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European Super League: kicking off the match against FIFA and UEFA.

Exploring C-333/21 European Super League Company v FIFA and UEFA in the light of EU competition law, and its effect on the European Model of Sports.

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Abstract

The European Model of Sports includes features that form part of the European identity, such as inclusion, tolerance and respect. It has been developed since the 1990s, and has been a cornerstone in the sports policy documents put forward by EU institutions, and was further strengthened by the introduction of Article 165 TFEU. The European Model of Sports is now under threat after the initiation of the proceedings against FIFA and UEFA after the collapse of the European Super League in April 2021. The referred questions in Case C-333/21 highlight the compatibility of FIFA and UEFA's prior authorisation mechanisms and the sanctions flowing from them with EU competition law, and Articles 101 and 102 TFEU in particular. The CJEU has developed an ever-changing position within sports since the 1970s, and it is against the latest case law that the CJEU is expected to make their assessment, meaning that it will explore the possible legitimate interest available to the defendants, but more importantly, the proportionality of the measures in the light of their objective. It is in this vein that this thesis argues that FIFA and UEFA are likely to be found to go beyond what is necessary to achieve their objectives by having the prior authorisation system and by threatening to impose the sanctions in question. On the other hand, it is likely that the European Super League is not going to be considered to be an appropriate alternative, as their cartel-like structure poses questions as to their compatibility with EU competition law. As such, the most appropriate outcome would be to limit the margin of discretion given to sport governing bodies by making them adhere to the general principle of proportionality, and therefore move towards a more transparent and modern European Model of Sports. In this regard, it is also possible to uphold the principle of one federation per discipline and thus the essence of the European Model of Sports, which would be a welcome outcome from the perspective of policy makers in the EU.

Abbreviations

AG	Advocate General
ch	Chapter
CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
EU	European Union
FIFA	Fédération Internationale de Football Association
ibid	Ibidem (in the same place)
p	Page
para	Paragraph
paras	Paragraphs
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
UEFA	Union of European Football Associations

1. Introduction

1.1 Background and outline

Since the 1970s, the CJEU has increased accountability of sport governing bodies under EU competition law and thereby leaving behind a general sporting exception. This increased accountability has meant a tightening of the margin of discretion enjoyed by sport governing to impose sanctions and to grant prior authorisation for competing sporting events. The CJEU now has the opportunity to review the rules and sanctions adopted by FIFA and UEFA which are the sport governing bodies of the largest sport in the world, namely football.[1] Through these rules, FIFA and UEFA practically have the mandate to pick and choose who can organise events that compete with their own leagues, and thus create a conflict of interest which can, in turn, lead to anti-competitive effects. These observations have been made by the European Super League company, who have initiated proceedings after they revealed plans of a European Super League in April 2021, which subsequently was shut down as a result of the threats to impose sanctions on the participating members that were announced by FIFA and UEFA. The case, which is now referred to the CJEU by the Madrid Commercial Court, has the potential to create a large impact on the European Model of Sports, either by formally recognising the importance of its monopolistic nature, or by limiting the prerogative of sport governing bodies and thus taking a leap towards closed leagues resembling the American Sports Model.

This thesis will first outline the most important and relevant events leading up to the referral to the CJEU by the Madrid Commercial Court, as well as the questions referred. After which, the jurisprudence of the CJEU regarding EU sports law will be analysed, including *International Skating Union*,[2] which can be considered as the benchmark case for the *European Super League* case, seeing as it was decided recently and concerned similar issues. Against this backdrop and the relevant competition law articles, the potential outcomes of the case will be discussed, followed by an evaluation of their impact on the European Model of Sports and the future of sports in Europe.

[1] Neil Dunbar, 'A European Football Super League: The Legal and Practical Issues' (2021) 27 James Cook University Law Review 111.
[2] Case T-93/18 *International Skating Union v Commission* [2020] ECLI:EU:T:2020:610.

1.2 Purpose and research question

The purpose of this thesis is to examine the prior authorisation system adopted by UEFA and the sanctions that emanate from that system in the light of Articles 101 and 102 TFEU.[3] In doing so, it is necessary to analyse the events leading up to the case, and the jurisprudence that has shaped the position taken by the CJEU in sports law cases. Furthermore, the thesis will attempt to assess the possible outcome of the case, and then evaluate its impact on the European Model of Sports. This therefore requires an explanation of Articles 101 and 102 TFEU, as well as the elements of the European Model of Sports.

The thesis will attempt to answer the following research question:
"In the context of the European Super League and the jurisprudence on EU sports law, do FIFA and UEFA's prior authorisation system and sanctions breach Articles 101 and 102 TFEU, and what effects could the judgment in C-333/21 have on the European Model of Sports?"

[3] An assessment will also be made of the European Super League under EU competition law, for the purpose of reaching a reasoned conclusion on the potential outcomes of the case.

1.3 Delimitations

As can be derived from the referred questions in the *European Super League* case, there are many aspects of the case that require exploring and evaluating. For the sake of clarity, this thesis will not specifically address the prior authorisation rules laid down in the FIFA statutes but give full focus on the UEFA statutes which adopt similar wording. FIFA's conduct will still be assessed in the light of this, seeing as they are tied to UEFA and their actions. Due to the abovementioned purpose of this thesis, the examining of the marketing rights conferred upon UEFA by FIFA in the FIFA Statutes Articles 67 and 68 fall outside the scope of this thesis, and thus the fourth question referred by the national court will not be addressed. Furthermore, the examination of the prior authorisation system in the light of the fundamental freedoms enshrined in Articles 45, 49, 56 and 63 TFEU will not be conducted in this thesis.[4] Despite the prevalence of the invocation of these articles in sports law cases in the EU, this thesis will have a pure focus on competition law. As such, the sixth and final question referred by the national court will not be addressed. Lastly, despite not being raised by the referring court, it is possible to assess this case in the light of the Charter of Fundamental Rights of the European Union, specifically Articles 16 and 17(2) which lay down the right to conduct a business and the right to protection of intellectual property.[5] As this does not concern a direct application of EU competition law, that assessment will not be conducted.

[4] These articles protect the following: the free movement of workers (45), the freedom of establishment (49), the free movement of services (56), and the free movement of capital (63).
[5] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Articles 16 and 17(2).

1.3 Methodology

The CJEU uses a goal oriented and teleological methodology which highlights both the surrounding context and particular facts of each case.[6] A similar type of methodology will be used in this thesis, where analysis will be made of the particular facts of the *European Super League* case, but still take the context in which this case exists into account. Moreover, in order to answer the research question and fulfil the purpose of this thesis, a doctrinal method will be followed. This includes conducting research into primary and secondary law, as well as legal commentary which will result in an all-encompassing understanding of the area of law in question.[7] Through this type of analysis, the thesis will analyse the relevant case law and primary law to examine *de lege lata* (how the law is). Subsequently, these findings as well as the legal commentary on the topic will provide help to the assessment of *de lege ferenda* (how the law should be), in an attempt to predict the reasoning of the CJEU against the backdrop of their case law and therefore also predict the outcome and how it should be, considering the context in which it will be examined. Furthermore, this thesis will follow a comparative methodology when assessing the European Model of Sports, compared with the American Model of Sports.[8] Through this method, an analysis will be made of the most fitting model for our society and whether it is likely that the CJEU will opt for endorsing a model resembling the American one.

[6] Jörgen Hettne, Ida Otken Eriksson, *EU-rättslig metod*, (Second Edition, Norstedts Juridik, 2011), p. 158.
[7] Mike McConville, Wing Hong Chui, *Research Methods for Law* (Second Edition, Edinburgh University Press, 2017); see also Rob van Gestel, Hans-W. Micklitz, 'Revitalising Doctrinal Legal Research in Europe: What about Methodology?' in Ulla Neergaard, Ruth Nielsen, Lynn Roseberry (eds), *European Legal Method,* (DJØF Publishing, 2011).
[8] *Hettne, Eriksson* (n 6), p. 162.

2. The European Super League: background

Before assessing the legal issues surrounding the European Super League, it is appropriate to revisit the facts of the case, and what happened in April 2021.

2.1. The founding clubs

On Sunday the 18th of April 2021, twelve of Europe's leading men's football clubs came together and announced their plan to establish a new 'super league' competition, called the European Super League. These founding clubs were AC Milan, Arsenal FC, Atlético de Madrid, Chelsea FC, FC Barcelona, FC Internazionale Milano, Juventus FC, Liverpool FC, Manchester City, Manchester United, Real Madrid CF and Tottenham Hotspurs. Three more clubs were going to be announced at a later date. In its statement, the founding clubs motivated the league by referring to their desire to improve the quality and intensity of existing European competitions by allowing the top clubs to compete on a regular basis. Furthermore, the announcement came at a time where the COVID-19 pandemic had led to financial instability within the European football industry, which, according to the European Super League, called for the need to adopt a strategic vision and a sustainable commercial approach.[9] In fact, the founding clubs would be receiving €3.5bn in support of their infrastructure investment plans and as help to recover from the impact of the pandemic.[10] Moreover, the European Super League would offer permanent financial security, which could otherwise not be guaranteed as their success would depend on their qualification to the UEFA Champions League.[11]

2.2. Competition format

The European Super League was described to have 20 participants with the 15 founding clubs as permanent participants. The remaining five clubs would qualify based on their performance in the previous season. The founding clubs were aware of the interference it may cause with national leagues, and therefore committed to mid-week match schedules. The league would commence in August 2021 and follow a classic league structure with a two-leg knockout format and a final in

[9] The Super League (18 April 2021) https://thesuperleague.com/press.html accessed 6 February 2022.
[10] *The Super League website* (n 9); Dunbar points out that, as a result of the pandemic, Real Madrid and Barcelona FC were in debt of €901m and €1.2bn respectively, see *Dunbar* (n 1), p. 117.
[11] Paul Michael Brannagan, Nicolas Scelles, Maurizio Valenti, Yuhei Inoue, Jonathan Grix, Seth Joseph Perkin, 'The 2021 European Super League attempt: motivation, outcome, and the future of football' (2022) 14(1) International Journal of Sport Policy and Politics 169.

May at a neutral venue. They further announced a plan to launch the same league within women's football in order to boost the game. The European Super League would offer uncapped solidarity payments, which would be higher than the payments that were being generated by the European competitions at that time.

2.3. The public's response

'*Football is the only global sport in the world with more than four billion fans and our responsibility as big clubs is to respond to their desires'* is an extract of the statement made by Florentino Pérez, the President of Real Madrid CF and the Chairman of the European Super League, in the announcement of the European Super League in April 2021. Ironically, they had completely misjudged the reaction that would come from football fans, public figures and national football federations all over Europe.[12] Within one day, European newspapers had described the league as a war declaration and '*la guerre des riches'* (war of the rich),[13] and prominent ex-footballers such as Gary Neville described the league as a '*criminal act against fans*'.[14] As anticipated by the media, football fans protested against the formation of the new league and demanded that it be dissolved. The outrage was based on feelings that the closed nature of the league and financial gains surrounding it would obstruct the competitive incentive that makes football appealing to spectators.[15] Within one week, AC Milan, Atlético Madrid, Internazionale Milan and all English teams had withdrawn from the project, and the European Super League subsequently collapsed.[16]

2.4. The response by football governing bodies

UEFA is the representative of national football associations in Europe, the organiser of pan-European competitions such as the Champions League as well as the controller of prize money, regulations and broadcasting rights in Europe. Together with various national football associations, UEFA's president Aleksander Ceferin made a statement in the wake of the formation of the

[12] ibid.
[13] Emma Kemp, Helen Sullivan, 'It's war': what the papers say about the European Super League' *The Guardian* (19 April 2021).
[14] Luke McLaughlin, 'Pure greed': Gary Neville takes aim at clubs in European Super League' *The Guardian* (18 April 2021).
[15] *Dunbar* (n 1).
[16] *Brannagan et al* (n 11) notes that the fact that only Juventus, FC Barcelona and Real Madrid were still participating meant effectively a collapse of the whole project.

European Super League. The statement was formulated in a passionate manner with the view to criticise the European Super League by describing the project as '*a spit in the face of all football lovers and our society*' and '*cynical plans that are completely against what football should be*'.[17] They highlighted the importance of maintaining a pyramid structure in football, and that football has become so great due to its open competition, integrity, and sporting merit. The European Super League was, according to the statement, purely about money and dismissed the important charity aspect of football which includes funding grassroots, women's football and youth football. UEFA further announced in their statement that anyone playing for the European Super League would be banned from participating in the Euros and World Cup, which are organised by UEFA and its worldwide counterpart, FIFA. This type of statement echoed across European football stakeholders, such as the Deutscher Fußball-Bund (German Football Association) and the Premier League. But due to UEFA and FIFA's range of authority, being the sole organiser and governing body of European-wide tournaments, the European Super League initiated proceedings against UEFA and FIFA.

