Sep 01, 2022

The future of professional football in view of Super League vs. UEFA - *How 15 judges may change the face of the world of football*

European Law | Opinion Article | International

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This article elaborates on the future of professional football in Europe. To come straight to the point: that future is dependent on a renovation of the organisational design of UEFA; whose current structure leads to many conflicts of interest and is in need of reform. The article kicks off with an analysis on UEFA's mismanagement of professional football's conflicts of interest. Secondly, it scrutinizes whether the rule of law can help manage professional football's conflicts of interest. Thirdly, it envisages what politicians could and should do to fundamentally address these issues.

Conflicts of interest and how they are not managed

In the context of professional football, there are various stakeholders. Key stakeholders are the football governing bodies - FIFA, UEFA and Member Associations -, leagues, clubs, players and fans. These stakeholders' interests can conflict[1], on sporting, commercial or financial grounds. For instance, the interests of players to enjoy a period of rest after a full season conflicts with UEFA's interest to organise yet another nation state tournament immediately

after the season's end, mostly to generate additional revenue for UEFA itself.[2] Clubs and/or leagues can have different views from UEFA on the format and selection process for European club football. More far-reaching, clubs and/or leagues can have various opinions on the organisation of European football itself, and may want to set-up a different league all together, that competes with UEFA's competitions. UEFA would quite naturally oppose this, as this would mean giving up its position as sole and, hence, dominant operator of European football. Clubs and/or leagues may also want to break out of their domestic competitions due to size, to form a transnational competition with clubs from several different countries. This would give them access to a more attractive competition and football product that generates more revenue, enabling them to bridge the gap with the teams in the larger ('Big 5') competitions. UEFA could take a more conservative stance towards such transnational leagues. These are but a few examples of situations in professional football where the interests of UEFA and its stakeholders can collide.

How does UEFA manage such conflicts?

The beginning of an answer to that question lies in UEFA's objectives, as included in Article 2 of its Statutes. Included among those objectives is that UEFA will "*ensure that the needs of the different stakeholders in European football (leagues, clubs, players, supporters) are properly taken into account.*"' That sounds promising, but is it really? A closer look invokes the question of whether UEFA commits to anything real *vis-à-vis* its stakeholders. They commit to *taking* their interests *into account*. There is no commitment to let their interests prevail over UEFA's after considering them, even if that would be a sensible thing to do. This might seem striking, but in fact it is not: UEFA is an association (under Swiss Law), and from an organisational law perspective it is quite normal that an association tends to its own interests above all.[3] That own interest is probably that of its combined members, *in casu* the Member Associations.

Moreover, UEFA's internal governance is not apt to let interests other than its own prevail. Membership of UEFA is open to national football associations only[4] and only Member Associations have voting rights in the UEFA Congress, UEFA's supreme controlling body.[5] UEFA's Executive Committee, competent *inter alia* for UEFA club licensing[6], is composed of 20 members: the President, sixteen other members elected by the Congress, two members elected by the European Club Association (ECA) and one member elected by the European Leagues (EL), ratified by the Congress[7]. Hence, at the level of the Congress, stakeholders other than UEFA and its Member Associations are not represented, and at the level of the Executive Committee clubs and leagues have only a small minority representation.

Is it a mitigating factor that professional football clubs and/or professional football leagues are usually part of the governance of Member Associations, and as such have an indirect impact on UEFA's decision-making? It is a factor, but not a decisive one. Said clubs and leagues usually have only a minority position in the governance of their Member Association, alongside *inter alia*representatives of grassroots football and independent persons. Hence, they can certainly weigh on Member Associations' decision-making, but they lack the power to steer it - and rightly so: Member Associations should be the guardians of football as a whole, not of professional football alone.

Under UEFA's governance, where stakeholders are not really represented, can it be expected that UEFA will really consider interests other than its own? The answer to that question lies in a witty quote from Judge *Leo Strine* of the Delaware Supreme Court. Touching on the core of the purpose debate in organisational law, he asserts that allowing managers to observe other interests than the interests of shareholders, without granting to these other stakeholders voting rights or enforcement rights or any other means to exert real pressure is "*more an exercise in feeling good than in doing good.*"[8] If UEFA is serious about taking a stakeholder approach, it has to admit for itself that its internal governance is no longer fit to manage professional football's conflicts of interest in a well-balanced manner.

Breakaway leagues are the prime illustration of this point

The creation of new leagues is regulated by Articles 49.1 and 49.3 of the UEFA Statutes. Article 49.1 states that UEFA has the sole jurisdiction to organise or abolish international competitions in Europe in which Member Associations and/or their clubs participate. FIFA competitions are not affected by this provision. Article 49.3 furthermore states: "*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*." The UEFA Statutes do not include any objective criteria relating to the organisation of a third-party competition, nor any clear procedural rules setting out the timing of the application procedure. Moreover, for a long time, such information was also not available in any other document made available to the public, including to clubs and leagues, although some rather vague and discretionary criteria appeared to have existed.[9] Interestingly and clearly pressured by the pending *Super League versus UEFA* case before the CJEU[10], on 10 June 2022, UEFA's Executive Committee adopted new "*Authorisation Rules governing International Club Competitions*", effective immediately.[11]

Can whoever applies for approval of a new league rival to UEFA competitions, and especially to the *Champions League*, realistically expect UEFA's approval within this framework? Probably not. Firstly, UEFA's governance is oriented towards UEFA's own interests, and therefore UEFA would logically oppose a competitor in the highly lucrative exploitation and contest market of professional football, which it currently dominates. Secondly, the criteria for approval of new competitions *de facto*ruled out any competition with existing mid-week UEFA club competitions, leaving no real room for alternative competitions.[12]On top of that, the criteria included a discretionary margin, allowing the possibility to refuse new competitions at will. The new 2022 Rules do not fundamentally change this analysis. One example from these rules is that a new competition may not adversely affect the good functioning of the UEFA *Champions League*. This makes perfect sense from UEFA's perspective, as the *Champions League* is one of its major revenue streams. On the other hand, however, it prohibits the best teams from participating in an alternative competition, making such an initiative less appealing, both from a sporting and from a commercial perspective - thereby *de facto* ensuring it will never happen. Furthermore, UEFA's decision-making margin remains discretionary and exclusive jurisdiction on the 2022 Rules continues to lie with the Swiss based Court of Arbitration for Sport (CAS).[13]

Could the representatives of ECA and EL in the UEFA Executive Committee act as a counter weight in UEFA's decision-making on new leagues? They cannot. Firstly, as aforementioned, they have only a small minority vote. Secondly, their seat on the UEFA Executive Committee came at a cost. On the basis of the 2019 Memorandum of Understanding between UEFA and ECA, ECA is required to "*ensure that none of its member clubs participate with any of its teams in any competition that is not organised or recognised by UEFA/FIFA*".[14] Based on the 2017 Memorandum of Understanding between UEFA and European Leagues, the latter have "*to abstain and to ensure that the EPFL Member Leagues abstain from jointly organizing or making any arrangement with a view to organising any supra-national sporting competitions, tournaments or football matches*". Moreover, they are "*to ensure that individual clubs taking part in unauthorised sporting competitions or tournaments and/or electing to leave the established structures of European football and, in particular, participating in rival competitions to those organised by UEFA, are not allowed to compete in their domestic championships organised by the relevant EPFL Member League and may also be subject to additional sanctions*."[15]

The much-discussed *Super League* provides a concrete example. UEFA, and FIFA, fueled by strong sentiments of fans and politicians alike, were quick to dismiss the *Super League* and to refuse it as an alternative competition. It was portrayed as an initiative of rich clubs, who desired even greater wealth, to the detriment of all others and football as a whole. The *Super League*'s own missteps made it easy for UEFA to dismiss their arguments.

