Eyes on the Ball

The Super-League Litigation before the CJEU

Petros C. Mavroidis & Damien J. Neven*

June 5 2023

Keywords : Anti-competitive Agreements, Sports Governance,

JEL Classification : K21, L12, L44

*Columbia Law School (pm2030@columbia.edu), and Graduate Institute, Geneva (damien.neven@graduateinstitute.ch) and Compass Lexecon, respectively.

We would like to thank Henrik Horn af Rantzien, Bill Kovacic, Kirtikumar Mehta, Pablo Ibanez-Colomo, Georges Siotis, Thomas von Ungern-Sternberg and Steve Weatherill for comments and discussions on previous versions of the arguments put forward in this paper. Remaining errors are ours. There is no conflict to report.

Abstract

The Court of Justice of the European Union (CJEU) was requested to consider whether the Union of European Football Associations (UEFA), which (according to the Court) has "conferred on itself the exclusive power to organize pan-European competitions" between football clubs, could exclude clubs wishing to participate in a rival competition without infringing competition rules, in particular in the absence of a proper authorization procedure to assess such potential participations. The questions were raised In the context of a recent litigation (C-333/21) involving the attempt to organize a rival competition by the European Sport League Corporation (ESLC). This paper considers the opinion put forward by Advocate General (AG) Rantos on the questions before the Court, focusing on two of his main findings, which, in our view raise significant issues with a potentially systemic dimension going well beyond the facts of this case. The AG first finds that UEFA regulation which sets out the exclusive right does not involve a restriction of competition by object because (inter alia) one cannot take it for granted that UEFA would exclude competitors in a way that is anti-competitive and because the regulation could be seen as merely involving a prohibition of dual memberships. We doubt that these considerations can challenge the strong premise (from economic principles), that a monopolist that has conferred on itself the power to vet entrants will have the ability and incentive to reduce competition. From this perspective, the agreement "reveals by itself a significant degree of harm" and hence is best seen as involving a restriction by object. Adopting the view of the AG would reduce the scope of restrictions by object, challenging the notion that restrictions by object are those for which there is such a strong prior of harm that a detailed examination of effects is not necessary. Second, the AG also finds that the exclusion of a rival competition can be seen as pursing the legitimate objective of supporting the European Sport Model (ESM), in the light of Art 165 of the Treaty (TFEU) which refers to the support of the European dimension of sport, so that it does not involve a restriction of competition under Art 101. We argue that there is limited ground within the realm of Art 165 on which the promotion of the European Sport Model could be qualified as a legitimate public policy objective that could trump competition concern (as well as an apparent disagreement with AG Rantos and AG Szpunar on the significance of Art 165). We also find that the AG analysis of whether the restriction of entry is necessary to pursue the objective (let alone proportionate) remains at a very general level, whereas a detailed analysis of facts, including the precise organization of ESLC, is required. Allowing a legitimate objective to overrule competition concerns on the basis of such limited ground and analysis might set a precedent leading to a potential weakening of the discipline towards anti-competitive agreements.

1. Introduction

The objective of this paper is to discuss the opinion of AG Rantos on the questions submitted to the Court of Justice in a request for a preliminary ruling by a Spanish Court in the context of a litigation between UEFA and the European Super-League Corporation (ESLC)[1].

UEFA is an association of national football federations[2], which, by regulatory fiat[3], has the monopoly of organizing football competitions between clubs belonging to national federations.[4] Any party wishing to organize a pan-European competition must, according to the UEFA statute, request the approval of UEFA first[5] but the UEFA statute does not provide any guidance on the criteria for the assessments of such requests.

ESLC is a business entity (incorporated under Spanish law), that has developed in 2021, at the initiative of its fifteen founding football clubs, a blue print for an independent pan European competition, known as the "Super-League" project.

---

[1] Opinion of AG Rantos, Case C-333/21, 15 December 2022. https://curia.europa.eu/juris/document/document.jsf;jsessionid=FDC9C7AFD18E98A0CF0626BB174FF823?text=&docid=268624&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3540648

[2] Football clubs are not members of UEFA. They are only members of their respective national football federations. However, two football clubs participate in the UEFA Executive Committee, and are usually referred to as "indirect" members of UEFA. https://www.uefa.com/insideuefa/about-uefa/executive-committee/. The UEFA is formally an association under Swiss Law.

[3] Note that national associations have the power to regulate the games that they organize (and indeed, there has been difference across countries with respect to some rules - for years, the English Football Association imposed on clubs to field 12 players only, when in continental Europe teams could bring 16 players to games and were allowed to substitute not only one but two of them during games). The national association have delegated some of the power to UEFA with respect to international competitions so that UEFA has power to regulation by delegation.

[4] This is clearly stipulated in the UEFA statutes. Art. 49.1 and 51.1 respectively read as follows; "UEFA shall have the sole jurisdiction to organize or abolish international competitions in Europe in which Member Associations and/or their clubs participate. FIFA competitions shall not be affected by this provision." ; "A Member Association, or its affiliated leagues and clubs, may neither play nor organize matches outside its own territory without the permission of the relevant Member Associations".https://documents.uefa.com/v/u/_CJ2HRiZAu~Wo6ytlRy1~g

[5] Per Article 49.3 of the UEFA Statutes, "International matches, competitions or tournaments which are not organized 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."

ESLC and UEFA held discussion about this plan that did not lead to an agreement.[6] Subsequently, UEFA threatened ESLC members with a ban from its competitions,[7] and went on to threaten football players who would participate in the Super-League with a ban, as well.[8] They would be both excluded and expelled from UEFA-sponsored competitions. For players, it could be devastating, as they would not be allowed to participate neither in UEFA club competitions, nor in the UEFA Nations Cup, a competition between national teams. For clubs that would continuously participate in the Super-League (the founders of ESLC) it may have mattered less than for those that would only participate by invitation (see section 2 for details on the proposed organization). However, the fear was that UEFA would request from national federations to also expel all clubs participating in ESLC from national championships. All clubs but three (Juventus, Real Madrid and Barcelona) left the ESLC venture.