2.5. Procedure before the national courts

The European Super League Company initiated proceedings and lodged an *ex parte* interim application for interim measures against FIFA and UEFA before the Commercial Court No 17 in Madrid in April 2021. They specifically noted that FIFA and UEFA had abused their dominant position, and they asked that FIFA and UEFA be prohibited from taking any further steps that would hinder the formation of the European Super League directly or indirectly. Furthermore, an injunction prohibiting FIFA and UEFA or any associate members to impose disciplinary sanctions against the participants in the European Super League. Lastly, the European Super League Company ordered that FIFA and UEFA eliminate all anticompetitive effects that occurred during or before the proceedings.[18] The Madrid Commercial Court granted the interim measures during the course of the proceedings and made a reference for preliminary ruling under Article 267 TFEU.

[17] Peter Hall, Kevin Liffey 'UEFA reacts to European Super League - full statement' *Reuters* (19 April 2021).
[18] AJM M 747/2021 European Super League Company SL v FIFA UEFA (11 May 2021) ECLI:ES:JMM:2021:747A.

2.6. The questions referred

The Commercial Court in Madrid referred six questions to the CJEU, and the questions that are relevant to this thesis are the following: [19]

> 1. Must Article 102 TFEU be interpreted as meaning that that article prohibits the abuse of a dominant position consisting of the stipulation by FIFA and UEFA in their statutes (in particular, Articles 22 and 71 to 73 of the FIFA Statutes, Articles 49 and 51 of the UEFA Statutes, and any similar article contained in the statutes of the member associations and national leagues) that the prior approval of those entities, which have conferred on themselves the exclusive power to organise or give permission for international club competitions in Europe, is required in order for a third-party entity to set up a new pan-European club competition like the Super League, in particular where no regulated procedure, based on objective, transparent and non-discriminatory criteria, exists, and taking into account the possible conflict of interests affecting FIFA and UEFA?
>
> 2. Must Article 101 TFEU be interpreted as meaning that that article prohibits FIFA and UEFA from requiring in their statutes (in particular, Articles 22 and 71 to 73 of the FIFA Statutes, Articles 49 and 51 of the UEFA Statutes, and any similar article contained in the statutes of the member associations and national leagues) the prior approval of those entities, which have conferred on themselves the exclusive power to organise or give permission for international competitions in Europe, in order for a third-party entity to create a new pan-European club competition like the Super League, in particular where no regulated procedure, based on objective, transparent and non-discriminatory criteria, exists, and taking into account the possible conflict of interests affecting FIFA and UEFA?
>
> 3. Must Articles 101 and/or 102 be interpreted as meaning that those articles prohibit conduct by FIFA, UEFA, their member associations and/or national leagues which consists of the threat to adopt sanctions against clubs participating in the Super League and/or their players, owing to the deterrent effect that those sanctions may create? If sanctions are adopted involving exclusion from competitions or a ban on [OR 30] participating in national team matches, would those sanctions, if they were not based on objective,

[19] Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, Case C-333/21 *European Super League Company v UEFA FIFA* (27 May 2021).

transparent and objective criteria, constitute an infringement of Articles 101 and/ or 102 of the

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

In essence, the referring questions are asking whether FIFA and UEFA restrict competition by having a prior authorisation system in their UEFA Statutes and by threatening to impose sanctions as a reaction to the European Super League. The very important question that the Court will have to clarify is the application of potential justifications available to FIFA and UEFA as monopolistic sport governing bodies operating in a time where sports associations are becoming increasingly subject to EU competition law.[20] These proceedings coincide with the appeal in the *International Skating Union* case which poses similar legal questions regarding the legitimacy of a ban imposed upon ice skaters from participating in unauthorised competitions, and the margin of discretion enjoyed by sport governing bodies in the EU.[21] Together with the judgment in *International Skating Union*, the outcome of the European Super League case has the potential to shake up the world of European sports as we know it.

3. EU sports law and policy

In order to fully understand the context within which the European Super League case exists, it is important to revisit the cases and documents which have shaped the nature of sports law and sports

[20] *Dunbar* (n 1).
[21] Case C-124/21 P *International Skating Union v Commission*, appeal brought on 26 February 2021.

policy in the EU. First, the jurisprudence of the CJEU will be examined, after which an introduction of the European Model of sports will be given.

3.1. From Walrave and Koch to International Skating Union: a journey from exceptions to accountability

The following section will outline and analyse the jurisprudence of the CJEU in the area of sports in order to reach an understanding of the framework within which the *European Super League* case operates.

3.1.1. Walrave and Koch: the development of a 'sporting exception'

Scholars have argued that the EU had a polarised sports policy during the 1970s as it contained two unrelated aspects.[22] Firstly, the CJEU would only intervene in sports cases if any free movement or competition issue arose, but this didn't allow for a coordinated EU sports policy, and the EU's judicial body lacked interest in regulating sports due to its absence in the treaties. On the other hand, the EU was pushing a political interest in sport as it would allow for a stronger image amongst the minds of Europe's citizens.[23] An example where the CJEU demonstrated a reluctance to regulate sports was in the case of *Walrave and Koch*[24] which concerned two Dutch nationals who wished to work as pacemakers for cycling teams abroad but had been refused from doing so due to the requirement that the pacemakers be of the same nationality as the cycling team in order to compete in the World Championships. The applicants argued that this was discriminatory and a restriction of their free movement under articles 48 and 59 EEC (now Articles 45 and 56 TFEU). This was the CJEU's first time to apply EU law to a sports case and it therefore set the tone of the European sports policy. The CJEU held that *'the practice of sport is subject to Community law only in so far as it constitutes an economic activity'*[25] but that *'[t]his prohibition [...] does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity'.*[26] This case therefore set a sporting exception which were upheld in subsequent applications of sports

[22] Richard Parrish, *Sports law and policy in the European Union* (Manchester University Press 2003), p. 5; Behiç Fidanoğlu, 'Sporting Exception the European Union's Sport Policy' (2011) 4(2) Ankara Bar Review 65.
[23] *Richard Parrish* (n 22).
[24] Case C-36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* [1974] ECLI:EU:C:1974:140.
[25] ibid. para. 4.
[26] ibid. para. 8.

within EU law.[27] These passages demonstrate that sports was not as commercialised as it is today, and therefore it was unlikely to fall within the scope of paragraph 4 of *Walrave and Koch*. In fact, only in the 1980s did the broadcasting market reform take place, which meant that a deregulation of public national broadcasting markets occurred which allowed for more commercial broadcasters to operate.[28] This, together with new technology such as satellite broadcasting, led to commercialisation of sports as the sale of broadcasting rights to the new operators generated more profit than to public broadcasting bodies.[29] With this booming new industry, the legal framework needed an update as the activities became increasingly commercialised, especially within sports such as football.

3.1.2 Bosman: the turning point

Following the economic upswing of sports, the case of *Bosman*[30] changed the way that sports was handled by the CJEU, and scholars consider this case to be the case that has had the most significant impact on professional European sport and therefore can be considered an origin of EU sports law.[31] *Bosman* concerned a Belgian football player who was transferring from a Belgian club to a French club as his contract was reaching the end, but the transfer was subject to a rigorous system. The essence of this system was that a transfer of a player can only be completed once the registration from the previous club has been released, which will only happen if they are satisfied with the new terms offered by the new club and have received the payable fee. In Bosman's case, the registration was not sent by the old club and as a result, Bosman was not eligible to play his first match of the season. Bosman was successful before the CJEU as it was held that the transfer system imposed a restriction on the free movement of workers, and that the system was disproportionate to the aim of the system and was therefore considered unjustified.[32] The consequences of this ruling are that discrimination based on nationality in sports had to be eliminated and a reform of the transfer system was needed. Despite approaching sports in *Bosman* as something that is subject to EU law, and therefore giving the CJEU a larger mandate to regulate

[27] Case C-13/76 *Gaetano Donà v Mario Mantero* [1976] ECLI:EU:C:1976:115.
[28] Rusa Agafonova, 'International Skating Union versus European Commission: Is the European sports model under threat?' (2019) 19 International Sports Law Journal 87.
[29] *Richard Parrish* (n 22), p. 10.
[30] Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECLI:EU:C:1995:463
[31] Lars Halgreen, *European Sports Law* (2nd edn, Karnov Group 2013) 46; Stephen Weatherill, *European Sports Law Collected Papers* (2nd edn, Asser Press 2014) 497.
[32] *Bosman* (n 30), para. 110.

the industry, the CJEU still recognised the significant social importance of sports which shows that the specificity of sports is an element to be taken into account in the justification assessment of a free movement case concerning sports.[33] Up until this point, the CJEU had been the main EU institution to take any measures in the field of sport, but the *Bosman* ruling shed an important light onto the problematic aspects of sports, which urged the European Commission to become more involved. Due to the focus on competition law in this thesis, the impact that *Bosman* had within competition law is particularly interesting. Karel van Miert, the commissioner in charge of DG Competition at the Commission at the time, stated that *'UEFA has to evolve, whether they like or not'* and that failure to comply with the ruling could lead to sanctions.[34] This new impetus led to a wave of investigations within DG Competition in an attempt to increase accountability of sports governing bodies. These investigations include the possibly dominant position of Fédération Internationale de l'Automobile (FIA) with regards to the organisation of Formula One[35] and UEFA's rules regarding broadcasting.[36] In fact, as a post-Bosman effect, there was an exponential increase in competition complaints coming into the Commission, obliging it to open 60 sports-related complaints.[37] Pre-*Bosman*, only four sports-related decisions had been taken with regards to Article 101.[38] This increase was significant, as most of the previous cases within the area of sports had concerned free movement and it has been argued that the *'extra territorial effect of EU competition law offered the opportunity to erode the immunity from litigation that had previously protected [sport governing bodies]'*.[39] However, the Commission held on to the special nature of sports within competition law and the secrecy and lack of transparency within the decision-making

[33] ibid. para. 106.
[34] Borja García, 'From Regulation to Governance and Representation: Agenda-setting and the EU's Involvement in Sport' (2016) 5(1) Entertainment and Sports Law Journal 2, para. 25.
[35] European Commission, 'Commission Opens Formal Proceedings into Formula One and other International Motor Racing Series' (European Commission Press Release IP/99/434 1999) https://ec.europa.eu/commission/presscorner/detail/en/IP_99_434 accessed 30 March 2022.
[36] European Commission, 'Commission welcomes UEFA's new policy for selling the media rights to the Champions League' (European Commission Press Release IP/02/806 2002) https://ec.europa.eu/commission/presscorner/detail/en/IP_02_806 accessed 30 March 2022.
[37] Ben van Rompuy, 'The Role of EU Competition Law in Tackling Abuse of Regulatory Powers by Sports Associations' (2015) 22(2) Maastricht Journal of European and Comparative Law 179, p.180.
[38] *Newitt/Dunlop Slazenger International and Others* (Case IV/32.290) Commission Decision 92/261/EEC [1992] OJ L 131/32; *Distribution of package tours during the 1990 World Cup* (Case IV/33.384 and IV/33.378) Commission Decision 92/521/EEC [1992] OJ L 326/31; *EBU/Eurovision System* (Case IV/32.150) Commission Decision 93/403/EEC [1993] OJ L 179/23; *Tretorn and Others* (Case IV/34.590) Commission Decision 94/987/EC [1994] OJ L 378/45. All decisions concerned revenue-producing activities that had a connection with sports, namely broadcasting sales, ticket distribution and the distribution of sports goods.
[39] Erika Szyszczak, 'Application of EU competition rules to sport' in Jack Anderson, Richard Parrish and Borja García (eds.), *Research handbook on EU sports law and policy*. *Research Handbooks in European Law* (Edward Elgar, Cheltenham 2018), p. 264.

process made it difficult to ascertain the reasoning behind this special treatment.[40] Nevertheless, *Bosman* played an important role in shedding light on the impactful role that sports governing bodies hold and therefore limited their immunity from EU law. But it was not until 2006, about ten years after *Bosman,* that a sports governing body would be held accountable for anti competitive behaviour before the European Courts.