Yet, is the concept really such a threat to European football? If designed in the right way, as an EU competition with clubs from the entire Union, it need not be. Such a project could enthuse EU citizens and politicians alike as a real Union flagship initiative, able to compete with the now dominant *Premier League*. Links with domestic or transnational competitions *via* relegation and promotion and solid solidarity mechanisms could ensure the project's firm rooting in the European model of sport. The EU League could exist alongside UEFA club competitions and both market participants could push each other towards increased product excellence in the quest for market share and fans. Clubs and leagues would have additional opportunities to play European football. Solidarity with grassroots football overall could increase.

However, would an EU league stand a chance of receiving UEFA's prior approval? It would not, as it would compete with the *Champions League*. It is just not in the interest of UEFA to allow this. It will probably never be as long as UEFA's own interest takes center stage in UEFA decision-making and other stakeholders' interests are relegated to the background.

Can football's stakeholders, other than UEFA and the Member Associations who are already represented, legitimately claim more representation and power in UEFA's governance bodies, so as to allow them to really weigh on decision-making, and to allow a more balanced decision-making within UEFA? It seems that they can. Here are some arguments.

Firstly, in the past few decades, clubs and leagues have become the '*engine*' of professional football, replacing nation states.[16] Whereas clubs, players and leagues take center stage in modern day professional football, it is remarkable that they are represented in football's governing bodies only through a stakeholder-inclusive approach.[17] They are largely absent in the real decision-making bodies. UEFA's governance does not reflect this changed landscape and, therefore, is in need of reform.

Secondly, from an organisational law perspective, it makes sense that the ultimate risk bearers of a commercial venture can steer the organisation and governance of the venture. In professional football, such logic apparently does not apply. Arguably, clubs, leagues and players are the risk bearers of modern football[18], but they cannot steer the commercial venture in which they operate; they do not even have a real say in it. It would make more sense to allocate voting rights in decision-making bodies to clubs, players and leagues that adequately reflect their skin in the game or, at least, provide some other means allowing them to exert pressure. Without adequate representation, it is simply too easy for football's governing bodies to claim stakeholder interests are taken into account, whereas in fact they are not or not sufficiently.

Thirdly, in professional football there is no public or state regulator, but only a private regulator, UEFA. That private regulator also organises and operates European competitions, both club competitions and nation state competitions. As such, UEFA can have competing interests and effectively competes with clubs and leagues, whilst it at the same times regulates clubs, leagues and players, without these having any real say on how they are regulated. Of course, in most other sectors market participants do not decide on the regulation of market entrance and operation. Yet, in those cases, it is normally a government or an entity with powers derived from government that regulates and operates the market; a government that moreover will not compete with the market participants on the relevant market, or that, when it does, cannot claim a privileged position. UEFA is a private regulator, regulating other private actors, which moreover has a privileged position on the market it regulates. It does not really have to take into account the interests of those it regulates; it can subordinate their interests to its own. A more representative

composition of UEFA's governing bodies could help to address this imbalance, albeit that the real underlying question is of course whether it is justifiable that UEFA combines the capacity of regulator and operator - a question that is fundamentally a legal one - and whether it would not be better to have an independent regulator.[19]

Fourthly, from a policy perspective, the 2021 '*Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model*'[20] emphasized the role of stakeholders and the need to take them into account in the further development of sport in Europe.

However justified claims for more representation in UEFA's governance might be, it is probable that they will fall on deaf ears. Amending UEFA's governance requires amending the UEFA Statutes with a majority of at least two-thirds of the Member Associations present at the Congress.[21] It requires UEFA to renounce voluntarily part of its powers to the advantage of other stakeholders. UEFA will probably not do that. It would most likely only do so under serious threat of statutory intervention, a threat that is absent today.

The rule of law as mitigating factor?

As aforementioned, UEFA is both the regulator and operator of professional football. This structure embeds conflicts of interest between UEFA and football's stakeholders. Whereas UEFA's internal governance deficit could still be portrayed as an internal matter, its double hatting cannot: this is a matter of law and has to be assessed against the rule of law. In the pending case of the *Super League versus UEFA*, the Grand Chamber of the Court of Justice of the European Union (CJEU) will have to do exactly that. Specifically, alongside free movement queries, the Court will have to assess whether UEFA restricts competition in the sense of Article 101 TFEU and/or abuses a dominant position in the sense of Article 102 TFEU. Contrary to its earlier case law in *MOTOE*[22] and *OTOC*[23], Article 106 TFEU is not relevant in this case, as UEFA is not a public entity, nor does it derive its powers from the state; it is a purely private entity.[24] The Court's assessment occurs against the background of Article 165 TFEU. This is basically a summary of established practice, without prejudice to the Court's ability to fully assess the case of UEFA against EU competition law and the free movement principles.[25] The hearing in the *Super League* case took place on 11 and 12 July 2022. Advocate General *Rantos*' Opinion is expected on 15 December 2022. It is impossible to predict how the Court will rule, but let's give it a try.

In *MOTOE*, on Article 102 TFEU, and in *OTOC*, on Article 101 TFEU, the Court emphasized that a system of undistorted competition, such as that provided by the Treaty, can be guaranteed only if equality of opportunity is secured between the various economic operators.[26]

Building on that principle, in *MOTOE* the Court found that entrusting a legal person, which itself organises and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorisation to organise such events, places that entity at an obvious advantage over its competitors.[27] Moreover, the Court continued, a rule which gives a legal person the power to give consent to applications for authorisation to organise motorcycling events without that power being made subject by that rule to restrictions, obligations and review, could lead the legal person entrusted with giving that consent to distort competition by favouring events which it organises or those in whose organisation it participates.

Similarly, in *OTOC* the Court held that rules which grant a legal person the power to rule unilaterally on applications for registration or approval submitted with a view to the organisation of training sessions, without that power being made subject by those rules to limits, obligations or a review, could lead the legal person holding such power to distort competition by favouringthe training which it organises itself.

From these verdicts it can be inferred that the Court finds the combination of regulatory and operating power not in itself restrictive of competition or an abuse of a dominant position. That combination does however conflict with competition law when there are no adequate limits or restrictions, obligations and power of review over the legal entity performing both functions. The General Court developed the same line of reasoning in *ISU*.[28] In this case, the General Court ruled that the situation of the International Skating Union (ISU), which organises events and also has the power to authorise events organised by third-parties, is capable of giving rise to conflict of interests. In those circumstances, the ISU must ensure, when examining applications for authorisation, that those third-parties are not unduly deprived of market access to the point that competition on that market is distorted.[29]

How to apply this to UEFA?

Similar to *MOTOE* and *OTOC* - and *ISU* for that matter - in this case UEFA is both a regulator and an operator. To assess the legality of its actions, the crux will be to determine if its prior approval right, exercised as at the request for approval by the *Super League*, was subject to adequate limits or restrictions, obligations and review.

Arguably, no such limits or restrictions, obligations and review existed.

Firstly, as aforementioned, the criteria for the approval of alternative competitions were not transparent and included a broad discretionary margin for UEFA.