The ESLC has then lodged a complaint before a Spanish court (the Provincial Court of Madrid) challenging the statutes and the conduct of UEFA under EU competition law[9]. As this challenge involved an interpretation of novel issues under EU law, the Spanish court submitted a request for preliminary ruling regarding the following questions:

- Are UEFA statutes (and more precisely Articles 49 and 51), because of the requirement included therein regarding the necessity for prior approval in order to set up a new pan-European competition, without however defining the criteria for approval, in violation of Articles 101 and 102 of TFEU?

[6] https://www.espn.com/soccer/uefa-champions-league/story/4795905/uefa-repeats-opposition-to-super-league-in-meeting-with-esl-backer-a22-sports
[7] https://apnews.com/article/sports-general-news-749ce4257b0f9a17b3fc34d60cccd00c
[8] https://www.theguardian.com/football/2021/apr/19/super-league-players-face-world-cup-and-euros-ban-warns-furious-uefa-chief
[9] Note that EU law applies to UEFA regulation to the extent that these regulations affect the economic activities that UEFA provides, or in other words, in broad terms, the rules about the game by contrast with rules of the game. The line is however not necessarily easy to draw. In C-519/04P (*Meca Medina*), the CJEU did not deny its competence to adjudicate a dispute concerning sanctions for violating doping regulations. In light of the subject-matter and the absence of a plea to the effect that the sanctions imposed had been disproportionate, the CJEU dismissed the complaint. The CJEU thus, still left the door open to also adjudicate in future complaints the proportionality of sanctions for violating sporting rules.

- Are sanctions against participating clubs in the Super-League equally a violation of these two TFEU provisions? And, finally,
- Are sanctions against participating players a violation of the same two provisions as well?

In this paper, we will discuss the answers provided by AG Rantos to these questions. The AG focuses on two issues, namely whether the UEFA regulation for prior approval can be seen a restriction by object as per Art 101 and whether the exclusion of a rival competition can be seen as necessary (and proportionate) in pursuing a legitimate objective. If that would found to be case, the restriction would then fall outside the scope of Art 101 altogether (following the approach developed initially in *Wouters* (C-399/09)).

At the outset, it is important to recognize the complex nature of the activities undertaken by sports governing bodies like the UEFA (see Ibanez Colomo, 2022)[10]. The willingness to pay of fans and viewers of sport competition is driven to a significant extent by the presence of competitive balance (see for instance, Leeds and von Allmen (2014)[11]). As a result, participants in a competition not only jointly produce a valuable good (the competition) but also have an incentive to ensure that competition among between themselves is balanced. There is potentially an important role to play for sports governance organization in this respect and competitive balance could thus be seen as a legitimate objective (for instance in the context of Art. 101 but also more generally in a regulatory context). As observed by Ibanez Colomo (2022), one should also expect that conflict between participants in the competition and the governance organization will arise, for instance regarding the distribution of the revenues resulting from the (joint) production of the competition. Decision by governance organizations that restrict the conduct of some of the competing teams, for instance their ability to set up alternative competition, can thus potentially be justified by the role that they play in terms of maintaining competitive balance (or possibly achieving other objectives that may be essential for the joint

[10] Ibanez Colomo, P., (2022) Competition Law and sports governance : disentangling a complex relationship, *World Competition*, 45

[11] Leeds, M. and P. von Allmen, (2014), *The Economics of Sports*, fifth edition, Routledge, New York. See also Contra, Stefan Szymanski and Stefan Késenne (2004), Competitive Balance and Gate Revenue Sharing in Team Sports, *The Journal of Industrial Economics*, 52: 165-177.

production). We do not question the role played by sport governance organization (beyond the so-called rules of the game). A discussion of competition balance and the whether competitive balance could be seen as a legitimate objective is beyond the scope of this paper. This paper focuses on what is at stake in the ESLC case, namely the proper articulation of the analysis between the assessment of the anti-competitive effects and the pursuit of other objectives as well as the standard for recognizing these objectives.

The opinion of AG Rantos in the ESLCcase must also be assessed in the light of the prior CJEU decisions on the *International Skating Union* (ISU) case (C-124/21 P), the *MOTOE* (49/07), and the OTOC (C1/12) case.

In *MOTOE*, the Court was dealing with the Automobile and Touring Club of Greece (ELPA') which was both a regulator and an entrepreneur with respect to motorcycle races. ELPA was deciding whether those participating in its competitions, could also participate in competitions organized by others. The Court found that:

> "A system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust a legal person such as ELPA, which itself organizes and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorization to organize such events, is tantamount de facto to conferring upon it the power to designate the persons authorized to organize those events and to set the conditions in which those events are organized, thereby placing that entity at an obvious advantage over its competitors" (§ 51).

The Court of Justice emphasized the incentive to exclude entrants (§ 52) and concluded that the power to do so had to be made subject to restrictions, obligations and review (§53).

In *OTOC*, the Court dealt with an association of accountants in Portugal that was both providing and regulating training. The Court confirmed the analysis of *MOTOE*, and further held that the regulation did not ensure equality of opportunity because the conditions which must be met by the training bodies were drafted in vague terms (§90).

The ISU had put into place a system whereby its prior approval was necessary for participation in competitions outside those that it organized. Participation in non-ISU competitions could lead to a lifetime ban. Unlike the UEFA, ISU had published criteria for obtaining approval but those were considered to be vague, and led both the Commission as well as the General Court to find ISU in violation of EU competition law. The Commission concluded that ISU's scheme was a restriction by object as it had an anti-competitive purpose (see § 163 et seq.) and the vagueness of the approval criteria was instrumental in reaching that conclusion. The Commission's argued, in essence, that the discretion would provide ISU with the ability to distort competition and that it would have the incentive to do so to protect its economic interest. In this respect, the General Court also drew negative inferences from the observation that the eligibility rules did not relate to the legitimate objectives that ISU might have been pursuing through the implementation of its authorization system. This inference raises the issue of the interface between the analysis of the existence of a restriction by object and the analysis of the existence of legitimate objectives (to which we will return later in section 5).