3.1.3. Meca-Medina: reaching accountability

Meca-Medina[41] concerned two professional swimmers who argued that the anti-doping rules adopted by the International Olympic Committee (IOC) and the Fédération Internationale De Natation (International Swimming Federation, FINA) were in breach of articles 81 and 82 EC Treaty (now articles 101 and 102 TFEU). The Commission's decision following their investigation reached the courts in Luxembourg and the CJEU eventually confirmed the General Court's finding that no competition law violation had occurred. The case of *Meca-Medina* is monumental in EU sports law as it created a bridge between free movement and competition law. This is visible in the fact that a sport governing body was, for the first time, assessed under competition law by the CJEU, and the CJEU applied the *Wouters*[42] test as a possibility to justify anti-competitive behaviour under Article 101 which is a proportionality-based test stemming from free movement law, and *Gebhard*[43] in particular. This test is that the context and the objectives of the conduct needs to be taken into account, after which it should be established whether the conduct and the anti-competitive effects are inherent to the pursuit of the objective and also whether they are proportionate to its pursuit.[44] Through this test, the IOC could argue that fairness and equality is the legitimate interest pursued by the rigorous doping rules. The CJEU further found that the penalties were necessary for the enforcement of the rules and therefore, the effects on the freedom of the athletes was deemed inherent. Lastly, the penalties were held to be proportionate to the pursuit of the legitimate interest.[45] *Meca-Medina* was also a game changer in the *lex sportiva* as it was the nail in the coffin for the sporting exception developed in *Walrave and Koch* and subsequently undermined by *Bosman* by stating that *'in holding that rules could thus be excluded*

[40] ibid.
[41] Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECLI:EU:C:2006:492.
[42] Case C-309/99 *Wouters and Others* [2002] ECLI:EU:C:2002:98, para. 97.
[43] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECLI:EU:C:1995:41.
[44] *Meca-Medina* (n 41), para. 42.
[45] ibid. paras 43-54.

straightaway from the scope of those articles solely on the ground that they were regarded as purely sporting with regard to the application of Articles 39 EC and 49 EC, without any need to determine first whether the rules fulfilled the specific requirements of Articles 81 EC and 82 EC, as set out in paragraph 30 of the present judgment, the Court of First Instance made an error of law.'.[46] Through this paragraph and the general outcome of the case, the CJEU in *Meca-Medina* changed the way the European courts should look at sports cases; away from a general sporting exception developed in *Walrave and Koch* and towards considering the specific nature of sports and potential justifications within sports by applying the *Wouters* test.

3.1.4. MOTOE: the introduction of Article 102 TFEU

In 2008, the CJEU further confirmed their stance held in *Meca-Medina* by delivering their judgement in *MOTOE.*[47] The CJEU held that the Greek sport governing body in charge of organising motor sports in Greece abused its dominant position under Article 102 TFEU by not allowing a legal recourse for appeal or review when no authorisation was given to undertakings attempting to organise motor sport competitions. *MOTOE* further increased accountability against sport governing bodies by subjecting a regulatory body that also engages in economic activity to competition law. Together with *Meca-Medina,* this judgement destroyed the automatic exception for purely sporting rules developed in the 1970s, and increased the use of competition law within the field of sports. This was also the first case before the CJEU that used Article 102 in the field of sports, and some scholars find it surprising that Article 102 has not been used more frequently to challenge sport governing bodies.[48]

3.1.5. Olympique Lyonnais: recognising Article 165 TFEU

Before the Lisbon Treaty, EU sports policy was shaped by various policy documents such as the Commission White Paper on Sports in 2007,[49] and the CJEU case law such as those previously mentioned. Despite this, the EU lacked a clear and direct competence or responsibility allowing them to regulate and finance sports. After the Lisbon Treaty, however, the interests of the EU would be made clear by the introduction of Article 6 TFEU, and Article 165 TFEU. Article 6 TFEU gives the EU supporting competence in the area of sports, which, in practice, means that

[46] ibid. para. 33.
[47] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECLI:EU:C:2008:376.
[48] *Szyszczak* (n 39), p. 272.
[49] Commission, 'White Paper on Sport' COM (2007) 391 final.

the EU can only act through non-binding means and soft law, such as policy documents, guidelines and recommendations.[50] Article 165 TFEU highlights the aims of EU sports policy and provides that *'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'.*[51] The EU is therefore tasked with the responsibility to promote fairness and openness in sports and to protect the integrity of athletes. It further upholds the specific nature of sports and thus limits the EU's discretion to intervene as the specific nature of sports is to be taken into account. Even without a clear definition, the specificity of sports has been endorsed by the CJEU, and was thus included in the wording of Article 165 TFEU.[52] Article 165 TFEU can be considered to be an integration clause when it comes to policy making within the area of sports, and it applies to both professional and amateur sports.[53] Its first invocation in front of the CJEU occurred in the case of *Olympique Lyonnais*[54] where Olivier Bernard, a French footballer, argued that his free movement as a worker under Article 45 TFEU had been breached by the Professional Football Charter which regulated employment of football players at the time and hindered him from transferring to a club in another Member State. In the assessment of potential justifications, the CJEU states that *'account must be taken (…) of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU'.*[55] By combining the position held in *Bosman* with regards to the importance of training and recruitment of young players, and Article 165 TFEU, the CJEU strongly confirmed the important social function of sports but subsequently held that certain aspects of the rules in question had gone further than necessary to achieve that objective.[56] Following this case, Article 165 TFEU has been invoked within free movement again in the case of *TopFit Biffi*[57] as well as

[50] European Parliament, 'EU Sports Policy Briefing, Going faster, aiming higher, reaching further' (2019) PE 640.168.
[51] Consolidated Version of the Treaty of the Functioning of the European Union (TFEU) [2012] C326/01, Article 165(1).
[52] An Vermeersch, 'Specificity of Sport' in Jack Anderson, Richard Parrish and Borja García (eds.), *Research handbook on EU sports law and policy*. *Research Handbooks in European Law* (Edward Elgar, Cheltenham 2018), p. 312.
[53] Case C-22/18 *TopFit e.V. and Daniele Biffi v Deutscher Leichtathletikverband e.V* [2019] ECLI:EU:C:2019:497, para. 33.
[54] Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECLI:EU:C:2010:143.
[55] ibid. para. 40.
[56] Frank Hendrickx, 'The Bernard-Case and Training Compensation in Professional Football' (2010) 1(3) European Labour Law Journal 380, p.384.
[57] *Topfit Biffi* (n 53).

recently in the context of competition law, specifically *International Skating Union.*[58] It is further expected of the defendants in the *European Super League* case to invoke this article in the justifications assessment as the nature of the conduct asks for the specificity of sports to be taken into account. It is clear from the foregoing that the CJEU and the EU are keen to uphold the specificity of sports, however its definition has not always been clear.[59] According to the European Council's Declaration on the specific characteristics of sport and its social function in Europe in 2000,[60] and further clarified in the Commission's White Paper on Sports in 2007,[61] the definition has two aspects: firstly, the nature of the rules of the games and the selection criteria within the sports, and secondly, the specific structure of sports within Europe which will be discussed later in this thesis.[62] To sum, the specificity of sports can be understood as *'the inherent characteristics of sports, both as a social and economic activity which can justify a tailored application of EU law and policies.'*[63] It is made clear, however, that the specificity is not a blanket exemption from sporting rules and should still be applied and assessed on a case-by-case basis.[64] This aspect of Article 165 TFEU, whilst being highly beneficial to sport governing bodies, has been criticised by sports federations such as UEFA creating an unstable legal environment for sports which creates a sense of ambiguity and legal uncertainty. As a result, there is a demand that the EU will provide guidelines that will address these issues.[65] To date, no such guidelines have been provided and the supposed legal uncertainty as to the scope and applicability of Article 165 TFEU remains.

3.1.6. International Skating Union: the latest development

The latest development within the European Court's jurisprudence within EU sports law is the General Court judgement in the case of *International Skating Union*[66] from 2020. Due to its relevance in the *European Super League* case, it is likely to be used as a benchmark case against which the CJEU will assess the *European Super League* case. The case concerned two international speed skaters who filed a complaint to the Commission regarding the International

[58] *International Skating Union* (n 2).
[59] *García* (n 34), para. 31.
[60] European Council, 'Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies (Annex IV)' (2000).
[61] *Commission White Paper on* Sport (n 49).
[62] *European Parliament EU Sports Policy Briefing* (n 50).
[63] *García* (n 34), para. 31.
[64] *Commission White Paper on Sport* (n 49), p. 13.
[65] UEFA, 'UEFA's position on Article 165 of the Lisbon Treaty' https://www.uefa.com/multimediafiles/download/uefaorg/europeanunion/01/57/91/67/1579167_download.pdf accessed 25th March 2022.
[66] *International Skating Union* (n 2).

Skating Union's ("ISU") eligibility rules and their compatibility with Article 101 TFEU. The ISU is the sole regulator and administrator of speed skating and figure skating, and imposed severe penalties upon athletes that participate in competitions that have not been authorised by the ISU. Consequently, the ISU was accused of preventing other organisers from operating on the market. The General Court emphasised that the ISU had a special responsibility to ensure undistorted competition on the market,[67] and while the ISU did pursue legitimate objectives, the rules were disproportionate to the pursuit of those objectives. This is because the ISU held significant discretion as to the authorisation of competitions,[68] imposed penalties that were manifestly disproportionate in comparison to the athlete's career length,[69] and they failed to impose pre-authorisation criteria that were *'clearly defined, transparent, non-discriminatory, verifiable and capable of guaranteeing effective access to the market for competing event organisers'.*[70] Consequently, the ISU rules were found to constitute a breach of Article 101 TFEU. The circumstances of this case are similar to the ones in the *European Super League* case as they both concern pre-authorisation schemes in the context of sports, which inherently raises conflicts of interest.[71] This judgement further confirms the position held in *Meca-Medina* which gives sport governing bodies the freedom to invoke legitimate objectives related to the specific nature of sports when assessing their conduct under competition law. These objectives can even include their own economic interests.[72] The General Court also confirmed that the use of pre-authorisation is not unlawful but they still need to impose rules that are clear, transparent and non-discriminatory whilst also avoiding advancing their commercial interest to the detriment of competitors as to not create foreclosure of the market or conflict of interest.[73] The General Court further endorsed the role that CAS holds as the primary body for adjudication of sports related disputes and therefore preserving the arbitration function held within numerous sports associations.[74] However, the

[67] ibid. para.114.
[68] ibid. para. 86.
[69] ibid. para. 92.
[70] ibid. para. 88.
[71] ibid. para. 75; similar observations have been made in cases like the FIA Commission Decision (see *FIA decision* n 33). As such, the conflict of interest arising in situations concerning sport governing bodies and their regulatory activities has been continuously explored; see Katarina Pijetlovic, 'European model of sport: alternative structures' in Jack Anderson, Richard Parrish, Borja García (eds), *Research Handbook on EU Sports Law and Policy* (Edward Elgar Publishing Limited 2018), p. 342.
[72] *International Skating Union* (n 2), para. 109.
[73] Andrea Cattaneo, 'International Skating Union v Commission: Pre-authorisation Rules and Competition Law' (2021) 12(4) Journal of European Competition Law & Practice 318, p.320.
[74] Antoine Accarain 'EU General Court issues judgment in International Skating Union case' (*Ashurst Competition Law Newsletter,* 3 February 2021) https://www.ashurst.com/en/news-and-insights/legal-updates/competition-law-newsletter-february-2021/cn03---eu-general-court-issues-judgment-in-international-skating-union-case/ accessed 4 April 2022.

question of contention in the application of this judgement to the *European Super League* is whether the use of pre-authorisation rules can pursue a legitimate sports-related objective which can mitigate their significant anti-competitive effects.[75] Nevertheless, the judgement in *International Skating Union* reflects the cautionary position that the EU currently holds towards allowing sports governing bodies a wide margin of discretion that imposes adverse effects on competition law, and a different outcome in *European Super League* would reveal an inconsistency which could perhaps only be explained by the different nature of the two sports concerned. Alongside the *European Super League* procedure is the appeals procedure in *International Skating Union* which includes two pleas which attempt to overturn the General Court's judgement by finding that the 'by object' Article 101 assessment was faulty, and that the judgement had failed to consider the legitimate objective sought by the ISU rules and the ethical concerns that arise with regards to betting that are connected to the particular third-party organised skating competition in question.[76] The outcome of this appeal has the potential to shake up EU sports law significantly by potentially allowing a wide margin of discretion with regards to pre-authorisation powers.

