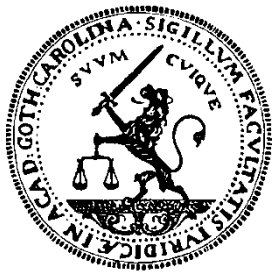

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The FIFA and UEFA prior authorisation rules and the European Super League in light of competition law: A red card?

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Summary

This thesis scrutinises the concept of the European Super League in light of EU competition law and aims to provide an answer to the question whether the rules on prior authorisation by FIFA and UEFA infringe Article 101 and/or Article 102 TFEU, and whether the European Super League itself infringes Article 101 TFEU. The outcome of this thesis is that both questions must be answered in the affirmative.

FIFA's and UEFA's rules on prior authorisation amount to a restriction of competition by object under Article 101(1) TFEU and abuse of a dominant position under Article 102 TFEU, as the rules restrict market access. Moreover, the rules are disproportionate, seeing that they do not set out any criteria regarding the approval of prior authorisation requests and are not subject to restrictions, obligations and review.

Would the European Super League be executed in the way it was announced in 2021, it would restrict competition by effect under Article 101 TFEU as it would allow the founding clubs to increase their market power. The European Super League agreement cannot be justified as it is disproportionate and could damage the competitive structure of the market.

Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
EMoS	European Model of Sport
ESL	European Super League
ESLC	European Super League Company S.L.
EU	European Union
FIFA	Fédération Internationale de Football Association
GC	General Court
SGB	Sports governing body
TEU	Treaty of European Union
TFEU	Treaty on the Functioning of the European Union
UEFA	Union of European Football Associations

1. Introduction

1.1. Background

In April 2021, twelve European top-football clubs announced the European Super League ('ESL'), a new football competition. The ESL would consist of fifteen founding clubs and five annual qualifiers. The games would be played mid-week, and all clubs would remain in their domestic leagues.[1] Most importantly, this competition would not be regulated by the Union of European Football Associations ('UEFA'), which is the governing body of European football and the sole organiser of the three current European football club competitions: the Champions League, the Europa League, and the newly established Conference League.[2] As such, the ESL would constitute a 'breakaway league'. According to UEFA, the ESL would infringe Article 49(3) of the UEFA Statutes, which states that competitions which are not organised by UEFA but are played on UEFA's territory should have prior authorisation.[3] In reaction to the announcement of the ESL, the Fédération Internationale de Football Association ('FIFA'), UEFA and UEFA's members (55 national football organisations across Europe) adopted a joint statement, saying that they will remain united in their efforts to stop the ESL. FIFA and UEFA threatened that the clubs participating in the ESL would be banned from participating in other competitions, and that their players could be denied to represent their national teams.[4] This statement, combined with a wave of criticism from fans, politicians and football players, made that within 72 hours after the announcement of the ESL, most of the football clubs involved declared that they would withdraw from the competition.[5] By May 2021, nine of the twelve founding clubs had withdrawn from the ESL and had agreed to reintegration measures drawn up by UEFA, acknowledging that the ESL was a mistake and that it would not have been authorised by UEFA.[6] However, that is not yet the end of the Super League saga. Today, the ESL is still supported by the three remaining founding clubs (Real Madrid, FC Barcelona and Juventus) and is subject to legal proceedings before a commercial court in Madrid. The applicant in this procedure is the European Super League Company S.L. ('ESLC'), a

[1] European Super League Company, 'The Super League' <www.thesuperleague.com> accessed 3 January 2022.
[2] UEFA, 'What UEFA does' (22 January 2019) <www.uefa.com/insideuefa/about-uefa/what-uefa-does> accessed 14 January 2022.
[3] Joint Brussels Office, 'The European Super League and Competition Law' (*The UK Law Societies' Joint Brussels Office* 31 August 2021) <www.lawsocieties.eu/news/the-european-super-league-and-competition-law/6001961.article> accessed 3 January 2022.
[4] UEFA, 'Statement by UEFA, the English Football Association, the Premier League, the Royal Spanish Football Federation (RFEF), LaLiga, the Italian Football Federation (FIGC) and Lega Serie A' (18 April 2021) <www.uefa.com/insideuefa/mediaservices/mediareleases/news/0268-12121411400e-7897186e699a-1000--joint-statement-on-super-league/> accessed 3 January 2022.
[5] 'European Super League timeline: Game changer – football's volatile 72 hours' *BBC* (21 April 2021) <www.bbc.com/sport/football/56825570> accessed 4 January 2022.
[6] UEFA, 'UEFA approves reintegration measures for nine clubs involved in the so-called 'Super League' (7 May 2021) <www.uefa.com/insideuefa/news/0269-123871bd86ca-d9571aa78f72-1000--uefa-approves-reintegration-measures-for-nine-clubs-involved-in/> accessed 15 May 2022.

company set up by the founding clubs of the ESL. The ESLC questions the legality of the prior authorisation rules in the UEFA and FIFA Statutes, inter alia in light of Articles 101 and 102 TFEU. The relevant rules in the FIFA Statutes are Articles 22, 71 and 73 of the FIFA Statutes, which state that FIFA's members – including UEFA – must ensure that international leagues are not formed without FIFA's consent and approval (Article 22(3)(e)), that no competition can take place without FIFA's and/or the member association's consent (Article 71), and that clubs affiliated to a member organisation of FIFA may only join another member association or take part in competitions in that member's territory when prior authorisation has been given by the member organisations and FIFA (Article 73).[7] With regard to the UEFA Statutes, the relevant articles are Articles 49 and 51, which state that competitions not organised by UEFA but played on UEFA's territory require prior approval by FIFA and/or UEFA (Article 49(3)), and that no alliances between UEFA member associations, leagues or clubs may be formed without the permission of UEFA (Article 51(1)).[8] All these rules will be referred to as the 'rules on prior authorisation'. The Madrid court decided to stay the proceedings and to refer preliminary questions to the Court of Justice of the European Union ('CJEU' or 'the Court'), inter alia asking whether FIFA's and UEFA's rules on prior authorisation are contrary to Articles 101 and 102 TFEU.