Secondly, it could be argued that the review process is designed to evade the European rule of law, as according to the UEFA Statutes the CAS has exclusive jurisdiction.[30] The CAS is a Swiss based arbitration tribunal. Its decisions are appealable before the Swiss Federal Supreme Court on limited grounds, which do not include a violation of EU competition law rules nor a violation of the freedoms of movement.[31] As a result, the Swiss Federal Court will not sanction the CAS should it have not heard a party's arguments pertaining to compatibility with EU Law and it cannot request a preliminary ruling from the CJEU. Hence, even when the CAS or the Swiss Federal Court interpret principles of European Law, they can do so *à la Suisse*. There are no real safeguards on compliance with the European rule of law, as it is applicable within the Union. When subjects of the Union, with respect to a conflict relating to EU Law on EU territory are denied access to a EU court, it is difficult to consider this an adequate review in the sense of *MOTOE* and *OTOC*.[32] The Court's line of argument in *ISU* is supportive of this claim with the General Court stating that any person is entitled to bring proceedings before a national court and claim compensation for the harm suffered where there is a causal link between that harm and an agreement or practice prohibited under Article 101 TFEU.[33] Of course, a party that is malcontent by a CAS verdict could still travel up to the CJEU afterwards. It could do so by requesting a national court to refuse the recognition of the arbitral award, because it is contrary to public policy within the meaning of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. That notion includes EU competition law. The national court could then launch a request for a preliminary ruling.[34] Yet, this is quite the detour and it does not alter the fact that the CAS and the Swiss Fe-

deral Court do not have to take EU Law as interpreted in the EU into account in the first place. Furthermore, in practice, UEFA or FIFA do not really need to request a national judge to recognize a CAS decision - which would then offer the aggrieved party the possibility of raising arguments of public policy - as, in fact, they possess the power to self-enforce their sanctions confirmed by the CAS, *e.g.* by closing the club's access to the Transfer Matching System, by retaining payments (from the centralized marketing) or by banning clubs and/or players from their own competitions or even from their domestic competitions. In short, the review in place is arguably not tantamount to an adequate review in the sense of *MOTOE* and *OTOC*. Hence, it is very well possible that the Court will find that UEFA infringes Article 101 and Article 102 TFEU.

Is the fact that in *OTOC* and *MOTOE* the verdict was based on Articles 101 and 102 TFEU respectively *and* Article 106 TFEU a decisive factor in the case against UEFA, forcing the Court to assess these cases differently? In other words, does it matter that in *OTOC* and *MOTOE* the regulator and operator was a '*public undertaking or an undertaking to which a Member State granted special or exclusive rights*', whereas in the current case UEFA is a purely private regulator and operator? *Pablo Ibáñez Colomo*argues it does, and that private parties should be given more leeway to pursue their own interests, even in the event of double hatting, than governments or actors dependent on governments, who should be assessed more restrictively.[35] The *rationale* is that when there are no statutory rules preventing a competitor from entering the market, but only private rules shielding a private party's position on the market, the competitor can just enter the market and launch a new product competing with the existing product. As such, the reasoning continues, there is no need for competition law to intervene. Although at first glance this reasoning has merit, on second thought it is flawed.

Firstly, the reasoning depends very much on the *ability* of a private actor to enter the market and compete with the existing product, which, in the case of UEFA and the market for European football, is factually impossible, *inter alia* because of UEFA's strict stance towards continued participation in domestic competitions and threats of sanctions as against clubs *and* players. Only top teams, because of their brand value, would stand any chance, but the severity of sanctions against players still wanting to perform for their national squads, could nip even that slight chance in the bud. Furthermore, even top teams would probably need quite a lengthy transition phase to establish a league of their own. In the meanwhile, they would be dependent on UEFA for their survival and a likely ban from UEFA's competitions during that time could very well lead them to insolvency. Because of these reasons, this approach seems too theoretical and somewhat erring on the facts. Moreover, that approach would be controversial in the context of professional football, where calls for statutory intervention are increasingly being voiced, because of the large scale of the market and the inability of football's governing bodies to regulate it properly. Indeed, this is a market where one would expect a presence of statutory law. But of course, as long as politicians do not act, one might argue that the law of the land is still that it is strictly private territory and that this reflects the political consensus. More fundamentally, however, one can argue too that the absence of governmental control, in a sector where a private body assumes both the task of regulator and operator in a significant market in the EU, whereby that double hatting can be used to hide conduct purely in the own commercial interests behind a smokescreen of portrayed legitimate objectives[36], is an aggravating factor in comparison with *MOTOE* and *OTOC*, requiring at least the same rigor as in those cases, and perhaps even more.[37]

Along similar lines, *Pablo Ibáñez Colomo* argues that the focus on 'conflicts of interest' is potentially problematic (and unfair), firstly "*because it suggests that the fact that a firm protects its own economic interests is somehow a concern under competition law (of all disciplines). Second, because it is based on the (now discredited) idea that one can meaningfully distinguish between, respectively, sports-related and economic considerations. Third, and finally, because it would be unfair to sports associations, in the sense that it would demand more from them than from any other entity engaged in an economic activity.*"[38] To illustrate that point he refers *inter alia* to franchise constructions: "*A franchisor finds itself in a position that is not fundamentally different from that of a sports gover-*

ning body. It dictates the rules of the system (brand image, quality of the products, look and feel of the stores) and also limits competition: franchisees will typically be subject to a non-compete obligation preventing them from concluding similar agreements with other suppliers, or setting up rival shops themselves. In spite of the blatant conflict of interest, franchising agreements are prima facie lawful under Article 101(1) TFEU." I disagree with this line of reasoning. Firstly, a focus on conflicts of interest does not suggest that the conflicted party cannot protect its own economic interests. It can, but when a regulator and dominant operator of a market does so, sufficient procedural and substantive safeguards should be in place to prevent or remedy abuse. Secondly, the conflict relates to the regulation of access to the market of European professional football by UEFA, acting as dominant market operator too. There are but economic considerations in this debate; the divide between sports-related and economic considerations, if at all possible, is therefore irrelevant here. Thirdly, there is a fundamental difference between the case of professional football and that of ordinary business, because in other economic sectors the private regulator and operator of a business network cannot prevent a competitor from entering the market, whereas in professional football UEFA can do so, if not direct than at least indirect. The franchise example actually illustrates this point: *Burger King* does not need *McDonalds*' approval to compete on the fast-food market, whereas the *Super League* does need the approval of UEFA to compete on the market of European professional football. The real question is whether from an EU Law perspective it is fair to grant professional football more leniency than ordinary business. Arguably, it is not. Of course, UEFA may protect its own commercial interests, but it may not boycot others from competing with its own competitions. In that circumstances, the conflict of interest *is* problematic.

Can the Court stop here? In other words, the fact that UEFA combines regulatory and operating power - is this in and of itself an inexcusable restriction of competition, because it inevitably leads to abusive conduct? Some do read *Wouters*[39], at the cradle of *Meca-Medina*[40], as an application of the ancillary restraints doctrine.[41] According to that doctrine a restriction of competition, such as the prior approval right *in casu*, is legitimate if it can be justified in view of a broader commercial transaction that in itself is not anti-competitive. The professional bar rule restrictions in *Wouters* could thus be seen as an ancillary restraint necessary to protect the profession of lawyering; the anti-doping rules in *Meca-Medina* as an ancillary restraint necessary to ensure fair competition between athletes and a qualitative product (professional swimming). Along those lines, UEFA's prior approval right could be seen as an ancillary restraint ensuring the preservation of UEFA's commercial model to exclusively produce the product of (European) football. The Court would then have to assess whether the double hatting model itself is legal under EU competition law, and could very well come to the conclusion that it is not, as per the arguments set out above, as a result invalidating the prior approval right too.