3.2. The European Model of Sports

The European Model of Sports can be considered a limb of the specificity of sports and therefore is included in the interests held by the EU in Article 165 TFEU. A clear definition of the European Model of Sports that is used by all actors has not been developed, but it has been [77] by numerous features:[78]

a) A pyramid structure which resembles the model portrayed adjacent to this paragraph. The clubs in each region are usually the members of the regional federations, and are

[75] *Cattaneo* (n 73).
[76] *International Skating Union appeal* (n 21).

[78] *Agafonova* (n 28).

therefore limited to the competitions and regulations organised by that federation. Each federation is usually a member of the federation above them in the hierarchy;[79]

b) a values-based model which reflects the specific nature of sports and the fundamental values held within sports such as tolerance, well-being and health;[80]
c) a financial solidarity system which allows for revenue to be reinvested into the grassroots level; and
d) a system of promotion and relegation which prioritises sporting merit and ensures open competitions with the possibility to enter by all well-performing athletes.

3.2.1. The pyramid structure and the one federation per sport principle

As this thesis is primarily about football, it is pertinent to explain the structure of European football under the European Model of Sports. FIFA, the governing body that regulates football worldwide, is at the top of the pyramid. Beneath FIFA is UEFA, which is the European federation for football. Beneath UEFA are national federations such as the Swedish Football Association (SvFF) and the Fédération Française de Football (FFF). Afterwards come the professional clubs such as FC Barcelona and Chelsea FC, as well as interested actors that form part of the grass roots which include amateur bodies and regional associations.[81]

The distinct feature of the pyramid structure is that it adopts a 'one federation per sport' principle (also known as the *Ein-Platz Prinzip*) which makes the system easier to manage.[82] However, this allows sports federations to hold a monopoly in practice, which can be legally challenging to maintain. Despite this, commentators regard that the existence of several federations per sport would create a risk of major conflicts, but that after the commercialisation of sports, the attribution of monopolistic powers to sport governing bodies goes beyond what is necessary to ensure the proper organisation of sports.[83] At a time where sports is highly commercialised, it is difficult to ascertain the dividing line between purely sporting rules and rules which serve an economic purpose.[84] Therefore, sport governing bodies and the federations at the top of the pyramid have

[79] *Commission White Paper on Sports* (n 49).
[80] International Olympic Committee, 'The European Sport Model' (2020).
[81] *Halgreen* (n 31).
[82] *Halgreen* (n 31), p.65; Lindholm has described this as '*the heart of the "pyramid-like" organisation that is typical for European sport.'*, see Johan Lindholm, 'The impact of SBF v KKV on sport: Swedish fender-bender or European pileup?' (2013) 34(7) European Comparative Law Review 367.
[83] *Weatherill* (n 31), ch. 12 'Is the Pyramid Compatible with EC Law?', p. 295.
[84] *Bosman* (n 30), para. 76; *Weatherill* (n 31), p. 300.

significant economic influence whilst severely restricting market access for new leagues.[85] This power, if held by any other type of private commercial body, would most likely be regarded as a violation under Article 102. At the same time, their monopoly is justified by the idea that the pyramidal structure within the European Model of Sports is simply the most efficient way of organising sports.[86] On the other hand, they are not immune, as we have seen in cases like *Bosman, Meca-Medina* and *International Skating Union.* But in all these cases, the sport governing body may invoke the specific nature of sports (including the pyramidal structure of the European Model of Sports) in order to justify their conduct. In *Bosman,* the Court even extended the discretion to invoke public policy justifications to private bodies. Thus, EU law admits that sport governing bodies enjoy a conditional autonomy as long as they can prove that the rules in question are necessary to ensure the proper functioning of the sport. Whilst the test for justifications is becoming more stringent, as seen in *International Skating Union*, sport governing bodies retain their monopoly through the invocation of sports related interests.[87] The question that therefore remains is whether the pyramid structure really is the most efficient way to organise sports or whether it should be updated to take into account the modern and commercialised aspects of sports.

3.2.2. The American Sports Model

In order to evaluate the efficiency of the European Model of Sports, one can compare it to the American Sports Model. The American Sports Model can be difficult to clearly define, but there are some clear differences that can be ascertained in comparison to the European Model of Sports.[88] A large difference is the sharp distinction that is drawn between professional and amateur sports in the US.[89] This has had a deep impact on the law concerning US amateur sports and the law has primarily focused on defending amateur eligibility which gives amateur athletes the right to participate in amateur or school athletic activities.[90] The National Collegial Athletic Association (NCAA) is the main governing body of amateur sports in the US that ensures the enforcement of

[85] *Halgreen* (n 31), p. 65.
[86] European Commission Consultation Document of DG X, 'The European Model of Sport' (1999) C374/56, para. 3.2.
[87] It is important to remember that the *International Skating Union* appeal includes the plea that the legitimate interest invoked by the ISU should have been given more consideration, which can lead the CJEU to expand their autonomy.
[88] James A.R. Nafziger, 'A comparison of the European and North American Models of Sports Organisation' in Simon Gardiner, Richard Parrish, Robert C.R. Siekmann (eds.) *EU, Sport, Law and Policy. Regulation, Re-regulation and Representation* (TMC Asser Press 2009), p. 40.
[89] *Szyszczak* (n 39).
[90] *Halgreen* (n 31), p. 70.

the eligibility rules and therefore upholds the policy goal of amateurism in college sports.[91] This aspect goes hand in hand with the strong sports culture in colleges and universities in the US which differs from the role it plays in most European universities. Whilst the sports played in college are at amateur level, college sports is still a billion-dollar industry through broadcasting revenues and merchandise distribution which therefore attributes organisations like the NCAA significant economic influence.[92] Professional sports in the US involves a closed system of competition which does not adopt the system of promotion and relegation. The so-called 'major leagues' organise closed competitions with about 30-32 teams and the four leagues in question are the Major League Baseball (MLB), National Football League (NFL), National Basketball League (NBA) and National Hockey League (NHL). These leagues have often been described as 'franchises' which resemble major business corporations.[93] The major leagues are private associations which therefore still retain autonomy and self-governance when it comes to regulating the sports, but they are still bound by the constitution that has been adopted by the teams in the leagues. At the top of the major leagues is a Commissioner that is in charge of the enforcement of the rules and therefore is attributed the power to adopt penalties and to adopt any decision they see is in the interest of the sport.[94] Qualification to the major leagues is not based on sporting merit but on money and an invite from the other teams in the league, and once you're in, there is little fear of expulsion.[95] In the league, the teams must still respect mutual market opportunities and work together to promote their mutual economic interests, and they therefore act as joint ventures.[96] The commercialisation aspect is also different in the US which influences the rules of the game. US professional sports include a lot of breaks in their games in order to fit advertising in the broadcasting which will answer to the commercial interests of the major leagues. This is a big difference from the way sports is done in Europe, as the traditional European notion has been to not allow frequent interruptions for the purpose of advertisements. One commentator regards that this unwillingness to change the fundamental rules of some sports like football, has been a reason why European football has not done so well in the US markets.[97] The conclusion that can be drawn from the

[91] ibid. p. 71
[92] In 2019, the NCAA declared total revenues at $18.9bn according to Statista. See Felix Richter, ' U.S. College Sports Are a Billion-Dollar Game' (*Statista.com*, July 2021) < https://www.statista.com/chart/25236/ncaa-athletic-department-revenue/> accessed 19th May 2022.
[93] *Halgreen* (n 31), p. 73-74.
[94] ibid. p. 74.
[95] *Nafziger* (n 87), p. 42.
[96] ibid.
[97] *Halgreen* (n 31) p. 75-76.

comparison between these two models is that the American model holds a large focus on commercialisation and doesn't adopt the 'open' nature of sports competitions which the European model finds to be integral. More specifically, as described by Stephen Weatherill, the European Model *'is not an attack on commercialism per se [...] but rather it is a quest to foster an environment within which commercialism will not undermine core sporting values such as uncertainty of result, integrity of competition and achievement based on merit'*.[98] It is also worth noting that the big difference in the approach to the openness of the leagues between these two models has to do with demographics and geography. In fact, it is argued that the dense population in small European countries creates more clubs in close proximity, which differs from the situation in America where the population, and thus the clubs, have less density. This therefore calls for a different need, and, consequently, a different model of sports.[99]

3.2.3. Analysis

The question still remains: which model is better and the most efficient way of organising sports? It depends on the perspective, as increased commercialisation and a closed league would increase the economic influence of the industry, but the principle of 'one federation per discipline' can be regarded to be the most simple and efficient way to organise sports. From a European perspective, it is clear that the EU institutions, whilst recognising the important commercial dimensions of sports, have given the educational, social and cultural dimensions a lot of attention.[100] The European Model of Sports includes the values held by the European Union, and therefore acts as part of the 'European identity'.[101] As such, a move towards the American model would be a step away from the traditional civilizational components of European identity (tolerance, respect and equality of opportunities for all).[102] Despite this, it has been argued that through general 'Americanization', the European Model of Sports is shifting and starting to lean more towards its counterpart across the Atlantic.[103] This is mostly visible in the area of football, and most

[98] *Weatherill* (n 31) ch. 8 'Resisting the Pressures of 'Americanization': The Influence of European Community Law on the 'European Sport Model', p. 189.
[99] *Dunbar* (n 1).
[100] Commission 'Report from the Commision to the European Council with a View to Safeguarding Current Sports Structures and Maintaining the Social Function of Sport within the Community Framework - The Helsinki Report on Sport' COM (1999) 644 final; White Paper on Sports (n 49); Article 165 TFEU (n 51); *TopFit Biffi* (n 53) para. 33.
[101] Vladimir Zuev, Irina Popova, 'The European Model of Sport: Values, Rules and Interests' (2018) 13(1) International Organisations Research Journal 51, p. 57.
[102] ibid.
[103] *Weatherill 'Resisting the Pressures of 'Americanization': The Influence of European Community Law on the 'European Sport Model'* (n 97), p. 190.

importantly in the European Super League, where elite football clubs remove merit-based opportunities in favour of commercial benefits. The CJEU in the European Super League case therefore plays a key role in the future and survival of the European Model of Sports.

4. EU competition law: the basics of Articles 101 and 102 TFEU

As can be derived from the questions referred in the European Super League case, the competition law articles that are to be interpreted are Articles 101 and 102 TFEU. It is therefore necessary to lay out the essentials of these articles before diving into the assessment of the parties' conduct under EU competition law. An important note is that competition law is an area of exclusive competence within the EU.[104] This means that the EU is able to adopt legislation and binding acts within this area without giving Member States much discretion.

4.1. Consumer welfare as a goal of EU competition law

Numerous objectives of EU competition law have been identified throughout the years, and these include economic efficiency, protection of SMEs, maintenance of the single market structure and the protection of consumer welfare.[105] However, it has been repeatedly argued that one the principal objectives of EU competition law is to prevent consumer harm.[106] This includes the protection of innovation, choice, quality and favourable prices.[107] Most recently, this has been confirmed in *Servizio Elettrico Nazionale* by placing high importance on the consumers in finding abuse.[108] Therefore, consumer welfare is a recurring objective which has to be taken into account in all competition law assessments, including in the *European Super League* case.

[104] Consolidated Version of the Treaty of the Functioning of the European Union (TFEU) [2012] C326/01, Article 3(1)(b).
[105] The ranking of these objectives in terms of importance change over time and from institution to institution, as evident in Konstantinos Stylianou, Marios Iacovides, 'The goals of EU competition law: a comprehensive empirical investigation' [2020] Legal Studies, SSRN.
[106] See, for example, Case C-209/10 *Post Danmark A/S v Konkurrensrådet* [2012] ECLI:EU:C:2012:172, para. 20; Commission Notice, 'Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC)' [2004] OJ C 101 97, para. 13, noting that the numerous objectives of EU competition law ultimately lead to the benefit of consumers.
[107] Commission Guidelines, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5.
[108] Case C-377/20 *Servizio Elettrico Nazionale SpA and Others* [2022] ECLI:EU:C:2022:379, paras. 40-48.

4.2. Article 101

Article 101(1) stipulates that '*the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.*'[109] As the treaty does not specify the terms used in the article, the CJEU has provided clarification as to the interpretation of these terms.