The abovementioned events are interesting from a competition law perspective for two reasons. Firstly, the ESLC argues that the prior authorisation rules in the FIFA and UEFA Statutes constitute abuse of a dominant position under Article 102 of the Treaty on the Functioning of the European Union ('TFEU'), and that UEFA and FIFA are imposing unjustified and disproportionate restrictions in breach of Article 101 TFEU.[9] Secondly, it could possibly be argued that the ESL itself would infringe Article 101 TFEU, as the closed nature of the competition could be seen as a cartel.[10] These questions are even more interesting seeing that recently, there have been rumours about a revive of the ESL.[11]

1.2. Research question and purpose

The aim of this thesis is to investigate the legitimacy of the UEFA and FIFA rules on prior authorisation, and the legitimacy of the creation of the ESL in light of competition law. Therefore, the research question of this thesis is:

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[7] FIFA, 'FIFA Statutes' (June 2019 edition).
[8] UEFA, 'UEFA Statutes' (Edition 2020).
[9] Case C-333/21 *European Super League Company v UEFA and FIFA* (request for a preliminary ruling), para 16.
[10] See Dwayne Bach, 'The Super League and its related issues under EU Competition Law' (*Kluwer Competition Law Blog*, 22 April 2021) <http://competitionlawblog.kluwercompetitionlaw.com/2021/04/22/the-super-league-and-its-related-issues-under-eu-competition-law/> accessed 3 January 2022.
[11] Simon Stone, 'European Super League: A 'nonsense' idea but is it still possible without the English clubs?' *BBC* (London, 3 March 2022) <https://www.bbc.com/sport/football/60609854> accessed 17 May 2022.

Do the rules on prior authorisation by FIFA and UEFA infringe Article 101 and/or Article 102 TFEU, and does the European Super League infringe Article 101 TFEU?

The sub-question are as follows:

- How are Articles 101 and 102 TFEU applied within the context of sports?
- Do the rules on prior authorisation by FIFA and UEFA infringe Article 101 TFEU?
- Do the rules on prior authorisation by FIFA and UEFA infringe Article 102 TFEU?
- Does the European Super League infringe Article 101 TFEU?

The 'rules on prior authorisation' must be understood as Articles 49 and 51 of the UEFA Statutes, and Articles 22 and 71 to 73 of the FIFA Statutes.

1.3. Delimitations and methodology

Before moving on to the content of this thesis, five delimitations must be made clear. Firstly, it must be noted that this thesis falls within the realm of competition law, however, it also has input from free movement law. This is because free movement law has been highly important to shape the application of European law to sports, especially in relation to prior authorisation.

Secondly, European competition law exists of antitrust law, merger control and rules on State aid. This thesis will focus on antitrust law, which exists of Articles 101 and 102 TFEU. This is because merger control and rules on State aid are not relevant with regard to the ESL.

Thidly, it must be noted that the rules of FIFA and UEFA will be examined in light of both Articles 101 and 102 TFEU, whereas the ESL will only be examined in consideration of Article 101 TFEU. This is because it is impossible to predict whether the ESL would – if the plans were to be executed – hold a dominant position, and if so, what that dominant position would look like. This is even more the case seeing that there are currently only three clubs involved in the ESL, however, a possible revival of the ESL in another formation is not excluded.[12] It cannot be ruled out that the format of the ESL might change, depending on the outcome of the CJEU ruling in the ESLC case. For these reasons, the ESL will not be examined in light of Article 102 TFEU.

Fourthly, it is important to note that the cases before the Madrid Court and the Court of Justice have not been ruled on yet. The answers to the preliminary questions sent to the Court of Justice are not expected before handing in this thesis. As a consequence, this thesis will have a somewhat anticipating nature and the research results can unfortunately not be compared to the outcome of the rulings of the CJEU and Madrid Court. Nevertheless,

[12] Stone (n 11).

it still remains interesting to compare the outcome of this thesis with those judgments at a later stage.

Finally, the research will be based on academic literature, official publications, and case law. Due to the novelty of the topic, it will also exploit newspaper articles, blogs, and other publications. The research is thus based on legal doctrinal methodology.

2. European competition law in the context of sports

This Chapter seeks to answer the first sub-question by investigating how Articles 101 and 102 TFEU are applied within the context of sports. To be able to answer that question, this Chapter will first investigate what Articles 101 and 102 TFEU entail (paragraph 2.1). Secondly, the organisation of sports in the European Union ('EU') will be explored (paragraph 2.2). Subsequently, the application of EU law to sports will be examined (paragraph 2.3). As previously stated, will this be done in a broader sense than only examining competition law, as free movement law has also played an important role in shaping the legal context within the field of sports. Finally, this Chapter will formulate an answer to the first sub-question (paragraph 2.4).

2.1. European competition law

EU competition rules deal with market imperfections and failures.[13] If markets were to be left alone, firms are likely to collude in such a manner that would be profitable to them, but which would disadvantage the society as a whole.[14] Based on Article 3(1)(b) TFEU, it is the exclusive competence of the Union to establish the competition rules.

Articles 101 and 102 TFEU only apply to undertakings and associations of undertakings, which thus determines the scope of competition law.[15] Therefore, the meaning of an undertaking will be discussed first.

2.1.1. Undertaking or association of undertakings

The concept of an undertaking is not defined in the Treaties but has been considered extensively by the CJEU and Commission.[16] The basic definition was laid down by the CJEU in *Höfner*, where the Court considered that 'the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity

[13] Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases and Materials* (7th edn, OUP 2019) 3.
[14] ibid.
[15] Jones, Sufrin and Dunne (n 13) 141.
[16] Van Bael & Bellis, *Competition law of the European Union* (6th edn, Wolters Kluwer 2021) 25.

and the way in which it is financed'.[17] As the legal status of the entity is not decisive, natural persons, legal persons and even public bodies can be regarded as undertakings.[18] The crux is thus whether an entity carries out an economic activity.[19] The CJEU has given a wide interpretation to this concept, considering that an economic activity must be understood as any activity consisting in offering goods or services on a given market.[20] Furthermore, it should, in principle, be possible that that activity is carried out by a private undertaking in order to make profits.[21] It is irrelevant whether the entity actually seeks to make a profit[22] or is not set up for an economic purpose.[23] For example, customs agents, self-employed medical specialists, musicians and opera singers have been held to engage in economic activity and therefore constitute undertakings.[24] However, employees – and thus football players employed by a club – generally do not constitute undertakings.[25]