UEFA, however, backed by a massive show of support by Member States at the hearing on 11 and 12 July, developed the defense that it does not solely pursue commercial interests[42], and that its prior approval right is ancillary to legitimate objectives of general interest ('regulatory ancillarity')[43] too, allowing a more lenient approach to regulatory rules, such as professional rules or sporting rules.[44] This reasoning was recently applied by the General Court in *ISU* and boils down to this: if the restriction of competition is inherent in the pursuit of legitimate objectives of general interest and proportionate to those, it is legal.[45]

Assuming this reasoning would be the route to follow, is the UEFA approach to the *Super League* underpinned by legitimate objectives? This is then a crucial question, as absent any legitimate objectives, it can only seek justifications in the ordinary commercial ancillary restraints doctrine or in Article 101(3) TFEU.[46] To convince the Court, UEFA will have to bring forward the legitimate objectives it pursues, demonstrate that it adequately pursues those, and that the alternative competition would jeopardize the objectives pursued. In any event, vague references to the integrity of sports, ethics, fair play or similar principles will not in themselves be sufficient to convince the Court.

In *ISU*, the European Commission noted that the following objectives might constitute legitimate objectives that could justify a restriction of competition by a sports governing body: the integrity of sport, the protection of health and safety, the organisation and proper conduct of competitive sport (including the protection of the proper functioning of the ISU calendar and the protection of uniform rules of sport), solidarity between participants and the protection of the volunteer model of a sport. On the basis of Article 165 TFEU, the promotion of fairness and openness in sporting competitions and cooperation between bodies responsible for sports could be added to that list.[47]

There are no indications that the *Super League* would pose a threat to the integrity of sport, nor to the volunteer model of sport or the cooperation between bodies responsible for sports alike. It did, however, appear to be a semi-closed league, at odds with the openness of sport in Europe. As such, that could prove problematic. In fact, however, it is probably not. The known facts are very little, and it could very well be that through negotiation the *Super League* would have developed into a league format that was open - or perhaps it was already envisaged as open, but just poorly communicated. Refusing the *Super League* on partial information, not yet materialized in a definitive proposal, without entering into dialogue with the backers of the *Super League*first, seems premature and hardly coherent nor proportionate in the pursuit of the protection of the European model of sport. Moreover, the argument that UEFA's own European competitions, especially the *Champions League*, in fact resembles features of a closed league, is not unheard of either, questioning whether UEFA itself succeeds in the pursuit of the European model of sport and openness of competitions in particular. Even more striking is that, in March 2019, UEFA itself proposed a reform of its *Champions League* competition as a semi-closed competition, with 32 guaranteed participants, and only 4 places accessible on the basis of promotion and relegation *via* domestic leagues. This is a concept that is pretty similar to the *Super League*, portrayed as 'devilish' by UEFA. It seems to reveal that UEFA is actually not opposed to semi-closed formats as such, but only to semi-closed formats organised *by somebody else*.

Next, comparable to *ISU*, particularly relevant when assessing UEFA's *ex ante* control system appear to be the following two objectives: (i) developing football through a solidarity model, and (ii) the organisation and proper conduct of competitions.[48]

Solidarity is built into all levels of the football pyramid, *e.g.* solidarity payments with regard to player transfers, distribution schemes for revenue from media rights, funding of grassroots football projects, distribution of funds to clubs whose players participate in international tournaments between national member associations, and so on. Hence, UEFA will be able to assert that it pursues solidarity within the football pyramid, without relieving it from the requirement to demonstrate that the mechanisms in place also effectively contribute to solidarity - and that payments due *via* solidarity actually reach their beneficiaries. The revenue streams generated under a new third-party competition may not be redistributed in the same way as is done in the current football pyramid, because the new redistribution scheme could only apply to participating football clubs of the third party competition.[49]If (all) major football clubs chose to leave the current football pyramid, the current solidarity model could collapse. This risk may justify bringing the organisation of third-party competitions under some form of control by UEFA. If the new redistribution scheme had sufficient solidarity mechanisms in place, solidarity beyond that with the clubs directly participating in the new competition, UEFA would probably have no reason to refuse such competition.

As to the legitimate objective of the organisation and proper conduct of competitions, this covers at least two key aspects: (i) protecting the good functioning of the match calendar, and (ii) preserving uniform rules of sport.

The latter aspect is probably less relevant here. There is little doubt that uniform and centrally drafted rules can contribute to the consistency of sporting regulations and rules of the game and to the organisation of sporting competitions in a proper way, while promoting good governance in sport.[50] However, contrary to the situation in *ISU*[51], there is no evidence that the *Super League* would somehow have wanted to change the rules of football. Furthermore, UEFA has not excelled in good governance themselves in recent years, making their claim to preserve good governance throughout the sport of football less credible.[52]

The match calendar is a more serious issue though. Athletes have to divide their energy between different games throughout the season. Therefore, it is essential that there is a healthy balance between rest and matches. To achieve that, it is key that a sport's governing body can impose rules with regard to the match calendar.[53] This also applies to the football sector. In order to avoid any conflict with matches organised by FIFA, UEFA, the domestic leagues and national Member Associations, it is important to have uniform rules and centralized coordination. A difference with other (individual) sports is that football competitions, in general, are organised over a longer period of time, e.g. one month for a standard international tournament between national Member Associations, ten months for a standard domestic club league and ten months for a pan-European club competition. This structure does not leave much room for additional third-party competitions. In order to ensure that the current organisation of the competitions is unobstructed, for example, by certain clubs being unable to complete all matches due to timing or logistical problems, it could be justifiable to have a pre-authorisation system in place. However, the backers of the *Super League*, who only wanted to replace UEFA club competition games by *Super League* games and to continue to participate in domestic league games, had anticipated a possible objection to their alternative league on this ground since they envisaged that "*[Super League] Games will be played mid-week*" so that "*all clubs will remain in their domestic leagues*".[54]

In sum, it is not clear whether the *Super League* would jeopardize the pursuit of any of the legitimate objectives in football. As a result, a legitimate objectives defense by UEFA may not work out.