At the moment of writing, the General Court's decision is under appeal at the CJEU. AG Rantos (who has been appointed in this case as well) issued his opinion on the same day as his opinion in the ESLC case.[12] He acknowledged that the system of approval prior to participating in an event, raised questions of harm (§73) but was not convinced that the broad discretion was necessarily relevant to establish the existence of restriction by object (§ 75). This finding is, of course, essential for the resolution of the ESLC case; had the AG confirmed the judgment of the General Court that discretion was relevant to establish a restriction by object, a fortiori, the absence of any criteria in the case would have raised a concern in this respect.

[12] Opinion of the AG Rantos, CaseC-124/21 P, 15 December 2022.

The paper is organized as follows. Section 2 provides some further background information on the international competition organized by UEFA and the project put forward by ESLC. Section 3 discusses the existence of a restriction by object. Section 4 discusses the restriction in light of the legitimate objective of promoting the ESM. Section 5 discusses the interplay between the analysis of whether an agreement is a restriction by object and the analysis of whether it can be justified by legitimate objectives. Section 6 concludes.

2. Background on the dispute

The Champions League is the prime competition sponsored by UEFA that is meant to involve the champions from national competition. Following discussion with ECA (European Clubs Association),[13] UEFA however manages access by attributing different weights to different countries resulting in different slots to national federations. The English F.A. (Football Association) for example, has been allotted four slots (three of which entail automatic participation in the Champions' League group-stage), whereas the champion of Scotland will be admitted to group-stage, only after it has earned this right through participation in qualifying rounds. In addition to Champions League, the UEFA is also organizing the Europa League and the Europa Conference League (for clubs achieving lower positions in national competitions).

The ESLC includes some of the most "commercial" clubs in Europe. These franchises can attract investors and sponsors worldwide (largely because of their sporting success and their large fan base)and have been participating routinely in the Champions League. These clubs, through their participation in ECA, have been engaging in frequent negotiations with UEFA, to secure their quasi-permanent participation in UEFA-sponsored competitions. By steadily increasing the coefficient of importance of some national championships, they did manage to improve their

[13] ECA does not include all European clubs, but only those clubs that participate in UEFA-sponsored competitions. Its membership is divided into voting- and non-voting members. Only a fixed number (periodically reviewed) of a national federation, the so-called "ordinary members" enjoy voting rights, see https://www.ecaeurope.com/media/4856/eca-statutes-september-2020.pdf

position over the years. The four slots allotted to the English, the Italian, and the Spanish federations reflect this.

The clubs which are members of the ESLC were not satisfied with the financial arrangement. The UEFA sells TV rights to broadcasters[14], keeps a certain percentage, and distribute revenues to clubs. UEFA distributes the revenues not only to participants in its competitions (in decreasing order, the winner enjoying the lion's share), but also to smaller clubs through the, so-called, "solidarity" payments.

The ESLC clubs thus proceeded to organize their own Super-League competition, in lieu of UEFA's Champions League. The plan was for ESLC members to continue to participate in their national championships but not to participate in the Champions League. The other UEFA competitions, namely the Europa League, and Europa Conference League would not be affected.

The Super-League participants (as originally planned) would be 20 clubs (15 founder "permanent" clubs, and 5 by invitation). They would be divided into two groups of 10, which would play 18 games against each other (home and away). The top 3 of each group and 2 more clubs that would qualify (knock out games between the 4th and 5th of each group) would form a new group of 8 teams that would play knock-out games until the final winner emerged.[15] Participating clubs would retain their gate- and sponsorship revenues, and would split between them TV rights: 32.5% would go to founders; 32.5%, to all 20 participating clubs; 20% would be distributed according to club performance; and the remaining 15%, according to broadcast revenue.

[14] These revenues are substantial (https://www.statista.com/statistics/378203/rights-revenue-of-uefa/) and are expected to grow further (https://www.axios.com/2022/07/11/champions-league-tv-rights-soccer)

[15] The initial lay-out was subsequently revamped (https://www.managingmadrid.com/2022/10/19/23412486/super-league-ceo-says-re-launch-will-happen-with-a-revamped-format-and-new-vision). For the purposes of our paper, it is simply immaterial whether it was the initial or a subsequent revamped competition that formed the subject matter of the litigation. The key question as we explain in what follows is whether the prior approval scheme by UEFA for whatever competition is consistent with the EU competition law.

ESLC, through this formula, would still be in position (according to its own claims) to distribute €400,000,000 to "weaker" clubs, as a form of solidarity payment (a sum that exceeds what UEFA currently disburses for the same reason by a factor of about four[16]).

While awaiting the response of the CJEU, the Provincial Court did not remain inactive. In a decision issued at the end of January 2023,[17] it reinstated an injunction that a Commercial Court of Madrid had imposed against UEFA already in April 2021, which a different panel of the same court had lifted a year later. ESLC had asked the Provincial Court to impose an injunction against UEFA (and FIFA) alleging that they had abused their dominance, and thus consequently, had violated competition law by attempting to stop the proposed tournament from going ahead through the sanctions that they had threatened to apply against participating clubs. The Provincial Court ordered that UEFA cease from adopting any measures until the CJEU had issued the requested preliminary ruling. UEFA has complied with this order. UEFA has abstained from sanctioning the three clubs that continue to be ESLC members.