Article 101 TFEU also applies to decisions taken by *associations of undertakings*. In *Wouters*, the Court clarified that the concept of an association of undertakings 'seeks to prevent undertakings from being able to evade the rules on competition' by 'institutionalised forms of cooperation'.[26] Examples of associations of undertakings are trade associations and professional bodies. It is irrelevant whether an association has a public law status.[27] In contrast with the definition of undertaking, an association of undertakings does not have to engage in economic activity itself to fall within the scope of Article 101(1). It is sufficient that the association of undertakings is an institutionalised form of coordination.[28] An example of an association of undertakings is given in *Wouters*, where the CJEU ruled that decisions of the Netherlands Bar should be seen as decisions adopted by an association of undertakings, as its members – lawyers who offer legal services for a fee – carry out an economic activity and thus constitute undertakings.[29]

Competition law does not apply to the exercise of sovereign powers of the state, essential tasks performed in the public interest, or administrative functions.[30] However, one entity can carry out essential tasks performed in the public interest, whilst simultaneously

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[17] Case C-41/90 *Höfner* [1991] ECR I-01979, para 21.
[18] Jones, Sufrin and Dunne (n 13) 142.
[19] Alison Jones, 'The boundaries of an undertaking in EU competition law' [2012] European Competition Journal 301, 302.
[20] Case C-35/96 *Commission v Italy* [1998] ECR I-3851, para 36; Case C-205/03 P *FENIN v Commission* [2006] ECR I-06295, para 25.
[21] Case C-67/96 *Albany* [1999] ECR I-05751, Opinion of AG Jacobs, para 311; Cases C-180–184/98 *Pavlov* [2000] ECR I-06451, para 201.
[22] *Albany* (n 21); Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-08089.
[23] Case C-155/73 *Sacchi* [1974] ECR 00409; Jones, Sufrin and Dunne (n 13) 143.
[24] See Van Bael & Bellis (n 16) 28.
[25] Lars Halgreen *European Sports Law* (Karnov Group Denmark 2013) 94.
[26] Case C-309/99 *Wouters* and Others [2002] ECR I-01577, para 61.
[27] *Commission v Italy* (n 20), para 40; *Pavlov and Others* (n 21), para 85.
[28] See for example Case C-382/12 P *MasterCard and Others v Commission* [2014], para 72.
[29] *Wouters* (n 26), paras 48-49, 64.
[30] Case C-30/87 *Bodson v Pompes funèbres des régions libérées* [1988] ECR 02479, para 118; Jones, Sufrin and Dunne (n 13) 144.

providing services which constitute economic activity. It is therefore relevant to note that the notion of undertaking is 'a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules'.[31]

Having established that competition law only applies to undertakings, this thesis will now elaborate on the rules that undertakings are subject to, starting by Article 101 TFEU.

2.1.2. Article 101 TFEU

Article 101 TFEU prohibits agreements and other types of collusive behaviour between undertakings that restrict competition and affect trade between Member States. Contractual arrangements between undertakings are present on any market, however, agreements could be used to, for example, artificially reduce output and raise prices. Article 101 TFEU covers these agreements, and additionally covers any other type of collusion between undertakings that restricts competition. The rationale behind Article 101 TFEU is that undertakings are supposed to compete with each other – they should not cooperate to disadvantage competition and, in the end, consumers.[32]

The first paragraph of Article 101 TFEU provides a prohibition of certain types of conduct that restrict competition. The second paragraph sets out one of the consequences of infringing Article 101(1) TFEU, namely nullity. The third paragraph stipulates the conditions for escaping the prohibition.

For the prohibition of Article 101(1) TFEU to apply, four conditions have to be fulfilled:

- Two or more undertakings or an association of undertakings;
- Which have some type of collusion, or a decision by an association of undertakings;
- With the object or effect of restricting competition to an appreciable extent;
- Which may affect trade between Member States to an appreciable extent.

The notion of an undertaking has already been discussed. In the following paragraphs, the remaining requirements will be explained.

2.1.2.1. Agreement or other type of collusion

Article 101(1) TFEU prohibits 'agreements between undertakings, decisions by associations of undertakings and concerted practices' which restrict competition. Triggering this prohibition thus requires some form of joint behaviour, but unilateral conduct falls outside its scope. The categorisation of the collusion does not make any material difference and where this thesis uses one of these terms, the other types of collusion must also be deemed

[31] *Ambulanz Glöckner* (n 22), Opinion of AG Jacobs, para 72.
[32] Van Bael & Bellis (n 16) 23.

included. However, for the sake of clarity, the meaning the terms agreements, decisions, and concerted practices mentioned in Article 101(1) will now be discussed.

The term 'agreement' has been interpretated broadly by the CJEU and encompasses 'any kind of consensus or understanding between parties as to their future behaviour.'[33] Based on *Bayer AG v Commission*, the key element is that there must be 'a concurrence of wills' between undertakings.[34] It is irrelevant in which such a joint intention is expressed and it does not need to be a valid agreement under national law.[35] For example, an agreement can be written or oral, signed or unsigned, and it can constitute of terms and conditions, guidelines or protocols.[36] Furthermore, it is irrelevant whether a company has taken part in all features of an anti-competitive agreement, nor is it relevant that it merely played a minor role in its implementation. It is also immaterial whether one of the undertakings to the agreement is not active on the market targeted by the agreement.[37] The concept of 'agreement' is objective in nature, which means that underlying motives and hidden intentions are not relevant.[38]

The prohibition of Article 101(1) TFEU also applies to joint conduct through decisions of an association of undertakings. In such a case, both the association and the member company may be liable for infringing Article 101(1) TFEU.[39] As already stated, the term 'association' has been interpreted broadly.[40] In addition, the term 'decision' has also been interpreted in a broad manner. For example, the CJEU has ruled that a non-binding recommendation by an association of undertakings may also constitute a decision in the sense of Article 101(1) TFEU, if it reflects the association's aim to coordinate the conduct of its members.[41] Furthermore, the operation of certification schemes, resolutions, and the association's constitution may amount to decisions in the spirit of Article 101(1) TFEU.[42]

A concerted practice is any form of coordination between undertakings which does not amount to an agreement.[43] This requires a joint intention of both parties to behave in a specific way as to influence the conduct of a competitor.[44] However, this 'does not deprive economic operators of a right to adapt intelligently to the existing and anticipated conduct