For the sake of the argument, let's assume it would work, and that the need to control the openness of competitions, the organisation and proper conduct of football competitions could, just like the solidarity model of football, serve as legitimate aims to justify UEFA's *ex ante* control system for breakaway leagues. Assuming that hypothesis, the next step is to assess whether UEFA's prior approval right is *inherent* in the pursuit of these objectives and proportionate to them. This is again a difficult hurdle to surmount, and, similar to *ISU*, will certainly appear as an obstacle. In *ISU*, it was mainly on the aspects of inherency and proportionality that the European Commission and the General Court considered that the ISU's rules faltered. Among others, the European Commission and the General Court took issue with the discretionary margin the ISU had to refuse alternative competitions and the severity of the sanctions with which it threatened. The margin of discretion is also likely going to be a main concern in the case of UEFA. As aforementioned, Article 49.3 of the UEFA Statutes, which includes UEFA's prior approval right, does not include any objective criteria relating to the organisation of a third-party competition, nor any clear procedural rules setting out the timing of the application procedure. The criteria that reportedly existed as at the launch of the *Super League* were not transparent and included discretionary margin for UEFA. That this issue is particularly serious is highlighted by the fact that the General Court in its judgment in *ISU* also stressed "*the absence of objective, transparent, non-discriminatory and verifiable authorization criteria*", in combination with "*the applicant's broad discretion to authorize or reject such events*". As a consequence, "*the eligibility rules did not provide the exercise of the applicant's regulatory function with the necessary safeguards to ensure that third parties had effective access to the relevant market.*"[55] The severity of the threatened sanctions will also prove a stumbling block for the legality of UEFA's actions. FIFA and UEFA announced on 21 January 2021 that clubs and players involved in the *Super League* would not be allowed to participate in competitions organised by FIFA and its confederations. The exact scope of the sanctions that would be imposed is unclear. Would a player be banned from the football pyramid for one season, three to five years, for a lifetime? Would FIFA and UEFA effectively apply sanctions, knowing that excluding world class players from participation in the FIFA World Cup and/or the UEFA EURO Cup might have an impact on the commercial success of these tournaments? Nevertheless, even the exclusion from one international tournament could be a severe sanction. In *ISU* the General Court was clear on the disproportionality of the ISU sanctions in view of the average length of a skater's career.[56] The average length of a professional footballer's career is similar to the career length of a professional skater. Moreover, a FIFA World Cup and UEFA EURO Cup is organised every four years, with an interval of two years between these tournaments. Banning players who participated in unauthorised third-party competitions from participating in, for instance, the FIFA World Cup and/or UEFA EURO Cup even once, is therefore likely to be disproportionate. A counter argument could be that, unlike professio-

nal skaters, who remain dependent on the income generated by the major skating events organised by the ISU even if they would participate in a non-authorised skating event[57], football players involved in a breakaway league are not financially dependent on FIFA and/or UEFA tournaments. Nevertheless, performing at a World Cup or regional championship often has a significant impact on a player's value on the (transfer) market, and a ban to do so could therefore have a significant impact on the player as well (quite apart from the personal, ethical reasons why a player may want to perform for his or her national team). The analysis of sanctions imposed on clubs may be different, however. From a practical perspective, clubs might just not be impressed by a ban on participating in UEFA competitions, because a breakaway league would replace the latter. Indeed, clubs might be persuaded to join the breakaway league despite FIFA's and UEFA's sanctions if they are offered a guaranteed starting fee (far) exceeding their current future revenue projection. Furthermore, from an EU (competition) law perspective, nothing appears to prevent clubs from withdrawing from the current football pyramid and forming a breakaway league[58], assuming the latter is itself compatible with EU Law principles.[59] However, as aforementioned, an important practical hurdle would be that such initiative would require a transitional phase wherein clubs are at the mercy of UEFA: setting up a new competition takes time and not being able to play in UEFA competitions in the meantime could lead them to bankruptcy, making the possibility to break away a theoretical one to large extent.

The above leads to the conclusion that UEFA's prior approval right does not stand up to antitrust scrutiny. To what extent the Court will sanction UEFA remains to be seen, but, similar to *GB-Inno-BM*[60], it could potentially go as far as sanctioning the combination of regulatory and operating power in professional football itself. If the interventions of the judges at the Court of Justice's hearing on 11 and 12 July 2022 are telling, UEFA should brace itself. Judge *Wahl*, a competition law heavyweight, firstly emphasized that the Court of Justice's task is to reply to the Commercial Court of Madrid's preliminary questions. As these questions relate to UEFA, the case is about UEFA, not about the *Super League*. Secondly, he noticed that in any other sector UEFA's conduct would qualify as a boycott, and explicitly queried why this should be acceptable simply because it is football 'entertainment'.

Anyway, at the very least, UEFA should be rapped on the knuckles for the absence of objective, transparent, non-discriminatory and verifiable authorisation criteria for alternative competitions. Restrictions on the organisation of alternative competitions, at least in theory, may be permissible, for example to protect the match calendar of UEFA and domestic leagues. Yet, rules should be drawn up to make such a concern explicit and to describe what criteria will be used to determine whether such a concern may prevent the organisation of alternative competitions, such as the *Super League*. Furthermore, UEFA decisions should be made subject to adequate review, which, in my view, on the one hand, means a review that gives access to the CJEU for matters concerning EU Law, and, on the other hand, requires a correct (strict) application of the traditional proportionality test.

Perhaps because UEFA saw already what might be coming, it adopted on 10 June 2022 a set of Authorisation Rules for alternative competitions, which are now public and include procedural steps. Do these pass the bar? Probably not. As aforementioned, the new rules still include broad discretionary margin for UEFA to refuse competitions. Furthermore, they still cut off the route to the CJEU and the application of the EU rule of law *via* mandatory arbitration in Switzerland. The latter issue could easily be resolved should the CAS also open up shop within the EU[61], because in the EU, the EU rule of law is part of public policy against which national courts can assess the legality of arbitral awards. Nevertheless, on that front, the silence remains deafening.

What politicians should do

The CJEU's ability to uphold the rule of law depends on the eventuality of a case making it to court. The outcome of the case depends on the facts and the legal questions presented. The Court can only do so much, structural solutions require the intervention of politicians enacting statutory law. The time for that in professional football is now.[62] As *Weiler et al.* sharply phrase it:

> "*Football is probably the best example of the absence of the rule of law in a private system stretching over a substantial part of the internal market. The European Union cannot allow the current state of affairs to go on. … Change can't be done from within. It is only the EU that can generate the needed reforms. Let the rule of law come also to sport!*"[63]

For politicians to intervene, three questions must be answered: (i) can the state, from a policy perspective, regulate professional football?; (ii) if so, on which legal basis?; and (iii) what should it regulate substantively?

Can, from a policy perspective, the state regulate professional football? This question relates to the autonomy of sports and whether football's governing bodies can still validly claim such autonomy today. Professional football is largely autonomous and self-regulated within a hierarchical pyramid structure. The autonomy of sporting organisations - such as in football: FIFA, UEFA and Member Associations - is long-standing and acknowledged by the European Commission, *inter alia* in its important White Paper on Sport (2007).[64] The EU's acknowledgement of the autonomy of sporting organisations explains its current reticent approach regarding sports: the EU engages in structured dialogue with sports stakeholders, cooperates with Member States and organises a social dialogue at the European level, yet it does not enact sport specific regulations. From a legal perspective, the EU's current approach is founded in Articles 6 and 165 TFEU, granting the EU a supporting, coordinating and supplementing competence for sports.

From the outset, the European Commission underlined that sporting organisations have to operate within the boundaries of EU Law.[65] It also emphasised early on that the autonomy of sporting organisations is subject to compliance with good governance principles[66], including inclusiveness in the representation of interested stakeholders.[67] Hence, autonomy and good governance are inextricably linked. Sports governing bodies, including football's governing bodies that do not function according to good governance principles can expect their autonomy and self-regulatory practices to be curtailed.[68]

Professional football's governance arguably no longer meets good governance standards. Here are a couple of examples.

Firstly, stakeholders are very weakly involved in decision-making, through dialogue only, but organisationally they lack any real means to exert pressure. Thus, the reality of inclusiveness of stakeholders leaves much wanting.

Secondly, the composition and organisation of the UEFA Congress are not exactly a paragon of good governance. The Congress, comprising a majority of non-EU countries, counts some states considered undemocratic[69], as well some very small states (e.g.Andorra, Gibraltar, Liechtenstein), all with the same voting power as states with strong football traditions and/or competitions. In fact, the latter countries only have a minority say in the Congress. As a result, the others have the power to determine the direction and to dictate them. Such a structure is at odds with the (commercial) reality of modern professional football. Even aside the potential integrity issues it might entail, the structure is no longer fit for professional football, without prejudice, however, to its potential merit for grassroots football.

