necessary for any conceivable cross-border football competition.[193]

227. The author will discuss the interpretation of Articles 101 and 102 TFEU only with regard the scenario where a third party potential entrant to the market for organising international club football competitions in Europe request the prior approval of UEFA.[194] While a provision declaring UEFA as the original owner of all rights related to the competition might seem irrelevant if a new entrant wants to operate completely outside of the FIFA/UEFA pyramid, it is clear from the wording of those provisions that they would have an effect already on the new entrant when it asks for a prior approval from FIFA and UEFA. This is because a new entrant willing to avail of the services of any input provider that forms part of the UEFA pyramid, might not get the prior approval of UEFA unless it accepts the relevant provisions of the FIFA Statutes and agrees to assign all right to UEFA, its only competitor. A choice can be made between accepting these rules and negotiate a deal with UEFA on the sharing the revenue from those rights or trying to organise

[193] See paragraph 108 above, in particular point 5.

[194] The other scenario might concern the competitions organized by UEFA, whether these rules declaring UEFA as the sole original owner of all rights might have negative effects on other participants of the production process.

the competition without any input providers having links to FIFA, UEFA or any national association.

228. As in the case of the FIFA/UEFA Statutes provision discussed under the first, second and third question, the possible infringement could be a restriction by effect, where the decisive element would be the market power of FIFA and UEFA, i.e. the importance of input providers in their pyramid structure for the purposes of providing services on the relevant market. If those clubs and/or players would be essential for any new entrant and would be threatened to associate with any new entrant due to the applicable FIFA, UEFA or national association sanctions, then Articles 67 and 68 might qualify as a decision of association of undertakings with a restrictive effect or an abuse of dominant position. The considerations concerning the main elements of Articles 101 and 102 TFEU, as discussed in sections 4.3.1, 4.3.2 and 4.3.3. above, will not be repeated here, as those would be equally applicable for the assessment of Articles 67 and 68 of the FIFA Statutes. In the following, only the elements that are special to the assessment of Articles 67 and 68 will be discussed.

229. As a starting point for the competition law assessment, it would need to be examined who originally owns those rights mentioned in Article 67 of the FIFA Statutes. This would serve the purpose to ascertain whether there is any possibility that FIFA or UEFA may be the original and sole owner of all rights in football competitions and events. If it would be the case, these the provisions in the FIFA Statutes would then have no practical effect and just reflected the existing legal situation.

230. The question of who originally owns these rights to football competitions and events is a matter in the first instance for national law. National law varies from one Member State to another. Ownership of media rights, for example, may be based on stadium or property ownership or commercial and financial risk. In practice, the question of ownership of media rights depends almost entirely upon the contractual arrangements under which the event is filmed.

231. The Commission has already examined similar issues in its 2003 exemption decision adopted concerning the joint selling of the commercial rights of the Champions League.[195] According to the findings of the Commission for each individual football match played in the UEFA Champions League, the two participating football clubs may claim ownership to the commercial rights.[196] Looking at a whole football tournament, it would seem that each football club would have a stake in the rights in the different constellations in which they play but their ownership could not be considered to extend beyond that. The fact that football clubs play in a football tournament does not mean that ownership extends to involve all matches in the tournament, nor does it mean that ownership is inter-linked to an extent where it must be held that all clubs have an ownership share in the whole league as such and in each individual match.[197] UEFA argued that it is the owner of the UEFA Champions League property rights due to the tasks it undertakes,[198]

[195] 2003/778/EC Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League), OJ L 291, 8.11.2003, p. 25–55
[196] Ibid. para 118.
[197] Ibid. para 119.
[198] Ibid. para 120.

nevertheless the Commission found that UEFA can at best be considered as a co-owner of the rights, but never the sole owner.[199]

232. It was not necessary, for the purpose of the case to determine who (and to what extent), owned the relevant rights under the national law of different countries, since it could be determined that UEFA was at best considered as a co-owner of the rights, but never the sole owner, even concerning its own Champions League product.[200]

233. It would need to be examined whether UEFA or FIFA makes any financial contribution to the risk of staging a third party football competition and had any commercial control or influence over it. Using those arguments, it seems FIFA or UEFA cannot be the exclusive original owner of rights in football competitions, which it merely authorises as part of its regulatory activities.

234. Accepting that UEFA cannot be considered as the original owner of the rights in football competitions, the rules' compatibility with the TFEU should be examined. UEFA's use of its market power resulting from its dominance to force the organisers to cede all their rights would be contrary to Articles 101 or 102 TFEU.