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[33] Van Bael & Bellis (n 16) 37.
[34] Case T-41/96 *Bayer v Commission* [2000] ECR II-03383.
[35] Case C-277/87 *Sandoz v Commission* [1990] ECR I-00045 (para 2 of summary judgment).
[36] Van Bael & Bellis (n 16) 40.
[37] ibid 39.
[38] Jones, Sufrin and Dunne (n 13) 167.
[39] Case T-193/02 *Piau v Commission* [2005] ECR II-00209, para 72; Van Bael & Bellis (n 16) 46.
[40] *Commission v Italy* (n 20), para 40; *Pavlov and Others* (n 21), para 85.
[41] Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 00405; Case 96/82 *IAZ v Commission* [1983] ECR 03369.
[42] Jones, Sufrin and Dunne (n 13) 185.
[43] Cases 48, 49, and 51–57/69 *ICI v Commission* [1972] ECR 00619, paras 64-65; Jones, Sufrin and Dunne (n 13) 177.
[44] Jones, Sufrin and Dunne (n 13) 177.

of their competitors'.[45] For concerted practice to be established, there must be a causal link between the concertation and conduct of the parties.[46]

Before moving on to the next requirement, it must be stated that Article 101(1) covers horizontal as well as vertical agreements.[47] Horizontal agreements are agreements between undertakings at the same level on the market, whereas vertical agreements are agreements between undertakings operating at different levels of the production chain.[48] This distinction is important, as there are various Commission guidelines and specific regulations applicable to either horizontal or vertical agreements.[49] This is because, in general, it is assumed that vertical agreements are less likely to harm competition than horizontal ones.[50] Another distinction that should be made is the difference between inter-brand and intra-brand competition. Inter-brand competition concerns competition between suppliers of competing products or services. Intra-brand competition concerns competition between suppliers of one producer's product of services.[51] In general, agreements or practices which limit intra-brand competition raise less competition concerns, as they may increase the distributor's selling efforts and eventually increase inter-brand competition.[52]

2.1.2.2. Object or effect of restricting competition

An agreement or concreted practice must restrict competition to fall within the prohibition of Article 101(1) TFEU, and it can do so either by object or by effect. Once it has been established that an agreement restricts competition by its object, there is no need to consider the existence of anticompetitive effects.[53] However, where no restriction of competition by object can be found, it must nonetheless be examined whether the agreement has the effect of restricting competition.[54] The meaning of a restriction by object and by effect will now be discussed.

A restriction by object is rooted in the belief that 'certain forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper

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[45] Case C-89/85 *Ahlström and Others v Commission* [1993] I-01307, para 71.
[46] Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, paras 58–67.
[47] Case C-56/64 *Consten and Grundig v Commission* [1966] ECR 00429.
[48] Richard Whish & David Bailey, *Competition Law* (10th edn, OUP 2021) 122.
[49] See for example Commission, 'Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices' COM 330/2010, which only applies to vertical agreements. See also Commission, 'Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union' COM 2014/C 291/01, which deals with vertical agreements more generously than with horizontal ones.
[50] Whish & Bailey (n 48) 4.
[51] Jones, Sufrin and Dunne (n 13) 740.
[52] Jones, Sufrin and Dunne (n 13) 740.
[53] *Consten and Grundig v Commission* (n 47); Pablo Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (2016) 12 Journal of Competition Law & Economics 749, 756.
[54] Anne C. Witt, 'The enforcement of Article 101: What has happened to the effects analysis?' (2018) 55 CMLR 417, 424; Case C-501/06 P *GlaxoSmithKline Services and Others v Commission* [2009] ECR I-09291, para 55.

functioning of normal competition.'[55] Based on the serious nature of the restriction and experience,[56] such restrictions 'reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects'.[57] The Court has stipulated that the concept of a restriction of competition by object should be interpreted restrictively.[58] To establish a by-object restriction, 'regard must be had inter alia as to the content of its provisions, the objectives it seeks to ascertain and the economic and legal context of which it forms part.'[59] When considering the objectives of the agreement, the focus must be on the wording of the provisions, rather than on the subjective intention of the parties, as the parties' intention is not a necessary condition to the finding of a restriction by object.[60] The subjective intention is nevertheless a factor that can be taken into account when assessing the procompetitive or anticompetitive rationale behind the agreement.[61] Examples of what the CJEU has recognised as restrictions by object are agreements that fix prices, limit output, share markets, reduce capacity, exchange information to fix prices, and boycott a competitor.[62] If an agreement also produces pro-competitive effects which are demonstrated, relevant and specifically related to the agreement concerned, these pro-competitive effects can prevent the characterisation of an agreement as a restriction by object.[63][64]

Where it cannot be established that the object of an agreement or concerted practice is to restrict competition, it may nevertheless restrict competition by effect. The Commission has stated that, for an agreement to restrict competition by effect, 'it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability'.[65] Furthermore, according to the Commission, the effects-analysis should hold consumer welfare as its benchmark consideration.[66] When analysing the effects of an agreement, 'account should be taken of the actual conditions in which [the agreement] functions, in particular in the economic context in which the undertakings operate, the products or services covered by the agreement and the actual

[55] Case C-67/13 P *CB v Commission* [2013], para 50.
[56] David Bailey, 'Restrictions of competition by object under Article 101 TFEU' (2012) 49 CMLR 559, 562.
[57] *CB v Commission* (n 55), para 49.
[58] *CB v Commission* (n 55), para 58; Case C-345/14 *Maxima Latvija* [2015], para 18.
[59] *GlaxoSmithKline Services and Others v Commission* (n 54), para 58.
[60] Ibáñez Colomo (n 53) 758.
[61] Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, para 27; Case C-96/82 *IAZ v Commission* (n 41), paras 23–25; Jones, Sufrin and Dunne (n 13) 219.
[62] See Jones, Sufrin and Dunne (n 13) 220 and the case law cited.
[63] Case C-307/18 *Generics (UK) and Others* [2020], para 107.
[64] Ibáñez Colomo (n 53) 755.
[65] Commission 'Guidelines on the application of Article 81(3) of the Treaty' COM 2004/C 101/08, para 24.
[66] Commission, 'White Paper on Sport' COM(2007) 391 final, paras 56–57, as interpreted by Jones, Sufrin and Dunne (n 13) 240; Anne C. Witt (n 54) 433.