Thirdly, UEFA's double hatting structure embeds conflicts of interests between UEFA and its stakeholders structurally. That is not in the best interest of football; it is in the best interest of UEFA, and can be to the detriment of other relevant stakeholders as well as to the game itself. It is perhaps even contrary to the rule of law.[70]

Fourthly, UEFA has not so far managed to put a stop to the dire financial condition of a vast amount of clubs throughout Europe, albeit that, admittedly, the new squad spend rule is a step in the right direction. State aid by third countries remains a possibility, whereas EU statutory law prohibits state aid by EU Member States. This contributes to unlevelled playing fields between clubs owned by individuals or companies on the one hand and clubs owned by foreign states on the other hand.[71] Furthermore, UEFA shows no incentives to restore competitive balance in European football. Against that backdrop, advocating to be the guardian of sports integrity, including rewards based on sportive merit, sounds somewhat hollow.[72] In general, it is remarkable that UEFA's license criteria for clubs do not put a lot of emphasis on good governance: good governance requirements are underrepresented, not particularly well developed and minimal.

Fifthly, although a FIFA matter, football's governing bodies can be reproached because of their lax stance towards football agents, albeit that the envisaged FIFA Football Agent Regulations[73] take a stricter position.

Lastly, over the past years, football's governing bodies suffered severe governance issues themselves, including cases of corruption, a lack of transparency and ethics issues, among others.[74]

Hence, there seem to be valid reasons for politicians to act. Should politicians act, on what legal grounds can they do so?

Prior to answering this question, it is obvious that action should be European[75], allowing unified and performant rules for professional football throughout the EU, and *via* the 'Brussels effect'[76], also beyond. It makes little sense to regulate professional football - which does not confine to national markets, but for which the market is European and even global - along national lines. On the contrary, domestic stand alone initiatives would only contribute to unlevelled regulatory playing fields, which could very well be at odds with what the internal market requires, without solving anything material.

In the EU toolbox, various legal grounds are available to regulate the business of professional football. As *Stephen Weatherill*asserts, there is plenty of illustrative material in existing EU Law nourishing the argument that agents' services can be regulated in conformity with EU internal market law, on the basis of Articles 53, 62 and 114 TFEU.[77] For the regulation of clubs and leagues, Article 59 TFEU can be added to that list.[78] All these TFEU connecting factors result in EU legislation adopted in accordance with the ordinary legislative procedure, enhancing practical feasibility.[79]

Hence, the legal grounds are available. Therefore, what it boils down to is political will.[80] A condemnation of UEFA by the CJEU in the pending case initiated by the *Super League*, on top of the aforementioned good governance flaws and increased public expectations from professional football after subsidisation following COVID, might just be the tipping point inciting politicians to roll up their sleeves. In the words of Dutch football player *Cruyff*, "*Often something needs to happen, for something to happen.*"[81]

What should politicians regulate?

Firstly, they should introduce basic standards for clubs' and agents' access to the market of professional football: a minimum of high-standard good governance requirements (also financial), increased transparency and compliance standards, uniform supervision and sanctioning as tail piece. The framework should be tailor made for professional football and as such mindful of the (global) market of professional football and the specificity of the sport and the sector, but it should, at the same time, be benchmarked against the principles of good governance for corporations and associations more generally.

Secondly, they should regulate new leagues' access to the football market *via* objective and transparent criteria. Doing so, they could open up the market and create, so to speak, a *Bosman* for clubs and leagues for them to truly benefit from internal market freedoms. Arguably, today they cannot, which is especially detrimental for clubs in smaller countries. The prevailing principle of (national) territoriality for football competitions restricts clubs in (large) cities of smaller (but important) countries to develop sportively and financially. As such, the vast majority of clubs are prevented from bridging the gap with clubs in larger countries with strong competitions. It is the reason why *Villarreal* can prosper and Irish or Luxembourg clubs, to give only two examples, cannot.[82] There can be a cumulative effect with home-grown player rules, as these negatively impact the chances of clubs in smaller countries to develop, because the talent pool is arguably smaller there than in a larger country. As an aggravating factor, absolute talents will be transferred out to top leagues sooner in their careers. Opening up the football market, in line with the internal market, could be the key to a more competitive football sector, throughout the whole of Europe, whereby top football is not confined to only a small number of countries. Domestic leagues could rise to the occasion and create transnational leagues. Through the creation of, e.g. five to ten transnational leagues, with a Benelux league as prime example, domestic leagues could effectively pick up the gauntlet against the 'Big 5'.

As is shown by the *Swift Hesper* case, this is not merely a theoretical issue. In July 2022, just after the Court of Justice's hearing in the *Super League* case, Luxemburg club *Swift Hesper* launched a claim arguing that UEFA's territorial model of football is at odds with the EU rule of law.[83] It is designed to keep small clubs small, prevents them from growing and denies them even a chance to bridge the gap with clubs from which they are distinguished only through their location in a larger country. This is an interesting new development: at least it shows that UEFA is under attack not only by big clubs, but also by a lower tier club, underwhelmed by UEFA's governance and solidarity mechanisms. Furthermore, it places into perspective the many interventions by Member States at the CJEU court hearing on 11 and 12 July claiming UEFA is the saviour of football and the guardian of solidarity for grassroots football.

Thirdly, who should supervise all this? From the above it is clear that the current model of professional football, whereby UEFA combines the capacity of regulator and operator is flawed. A far better structure would be to separate both functions, and to allocate regulatory power to an independent regulator.[84] That could be UEFA, provided it does not function as operator on the market anymore, or that at least it has a solid functional separation between its regulatory and operating role, effectively under EU Law oversight. Whether under the hypothesis of full separation it would be factually feasible or desirable for UEFA to act as regulator in view of its long term commitments as an operator *vis-à-vis* contracting parties, is another matter. The independent supervisor could also be an existing EU body or a new body created by the EU, or any other trustworthy body that can be supervised under the rule of law, whereby UEFA would become an operator only.

As regards UEFA's internal governance, the EU should set clear good governance standards, including real representation of all relevant interests, sufficient checks and balances and effective separation of powers.[85]

As drivers of change, collective bargaining could play a role too: players and clubs could, *via* this route, enter into binding agreements regarding their mutual relationship, acknowledged by EU Law[86], without being dependent on the football regulator, and in doing so come to tailor-made solutions, adding to the aforementioned desirable regulatory set-up.

Conclusion

Professional football in Europe is in need of structural reform to address its systemic design errors. These are mainly the result of structural conservatism, whereas the reality of the sector has evolved immensely. Arguably, the main issue is the combination of regulatory and operating powers within the same entity - UEFA. The Court of Justice of the European Union will have a chance to rule on this structure soon and may overthrow it. In any event, the Court can only do so much so that structural solutions for professional football lie in the hands of EU based clubs, *i.e.* the undertakings that produce professional football, and of EU politicians and political will to act. The judgement can be a catalyst for that. Ideally, it provides a sound legal basis for progressive EU clubs and EU politicians, monitored by a pro-active European Commission, to design and implement a new architecture for European professional football. This could very well include a true EU League, most likely with several divisions, open-minded to an articulation with domestic leagues and receptive to clubs with sound projects regardless of the size of the Member State in which they are located.

One thing is for sure: over the next few months, the eyes of the football world will be fixed firmly on Luxembourg and 15 judges.