3. Restriction by object

What constitutes a restriction by object and the delineation of an appropriate legal test remains a subject of debate[18] but Case law seems to have, to some extent, crystallized in recent years. The Court in *Cartes Bancaires*[19] has put forward a principle, which is particularly useful to the extent that it also involves a clear distinction between restrictions by object and by effect. According to *Cartes Bancaires*, the essential legal criterion for ascertaining whether there is a

[16] https://www.maltafootball.com/2022/07/28/uefa-releases-details-of-payments-to-clubs-participating-in-club-competitions/

[17] https://files.lbr.cloud/public/2023-02/Auto%20Apelaci%C3%B3n%20Cautelares.pdf?VersionId=4eAtONcTNA_QdIu2uH4tO3D77GRPH6vv

[18] See for instance, Jones, A. and W. Kovacic, (2017), Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework, *The Antitrust Bulletin*, 62(2), 254-293, or Ibanez Colomo, P., (2021), Anticompetitive Effects in EU Competition Law, *Journal of Competition Law and Economics*, 17, Prete L. and M. Scholz, (2023), The object/effect dichotomy, in *Regulation 1/2003 and EU Antitrust Enforcement A Systematic Guide*, Kris Dekeyser, Céline Gauer, Johannes Laitenberger, Nils Wahl, Wouter Wils and Luca Prete (eds), Wolters Kluwer

[19] See CB vs Commission, C-67/13, 11 September 2014 and opinion of AG Wahl, 27 March 2014. See also Budapest *Bank* and others, C-228/18, 2 April 2020, § 37.

restriction of competition by object is the response to the question whether the challenged measure "reveals in itself a sufficient degree of harm to competition" for it to be considered that it is not necessary to assess its effects (AG in ESL, § 68) [20]

The AG refers to this approach in both the ISU and ESLC case and characterizes it as settled case law (for instance in § 68 in ESLC).[21] From an economic perspective, whether an agreement "reveals in itself a sufficient degree of harm" can be assessed in terms of priors informed by economic analysis and experience[22], also referred to as economics premises.[23] The Court of Justice has also clarified (i) that the assessment of whether agreements reveals by themselves a sufficient degree of harm should take into account the legal and economic context,[24] and (ii) that it is only when there is no strong prior that the agreement leads to significant harm that a detailed analysis of effects should be undertaken to determine whether the agreement indeed leads to a restriction by effects[25] (see §79 of AG Opinion in ESLC).[26]

What evidence can be considered sufficient in order to decide that an agreement reveals in itself a sufficient degree of harm has been discussed in subsequent cases in light of specific legal and

[20] The emphasis on significant effects is an evolution from earlier judgements like *T-Mobile* (C-9/08), in which a few years earlier, the Court had ruled that the potential for negative impact sufficed in order to characterize the challenged measure a restriction by object.

[21] This approach can be cast in a decision-theoretic framework such that agreements for which there is a strong prior in light of economic theory and experience that they will lead to significant anti-competitive effects can be characterized as restriction by object without a detailed analysis See for instance, Beckner, F. and S. Salop (1999), Decision theory and antitrust rules, *Antitrust Law Journal*, 67(1), 41-76: Salop, S., (2017), An enquiry Meet for the case: Decision theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards, mimeo; Neven, D. (2016), Identifying restrictions of competitions, Some comments from a law and economics prospective, Proceedings of the 11th GCLC conference, D. Gerard (eds), *The notion of restriction of competition: revisiting the foundations of antitrust enforcement in Europe*, Bruylant.

[22] See *Generics* (In Case C-307/18, 30 January 2020, § 64) that emphasizes the relevance of experience in relation to particular conducts.

[23] See Kalintiri, A. (2020), Analytical shortcuts in EU competition enforcement: proxies, premises and presumptions, *Journal of Competition Law and Economics*, 1-42

[24] See for instance, § 69 in the AG opinion in ESLC, referring to *Visma Enterprise* (C-306/20). From a decision theoretic perspective, this could understood as an instruction to check whether agreements that according to economic theory and experience can be expected to lead to significant harm do indeed have this potential in the specific circumstances of the case.

[25] This approach comes close to what is known in the US legal order as a truncated rule of reason. See for instance, Hovenkamp, H., (2018),The Rule of Reason, *Florida Law Review*, 70: 81-167.

[26] See also judgment of 18 November 2021, *Visma Enterprise* (C-306/20)

economic contexts. For instance, in *Generics*[27], the Court held that the absence of a plausible explanation, other than the restriction of competition for magnitude of the reverse payment, was decisive (§84).

As mentioned above, when confronted with instances in which an entity acted both as a supplier and regulator, the Court of Justice recognized the incentive to exclude entrants as compelling and found that the rule of the Treaty would require a level playing field across all suppliers (see *MOTOE*). In *OTOC*, the CJEU found that vague approval criteria reinforced the prospect of anti-competitive effects. In ISU, the Commission and the General Court went one step further, and found that vague criteria were a relevant element of context leading to the conclusion that the approval system was a restriction by object. In his opinion, AG Rantos disagreed with the General Court, holding that vague criteria were not constitutive of a restriction by object. The AG refers to anti-competitive exclusion as a theoretical possibility (§ 72) thereby neglecting consideration of the commercial incentive of ISU.

The AG also denied the relevance of the *OTOC* judgment (Case C-1/12, 28 February 2013), on the ground that it was concerned with restriction by effect, and not by object. The approach of the AG seems somewhat formalistic, to the extent that a restriction by object is one in which the prior of effects is particularly strong (as he himself recalls in § 68).

In the ESLC case, the AG went even further. He observed (§74-75) that, unlike what happens in *OTOC*, UEFA is not a public entity and has no special rights so that clubs wishing to organize a competition could do so without UEFA's approval (while recognizing himself that this perspective is purely legal). He further held that one cannot anticipate anti-competitive effects solely from the examination of the rules and that "only a specific analysis of the exercise of the discretion held by UEFA could establish whether its use of that discretion has been discriminatory and inappropriate in order to demonstrate anti-competitive effects" (§ 72). An examination of the rules in the abstract does not suffice (§77).

[27] *Generics*, Case C-307/18, 30 January 2020.

The AG thus denies entirely the relevance of the incentives of UEFA to protect its rents by denying entry.[28] He did not even refer to this issue (unlike what happened in earlier cases). Besides, the AG did not consider, as part of the relevant element of context, whether clubs would realistically organize competition without UEFA' approval. His position comes close to stating that an agreement is not a restriction by object, as long as there is the possibility that the agreement will not be used in way that is anti-competitive (despite the incentive to do so). If confirmed by the Court of Justicze, this position would appear to be a complete reversal in less than 10 years of the view held in *T-Mobile* (C-9/08), that an agreement could be seen as a restriction by object if it had the capability to lead to anti-competitive effects. What was required at the time was the possibility of an anti-competitive effect; what the opinion of the AG would require is the absence of the possibility that it might not.