4.2.1. Undertaking

The basic definition of the concept of 'undertaking' is *'every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed'*.[110] Within this definition, it has been problematic to ascertain that concept of economic activity, which has been clarified by the CJEU to mean 'any activity consisting in offering goods or services on a given market'.[111] This broad definition includes entities offering goods or services without a profit-motive,[112] or without an economic purpose.[113] In this line, the General Court has held in *Piau*[114] that the practice of football by football clubs is an economic activity, despite the fact that some of these clubs may be purely amateur clubs.[115] Article 101 TFEU prohibits anti-competitive conduct between undertakings, but associations of undertakings are also caught by the prohibition. An association of undertakings refers to *'a representative body, usually with members, that typically makes decisions which are followed, whether as a matter of obligation or practice, by its members or those whom it represents'*.[116] It has been held that FIFA is an association of undertakings,[117] and due to the similarities in the structure and operations between FIFA and UEFA, it can be argued that UEFA should therefore also be considered an association of undertakings.

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[109] Consolidated Version of the Treaty of the Functioning of the European Union (TFEU) [2012] C326/01, Article 101(1).
[110] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161, para. 21.
[111] Case C-118/85 *Commission v Italy* [1987] ECLI:EU:C:1987:283, para. 7; Joined cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECLI:EU:C:2000:428, para. 75.
[112] Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato e Cassa di Risparmio di San Miniato SpA.* [2006] ECLI:EU:C:2006:8, paras. 122-123; *MOTOE* (n 47), para. 27.
[113] *Cassa di Risparmio di Firenze* (n 111) para. 123.
[114] Case T-193/02 *Laurent Piau v Commission* [2005] ECLI:EU:T:2005:22.
[115] ibid. paras. 69-70.
[116] Case C-309/99 *Wouters and Others* [2002] ECLI:EU:C:2001:390, Opinion of AG Léger, para. 61; Richard Whish, David Bailey, *Competition Law* (9th edn, Oxford University Press 2018), p. 92.
[117] *Piau* (n 113), para. 72.

4.2.2. Agreements, Decisions and Concerted Practices

Article 101 TFEU prohibits agreements which restrict competition, but are not limited to formal contracts or agreements at the same level of the market. The definition of an agreement is broad as to not make evasion of the law simple. The definition is as follows: *'the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention'*.[118] Due to the extremely broad nature of the concept of agreements, the definitions of agreements and concerted practice overlap and therefore the European Courts sometimes find it to be immaterial to make the distinction.[119] Decisions by associations of undertakings can include regulations governing the operation of the association,[120] and it does not have to be unanimously accepted by its members.

4.2.3. The Object or Effect of Preventing, Restricting or Distorting Competition

Article 101(1) prohibits agreements which have the object or effect the prevention, restriction or distortion of competition. The article further includes a non-exhaustive list of examples of such restrictions, for example price fixing and market sharing. The first point to be made on these two types of restrictions is that they are not cumulative, but alternative and they are thus meant to be read disjunctively.[121]

4.2.3.1. Object

Starting with the restriction by object, it is necessary to look at whether the agreement *'reveals in itself a sufficient degree of harm to competition'*,[122] and the restriction of competition would therefore be the objective and meaning of the agreement in question. The subjective intention of the undertaking is not the determining factor in these cases, however it does act as evidence in the assessment of agreements having the object the restriction of competition.[123] After cases like *T-Mobile*[124] and *Allianz Hungaria*[125], the test for object restrictions seemed to have widened and it

[118] Case T-41/96 *Bayer AG v Commission* [2000] ECLI:EU:T:2000:242, para. 69.
[119] Joined Cases C-209-215 and 218/78 *Van Landewyck v Commission* [1980] ECLI:EU:C:1980:177 Opinion of AG Reischl, p. 3310.
[120] *Coapi* (Case IV/33.686) Commission Decision 95/188/EC [1995] OJ L 122/37, para. 34.
[121] Case C-56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECLI:EU:C:1966:38, p. 249.
[122] Case C-67/13 P *Groupement des Cartes Bancaires (CB) v Commission* [2014] ECLI:EU:C:2014:2204, para. 57; further cited in Case C-228/18 *Budapest Bank and Others* [2020] ECLI:EU:C:2019:678, para. 37.
[123] Case C-32/11 *Allianz Hungária Biztosító and Others* [2013] ECLI:EU:C:2013:160, para. 37.
[124] Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECLI:EU:C:2009:343.
[125] *Allianz Hungaria* (n 122).

was *'sufficient that [the agreement] has the potential to have a negative impact on competition'*.[126] However, in the appeal in *Cartes Bancaires,* the CJEU thoroughly reviewed and scrutinised the wide test that had been applied in the contested General Court judgement. The most important point to be taken from the CJEU judgement in *Cartes Bancaires* is that the object test must be applied restrictively, so as to not be mixed with the effects assessment. This approach was later confirmed in *Budapest Bank*[127], and was even further restricted in that case. The CJEU provided clearer guidance on the approach to be taken by the European Courts in object assessments in *Budapest Bank,* which includes having to take sufficient experience, potential pro-competitive effects, and the context in which the agreement exists. For the purpose of this thesis, it is of relevance to elaborate on the role of pro-competitive effects of measures which are potentially anti-competitive. In *Generics,* it was pointed out that pro-competitive effects are to be taken into account in the assessment of a restriction being categorized to have the object of restricting competition.[128] These effects have to be sufficiently significant, so as to justify a reasonable doubt as to whether the measure imposes sufficient harm on competition.[129] These indications will be of use in the assessment of a restriction under Article 101 in light of the *European Super League* case, especially considering the special context of sports in which the case is situated.

4.2.3.2. Effect

Only after a restriction by object has not been possible to establish, one turns to assess the agreement's effects on actual and potential competition. The CJEU has observed that the agreement must be *'liable to have an appreciable adverse impact on the parameters of competition, such as the price, the quantity and quality of goods or services.*[130] The Commission has further expanded on this by adding that an agreement can have this anti-competitive effect by *'appreciably reducing competition between the parties to the agreement or between any one of them and third parties'*.[131] The assessment of this aspect of Article 101 is highly factual and dependent on the market in which the undertakings operate.[132] This has led to the publication of numerous Commission Notices and Guidelines which can guide the European Courts and the

[126] *T-Mobile* (n 123) para 31.
[127] *Budapest Bank* (n 121) para. 54.
[128] Case C-307/18 *Generics (UK) Ltd and Others* [2020] ECLI:EU:C:2020:52, para. 103.
[129] ibid. para. 107.
[130] Case C-382/12 P *MasterCard and Others v Commission* [2014] ECLI:EU:C:2014:2201, para. 93.
[131] Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance' COM (2011) 11, para. 27.
[132] Case C-345/14 *Maxima Latvija* [2015] ECLI:EU:C:2015:784, para. 29.

Commission on the application of the test for restrictions by effect to the different circumstances in each case. Due to the high bar set for restrictions by object, many agreements have been caught by this aspect of the Article 101 prohibition. Applying this to the *European Super League* case, it is therefore likely that certain conduct within that case will be caught by the Article 101 prohibition.

4.2.4. Justifications and defences

Through the development of case law under Article 101 as well as the efficiency defence in Article 101(3), certain agreements have been seen as falling outside the scope of Article 101. Seeing as one of the referred questions in the *European Super League* case concerns the potential justifications available for FIFA and UEFA, it is pertinent to explore the justifications available.

4.2.4.1. Article 101(3)

Article 101(3) gives an exception by providing that Article 101(1) is to be declared inapplicable to an agreement which *'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.* This exception applies to any type of agreement,[133] including agreements which have as the object the restriction competition.[134] Article 101(3) has been applied and accepted in the case of football and specifically FIFA rules on licence systems in the case of *Piau.*[135] It was deemed to be possible to benefit from the exception as the rules could lead to economic progress by raising professional and ethical standards for players' agents and thus protect football players with a short career.[136]

4.2.4.2. Commercial and regulatory ancillarity

Some agreements fall outside the scope of Article 101 if they are deemed to be objectively necessary to achieve a legitimate purpose, which leads the agreement in question to be ancillary

[133] Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECLI:EU:C:2011:649, para. 57.
[134] *Commission Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC)* (n 105), para. 46.
[135] *Piau* (n 113), paras. 100-106.
[136] *Piau* (n 113), para. 102.

to that commercial purpose.[137] This differs from regulatory ancillarity which was established in *Wouters,* and later reconfirmed in *Meca-Medina,* which has been elaborated on in section 2.3 of this thesis. The justification allows for undertakings to rely on a legitimate aim and that the agreement in question is inherent and proportionate to the pursuit of that aim.[138] After its application in *Meca-Medina,* it was unsure whether the test would still be applicable seeing as Regulation 1/2003[139] made Article 101(3) directly applicable. However, the subsequent applications in *OTOC*[140] and *CNG*[141] prove that the test is still used and intrinsic to the assessment under Article 101.[142]

4.3. Article 102

As opposed to Article 101, Article 102 TFEU is directed at single undertakings or associations of undertakings and their conduct on the market. More specifically, it stipulates that *'any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States'.*[143] The concepts of dominant position, relevant market, and abuse have been further elaborated on by the European Courts.

4.3.1. Dominant position

The CJEU established in *United Brands*[144] the meaning of a dominant position. Specifically, it '*relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its*

[137] Case T-112/99 *Métropole télévision (M6) and Others v Commission* [2001] ECLI:EU:T:2001:215.
[138] *Wouters* (n 42), para.97; *Meca-Medina* (n 41), para. 42.
[139] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, recital 5.
[140] Case C-1/12 *Ordem dos Técnicos Oficiais de Contas (OTOC) v Autoridade da Concorrência* [2013] ECLI:EU:C:2013:127, para. 28.
[141] Case C-136/12 *Consiglio nazionale dei geologi (CNG) v Autorità garante della concorrenza e del mercato* [2013] ECLI:EU:C:2013:489, para. 53.
[142] Julian Nowag, 'Wouters, when the condemned live longer: a comment on OTOC and CNG' [2015] European Competition Law Review 39.
[143] Consolidated Version of the Treaty of the Functioning of the European Union (TFEU) [2012] C326/01, Article 102.
[144] Case C- 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECLI:EU:C:1978:22.

consumers'.[145] The Commission has provided further guidance in this respect and noted that there are at least three issues to be taken into account when assessing dominance. These include the market position of the dominant undertaking and its competitors, the potential competition and the access to the market, as well as the countervailing buyer power and bargaining strength held by the undertaking.[146] If an undertaking is found to be dominant, it holds a special responsibility not to distort competition on the market.[147]

4.3.2. Relevant market

It is impossible to make an assessment of the dominance of an undertaking without first looking at the relevant market. It is important to note that this is also an important step in the Article 101 assessment, and therefore this section is relevant for section 4.2 of this thesis as well. Defining the market is highly economic and fact-based which might fall outside the competence of lawyers, but the Commission has provided guidance on the elements to market definition in their '*Notice on the Definition of the Relevant Market for the Purpose of [EU] Competition Law'*.[148] This Notice points out why market definition is important by stating that *'market definition is a tool to identify and define the boundaries of competition between firms'*.[149] Firstly, the identifying of the relevant product market is of crucial importance in the Article 102 assessment. In fact, in *Continental Can,*[150] The Commission's failure to define a product market caused the CJEU to quash the decision.[151] In that same case, the CJEU established that a product market is identified through the *'characteristics of the products in question by virtue of which they are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products'*.[152] Substitutability and interchangeability therefore are the most important aspects of identifying the product market, and particularly demand-side substitutability is looked at above all else.[153] A technique that is used here is the SSNIP test which stands for Small but Significant and Non-

[145] *United Brands* (n 143), para. 65; see also Case C-85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECLI:EU:C:1979:36, para. 38.
[146] Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C 45/7, para. 12.
[147] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECLI:EU:C:1983:313, para. 10.
[148] Commission Notice, 'Notice on the definition of relevant market for the purposes of Community competition law' [1997] OJ C 372/5.
[149] ibid. para. 2.
[150] Case C-6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECLI:EU:C:1973:22.
[151] *Whish, Bailey* (n 114), p.29.
[152] *Continental Can* (n 149), para. 32.
[153] *Notice on market definition* (n 147), para. 13.

transitory Increase in Price. Through this test, one looks at whether, in the event of a small rise in cost, enough customers would change products and thus render the price rise unprofitable.[154] If yes, then the market includes those products that the consumers would turn to as well. Emphasis is also given on supply-side substitutability, which looks at the readiness and ease of the supply side to change the production process to produce other types of products. If yes, then those products are included in the product market. Potential competition is also taken into account, which includes the barriers to entry to the market.[155] Market definition also includes the identification of the relevant geographic market, and its definition was given in *United Brands*, where it was stated that Article 102 must be considered *'with reference to a clearly defined geographic area in which [the product] is marketed and where the conditions are sufficiently homogenous for the effect of the economic power of the undertaking concerned to be evaluated'*.[156] The Commission applies a test of substitutability here as well, and looks at whether enough customers would switch suppliers to ones in another region or country so as to render the price increase unprofitable.[157] Lastly, it may sometimes be necessary to assess the temporal market, as conditions may vary based on seasons and consumer habits which can change the market power of the undertaking significantly throughout the year.[158] Having established the importance and conceptual framework of market definition, this thesis will elaborate on the possible market definition in the *European Super League* case at a later stage.