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[1] According to the *Cambridge Dictionary* a conflict of interest is "*a situation in which someone's private interests are opposed to that person's responsibilities to other people*" and also "*a situation in which someone cannot make a fair decision because they will be personally affected by the result*".

[2] Dries Bervoet, '*De landencompetitie waar vooral de UEFA achter staat*', *De Tijd*, Wednesday 1 June 2022.

[3] Admittedly, in organisational law, there is a growing tendency towards more stakeholder oriented decision-making models under influence of the so-called purpose movement, yet that is mostly still scholarly debate. It is not the law, nor vested practice.

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

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

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

[7] Article 21 UEFA Statutes (edition 2021).

[8] Leo Strine, '*The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*', University of Pennsylvania Law School, Institute for Law and Economics, Research Paper no. 15-08, 2015.

[9] Katarina Pijetlovic, '*EU Sports Law and Breakaway Leagues in Football*' (Asser International Sports Law Series - Springer 2015) 73-74.

[10] See hereinafter '*The rule of law as mitigating factor?*'.

[11] The rules, which according to UEFA 'codify existing practices and procedures', are applicable to competitions or tournaments involving a series of football matches between a number of competing clubs which is:

(i) played on UEFA's Territory by clubs affiliated to different Member Associations and which is not organised by UEFA; and/or

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

Not in scope are cross-border club competitions merging or replacing existing national leagues and/or national cup competitions across two or more Member Associations.

[12] Whereas there is also no room in the weekends, because domestic competitions are played then, unless of course a breakaway competition would cut loose from domestic competitions too.

[13] Why the latter is an issue is set out hereinafter '*The rule of law as mitigating factor?*'.

[14] Article D.3 of the Memorandum (available at <https://www.uefa.com/MultimediaFiles/Download/uefaorg/General/02/59/04/66/2590466_DOWNLOAD.pdf> accessed 27 June 2022).

[15] Articles 3.6 and 3.7 of the Memorandum (available at <https://editorial.uefa.com/resources/0244-0f842d9e24af-1c8af7b575b0-1000/memorandum_of_understanding_-_uefa_european_leagues_-_2017.pdf> accessed 27 June 2022).

[16] *E.g.* Stephen Morrow, '*The People's Game? Football, Finance and Society*' (Palgrave Macmillan 2003) 1.

[17] See on that Richard Parrish, '*Organisation of European Professional Football: A Stakeholder Theory Analysis*', in Robby Houben (ed.), *Research Handbook Professional Football Clubs* (Edward Elgar Publishing forthcoming).

[18] *E.g.* clubs pay the players and bear the consequences of injuries, weighing on sporting and economic performance of the team, and potentially also that of the league, and of course on the player's physical integrity.

[19] See hereinafter '*What politicians should do*'.

[20] [2021] OJ C 501/1.

[21] Article 18 UEFA Statutes (edition 2021).

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

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

[24] Also see on the non-application of Article 106 TFEU to sports: Pijetlovic (n 11) 194-196.

[25] See Stephen Weatherill. '*Football agents*', in Robby Houben (ed.), *Research Handbook Professional Football Clubs* (Edward Elgar Publishing forthcoming).

[26] Case C-1/12 *Ordem dos Técnicos Oficiais de Contas vs. Autoridade da Concorrência* [2013] ECLI:EU:C:2013:127, par. 88; Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) vs. Elliniko Dimosio* [2008] ECLI:EU:C:2008:376, par. 51.

[27] Ibid.

[28] Case T-93/18 *International Skating Union vs. EC* [2020] ECLI:EU:T:2020:610.

[29] The General Court's verdict was appealed before the Court of Justice and heard together with the *Super League* case on 11 and 12 July 2022.

30. Also see on this issue: Antoine Duval, '*The Court of Arbitration for Sport and EU Law: Chronicle of an Encounter*' (2015) 22 Maastricht Journal of European and Comparative Law 224-255. The *Super League* managed to escape this *via* the Commercial Court in Madrid, requesting a preliminary ruling from the CJEU.

[31] Article 190 of the Swiss Federal Act on Private International Law. Andrea Cattaneo and Richard Parrish, '*Sports Law in the European Union*' (Wolters Kluwer 2020) 72. Also see Swiss Federal Court, Arrêt du 20 février 2018, n° 4A_260/2017, 5.2 (available at <https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F20-02-2018-4A_260-2017&lang=de&type=show_document&zoom=YES&> accessed 27 June 2022).

[32] See additional observations on the CAS, weighing on the assessment of the (absence of) a 'fair trial' by the CAS: Margareta Baddeley, '*The extraordinary autonomy of sports bodies under Swiss law: lessons to be drawn*' (2020) 20 International Sports Law Journal 3-17. Also see the Commission's answer to a parliamentary question in 2006: '*on the subject of recourse to ordinary courts, the Commission took the view that rules prohibiting recourse to courts and imposing compulsory arbitration are prima facie contrary to the EC Treaty, including Articles 81 and 82 of the EC Treaty, inasmuch as the denial of access to the courts may facilitate anti-competitive agreements or conduct.*': Question reference: P-3853/2006. The necessity of a fair trial in sports was recently emphasized by a Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model [2021] OJ C 501/1.

Also see *Achmea*, wherein the CJEU ruled that the arbitration clause in a BIT had an adverse effect on the autonomy of EU law (Case C-284/16 *Slovak Republic vs. Achmea BV*[2018] ECLI:EU:C:2018:158).

[33] Case T-93/18 (n 30) par. 157.

[34] Case C-126/97 Eco Swiss China Time Ltd vs. Benetton International NV [1999] ECLI:EU:C:1999:269; Andrea Cattaneo and Richard Parrish (n 32) 72-73.

[35] See Pablo Ibáñez Colomo, '*Competition law and sports governance: disentangling a complex relationship*' [2022] 22-23 and 29-30 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130043> accessed 28 June 2022. Note, however, that the Court in *Wouters* was lenient, although the Dutch bar association was mandated by statutory law.

[36] Also see Andrea Cattaneo and Richard Parrish (n 32) 101.

[37] Also see, albeit in the context of a different question: Pijetlovic (n 11) 194-196.

[38] Pablo Ibáñez Colomo, '*In the wake of the ISU and Super League hearings: why the focus on 'conflicts of interest' is potentially problematic (and unfair)*' <https://chillingcompetition.com/2022/07/13/in-the-wake-of-isu-and-super-league-why-the-focus-on-conflicts-of-interest-is-potentially-problematic-and-unfair/> accessed 24 August 2022.

[39] Case C-309/99 *Wouters, Savelbergh and Price Waterhouse Belastingadviseurs BV vs. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECLI:EU:C:2002:98.

[40] Case C-519/04 *Meca-Medina and Majcen vs. EC* [2006] ECLI:EU:C:2006:492.

[41] See the references in An Vermeersch, '*Europese spelregels voor sport*' (Maklu 2009) 331.

[42] Which is allowed. In *ISU* the General Court made very explicit that a sports organisation body has the right to defend its own commercial interests and that this is not in itself anti-competitive: Case T-93/18 (n 30) par. 105 ff.

[43] Pijetlovic (n 11) 153.

[44] As such, *Wouters* and *Meca-Medina* are understood as an expansion of the scope of the ancillary restraints doctrine. See Bellamy & Child, '*European Union Law of Competition, Article 101(1)*', 2.206-2.210.

[45] Case T-93/18 (n 30) par. 60 and 77.

[46] See on that Katarina Pijetlovic, '*European model of sport: alternative structures*', in Jack Anderson, Richard Parrish and Borja Garcia (eds.), *Research Handbook on EU Sports Law and Policy* (Edward Elgar Publishing 2018) 337.