The AG supports his opinion by offering a different perspective on the conduct of ESLC. He describes ESLC as attempting to seek a dual membership, namely participation if its own competition as well as participation in UEFA sponsored competition (§76). He observes in this respect that denying dual membership has not be held as restriction by object in the relevant case law[29].

First, the description of ESC's conduct as attempting to seek dual membership should be qualified. ESLC does not want to participate in any UEFA-sponsored competition. In fact, on numerous occasions the Super-league framers have stated that their aim is to continue participating in national championships (e.g., in competitions which are not organized by UEFA[30]), while

[28] Note that in characterizing UEFA as a monopolist in a position to restrict entry to protect market power, we are assuming that the organization of pan European competition is not a natural monopoly. That is we are assuming the provision of another pan European Football competition is feasible and would increase consumer welfare (because of lower prices, higher quality and more diversity)

[29] The AG emphasizes this again in the context of this discussion of legitimate objectives (§ 106), characterizing ESL's conduct as involving free riding (see also § 143).

[30] As discussed above, articles 49/51 limit UEFA's involvement to the organization of pan-European competitions only. UEFA is not organizing national championships.

organizing their own pan-European competition (the Super-League) in lieu of the UEFA-sponsored Champions League[31].

Second, it is unclear whether the case law on dual membership that the AG refers to, offers clear guidance. The AG refers to *Maxima Latja* (C-345/14). In this case, the CJEU considered whether the operator of a grocery store in a super-market could veto the entry of a second grocery store on the same premises. The Court of Justice found that it was not a restriction by object because "even if the clause at issue … could potentially have the effect of restricting the access of *Maxima Latvija*'s competitors to some shopping centers in which that company operates a large shop or hypermarket, such a fact, if established, does not imply clearly that the agreements containing that clause prevent, restrict or distort, by the very nature of the latter, competition on the relevant market, namely the local market for the retail food" (§22). The Court does not provide any further explanation but a natural inference is that there is no restriction in the local market for retail food if is already sufficiently competitive (so that there is no marginal effect from the restriction). In this perspective, the reasoning of the Court of Justice in *Maxima Latvija* is not relevant to the ELSC case; there is no competition at all for UEFA-sponsored pan-European competitions. By virtue of Articles 49/51 of UEFA Statutes, UEFA retains the (statutory) monopoly to organize pan-European competitions.

The AG also refers to *Remia and others vs Commission* (Judgment of 11 July 1985, 42/84). This case relates to a formal temporary non-compete obligation in the context of the sale of asset in which the seller commits not to compete for 10 years. The Court of Justice in that case observed (§ 19) that in the absence of the non-competition obligation, the sales of the assets would not have taken place. The Court further observes that the counterfactual would have been less competitive. Hence, the Court sees the restriction as ancillary[32], or in other words necessary for

[31] Note that the football players themselves would continue to participate in UEFA-sponsored competitions, namely the European Nations Cup, where national teams participate. The argument of the AG is however not about players but about clubs. In any event, as discussed below, AG Rantos takes the view that UEFA should not extend punishments to players.

[32] It would fit into the category of economic ancillarity, using the taxonomy of the AG (see below)

a pro-competitive outcome (the sale of the asset) to arise. This would not appear relevant to the situation of UEFA. It is indeed not clear that UEFA would not have organized international competition in the absence of the disputed regulation.

Next, the AG refers to *Pronuptia de Paris* (Judgment of 28 January 1986, 161/84). This is a case of territorial exclusivity in which again the Court refers to the counterfactual, such that in the absence of territorial exclusivity, *Pronuptia* would not have implemented a franchise contract. This case is thus not directly relevant for the same reason as *Remia*.

Finally, the AG refers to DLG (Judgment of 15 December 1994, case C-250/92). This is a case in which a cooperative in the purchasing of input for farming excluded from its management members that were buying inputs directly (in the context of another newly formed sub-cooperative). In that judgement, the Court of Justice found that exclusion of members who were making independent purchases from the management of DLG was proportionate to ensure the functioning of the cooperative. It is not clear why this case is relevant. The transposition in the ESLC case would be an exclusion of the clubs in ESLC from the participating in the management of international competition by UEFA. This is not the issue at stake.

To conclude, we fail to be convinced by the arguments put forward by AG Rantos. In our view, and in line with the observations made in earlier cases like *MOTOE* and *OTOC*, there is a strong incentive for a party that is both a supplier and a regulator to exercise its discretion as a regulator so as to prevent entry and thereby distort competition.

A final element deserves discussion regarding the assessment of whether the agreement is a restriction by object. The Commission and the General Court in the ISU case drew inferences from the observation that the criteria for review of alternative competition had failed to refer to the legitimate objectives that the ISU may have been pursuing. AG Rantos takes issue with this. We will simply flag this issue for now and will consider this part of this opinion after having discussed the legitimate objectives in the next section.

4. Legitimate objective

Agreements that restrict competition by object or effect can escape the prohibition of Art. 101 TFEU if they are ancillary. As explained by the AG, the ancillary restraint doctrine was initially developed for restrictions that were necessary for the implementation of an agreement that was itself pro-competitive (§87). It was subsequently extended to agreements that were necessary to fulfill another legitimate objective – so called "regulatory ancillary restraints" (§ 88). These legitimate objectives can take precedence over restrictions of competition with the result that there is no infringement of Art. 101(1) TFEU.

Wouters (C-309/09) is the first case in which the approach was deployed. The CJEU held that, to the extent that a legitimate objective is pursued and that the restriction of competition is inherent in its pursuit and proportionate, there is no violation of Articles 101. In this case, the Court of Justice was dealing with a measure adopted by the Dutch Bar which prevented its members from teaming up with accountants within the same business entity. The Court decided (§97) that not every restrictive agreement falls within Art. 85(1) (now Art. 101(1)). The context matters, and account must be taken of the objective pursued. National courts should ask whether a restriction is inherent in the pursuit of a (legitimate) objective. In this case, the objective pursued was legitimate (§105), since lawyers might not be in position to act independently if they belonged to an organization with different commercial interests. The Dutch statute was also considered necessary in order to ensure the proper practice of the legal profession[33].