4.3.3. Abuse

Under Article 102, courts and national competition authorities have to determine whether the conduct of a dominant undertaking is in line with competition on the merits, or whether it deviates from normal competition. This might be a hard distinction to make, as many dominant undertakings naturally produce exclusionary effects on the market by being more efficient. It is, however, not the purpose of Article 102 to ensure that competitors less efficient than the dominant undertaking stay on the market.[159] As a result of this difficulty, the Commission has published their enforcement priorities which sets out their approach to the choice of cases.[160] Whilst lacking

[154] ibid. para. 17
[155] ibid.
[156] *United Brands* (n 143), paras. 10-11.
[157] *Notice on market definition* (n 147), para. 28.
[158] See for example *United Brands* (n 143).
[159] Case C-413/14 P *Intel Corp. v Commission* [2017] ECLI:EU:C:2017:632, para. 133.
[160] *Guidance on enforcement priorities* (n 143); Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015] ECLI:EU:C:2015:651, para. 52

binding nature, it provides courts with an indication of the priorities taken by the Commission which can facilitate the assessment under Article 102. When it comes to the concept of abuse, there has been no exhaustive list of practices which amount to abuse, and there is no clear all-encompassing definition of the concept either. However, the CJEU's recent definition in *Servizio Elettrico Nazionale* is likely to be repeated as the general definition of abuse. It stipulates that the dominant undertaking abuses its position by recourse to resources or means different from those governing normal competition which thus adversely affect the effective competitive structure of the market.[161] The European Courts have recently adopted an effects analysis when assessing abuse,[162] which therefore goes away from a *per se* application of abuse. Despite this, there are certain types of abuses that can be more easily identified as abuse, and they can be divided up into the categories of exploitative and exclusionary abuses. Exploitative abuses include unfair selling prices or unfair trading conditions, which has been seen in the world of football, specifically in the *1998 Football World Cup* decision, where the Commission regarded the conditions of the sale of tickets as unfair to consumers which were not residing in France.[163] Exclusionary abuse is a broader category and includes the strengthening of a dominant undertaking's position and thereby eliminating competition on the market. This does not have to be indented by the undertaking, but is assessed objectively.

5. UEFA's actions: are they anti-competitive?

The referred questions pose the question of whether the prior authorisation mechanism adopted by FIFA and UEFA is anti-competitive. In particular, Article 49 of the UEFA Statutes is the most relevant and requires a lot of attention in light of the *European Super League* case. The first subparagraph reads as follows: *"UEFA shall have the sole jurisdiction to organise or abolish international competitions in Europe in which Member Associations and/or their clubs participate. FIFA competitions shall not be affected by this provision".*[164] The third subparagraph further reads as follows: *"International matches, competitions or tournaments which are not organised by UEFA but are played on UEFA's territory shall require the prior approval of FIFA and/or UEFA and/or the relevant Member Associations in accordance with the FIFA Regulations Governing*

[161] *Servizio Elettrico Nazionale* (n 107), para. 47.
[162] See e.g. Case T-201/04 *Microsoft Corp. v Commission* [2007] ECLI:EU:T:2007:289, paras. 1031-1090; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83; Case T-286/09 *RENV - Intel Corporation v Commission* [2022] ECLI:EU:T:2022:19
[163] *1998 Football World Cup* (Case IV/36.888) Commission Decision 2000/12/EC [2000] OJ L5/55, paras. 33-46.
[164] UEFA Statutes (Regulations governing the Implementation of the UEFA Statutes) [2021], article 49(1).

International Matches and any additional implementing rules adopted by the UEFA Executive Committee".[165] Due to the powerful position held by UEFA as the organiser of the Champions League, one of the absolute biggest football leagues in the world, the creation of breakaway leagues inherently leads to a conflict of interest.[166] Nevertheless, this system has allowed for the formation of other competing leagues, such as the Royal League, which consisted of various teams from Sweden, Norway and Denmark.[167] However, scholars argue that the situation of the European Super League is distinguished from leagues like the Royal League as the latter still corresponds to the interests held by the UEFA and upholds the pyramidal structure of the European Sports Model.[168] Moreover, the transnational yet local nature of those leagues do not undermine the position held by UEFA and therefore do not lead to a direct conflict of interests. With that being said, is it in line with EU competition law to have a prior authorisation system such as the one adopted by UEFA in Article 49 as a mechanism to exclude leagues which directly threaten their position and the European Model of Sports?

5.1. Preliminary points

This thesis aims to look at the questions referred by the national court by analysing both sides of the case in light of the jurisprudence of the European Courts. In order to make a proper assessment under EU competition law, one must first establish whether the entity in question is an undertaking, what the relevant market is, and whether it is dominant on that market.

5.1.1. FIFA and UEFA are associations of undertakings

As previously mentioned, FIFA has been considered to be an association of undertakings for the purpose of falling within the scope of EU competition law.[169] It is immaterial that FIFA and UEFA have a non-profit aim, and that they pursue a social aim.[170] The primary indication is nevertheless the financial resources and the activity undertaken by FIFA and UEFA, which includes the sale of broadcasting rights and the organisation of large international events which includes ticket sales

[165] ibid. Article 49(3).
[166] *International Skating Union* (n 2), para. 75.
[167] Robby Houben, Jan Blockx, Steve Nuyts, 'UEFA and the Super League: who is calling who a cartel?' [2022] International Sports Law Journal.
[168] ibid.
[169] *Piau* (n 113), paras. 69-79
[170] *MOTOE* (n 47), paras. 27-28.

and advertising.[171] It is moreover irrelevant that these are not their sole activities, as they still contribute to the overall economic nature of their activities. The members of FIFA and UEFA are the clubs which further pursue economic activities, including the transfer fees and the various sponsorship agreements and merchandise sales.

5.1.2. Market definition in football

When it comes to market definition, the geographical market should be the territory which is covered by the regulations and the operation of UEFA seeing as the European Super League is purely focusing on Europe. When it comes to the product market, the particular factors of professional sports can make such a definition complicated.[172] Following the reasoning of Stix-Hackl and Egger, the product market in professional football has three aspects: exploitation, contest, and supply.[173] The exploitation market includes the sale and exploitation of broadcasting rights, and the contest market includes the actual sporting contest that consists of two clubs competing against each other. In the contest market, the uncertainty of result and promotion and relegation are important factors.[174] It is not to be forgotten that the production of this product is largely focused on the players, trainers and medical staff, without which no product would be possible. The supply market is made up of the sale and purchase of players. Here, the transfer system in football can allow clubs to control the exchangeability of the players by determining their price. These three markets are interconnected but can also be distinguished depending on the context. When it comes to the European Super League, it has been noted that the relevant market should be the organisation of football competitions in Europe.[175] This market is connected to the exploitation market as the organisation of football entails access to the sale and distribution of advertising and broadcasting rights. In such a market, the clubs are not immediate competitors with FIFA and UEFA, but the combination of clubs coming together to form a European Super League would directly compete.[176] This therefore shows the substitutability of the product in this context, and therefore places both entities in the same market.

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[171] Alexander Egger, Christine Stix-Hackl, 'Sports and competition law: a never-ending story?' [2002] 23(2) European Competition Law Review 81.
[172] *Egger, Stix-Hackl* (n 170); see also a similar reasoning in *MOTOE* (n 45) para. 33.
[173] *Egger, Stix-Hackl* (n 170).
[174] ibid.
[175] Luca Marruzzo, 'UEFA's monopoly v the European Super League: chronicle of an already written ending?' [2022] 43(5) European Competition Law Review 219; see also *European Super League Summary of Request for Preliminary Ruling* (n 19), para. 22.
[176] *Luca Marruzzo* (n 174).

5.1.2. Dominance

It may seem straightforward that UEFA is a dominant entity in their market, but scholars have made interesting observations on this point by that should be raised. The fact that UEFA organises football competitions, and thereby engages with the exploitative aspect of football, means that they are highly dependent on football clubs to produce a good quality product on the contest market as well as their loyalty to UEFA. The fact stands that UEFA may not operate as efficiently without the performance of the clubs, but the clubs may switch to another supplier of the organisation of football competitions, and are therefore not necessarily dependent on UEFA. With that being said, it has been pointed out by the Commission that the practical monopolies of sport governing bodies may be considered dominant for the purpose of Article 102 TFEU.[177] Applying this to the case at hand, the dominance of UEFA is evident as their regulatory and organisatory powers render them in a practical monopolistic position. It has further been argued that FIFA and UEFA together hold a collectively dominant position due to the link between these two undertakings.[178]

5.2. The arguments by the parties

It is necessary to investigate both sides of this case in order to reach a concluding impression of the direction of the case. Therefore, this thesis will begin by examining the arguments put forward in the summary of the request for the preliminary ruling against FIFA and UEFA.[179]

5.2.1. The arguments put forward by the European Super League

With regards to the power that UEFA holds to authorise third parties to organise competitions, the applicant contends that the nature of that power results in an insurmountable barrier to entry of new competitors on the relevant market.[180] It has been recognised that prior authorisation systems may be considered in line with competition law if they include objective, transparent and non-

[177] *White Paper on Sport* (n 49), p. 68.
[178] Case C-395/96 P *Compagnie Maritime Belge and Dafra-Lines A/S v Commission* [2000] ECLI:EU:C:2000:132, paras. 40-45. The link in question can be economic, and not be purely based on an agreement between the two undertakings. It is through this link that a connection between the undertakings is established, and thus establishing collective dominance. Through the economic factors and the link in the operational functions of FIFA and UEFA, such collective dominance could be argued to exist.
[179] For the sake of simplicity, the following sections will have a focus on articles 49 and 51 of the UEFA statutes and the conduct by UEFA, as they are the main body governing football in Europe, which is the relevant geographic market in the case. There is an understanding that FIFA share the same stance as UEFA on the matter, and are therefore represented by UEFA in this instance.
[180] *European Super League Summary of Request for Preliminary Ruling* (n 19), para. 24.

discriminatory criteria which are known in advance.[181] However, it is the argument of the applicant that no such criteria have been fulfilled and subsequently, the general principle of legal certainty is undermined and therefore it imposes a severe restriction on competition law. In this vein, it is argued that the immediate conflict of interest that arises as a result of UEFA's prior authorisation system poses a threat to the transparency and objectiveness of the procedure.[182] As a result of this, prior authorisation systems must be subject to obligations and review to ensure that parties are not unduly deprived of market access for the purpose of favouring the events organised by the regulator.[183] Specifically with regards to Article 101 TFEU, it is observed that the agreement between FIFA and UEFA as individual associations of undertakings amounts to an agreement having the object the restriction of competition.[184] In support of this argument, it is argued that the subjective intention of FIFA and UEFA is irrelevant, and that having the objective to remedy a crisis in the football sector by adopting the prior authorisation mechanism is not an objective which can lead to the evasion of the application of Article 101 TFEU.[185] When it comes to Article 102 TFEU, the applicant claims that the self-given power of prior authorisation constitutes an abuse of dominance as it is behaviour which differs from normal competition.[186] It is further argued by scholars that the automatic self-preferencing that occurs as a result of the non-authorisation of a rival league constitutes abuse under Article 102 TFEU.[187]

5.2.2. Potential justifications

As importantly reiterated in the sports law jurisprudence of the CJEU, the potentially anti-competitive agreement should not be assessed in the abstract, but should rather be assessed on a case-by-case basis taking into account any potential justification relating to the specific sector within which the undertaking operates.[188] Therefore, the test laid down in *Meca-Medina*[189] shall be revisited in order to make a proper assessment. This includes the finding of a legitimate interest,

[181] *International Skating Union* (n 2), para 88; *Ordem dos Técnicos Oficiais de Contas* (n 139), para. 99; Pijetlovic further points out that a lack of supervision and regulation would not be in the interest of the sport, see *Pijetlovic* (n 71).
[182] *van Rompuy* (n 37).
[183] *International Skating Union* (n 2) para. 75; *MOTOE* (n 47) para. 52.
[184] *European Super League Summary of Request for Preliminary Ruling* (n 19), para. 27; see also *Houben et al* (n 166).
[185] Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECLI:EU:C:2008:643, para. 21.
[186] *European Super League Summary of Request for Preliminary Ruling* (n 19), para. 16, applying *Hoffmann La Roche* (n 144) para. 91.
[187] *Pijetlovic* (n 71).
[188] *Meca-Medina* (n 41), para. 42; see also Pijetlovic (n 71), p. 344.
[189] *Meca-Medina* (n 41), para. 42.

and the inherency and proportionality of the effects to that interest. Whilst this test specifically relates to Article 101 TFEU, it is a relevant assessment to make in order to establish abuse under Article 102 TFEU, as undertakings may protect their position, provided that they do so in a proportionate manner.