structure of the market concerned'.[67] The analysis focusses on the actual or likely anticompetitive effects by examining 'whether the parties individually or jointly have some degree of market power and, if so, whether the agreement contributes to the creation, maintenance, or strengthening of that market power or allows the parties to exploit it.'[68] Therefore, an effects-analysis often requires a definition of the relevant market and assess the parties' positions.[69] This assessment is also relevant in reviewing whether the parties to the agreement are competitors, as such agreements are often more restrictive of competition than agreements between non-competitors.[70] Other relevant factors in the effects-assessment are the duration of the agreement,[71] the effect of national law or measures,[72] and the context of the agreement.[73]

2.1.2.3.Appreciable restriction of competition

An agreement falls outside the scope of Article 101(1) where it only has an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question.[74] This was established by the CJEU in *Völk v Vervaecke* and can be seen as a *de minimis* doctrine with regard to what restrictions of competition are caught under Article 101(1) TFEU.[75] Relying on this case law, the Commission created the De Minimis Notice, which creates a safe harbour for undertakings with a low market share.[76] Restrictions by object are however excluded from the scope of the De Minimis Notice.[77] When an agreement falls within the scope of the De Minimis Notice, the Commission will not institute proceedings and will not impose fines. Lastly, the De Minimis Notice is also intended to give guidance to the courts and competition authorities of the Member States in their application of Article 101 TFEU.[78]

Apart from a low market share as covered by the De Minimis Notice, there are also other reasons which result in a lack of an appreciable effect on competition, which can be found

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[67] Case T-374/94 *European Night Services and Others v Commission* [1998] ECR II-03141, para 136. See also Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-00935, para 20; Case T-461/07 *Visa Europe and Visa International Service v Commission* [2011] ECR II-01729, para 67; Case T-587/08 *Fresh Del Monte Produce v Commission* [2013].
[68] COM 2004/C 101/08, paras 17–27, as summarised by Jones, Sufrin and Dunne (n 13) 246.
[69] Van Bael & Bellis (n 16) 66; see Chapter 2.1.3.1 of this thesis on how the relevant market is determined.
[70] Commission, 'Guidelines on Vertical Restraints' COM (2010) 411, para 98; Van Bael & Bellis (n 16) 67.
[71] Case C-214/99 *Neste* [2000] ECR I-11121.
[72] *Consten and Grundig v Commission* (n 47).
[73] See, e.g., Case C-23/67 *Brasserie de Haecht v Wilkin Janssen* [1967] ECR 00525; *Delimitis v Henninger Bräu* (n 67), para 14; Case C-279/95 P *Langnese-Iglo v Commission* [1998] ECR I-05609; Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-04653, para 83; Case T-419/03 *Altstoff Recycling Austria v Commission* [2011] ECR II-00975, para 56.
[74] Case 5/69 *Völk v Vervaecke* [1969] ECR 00295, paras 5-7; Case C-441/11 P *Commission v Verhuizingen Coppens* [2012], para 63.
[75] Bailey, 'Restrictions of competition by object under Article 101 TFEU' (n 56) 590.
[76] Commission, 'Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union' COM 2014/C 291/01.
[77] COM 2014/C 291/01, pt 13.
[78] COM 2014/C 291/01, pt 5.

in the Commission's Horizontal Guidelines[79] and Vertical Guidelines.[80] These are, however, not of relevance for this thesis.

2.1.2.4.Appreciable effect on trade between Member States

Another requirement to fall within the scope of Article 101(1) TFEU (and Article 102 TFEU) is that there must be an appreciable effect on trade between Member States. This criterion limits the applicability of EU competition law to agreements having cross-border effects within the EU,[81] as the EU has no jurisdiction over conduct of which the effects are limited to a single Member State.[82] The concept of appreciable affect on trade between Member States has been interpreted broadly within the case law of the CJEU,[83] upon which the Commission has based its Notice concerning Guidelines on the effect on trade concept contained in Articles [101] and [102] of the Treaty.[84] The concept of 'trade' is not limited to traditional exchange of goods and services, but it covers all cross-border economic activity including establishment.[85] An agreement is found to affect trade if it interferes with the pattern of trade between Member States (pattern of trade test),[86] or where it can interfere with the structure of competition in the common market (structural test).[87]

The pattern of trade test was elaborated upon in *Société Technique Minière v Maschinenbau Ulm*, in which the Court held that it must be 'possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'.[88] This means that an agreement is also found to fulfil this criterion if it does not affect the pattern of trade yet, but it is anticipated that it will do so in the future. Relevant factors are the nature of the agreement and practice, the nature of the products, and the position and importance of the undertakings involved.[89] Moreover, it is important to note that even an agreement which operates in only one Member State can affect trade between Member States.[90] Similarly, national cartels can also affect trade

[79] Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' COM 2011/C 11/01.
[80] COM (2010) 411, para 19.
[81] COM 2004/C 101/7, para 13.
[82] Case 22/78 *Hugin v Commission* [1979] ECR 01869.
[83] Van Bael & Bellis (n 16) 98; See, e.g., *Hugin v Commission* (n 82), para 17; Case C-407/04 P *Dalmine v Commission* [2007] ECR I-00829, para 89.
[84] COM 2004/C 101/7.
[85] COM 2004/C 101/7, para 19; See Case C-172/80 *Züchner* [1981] ECR 02021, para 18; *Wouters* (n 26), para 95; *Ambulanz Glöckner* (n 22), para 49; Joined Cases C-215/96 and 216/96 *Bagnasco* [1999] ECR I-135, para 51; Case C-55/96 *Job Centre* [1997] ECR I-7119, para 37; *Höfner* (n 17), para 33.
[86] Case C-56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 00337.
[87] Jones, Sufrin and Dunne (n 13) 197.
[88] *Société Technique Minière v Maschinenbau Ulm* (n 86).
[89] Case C-22/71 *Béguelin Import v G.L. Import Export* [1971] ECR 00949, para 18.
[90] Pieter van Cleynenbreugel 'Article 101 TFEU and the EU Courts: Adapting legal form to the realities of modernization?' (2015) 51 CMLR 1381, 1393.