Note that, unlike what happens under Art. 101(3) TFEU in which efficiency benefits can compensate for anti-competitive consequences, ancillary restraints imply that proportional measures pursuing a legitimate objective fall outside the scope of Article 101.1 altogether. So,

[33] The objectives are "here connected with the need to make rules relating to organization, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience." (§ 97)

unlike Art. 101(3) TFEU, there is no need to show that the restrictive measures have helped bring about an innovative or more cost-efficient product. We will return to this aspect later.

The question thus arises of how objectives can be deemed legitimate[34]. The Court of Justice has this appropriated this prerogative and besides administration of justice in the *Wouters* case, the Court has notably recognized, sports integrity (*Meca-Medina* C-519/04), and training/quality of services (*OTOC*, C 1/12).[35]

In AG Rantos' opinion, protection of the European Sport Model (ESM) is a legitimate objective. He finds support for this opinion from Art 165 TFEU, which stipulates that the Union shall contribute to the promotion of European sporting issues but does not refer to the ESM explicitly. The AG acknowledges that the ESM is not detailed in Article 165 of TFEU (§93), and thus sought to delineate it. According to the AG, the ESM is characterized by its pyramidal structure (the system of promotion/relegation). Unlike the North American model, ESM does not endorse a closed-league system (§33). It is all about open competitions, where any team can participate and win its way to a higher league through sporting performance (§30). The second leg of ESM is participation in European competitions by merit: it is the champions of national championships that will participate in the UEFA Champions League, and the following teams will participate in the UEFA Europa League etc. Finally, the third leg of ESM concerns financial solidarity, that is, the obligation that wealthier clubs and UEFA have accepted to help financially weaker clubs (§30).

This opinion of the AG raises a number of questions.

4.1 Is Art 165 an appropriate legal basis?

While the competence to regulate football originates in (individual) member states, Art. 165 TFEU acknowledges that the EU retains a "support competence". In the exercise of a support

[34] See Loozen, E., (2019), Strict competition enforcement and welfare: A constitutional perspective on Art. 101 TFEU and sustainability, *Common Market Law Review*, 56, 1265–1302.

[35] See also Case C-136/12, CNG, in which the Court took the view that the "the dignity of the profession of geologist" could be a legitimate objective failed could determine whether the restriction was necessary.

competence, the EU cannot adopt, as things stand, an initiative to regulate football, never mind a course of action that would pre-empt action by its member states. The latter keep the initiative to design football (sports) policies. EU's contributions under Art. 165 TFEU are limited to supporting its member states' initiatives.

In this respect, one can wonder about the addressee of this provision. AG Rantos implies that it is UEFA, which, based on this provision, would defend the ESM.[36] However, AG Szpunar, in a subsequent case (C-680/21), takes the view that it is the EU institutions that are targeted.

AG Szpunar offered his views in C-680/21. In this case, the question was submitted to the CJEU whether UEFA's regulation of Homegrown Players (HGP) rule was consistent with EU law. UEFA had imposed the HGP rule in the early 2000s, according to which, every club participating in UEFA-sponsored competitions should reserve 8/25 slots in the roster,[37] to club- / league-trained players[38].

While nationality of HGP was not prejudged in the UEFA statute, the concern was that this statute discriminates against foreigners. This is exactly what AG Szpunar opined: in his view, the statute was both discriminatory and incoherent (§§43-44). It was likely to discriminate against foreigners, who at a young age usually reside at home with their parents. It was incoherent because it was meant to support local communities, but by extending the definition of HGP to league-wide trained players, this objective was not served anymore (a native of Northumberland is hardly a Londoner).[39]

[36] In his opinion, AG Rantos leaves no one in doubt that he sees Art. 165 TFEU as the reflection of ESM.
[37] Clubs cannot have a larger roster by UEFA fiat.
[38] To illustrate, Anderlecht F.C., should keep 8 slots for players trained in the club, or anywhere in Belgium.
[39] The EU Commission has changed its position regarding HGP. Originally, it did not see much wrong with the rule https://ec.europa.eu/commission/presscorner/detail/en/ip_08_807 It adopted the opposite point of view before the CJEU proceedings.

AG Szpunar could have left it that. But he did not. He went on, as he thought that it was imperative for him to take a position on the reach of Art. 165 of TFEU. In his view (§51), this provision is soft law, and it is addressed to the EU institutions only (not even to member states). AG Szpunar went on to hold that UEFA pursues economic objectives, and cannot be the target of Art. 165 of TFEU: it is not for UEFA to pursue a public policy objective (§54).

If AG Szpunar's view is eventually upheld (and we see a lot of merit in his perspective), then, all of AG Rantos' opinion regarding ESM falls, as his finding that Art. 165 is the appropriate legal basis to protect the ESM will be incorrect. AG Rantos' opinion in this setting would be akin to governance (by UEFA) without competence (for UEFA).

This raises a broader issue with respect to the legitimate objectives that may affect the scope of the prohibition of Art 101 and whether it may not be appropriate to limit those to the implementation of public policies for which there is a clear regulatory framework in place (see Loozen, (2019) for a argument in this direction on the basis of constitutional considerations)

4.2 Is There a European Sports Model?

The relevant part of Art. 165 TFEU reads as follows:

> 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. Union action shall be aimed at: … developing the European dimension in sport, by promoting **fairness and openness** in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen. (Emphasis added)

The terms “fairness and openness” are the only ones that could lend some prima facie support to AG Rantos’ views. But these are open-ended terms, which could be understood as referring to the inclusion for example, of all Europeans in sports structures. To go from “fairness” to “economic fairness” and “solidarity payments” as AG Rantos suggests, is indeed a significant step. The same remark applies regarding the understanding of the term “openness”: why does this term refer to the promotion/relegation system and not to openness to the European society, and a consequential invitation, for example, to support inclusion of handicapped people into European sports?