5.2.2.1. Legitimate interest

Not any interest will be deemed legitimate under EU sports law[190], but the following have already been considered to be legitimate by the Commission: the protection of the integrity of the sport, the protection of health and safety, the organisation and proper conduct of competitive sport and the protection of the good functioning of the match calendar.[191] It is not yet known what the exact arguments of the defendants are due to the early stages of the case at the time of writing, but scholars have observed that the system set up by UEFA aims to pursue two objectives: the development of the European Model of Sport (specifically the solidarity model and the system of promotion and relegation) as well as the protection of the proper organisation and conduct of competitions.[192] With regards to the former, the observation is that the revenue streams under the European Super League may not be as efficiently distributed seeing as they might only go to the clubs participating in the league.[193] With regards to the latter, the organisation of football matches includes the functioning of the match calendar which can be compromised if the European Super League puts a strain on the performance of the athletes by limiting their ability to rest and divide their energy according to their sporting obligations.[194] This therefore requires a centralised organisation system which ensures a calendar which is manageable for the entire industry, including broadcasters and managers. The European Super League did try to circumvent this issue by having matches mid-week and thereby allowing for athletes to remain in their national leagues.[195] However, it is during the weekdays that UEFA's Champions League also organises their matches, and it would therefore be another direct conflict with the interest held by UEFA. It is moreover worth adding that UEFA has recently revealed plans to adopt a new structure in the

[190] For example, the protection of economic and/or financial interests may not be considered as legitimate interests for the purpose of justifying a breach of EU competition law. See *International Skating Union's Eligibility Rules* (AT.40208) Commission Decision [2017], para. 220; see also *Pijetlovic* (n 71), p.335.
[191] *ISU Commission Decision* (n 189), para 219; see also *Pijetlovic* (n 71) p. 335-337.
[192] *Houben et al* (n 166).
[193] *Houben et al* (n 166); Pijetlovic further adds that sport governing bodies may require some of the profits of breakaway competitions in order to help keep the smaller clubs in lower divisions afloat, see *Pijetlovic* (n 71), p. 338.
[194] *Houben et al* (n 166).
[195] *Dunbar* (n 1).

UEFA Champions League which entails an increase in matches played. With this in mind, the European Super League would pose a more severe strain on the proper functioning of the match calendar, and whilst the question of whether this new Champions League structure is an act of retaliation against the European Super League remains unknown,[196] the proper functioning of the match schedule must nevertheless be upheld, and therefore it is an interest which is likely to be seen as legitimate by the CJEU.

5.2.2.2. Inherency

The General Court in *International Skating Union* did not put a lot of emphasis on the inherency of the eligibility rules to the interest sought, but the Commission assessed this in more detail in their decision against the International Skating Union. More specifically, the eligibility rules were not deemed to be inherent to the pursuit of their objective and no evidence was provided by the International Skating Union that the participation in the contested event would harm the objective sought.[197] This kind of reasoning may pose difficulties for the legality of the prior authorisation system adopted by UEFA as the imposition of such a system may not be inherent to the pursuit of protecting the solidarity system and the proper organisation of sports. However, it may still be argued that without the system of prior authorisation and the exclusive role held by UEFA, that the proper functioning of football would be undermined seeing as sports in Europe adopt a specific model which protects a practical monopoly held by sport governing bodies.[198] Most importantly, this has been recognised by the CJEU to help ensure that the *'special requirements of sport, such as uniform rules and a uniform timetable for competitions are taken into account'*.[199] But in the end, it does come down to the proportionality of the system with regards to the objective.[200]

[196] It has been pointed out that UEFA's main mechanism to prevent breakaway leagues is to change the format of its own competitions, see Anthony Macedo, Marta Ferreira Dias, Paulo Reis Mourão, 'A literature review on the European Super League of football – tracing the discussion of a utopia?' (2022) International Journal of Sport Policy and Politics.
[197] *ISU Commission Decision* (n 189), paras. 244-245.
[198] *Pijetlovic* (n 71).
[199] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECLI:EU:C:2008:142, Opinion of AG Kokott, para. 96.
[200] The importance of proportionality in cases regarding the autonomy of sport governing bodies has been continuously repeated by scholars, and is argued that respecting the principle of proportionality is the only way to maintain the European Model of Sports, see *Pijetlovic* (n 71), *Agafonova* (n 28) and *Lindholm* (n 81).

5.2.2.3. Proportionality

When it comes to proportionality, it is important to note that the proportionality of the prior authorisation system is not the only relevant assessment. It is also important to take the proportionality of the sanctions that flow from this system, especially the ones that were threatened to be imposed on the participating clubs and athletes in the European Super League, such as the inability to represent their country in the World Cup and European Championship.[201] In this regard, one should assess the suitability and necessity of those measures.[202] UEFA and FIFA would thus firstly have to prove that the sanctions flowing from Article 49 of the Statutes are suitable for the attainment of the objectives. This would mean that no other measure would be more appropriate. Judging from the strict test applied in *International Skating Union,* it might be unlikely that such a finding is going to be made. Secondly, the necessity of the measures would have to be shown in light of the potential finding of less restrictive measures. The exact scope of the sanctions is unclear, but the length of the ban would be a useful indication as to the necessity of it, as seen in *International Skating Union.*[203] In that case, the length of the ban was compared with the average length of a speed skating career, and was therefore deemed to go beyond what is necessary and was consequently deemed to be disproportionate. In the case at hand, the length of a footballer's career is similar to the one of a speed skater and therefore a similar assessment can be made. Against this backdrop, it has been argued that the sanctions that are threatened to be imposed do go beyond what is necessary, even if it is just for one World Cup or European Championship seeing as they only occur every four years and are the biggest sporting events in the world.[204] This would place a competitive strain on the athletes as they would not be able to compete in an event which may be the only one of that kind in their career, and also miss out on the financial benefits flowing from the advertising and general press that is connected with these events. When it comes to the prior authorisation system itself, it is the margin of discretion awarded to UEFA and FIFA which will be the main concern in the proportionality assessment.[205] Specifically, the lack of objective and transparent criteria poses issues with regards to the necessity of this margin, and

[201] The mandate for UEFA to impose such sanctions stems from the UEFA Statutes. *UEFA Statutes* (n 163), articles 52-54.
[202] This derives from the proportionality test developed in German administrative law, but has since then become a general principle of EU law, as seen in Case C--205/20 *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld* [2022] ECLI:EU:C:2022:16, para. 31; see also Gino Scaccia, 'Proportionality and the Balancing of Rights in the Case-law of European Courts' (2019) 4 Federalismo.it.
[203] *International Skating Union* (n 2), para. 92
[204] *Houben et al* (n 166); see also *Marruzzo* (n 174).
[205] *International Skating Union* (n 2) paras. 86-89.

therefore the principle of legal certainty might be compromised. As such, the necessity of this margin of discretion would be difficult to demonstrate.[206] As a consequence, it is likely that the CJEU will find FIFA and UEFA's actions to be disproportionate and therefore restrictions of competition law under Articles 101 and 102 TFEU.

5.2.2.4. The reasoning in DLG

FIFA and UEFA may rely on the reasoning of the CJEU in *DLG*,[207] where the Danish agricultural cooperative purchasing association in question that had been established for the protection of a common interest was permitted to exclude some of their members for participating in a competing cooperative in pursuit of their objective. In this case, the exclusion of these members was seen as a legitimate way to uphold the cooperative, and the conduct was not considered abusive for the purpose of Article 102 TFEU.[208] FIFA and UEFA could rely on this by arguing that the prior authorisation system and the sanctions are needed in order to protect certain elements of the European Model of Sports. However, this interest would need to be protected in a proportionate manner. As assessed above, it is likely that the CJEU will find that FIFA and UEFA fail to fulfil the necessity limb of the proportionality assessment, and consequently, breach of Article 102 TFEU can be established despite the invocation of the reasoning in *DLG*.

6. Is the European Super League the better option?

It is important to note that a new league, itself, would not be against the European Model of Sports and, as previously noted, breakaway leagues have been established before.[209] With that being said, due to the strong response by UEFA, FIFA, football stakeholders and fans, it is necessary to assess the legality of the European Super League in order to ascertain whether that reaction is justified. An important preliminary remark is that the assessment is made on the information that is generally available. As the project never came into fruition, there are some details missing about the project that could change the conclusions reached hereinafter.

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[206] *Dunbar* (n 1).
[207] Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA* [1994] ECLI:EU:C:1994:413.
[208] *DLG* (n 206), para. 52 ; *Pijetlovic*, (n 71), p. 344.
[209] Tsjalle van der Burg, 'EU competition law, football and national markets' (2020) Managing Sport and Leisure.

6.1. Is it anti-competitive?

One of the main goals of competition law is consumer welfare,[210] which includes low prices, high quality products, choice and innovation.[211] Due to its importance, the following assessment will be made in that light. It was previously mentioned that the relevant market in this case is the one of organisation of football in Europe. However, scholars have noted the adverse effects the Super League would have on national markets, which therefore calls for them to be taken into account as well.[212] The main argument put forward is that the choice and quality on national markets would be reduced as the (at most) handful number of clubs that would play in the Super League would be the representatives of the top performing football clubs in their nation, and through financial gain from the Super League which would be invested into the performance of the club, would further help eliminate the uncertainty of outcome of matches.[213] Furthermore, the European Super League has been described as a cartel, despite the possibility of having five teams qualify based on merit each year. This argument stems from the fact that the 15 permanent members are guaranteed the lucrative broadcasting rights that are associated with the European Super League. This then leads to a significant increase in market revenue and market power based on the collective success of the clubs in a merit-based system which they are now partly abandoning.[214] Based on these findings, it is likely that the European Super League would be considered anti-competitive under Article 101 TFEU. Beyond strict application of competition law is the general application of EU law and EU policies which have also come into consideration in the application of competition law.[215] In particular, the EU promotes a system of promotion and relegation within sports as enshrined in Article 165 TFEU. By limiting this sport principle and only including football clubs based on their profitability and market power, the Super League poses threats to the European Model of Sports.

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[210] *Servizio Elettrico Nazionale* (n 107) para. 46.
[211] *Commission Guidelines, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (n 105).
[212] *van der Burg* (n 208).
[213] Tsjalle van der Burg, 'A European Super League would violate EU competition law – as would UEFA's proposed reforms of the Champions League' (*LSE Law Blog*, 2021) < https://blogs.lse.ac.uk/europpblog/2021/02/20/a-european-super-league-would-violate-eu-competition-law-as-would-uefas-proposed-reforms-of-the-champions-league/> accessed 12th May 2022; see also *Macedo et al* (n 195).
[214] Andreas Stephan, 'Do Plans for a European Super League Breach Competition Law?' (*Competition Policy Blog*, 2021) < https://competitionpolicy.wordpress.com/2021/04/20/do-plans-for-a-european-super-league-breach-competition-law/> accessed 12th May 2022.
[215] See, for example, *International Skating Union* (n 2).