between Member States, as their conduct is likely to prevent foreign competitors from entering their market.[91]

The structural test is more likely to be used with regard to Article 102 TFEU, however, it cannot be excluded that it could also be applied under Article 101(1).[92] The structural test implies that where a competitor will be eliminated as a result of a breach of Article 101 or 102, trade between Member States is affected where the targeted undertaking exports to or imports from other Member States,[93] and where it also operates in other Member States.[94]

Similarly to the requirement that the restriction of competition must be appreciable to fall within the scope of Article 101(1), the effect on trade must also be appreciable.[95] This was also considered in *Völk v Vervaeke*.[96] However, the interpretation of the appreciability criterion regarding trade differs from the one regarding an appreciable restriction of competition. Following the Commission's Effect on Trade Guidelines,[97] appreciability of the effect on trade can be measured in absolute terms (determining the turnover of the undertakings concerned) and in relative terms (comparing the market share of the undertakings concerned to their competitors).[98] The bigger the market share of the undertaking(s) concerned, the more likely it is that the agreement or concerted practice will affect trade between Member Sates to an appreciable extent.[99] The Effect on Trade Guidelines have also introduced a 'no appreciable affectation of trade' ('NAAT') rule, which only applies to Article 101(1) TFEU and contains a negative rebuttable presumption that an agreement is not capable of appreciably affecting trade between Member States where certain market share or turnover requirements are met.[100] On the other hand, the Effect on Trade Guidelines also set out a positive presumption for agreements that, by their very nature, are capable of affecting trade between Member States, for example where the parties exceed specific turnover or market share thresholds.[101]

2.1.2.5.Restraints in the pursuit of a legitimate objective

Not every agreement or decision that restricts competition necessarily falls within the prohibition of Article 101(1) TFEU. In the doctrine developed under *Wouters*, agreements

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[91] Jones, Sufrin and Dunne (n 13) 200.
[92] Van Bael & Bellis (n 16) 105.
[93] C-497/99 P *Irish Sugar v Commission* [2001] ECR I-05333, para 169.
[94] C-241/91 P *RTE and ITP v Commission* [1995] ECR I-00743, para 70.
[95] Van Cleynenbreugel (n 90) 1393; Saskia King 'How appreciable is object? The de minimis doctrine and Case C-226/11 *Expedia Inc v Autorité de la concurrence*' (2015) 11 European Competition Journal 1, 22.
[96] *Völk v Vervaecke* (n 74), paras 5-7.
[97] COM 2004/C 101/7.
[98] COM 2004/C 101/7, para 46.
[99] Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, para 138.
[100] COM 2004/C 101/7, paras 50-57.
[101] COM 2004/C 101/7, paras 53.

or decisions restrictive of competition escape the prohibition of Article 101(1) if the restriction is inherent to pursue a legitimate objective.[102] The overall context of that agreement or decision must be considered, including the objectives it seeks to pursue. It must then be considered whether the consequential effects restrictive of competition are inherent and proportionate in the pursuit of those objectives.[103] In *Wouters*, the legitimate aim of the decision – which was to ensure the integrity and experience of legal services and the sound administration of justice – was considered to be inherent and proportionate to the consequential effects restrictive of competition.[104] This reasoning was also applied to the sports sector in *Meca-Medina*, where the Court held that the anti-doping rules did not infringe Article 101(1) TFEU, as they were inherent and proportionate to the organisation and proper conduct of competitive sports.[105]

The test laid down in *Wouters* and *Meca-Medina* has strong similarities to the test applicable to free movement law as laid down in *Gebhard*, where an imperative requirement in the general interest must be suitable and not go beyond what is necessary to justify a restriction.[106] Lindholm mentions that the application of a legitimate objective to exclude an agreement from the scope of competition law, as was done in *Wouters* and *Meca-Medina*, can thus be seen as convergence of competition law to free movement law. The relationship between free movement and competition law is also explicitly mentioned in *Meca-Medina*, however, the CJEU notes that the fact that rules are allowed under free movement law does not automatically mean that those rules are also allowed under competition law, and vice versa. This is because both regimes still require their own assessment.[107]

2.1.2.6.Article 101(3) TFEU: legal exception

If there is a restriction of Article 101(1) TFEU, Article 101(3) provides for a justification if the agreement or decision generates overriding efficiency gains. This *exception légale* can be invoked with regard to restrictions by effect as well as restrictions by object.[108] For an agreement to fall under the exception of Article 101(3), four cumulative conditions have to be fulfilled, which will be discussed below. The agreement must:

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[102] *Wouters* (n 26), para 97; Charlotte Janssen & Erik Kloosterhuis, 'The Wouters case law, special for a different reason?' (2016) 8 ECLR 335, 335.
[103] *Wouters* (n 26), para 97.
[104] *Wouters* (n 26), paras 97, 105 and 107; Julian Nowag, 'Wouters, when the condemned live longer: a comment on OTOC and CNG' (2015) 36 ECLR, 39, 39.
[105] Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-06991, para 42 and 45. See paragraph 2.3.5 of this thesis for a summary of *Meca-Medina.*
[106] Johan Lindholm, 'Idrottens särart och EU:s konkurrensrätt' (2008) 4 Europarättslig tidskrift 914, 928; Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165, para 6.
[107] *Meca-Medina* (n 105), paras 30-32.
[108] Bailey, 'Restrictions of competition by object under Article 101 TFEU' (n 56) 593.