Furthermore, it is not clear why the ESM should only include an open (pyramidal) system. There are other models implemented in Europe like the Euro-league, the pan-European competition in basketball, where participation is by invitation. In similar vein, Weatherill (2023)[40] mentions the Tour de France, and the Austria/Germany Four Hills skiing competitions, which are organized in a drastically different manner (the latter coming very close to a “closed league”). Participation in all these competitions does not depend on criteria similar to those employed by UEFA. The best-case scenario for AG Rantos might that there is a European Football Model, an EFM, but not an ESM. He was defending nevertheless, the latter and of course, the statutory underpinnings of the EFM are not reflected in Art. 165 of TFEU at all.

In any event, the pyramidal structure of ESM corresponds to a practice rather than a norm recognized in any European regulatory framework. There is indeed nothing in EU law that would prevent a member state from adopting a closed-league system. In the absence of conferral of power, competence to regulate football remains at the national level. If UEFA would decide to impose sanctions against such member state, it would be exceeding its authority as UEFA only has competence over UEFA-sponsored competitions, and not over national competitions (see Art. 49/51 of the UEFA Statutes discussed above).

[40]Weatherill, 2023. A Judicial Coronation of the European Model of Sport? The Conclusions of Advocate General, available at https://www.concurrences.com/fr/review/issues/no-1-2023/conferences/the-future-of-sport-governance-in-europe-bruxelles-13-janvier-2023

4.3 Should the Protection of ESM not be Explicitly Stated in UEFA Statutes?

It is striking that there is no reference to the ESM in the UEFA statutes and one can wonder to what extent it is credible for a private institution like the UEFA to refer to a public policy objective that is nowhere reflected in its own statutes. This question was raised by AG Szpunar. He found that reference that to a public policy objective by a private institution is likely to be opportunistic, as it would be expected to pursue it commercial interests. In his view,

> " it is important to bear in mind that – contrary to a Member State as a public entity – private entities such as UEFA or the URBSFA, in line with their respective purposes, pursue objectives which are economic in nature. Such objectives may at times be in conflict with public objectives. Moreover, UEFA and the URBSFA exercise both regulatory and economic functions. Since these functions are not separated, conflicts of interest are bound to arise. Put differently, UEFA and the URBSFA would be behaving irrationally if they attempted to further public objectives which ran directly counter to their commercial interests."(58)

Importantly, from our perspective, AG Szpunar reaffirms in the quoted passage the strong economic premise that UEFA will pursue its economic interest and thus, in the context of ESLC can be expected to restrict entry.

In this respect, one can also wonder whether it would not have been appropriate for AG Rantos to suggest that the conduct of UEFA should also be examined to assess whether, as suggested by AG Szpunar, reference to a public policy objective is not merely an opportunistic way to find a justification for what is no more than the protection of its monopoly rents[41]. Indeed, the evolution of the manner in which the Champions League competition has been evolving over the last few years, is characterized by a shift in favor of the larger, more commercial players. UEFA has increased the number of slots reserved to "commercial" leagues, and decreased that for

[41] The AG (§108) observes that "from the perspective of competition law, an undertaking cannot be criticized for attempting to protect its own economic interest". This principle (which relates more to the assessment of the presence of a restriction of competition) would however need to be considered in the legal and economic context of the case. The facts that, as discussed above, UEFA is a self-appointed monopolist and that its economic interest are monopoly rents that it seeks to protect against entry are surely relevant.

"non-commercial" leagues. Questions could also be raised about the extent to which UEFA has maintained competitive balance as there is evidence that competitive balance has actually worsened following the implementation of the financial fair play regulation.[42] Questions can also be raised about the "solidarity" payments that UEFA has been paying to smaller clubs. Not only, according to UEFA's official figures, does the overall sum appear to be small (some 3% of overall revenues for clubs participating in qualifying rounds, or about 100 million),[43] but it pales by comparison to the amount that ESLC has committed to pay under the same heading ("solidarity" payments four times a high).

4.4 Why are Approval Criteria and Sanctions Necessary to Protect ESM?

AG Rantos concludes (§ 110) that the "non recognition by FIFA and UEFA of an essentially closed competition such as ESLC could be regarded as inherent in the pursuit of certain legitimate objective", namely the preservation of the ESM. AG Rantos also held that the sanctions imposed on clubs were proportionate in order to preserve the ESM (§122), while sanctions on players were disproportionate (§121) because the latter were not involved in the discussion.[44]

According to the AG, the deployment of the Super-League would have had negative impact on national competitions by reducing the appeal of these competitions (§102), and it would also have had a negative impact on the principle of equal opportunity, as the clubs belonging to the Super-League would be in a favorable position in national leagues because of their access to larger resources (§103). Furthermore, it would also run counter the "European" dimension of the sports model (104) and might have called into question to principle of solidarity (§105).

[42] See for instance, Ramchandani, G., Plumley, D., Davis, A., Wilson, R. , (2023) A Review of Competitive Balance in European Football Leagues before and after Financial Fair Play Regulations. *Sustainability* 2023, 15, 4284. See also Hoeya, S., T. Peeters and F. Principea, (2021) The transfer system in European football: A pro-competitive no-poaching agreement?, *International Journal of Industrial Organization*, 75, showing that the transfer system in the Europe has a minor effect on revenue inequality.

[43] https://www.maltafootball.com/2022/07/28/uefa-releases-details-of-payments-to-clubs-participating-in-club-competitions/

[44] But if this is the reason, then clubs that would eventually be invited to participate in the Super-League, should not be punished either. This would lead to a blatant discrimination: some participants in Super-League could be punished, whereas others would not.