[47] The openness of sporting competitions, allowing promotion and relegation, was recently emphasized as a key feature of the European model of sport in the Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model [2021] OJ C 501/1. Notwithstanding, it was recently advocated that '*Nothing in the EU competition law as currently interpreted appears to support the proposition that the compatibility of sports championships with Articles 101 and 102 TFEU hinges on the introduction of promotion and relegation mechanisms*': Pablo Ibáñez Colomo (n 35) 32.

[48] This analysis furthers the analysis in *Robby Houben*, *Jan Blockx* and *Steve Nuyts*, '*UEFA and the Super League: who is calling who a cartel?*' (2022) International Sports Law Journal <https://link.springer.com/article/10.1007/s40318-021-00201-2> accessed 28 June 2022.

[49] Pijetlovic (n 11) 275 and 280.

[50] Pijetlovic (n 11) 296; EC (2011), Developing the European Dimension in Sport, 2011/2087(INI), 14.

[51] In that case, speed skating in *Icerderby*'s planned event in Dubai was based on a different track and format. But even then, the EC found that the ISU had not shown that this would in any way endanger the organisation and proper conduct of speed skating. See EC, AT.40208, International Skating Union's Eligibility rules under 101 TFEU, Decision 8 December 2017, par. 245.

[52] With regard to governance issues in football governing bodies see *e.g.* European Parliament's resolution on recent revelations on high-level corruption cases in FIFA, 11 June 2015.

[53] Josephine Clausen and Emmanuel Bayle, '*Major sport events at the center of International Sport Federations*' resource strategy in Mark Dodds, Kevin Heisey and Aila Ahonen (eds), *Routledge handbook of international sport business* (Routledge 2017) 37-53; Rusa Agafonova, '*International Skating Union versus European Commission: is the European sports model under threat?*' (2019) 19 International Sports Law Journal 91.

[54] See <https://thesuperleague.com/#who_we_are> accessed 19 July 2021.

[55] Case T-93/18 (n 30) par. 118-119.

[56] *Ibid.*, par. 93.

[57] *Ibid.*, par. 74.

[58] Pijetlovic (n 11) 260-261; see also Andrea Cattaneo and Richard Parrish (n 32) 91.

[59] Pijetlovic (n 46) 339.

[60] C-18/88 *Régie des Télégraphes et des Téléphones (RTT) vs. GB-Inno-BM SA* [1991] ECLI:EU:C:1991:474, par. 19 to 28 (relating to the telecommunications market).

[61] As suggested by Melchior Wathelet, '*La gouvernance du sport et l'ordre juridique communautaire : le présent et l'avenir*', in *Les cahiers de droit du sport*, *Aix-en Provence*(Presses Universitaires d'Aix-Marseille 2007).

[62] See a short and popular version: Robby Houben, '*UEFA's crumbling fortress*' (28 July 2022) <https://www.euractiv.com/section/competition/opinion/uefas-crumbling-fortress> accessed 24 August 2022.

[63] Joseph Weiler, Miguel Poiares Maduro, Petros C. Mavroidis and Stephen Weatherill: '*Only the EU can save football from itself*' (12 November 2021) <https://www.euronews.com/2021/11/12/only-the-eu-can-save-football-from-itself-view> accessed 16 June 2022. This is in line with the position of the Council and of the representatives of the Governments of the Member States, which call for respect for the rule of law, emphasizing that this is of overriding

importance at a time when modernization of sport is bringing new financial opportunities from the economic potential of sport: Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model [2021] OJ C 501/1.

[64] EC, *White Paper on Sport*, 11 July 2007.

[65] *Ibid.*

[66] *E.g.* EC, *White Paper on Sport*, 11 July 2007.

[67] As highlighted also by Richard Parrish (n 17). The Council and the representatives of the Governments of the Member States very clearly reiterated this stance in a Resolution on the key features of a European Sport Model: Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model [2021] OJ C 501/1.

[68] Expert Group "Good Governance", *Deliverable 2 Principles of good governance in sport*, September 2013, 3; see also J-L Chappelet, '*The autonomy of sport and the EU*' in Jack Anderson, Richard Parrish and Borja (eds.), *EU Sports law and Policy* (Edward Elgar Publishing 2018) 157-172.

[69] Which is particularly at odds with the values of sports, as recently emphasized in the Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model [2021] OJ C 501/1.

[70] As analysed above '*The rule of law as mitigating factor*'.

[71] Note, however, that the European Commission's proposal for a regulation on foreign subsidies distorting the internal market (COM/2021/223 final) might become a statutory game changer.

[72] Especially, the Council and the representatives of the Governments of the Member States explicitly hint on attention for competitive balance too: "*It is fundamental for the long-term viability of sport to maintain, and, where necessary, enhance competitive balance to prevent unfair advantage. A broad range of measures addressing both short-term needs and long-term developments should be considered in order to promote fair, competitive and balanced sport competitions*.", Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model [2021] OJ C 501/1.

[73] Which are by now long announced, but still not yet adopted.

[74] As was also hinted at by the Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model [2021] OJ C 501/1.

[75] Also see Joseph Weiler, Miguel Poiares Maduro, Petros C. Mavroidis and Stephen Weatherill (n 63).

[76] This means that the European regulatory context is relevant beyond the EU and that in practice the EU's norms can become global norms: Stephen Weatherill (n 25).

[77] Stephen Weatherill (n 25). Also see extensively: Robby Houben and Steve Nuyts, '*A new deal for professional football in the EU*' (Intersentia 2021) 52.

[78] See extensively: Robby Houben and Steve Nuyts (n 77).

[79] See Articles 289 and 294 TFEU.

[80] As also asserts Stephen Weatherill (n 25).

[81] Free English translation of '*Vaak moet er iets gebeuren voordat er iets gebeurt*.'

[82] In fact, when players benefit from a single labour market (due to *Bosman*) but at the same time a regulator forces clubs to keep operating nationally, clubs located in the five big markets can and will take advantage of this single labour market, while UEFA's fifty other members undergo the law of the jungle. See Andrea Cattaneo and Richard Parrish(n 31) 88-89.

[83] See the press release published by the club: <https://www.swifthesper.lu/news/communque-de-presse-plainte-envers-la-flf-et-l-uefa-34834/> accessed 24 August 2022.

[84] As also highlighted by others such as Joseph Weiler, Miguel Poiares Maduro, Petros C. Mavroidis and Stephen Weatherill (n 63) and by the *Crouch* report as regards the UK. Interestingly, in the nineties of the past century FIA established a similar structure voluntarily. Following an EC investigation (Commission 13 June 2001, 35.163, Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning Cases Notification of FIA Regulations, agreements relating to the FIA Formula One World Championship and GTR/FIA & others, OJ C 169/5), in the also highly lucrative business of F1 racing FIA agreed to separate its regulatory function from its commercial function. To reduce the risk of possible future abuse FIA also agreed to the availability of legal challenges against FIA decisions, for anyone subject to FIA decisions, both within the FIA structure and before national courts. In 2001, the Commission closed its investigation on FIA. Hence, FIA acted pro-actively and doing so avoided a court case. This is something UEFA could have considered too, but clearly did not, or at least did not act upon, and so it was in fact only a matter of time before its structure would be up for trial.

[85] Also see: Joseph Weiler, Miguel Poiares Maduro, Petros C. Mavroidis and Stephen Weatherill (n 63).

[86] See on that Richard Parrish (n 17).