1) contribute to improving the production or distribution of goods or services, or to promoting technical or economic progress;
2) allow consumers a fair share of the resulting benefit;
3) not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
4) not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The benefits referred to in the first criterion relate to objective benefits, which should be established from empirical data and facts. The benefits must 'show appreciable objective advantages of such character as to compensate for the disadvantages which they cause in the field of competition.'[109] It is for the undertakings concerned to substantiate the efficiency claims by showing the nature of the claimed efficiencies, the link between the agreement and efficiencies, the likelihood and magnitude of the efficiencies, and how and when each claimed efficiency would be achieved.[110] Examples of efficiencies are cost reduction[111] or improvement in the quality and choice of goods and services.[112]

The second criterion requires that consumers are allowed a fair share of the benefit, which demands that there is a 'pass-on' of the quality and cost efficiencies to consumers.[113] The notion of 'consumer' is interpreted broadly and is not limited to direct consumers.[114] It also includes intermediate and final consumers, such as wholesalers and retailers.[115] When assessing this requirement, account must not only be taken of the benefits flowing to the consumers in the same market as where the restriction has been established, but also in other related markets.[116] However, it is required that at least some advantage must flow to the market where the restrictive measures are felt.[117] The requirement that consumers should enjoy a 'fair share' of the benefits entails that the 'pass-on of the benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition'. This means that 'the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement. If such consumers are worse off following the agreement, the second condition

[109] *Consten and Grundig v Commission* (n 47).
[110] COM 2004/C 101/08, paras 52-59.
[111] COM 2004/C 101/08, paras 64-68.
[112] COM 2004/C 101/08paras 69-72.
[113] COM 2004/C 101/08, paras. 83–104.
[114] Or Brook, 'Struggling with Article 101(3) TFEU: Diverging approaches of the Commission, EU Courts, and five competition authorities' (2019) 56 CMLR 121, 152.
[115] Jones, Sufrin and Dunne (n 13) 268.
[116] *Mastercard and Others v Commission* (n 28); Or Brook (n 114) 152.
[117] *Mastercard and Others v Commission* (n 28); Jones, Sufrin and Dunne (n 8) 268.

of Article [101(3)] is not fulfilled.'[118] However, it is not necessary that consumers receive a fair share of every benefit identified under Article 101(3).[119]

The third criterion requires that the agreement only contains restrictions which are indispensable to the achievement of the benefits flowing from it.[120] This condition requires a twofold test, which is in line with the EU principle of proportionality.[121] Firstly, the restrictive agreement must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.[122] Therefore, restrictions will not be indispensable if the efficiencies can be achieved by less restrictive means.[123] In general, restrictions by object or hardcore restraints are not indispensable, however, in theory it is possible to justify a restriction by object under Article 101(3).[124]

The fourth criterion requires that the agreement as a whole must not lead to the elimination of competition.[125] This criterion can be seen as a balancing act between short-term efficiency gains against any long-term damages to the competitive structure of the market.[126] In general, priority is given to the protection of the competitive structure.[127] Assessing this criterion requires an analysis of 'the competitive restraints imposed on the parties, the degree of competition existing prior to the agreement, and the impact of the agreement on competition',[128] alongside with an identification of sources of actual and potential competition and the effect of the agreement on them.[129]

2.1.3. Article 102 TFEU

Having established how Article 101 TFEU is applied, the focus will now switch to its counterpart in Article 102. This article prohibits undertakings from abusing their dominant position within (a substantial part of) the internal market in so far as it may affect trade between Member States. Article 102 TFEU gives expression to the 'special responsibility' that dominant undertakings have, as these undertakings may not be sufficiently restrained by other competitors.[130]

For the prohibition of Article 102 TFEU to apply, five conditions must be fulfilled:

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[118] COM 2004/C 101/08, para 85.
[119] COM 2004/C 101/08, paras. 86–89.
[120] David Bailey, 'Reinvigorating the role of Article 101(3) under Regulation 1/2003' (2016) 81 Antitrust Law Journal 111, 128.
[121] Jones, Sufrin and Dunne (n 13) 270.
[122] COM 2004/C 101/08, paras 73-74.
[123] Jones, Sufrin and Dunne (n 13) 270.
[124] See e.g. COM 2004/C 101/08, para 46
[125] Bailey, 'Reinvigorating the role of Article 101(3) under Regulation 1/2003' (n 120) 113.
[126] Jones, Sufrin and Dunne (n 13) 271.
[127] COM 2004/C 101/08, para 105.
[128] Jones, Sufrin and Dunne (n 13) 272.
[129] ibid.
[130] Case C-322/81 *Michelin I* [1983] ECR 03461, para 57; Jones, Sufrin and Dunne (n 13) 277.

- One or more undertaking(s);
- With a dominant position;
- Which is held within the internal market or a substantial part of it;
- An abuse;
- An effect on interstate trade.

These requirements will be elaborated upon in the following paragraphs. For the notion of undertaking, the reader is referred back to paragraph 2.1.1 of this thesis. Similarly, for the notion of the effect on interstate trade, reference is made to paragraph 2.1.2.4 of this thesis.

2.1.3.1. Dominance and relevant market

The concept of dominance is not defined in the Treaties but has been developed by the Court's case law. In *United Brands*, the CJEU defined dominance as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.'[131] In *Hoffmann-La Roche*, the CJEU clarified that this understanding of the concept of dominance does not preclude some competition, however, the dominant undertaking should be able to influence the conditions of competition on the market.[132]

To determine whether an undertaking enjoys a dominant position, a two-step assessment is needed. First, the relevant product and geographic markets must be established, after which it can be assessed whether the undertaking concerned has a dominant position on that market.[133] The objective of determining the relevant market is to identify the competitors of the undertaking under investigation.[134] Generally speaking, undertakings under investigation will argue that the market should be defined broadly, because the broader the market, the less likely the finding of dominance.[135] Establishing the relevant market is a challenging, comprehensive test, with an extensive background in economic theory. Considering that this is a legal thesis, it goes beyond its scope to investigate economic theory. Therefore, the market definition will only be touched upon from a legal perspective.

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[131] Case 27/76 *United Brands v Commission* [1978] ECR 00207, para 65.
[132] Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 00461, para 39.
[133] Case C-6/72 *Europemballage Corporation and Continental Can Company v Commission* [1973] ECR 00215, para 32.
[134] Commission, 'Notice on the definition of relevant market for the purposes of Community competition law' COM 97/C 372/03, para 2.
[135] Jones, Sufrin and Dunne (n 13) 307; Van Bael & Bellis (n 16) 118.