While the introduction of the ESLC can indeed be expected to have some of the consequences envisaged by the AG, what remains unclear is why a Super-League cannot be designed in such a way that potential concerns can be addressed, so that the non-recognition of a closed league like ESLC is not inherent in the pursuit of the objective of supporting the ESM. For instance, as mentioned in section 2 above, ESLC has already indicated that it was prepared to commit to transfer as much as €400,000,000 as solidarity payments. Transfers on higher scale than those currently undertaken by UEFA would presumably address concerns about solidarity (§105) but also unequal opportunities (§103) in the context of national competition (as teams in national competition that would not belong to the super league would presumably be recipient of some of the solidary payments). Similarly, as discussed in Section 2, access to Champions League is already managed by the UEFA so that not all countries are equal, with reserved sports for the UK, Italy and Spain. Whether a Super-League organized alongside the UEFA competition would lead to more unbalance in the representation of countries cannot be presumed without considering detailed plans. More generally, any discussion about equality of opportunities should recognize that it is in the interest of any closed league to maintain competitive balance as it is one of the key dimension of the willingness to pay of fans and viewers of sports competition. As the experience with the US closed league shows, competitive balance can be maintained in different ways (including restrictions on the acquisition of key inputs) and it would in the interest of ESLC to maintain competitive balance.

5. Interface between object and legitimate objective

There is an issue that deserve attention in relation to the interface between the analysis of whether an agreement involves a restriction by object and whether it can be justified by a legitimate objective.

In ISU, AG Rantos took issue with the negative inference drawn by the General Court from the absence of link between the criteria for allowing a competition outside ISU on the one hand, and the legitimate objective pursued by the ISU, on the other. He points out that the question of

whether an agreement is a restriction by object is analytically different from the question of whether it is contributes to the fulfillment of another legitimate objective. Indeed, the two questions relate to different aspects of the counterfactual. The first question asks whether there is a strong anticipation based on economic premises that anti-competitive effects would not arise in the absence of agreement. The second questions ask whether legitimate objectives would not be fulfilled in the absence of the agreement.

However, the perspective of AG Rantos appears to be rather narrow. Even if *ex po*st the absence of reference to the legitimate objective in the criteria does not shed any light on whether the criteria are likely to lead to anti-competitive effects, the matter may be different from an *ex ante* perspective; that is, the fact that the ISU has chosen not to include criteria that would relate to the legitimate objective may be relevant. It could reveal that the purpose of the criteria was not to ensure the fulfillment of the legitimate objective, so that the motivation should be found elsewhere and thus possibly in terms protecting its own rents.

AG Rantos makes a further, surprising, observation. He notes (§ 107) that the acknowledgement of a legitimate objectives should have led the General Court to "call into question its finding that the object of those rules is, by its very nature, harmful to the proper functioning of normal competition" (i.e. a restriction by object). While the AG does not quite say that an agreement which pursues a legitimate objective, cannot be a restriction by object, it comes close to it.

If indeed the statement of the AG is interpreted as saying that an agreement which pursues a legitimate objective cannot be a restriction by object because the object of the agreement can then not been seen as harmful by its very nature, it involves a contradiction with the statement of the AG according to which the analysis of whether an agreement involves a restriction by object and the analysis of whether it fulfills a legitimate objective, are conceptually different (§ 95). Indeed, if the acknowledgement of legitimate objectives implies that that an agreement cannot be a restriction by object, the two analyses are no longer conceptually distinct.

This discussion also highlights the potential pitfalls of emphasizing the "object of the rule" or the "objective purpose of the rule" as sufficient conditions for finding a restriction by object. As discussed above, what is the fundamental is the consideration of the *sufficient degree of harm to competition* (as indicated in *Cartes Bancaires*[45]). Reference to the underlying principle avoids the conflation between legitimate objectives and restriction by object, which arises when both refer to objectives or purposes.

6. Concluding Remarks

This paper has argued that unlike what is recommended by AG Rantos, the UEFA regulation with respect to the authorization of alternative competition is best seen as a restriction by object. Besides the specifics of the case, there is a systemic concern, namely that EU discipline towards anti-competitive agreement would be weakened if cases in which significant anti-competitive harm can be anticipated would be not characterized as restriction by object.

The paper has also argued that there is very limited legal ground in relation to Art. 165 to recognize the ESM, as understood by AG Rantos, as a legitimate objective that UEFA would be enjoined to pursue. There is indeed an apparent disagreement between two AG on this issue.

Besides the specifics of the case, there is a systemic concern[46] about recognizing legitimate interests that can altogether trump competition concerns too easily as it would again weaken the discipline towards agreements. From a policy perspective, some limiting principles seem warranted. For instance, legitimate objectives could be restricted to those that are pursued by

[45] See CB vs Commission, C-67/13, 11 September 2014 and opinion of AG Wahl, 27 March 2014.

[46] There are also some concern about the application of the approach AG Rantos in other sports. Recently, an arbitration (SR/165/2022) about the World Golfing Tour adopted a similar approach to that of the AG. The drafters of the award insisted that a restriction should be assessed in its context, and it would not be considered a restriction within the meaning of Art. 101 of TEFU, if the restriction was deemed necessary to achieve a legitimate objective. In this case, the organizing body (DP World Tour) of a golf tournament fined athletes who participated in a competition organized by a different body. The drafters accept that the organizing body (DP World Tour) is a commercial operator (§§141 et seq.), but then hold that it protects a legitimate objective. A few paragraphs later (§§160 et seq.), the drafters also hold that DP has the right to protect its income.

an existing regulation that the firms involved also need to respect. A precise formulation of the objectives as well metrics for the extent to which they are fulfilled also appear essential to give some substance to the tests for necessity and proportionality.

There may be a more general concern from a policy perspective about the implementation of regulatory "ancillarity". Unlike Art. 101(3), this approach does not recognize trade-offs between different objectives. As a result, the authorities are not in a position to assess alternative restrictions that may have different impacts in terms of competition and the fulfillment of other objectives. This shortcoming is evident in the ESLC case. The extent to which objectives in terms of solidarity for instance can be achieved when allowing for the development of a closed league in addition to the UEFA sponsored competition, and the extent to which UEFA competition need to protected depend on the details of the interactions between these competitions and financial arrangements. The enforcer should not be left with a discrete choice to allow a restriction or not; it should be in a position to investigate the trade-offs. If that is not feasible within the enforcement of Art. 101, then a European regulation of sports competition is required.