235. In the absence of a legal basis that entitles UEFA to be regarded as the absolute and exclusive owner of the rights in competition, or that it was entitled to require the transfer of rights belonging to original rights owners as a condition of authorising an international championship, it seems that UEFA would be altering the previous legal position substantially. This would significantly affect any new entrant's ability to compete effectively against UEFA. If UEFA by insisting, through the use of its regulatory power and the prior approval process, that competitors transfer their rights to it that would raise the issue of an infringement of Articles 101 or 102 TFEU.

236. The national court would need to demonstrate that FIFA and UEFA had a dominant position on the market for the organisation of international club football competitions in Europe, as well as on the market for the certification/licensing of third party competitions (if it is defined separately). In that case, it would be possible to consider that UEFA abused its dominant position in these markets by claiming sole ownership of all rights to all international competitions. UEFA would able to impose such requirement if it would be regarded in European football as the sole regulatory body for international club football competitions. This would help UEFA to maintain it de facto monopoly over the market. The FIA has reserved to itself without any objective necessity or justification an ancillary activity with the possibility to eliminate competition on this latter market from potential competing organisers.[201]

5 Conclusion

237. Accordingly, the author considers that the Court of Justice could answer the questions referred, insofar as they relate to the TFEU and EEA Agreement, as follows:

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[199] Ibid.

[200] Ibid. para. 122

[201] See case 311/84 Centre belge d'études de marché – Télémarketing, EU:C:1985:339.

1. *Article 102 TFEU/54 EEA must be interpreted as meaning that it prohibits a conduct of the dominant undertaking that requires the suppliers of that undertaking to provide their services needed for the organisation of international club football competitions on an exclusive basis to the undertaking in dominant position if the referring court identifies factors that show that competition including potential competition is in fact been prevented or restricted or distorted to an appreciable extent and irrespective of whether the conduct of the new entrant itself may qualify as a restriction of competition under the EU/EEA competition rules. The assessment, as a separate step, should also include a detailed fact specific analysis whether there are element justifying those restrictions including the examination of the overall context and whether there are legitimate public interest objectives pursued by those rules, whether they are inherent in the pursuit of those rules and whether they are proportionate to them.*
2. *Article 101 TFEU/53 EEA must be interpreted as meaning that it prohibits a decision of association of undertakings as a restriction by effect where that decision requires the suppliers of that association of undertakings to provide their services needed for the organisation of international club football competitions on an exclusive basis to the association if the referring court identifies factors that show that competition including potential competition is in fact been prevented or restricted or distorted to an appreciable extent and irrespective of the fact that those effects concern a market different from where the members of the association of undertakings are active or whether the conduct of the new entrant itself may qualify as a restriction of competition under the EU/EEA competition rules. The assessment, as a separate step, should also include a detailed fact specific analysis whether there are element justifying those restrictions including the examination of the overall context and whether there are legitimate public interest objectives pursued by those rules, whether they are inherent in the pursuit of those rules and whether they are proportionate to them.*
3. *Articles 101 and/or 102 TFEU / 53 and/or 54 EEA must be interpreted as meaning that the threat to adopt sanctions or an actual imposition of disproportionate sanctions against clubs and players participating in alternative football competition initiatives qualifies as part of the restriction of competition, if it can be proven in the underlying national procedure that an infringement by effect under Article 101(1) TFEU/53(1) EEA or an abuse of dominant position under Article 102 TFEU/54 EEA has been committed by foreclosing the necessary inputs needed to provide the services on the relevant market, since those circumstances would only contribute to the establishment of the restriction of competition.*
4. *Articles 101 and/or 102 TFEU / 53 and/or 54 EEA must be interpreted as meaning that Articles 67 and 68 of the FIFA Statutes can be infringing those provisions if UEFA would be altering the original legal position substantially with regard to the ownership of rights in competitions through restrictive effect of using its regulatory power and the prior approval process it put in place and thereby significantly affecting any new entrant's ability to compete effectively against UEFA.*

5. *Article 101 TFEU/53 EEA must to be interpreted as meaning, that the referring court has to assess the four conditions of Article 101(3) TFEU/53(3) EEA based on the arguments presented by FIFA and UEFA, in particular considering whether the conduct afford those undertakings the possibility of eliminating competition in a substantial part of the products in question and where failing to show the fulfilment of already one of those conditions would make the exemption under Article 101(3) TFEU/53(3) EEA inapplicable. Article 102 TFEU/54 EEA must be interpreted as meaning that the special characteristics of sport in relation to a restriction of competition must be considered by the referring court under the test offered in paragraph 42 of case C-519/04 P David Meca-Medina and not as a possible objective justification under Article 102 TFEU/54 EEA.*