6.2. Can it be justified?

Two potential interests have been identified by scholars, namely the need for a limited number of clubs in order to draw up and maintain workable match calendars, and that the financial commitment needed from the participating clubs could only be achieved if there is a guarantee of a return on their investment.[216] As a lack of financial viability would not allow for the creation of the new league, it can be argued that these interests constitute ancillary restraints. It would, however, be up to the CJEU to ascertain the legitimacy of these interests and whether they can be relied upon to justify a competition law breach. More importantly, it is the inherency and proportionality of the European Super League in relation to these interests that will play an important role in the assessment. Firstly, it should be observed that there are less restrictive measures available that would ensure the return of investment, and therefore no closed and exclusionary league would be necessary. For example, the number of permanent members could be reduced whilst achieving the same goal. It has also been suggested that the option to remove investments once a club is relegated would be a less harmful option.[217] The closed nature of the league has further been compared to the situation in *MasterCard*,[218] where the bank fees in question were deemed too high for the proper functioning of the credit cards, and thus created a barrier to entry which was unnecessarily high.[219] In this vein, it is argued that the closed nature of the league creates a barrier to entry which is too high considering the aims that are being sought. Therefore, it is unlikely that the European Super League would be able to rely on the ancillary restraints doctrine as laid down in *Wouters* and *Meca-Medina.* When it comes to Article 101(3), there could be arguments that the European Super League is justified based on the efficiency defence. It may be argued that the first two criteria of the defence can be fulfilled, seeing as consumers would be able to enjoy football with high quality seeing as it concerns the best

[216] *Houben et al* (n 166).
[217] ibid.
[218] Case C-382/12 P *MasterCard Inc. and Others v Commission* [2014] ECLI:EU:C:2014:2201.
[219] *Macedo et al* (n 193); see also Dwayne Bach, 'The Super League and its related issues under EU Competition Law' (*Kluwer Competition Law Blog*, 2021) < http://competitionlawblog.kluwercompetitionlaw.com/2021/04/22/the-super-league-and-its-related-issues-under-eu-competition-law/> accessed 20th May 2022.

footballers worldwide.[220] However, the indispensability aspect of the defence would likely not be fulfilled due to the semi-closed nature of the league and the less restrictive measures available.[221]

7. The impact of the European Super League case on the European Model of Sports

7.1 The monopolistic nature of sport governing-bodies

The CJEU is now at a crossroad when it comes to the future of European sports. By finding that FIFA and UEFA's actions are justified, the EU's top court would formally recognise and reinforce the monopolistic nature of the European Model of Sports, which would be a welcome message by the other European institutions. In fact, in November 2021, the Council of the European Union approved a resolution on the European Model of Sports during the EU's Council on Education, Youth, Culture and Sport. In particular, the pyramidal structure, the principle of one federation per discipline, the promotion of open competition and the solidarity mechanism are some specific features which were upheld in the resolution.[222] It was argued that this resolution comes at a time where the increased commercialisation of professional sport leads to increasingly profit-oriented competitions without the focus on the social function of sports and sporting based on merits.[223] It has further been observed by the Commission in their opinion on the *European Super League* case, that a sport governing body could justify the blocking of a rival league based on the fact that they would not conform to the European Model of Sports as the Commission strongly values the open nature of competitions and sporting based on merit.[224] Even if these opinions do not have any legally binding effect, it is likely to be highly influential in the CJEU seeing as the Commission is the top competition law enforcer in the EU. However, would this finding be in line with the CJEU's jurisprudence on sports as outlined in the previous section of this thesis? The CJEU has moved away from an all-encompassing sporting exception to increased liability of sport governing bodies

[220] This may be countered with the observation that the lack of a threat to be relegated might remove the motivation for football teams to play their best football. This is especially corroborated by the fact that they are already making a lot of money simply by participating in the European Super League, see *Dunbar* (n 1).
[221] *Houben et al* (n 166).
[222] Council of the European Union Press Release, 'Sport: Council resolution stresses key features of values-based sport model' (2021) https://www.consilium.europa.eu/en/press/press-releases/2021/11/30/sport-council-resolution-stresses-key-features-of-values-based-sport-model/ accessed 14th May 2022.
[223] ibid.
[224] Joachim Piotrowski, Simon Neill, 'Half-time analysis: what's next for the European Super League?' (*Lexology*, 2022) https://www.lexology.com/library/detail.aspx?g=cdfcaedf-6b1b-4638-86da-90d2074c52ee accessed 14th May 2022.

under competition law, whilst still allowing for the specific nature of sports to be taken into account. But as seen in *International Skating Union,* the proportionality test adopted in this respect is still as strict as in other areas of competition law. Therefore, the specificity of sports is no blanket exception and will arguably lose its value over time the more sport governing bodies use (and abuse) their monopolistic power. On the other hand, by maintaining the European Model of Sports, the CJEU would uphold consumer welfare due to the maintenance in quality and favourable prices. The harm of the European Super League is reflected in the reactions by fans and football stakeholders in the days following the announcement of the project. This kind of reaction sends a message to policy makers and courts alike that breakaway leagues of this kind are not in the interest of the public, which albeit is different from consumer welfare, reflects the decrease in quality that the European Super League would bring, as perceived by the fans. With that being said, there are differing opinions on the consumer welfare effects of the European Super League[225], but an assessment in the light of consumer welfare would definitely resonate with the approach recently taken by the CJEU in cases such as *Servizio Elettrico Nazionale*[226] and *Intel Renvoi.*[227] The CJEU will most likely revisit the most integral aspect of the monopolistic role held by sport governing bodies, namely the margin of discretion enjoyed by them. As seen in the competition law jurisprudence on this area, there is a limit to this discretion.[228] This has further been elaborated upon in free movement cases like *TopFit Biffi*,[229] and by the ECtHR in *Platini.*[230] The question remains whether the CJEU will apply these cases in competition law, and whether they are ready to accept a standard margin of discretion to be enjoyed by all sport governing bodies. Such an action could lead to a strong stance against the monopolistic nature of the European Model of Sports as we know it, whilst still endorsing it by recognising its importance, albeit with limitations.

7.2 The possibility of diverging values

Another important point to note with regards to the possibility of finding FIFA and UEFA's actions to be justified would be in connection with the 2022 FIFA World Cup in Qatar and the controversy surrounding that. It is no secret that the business conducted by FIFA has caused controversy with

[225] See, for example, *van der Burg* (n 212) and *Piotrowski, Neill* (n 223).
[226] *Servizio Elettrico Nazionale* (n 107).
[227] *RENV Intel* (n 161).
[228] See, for example, *MOTOE* (n 47) and *International Skating Union* (n 2).
[229] *TopFit Biffi* (n 53).
[230] *Platini v Switzerland* (2020) ECHR 526/18, para. 63.

regards to corruption, and it is no secret that the 2022 FIFA World Cup in Qatar entails poor working conditions for the workers on site, and the support of a country with values that do not resonate with those held by the EU, including discrimination based on sexuality and race.[231] It goes without saying that the CJEU adopts the rule of law, meaning that the parties before them receive a fair and unbiased judgment, but it might be affecting policy objectives of the European Commission and other EU institutions in case the CJEU endorses the position held by FIFA and UEFA by upholding their monopolistic position. The direct invocation of human rights in EU sports law has been limited, but not non-existent. Principles such as non-discrimination and the importance of the training and recruitment of young players were invoked in *Bosman*, for example.[232] Due to the controversies surrounding the 2022 FIFA World Cup, it would be expected of the EU institutions to condemn the event due to the differing values, as can be seen in Article 2 TEU.[233] Again, this cannot be expected of the CJEU in the *European Super League* case, but a finding which would limit the powers of FIFA and UEFA could have an indirect impact on the treatment of human rights by sport governing bodies through the work of the other EU institutions after the judgment.

7.3 A transatlantic step?

If the CJEU were to find that FIFA and UEFA's actions do infringe competition law and points out the problematic aspects of the monopoly held by FIFA and UEFA, European sports would potentially take a step towards the American Model of Sports, where closed leagues are the norm. It is unlikely that this would be received well by the EU Treaties which strongly uphold important principles such as non-discrimination.[234] Furthermore, Article 165 TFEU would be undermined as the open nature of sports would be compromised. This case would further beg the question of whether the other sports should adopt the same closed model, and in turn allow for increased commercialisation of sports. Such a type of league would further need some kind of exemption from competition law, seeing as a closed league as the European Super League would potentially

[231] Sean Ingle, 'Human rights groups warn of 'serious issues' as Qatar World Cup worker jailed' *The Guardian* (2021) <https://www.theguardian.com/football/2021/dec/15/former-qatar-world-cup-worker-jail-term-angers-human-rights-groups-abdullah-ibhais > accessed 14th May 2022; Simone Foxman, 'Why Qatar Is a Controversial Venue for 2022 World Cup' *Bloomberg* (2021) <https://www.bloomberg.com/news/articles/2021-06-21/why-qatar-is-a-controversial-venue-for-2022-world-cup-quicktake> accessed 14th May 2022.
[232] *Bosman* (n 30).
[233] Consolidated Version of the Treaty on European Union [2012] OJ C 326/13, Article 2.
[234] ibid. Article 3*; Charter of Fundamental Rights of the European Union* (n 5), Article 21.

raise competition law issues. Without such an exemption, it would be difficult to ensure the proper organisation of sports whilst allowing for the commercialisation to increase. [235]

7.4 So what will be the outcome?

For the reasons above, the CJEU has a lot bearing on its shoulders. It is the opinion of the author of this thesis that the CJEU is likely to find that the prior authorisation system and the sanctions threatened to be imposed by FIFA and UEFA fail on the necessity limb of the proportionality assessment, and for that reason will be deemed anti-competitive. It is nevertheless expected that the CJEU will take the opportunity to uphold certain elements of the European Model of Sports, including the open nature of leagues and sporting based on merit. This would allow for the CJEU to take a strong stance on the legitimate interest sought by FIFA and UEFA whilst maintaining a strict proportionality test, as seen previously in the jurisprudence of the CJEU. The CJEU will have to tread carefully so as to not fall outside of their competence within sports,[236] and therefore, details about sanctioning and other rules inherent to sport will fall within the competence of the sport governing bodies.[237]

8. Conclusion

Competition law shapes sports governance,[238] and therefore, the CJEU will need to address the discretion awarded to sport governing bodies, something which has been widely considered a key issue.[239] Together with the *International Skating Union* appeal, the *European Super League* case poses questions which may change the European Model of Sports, and thus go against important policy documents like the Commission White Paper on Sport, in favour of the proper implementation of EU competition law.[240] However, based on the findings of this thesis, the CJEU is likely to endorse the position of sport governing bodies as the most efficient way of organising sports. But, in doing so, it is also a potential outcome that the margin of discretion

[235] Sports organisations in America have withstood competition law scrutiny for this purpose, as can be seen in the case of *Mid-South Grizzlies v. NFL*, 720 F.2d 772 (3rd Cir. 1983).
[236] Consolidated Version of the Treaty on European Union [2012] OJ C 326/13, Article 6(e).
[237] *Pijetlovic* (n 71).
[238] *Agafonova* (n. 28).
[239] *García* (n 34); *Brannagan et al* (n 11).
[240] A similar approach has been taken before by the CJEU. A comparable situation is when the CJEU favoured important human rights like data privacy instead of the important political relationship between the EU and the USA in the *Schrems II* case, see Case C-311/18 *Facebook Ireland and Schrems* [2020] ECLI:EU:C:2020:559.

will be seen as overstepping what is necessary to reach any legitimate interest pursued by FIFA and UEFA. Consequently, the rules adopted by FIFA and UEFA would constitute restrictions under EU competition law. Such a finding would be in line with jurisprudence of the European Courts but would perhaps lead to a leap across the Atlantic towards the American Sports Model which entails closed leagues and high commercialisation. Such an interpretation could be seen as a more modern take on professional sports, seeing as the European market sees high consumption and increased commercialisation. This would also be seen a welcome outcome for those arguing that sports should be treated more realistically.[241] This means an environment where governing bodies would retain special power, but have the obligations to respect the principles of proportionality and transparency.[242] A narrower interpretation of EU competition law in this case, or a widening of the test in *Meca-Medina* would redevelop a sporting exception, and completely go against the direction in which the CJEU jurisprudence was heading.[243] The CJEU further has a chance to take into consideration the case law on the discretion of sport governing bodies and its effect on fundamental freedoms, as well as the case law developed by the ECtHR on this matter. As such, a generally applicable judgment *(arrêt de principe)* could be reached, that would take a clear stance on the prerogative of sport governing bodies in areas falling within the exclusive competences of the EU. In any case, a more narrow judgment could still change the way that sports is perceived in modern day Europe.

[241] *Agafonova* (n 28).
[242] *Agafonova* (n 28); This would further respond to points made by scholars that the European Model of Sports, *per se*, is anti-competitive. By respecting the principle of proportionality and upholding legitimate interests, these concerns would be eliminated, and the European Model of Sports would be modernised and unproblematic, see Lindholm (n 81).
[243] *Lindholm* (n 81).

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