The product market exists of goods or services that can be regarded as sufficiently interchangeable.[136] To establish interchangeability of products and services, regard must be had to demand substitutability and supply substitutability.[137] Demand substitutability is typically measured using the SSNIP-test, which questions what would happen if the producer of a product or service would introduce a small but significant non-transitory increase in price (a 'ssnip'). Would consumers, as a consequence of the price increasement, switch to other products? If so, this would mean that these products are within the same product market.[138] Supply-side substitutability investigates whether suppliers are able to switch to supplying the investigated products and whether they can market them in short term, without incurring significant additional costs or risks in response to small and permanent changes in relative prices.[139] If that is the case, the additional production appearing on the market will have a corrective effect on the companies on that market, including the undertaking under investigation under Article 102 TFEU.[140]

The relevant geographic market is considered to constitute a clearly defined geographic area in which the product or service is marketed, and 'where the conditions are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated'.[141] The Commission applies the 'hypothetical monopolist test' to define the geographic market: if the price of a certain product would increase in one geographic area, would a substantial number of customers switch to suppliers in another area and render the price increase unprofitable? If so, that would mean that these two areas are part of the same geographical market.[142]

After having established the relevant market, it must be examined whether the relevant undertaking holds a dominant position on that market. This can be done by assessing the market power of that undertaking. In this assessment, market shares provide a useful first indication of the importance of the undertakings on the market.[143] Market shares above 50% are usually considered to indicate the existence of dominance, and in the absence of exceptional circumstances, such a market share would constitute sufficient evidence of the existence of a dominant position.[144] Market shares between 20% and 50% would require the Commission to collect supplementary support in order to establish dominance.[145]

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[136] Whish & Bailey (n 48) 26.
[137] COM 97/C 372/03, paras 2 and 13. The third source of competitive restraints (potential competition) is not taken into account when defining markets, but only in a subsequent stage, see para 24.
[138] Augustin Fuerea, 'The Notion of Relevant Significant Market in the Sense of EU Law and the Jurisprudence of the Court in Luxembourg' (2016) 23 LEX ET Scientia Int'l J 100, 102-103; Whish & Bailey (n 48) 28.
[139] COM 97/C 372/03, para 20.
[140] COM 97/C 372/03, para 20.
[141] *United Brands* (n 131), paras 10–11.
[142] Fuerea (n 138) 103; Whish & Bailey (n 48) 37.
[143] Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' COM 2009/C 45/02, para 13.
[144] Case C-62/86 *AKZO v Commission* [1991] ECR I-03359, para 60.
[145] Van Bael & Bellis (n 16) 127.

According to the Commission, a single undertaking with a market share below 25% would be unlikely to enjoy a position of dominance.[146] Another factor that will be taken into account while assessing dominance on the market, is the possibility of expansion or entry by potential competitors. Potential barriers to expansion or entry include tariffs or quotas, economies of scale and scope, or the need to use an established distribution or sales network.[147] The third relevant factor in determining dominance, is the examination of constraints imposed by the bargaining strength of the undertaking's customers.[148] If consumers have a sufficient degree of bargaining strength, even an undertaking with a high market share may not be able to act to an appreciable extent independently of them.[149] Such countervailing buyer power may result from, inter alia, the customers' size or their commercial significance for the investigated undertaking.[150]

2.1.3.2.Substantial part of the internal market

In order to fall within the scope of Article 102 TFEU, the dominant position must be held in the whole or a substantial part of the internal market. This requirement differs from the definition of the relevant geographical market. It is generally considered that each Member State is considered to be a substantial part of the internal market, and the Court established in *Suiker Unie* that even parts of a Member State can qualify as being a substantial part of the internal market.[151]

2.1.3.3.Abuse

Holding a dominant position is not prohibited by Article 102 TFEU; it is the abuse of such a position which is illegal.[152] A dominant undertaking has a 'special responsibility not to allow its conduct to impair undistorted competition' on the internal market.[153] This means that certain conduct by dominant firms may be declared illegal under Article 102 TFEU, whereas the same conduct by non-dominant firms does not generate any problems under EU competition law. Sub-paragraphs (a) to (d) of Article 102 TFEU set out examples of abuses, however, this list is not exhaustive.[154] From *Hoffmann-La Roche* it can be derived that 'abuse' is an objective concept relating to the behaviour of a dominant undertaking, where that undertaking weakens the degree of competition on the market through recourse

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[146] Commission, 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses' (2005), para 31.
[147] COM 2009/C 45/02, para 17.
[148] COM 2009/C 45/02, para 12.
[149] COM 2009/C 45/02, para 18.
[150] COM 2009/C 45/02, para 18.
[151] Case C-40/73 *Suiker Unie and Others v Commission* [1975] ECR 01663; Whish & Bailey (n 48) 193.
[152] *Michelin I* (n 130), para 57.
[153] *Michelin I* (n 130), para 57.
[154] See *Continental Can* (n 133); Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-05951, para 37; Case C-95/04 P *British Airways v Commission* [2007] ECR I-02331, para 57; Case T-201/04 *Microsoft v Commission* [2007] ECR II-03601, para 86; Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-09555, para 173.

to methods different from those which govern normal competition.[155] Two elements of this definition must be examined further: the objective concept, and recourse to methods different from those which govern normal competition.

Firstly, the fact that the Court refers to abuse as an objective concept implies that abuse can occur irrespective of the intention of the dominant undertaking.[156] An undertaking stating that there was no intent to abuse its dominant position will thus not amount to a successful defence.[157] On the other hand, the finding that there was indeed such an intent is one of the factors that can be taken into account in order to determine whether a firm has abused its dominant position.[158]

Secondly, the Court's statement that dominant undertakings should refrain from 'methods different from those which condition normal competition'[159] gives rise to the question what can be understood as methods governing normal competition.[160] In *Deutsche Telekom v Commission* the Court refined this statement and held that dominant firms should refrain from methods 'other than those which come within the scope of competition on the merits'.[161] In subsequent cases, the Court has frequently used the expression 'competition on the merits'.[162] Competition on the merits can lead to the departure of an undertaking which is less efficient and so less attractive to consumers, based on, for example, price, choice, quality or innovation.[163] In its Guidance on Article 102 Enforcement Priorities, the Commission gives examples of what constitutes competition on the merits. This includes offering lower prices, better quality and wider choice of new and improved goods and services.[164]

The Court held in *Continental Can* that Article 102 prohibits two types of abuse: exploitative abuse and exclusionary abuse.[165] Although these two types of abuse have never been clearly defined by the authorities,[166] it is clear that exploitative abuse relates to abuse which directly harms consumers, for example where a dominant undertaking increases the price of its products or imposes unfair terms and conditions.[167] Exclusionary abuse is related to behaviour of a dominant undertaking which indirectly harms consumers by

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[155] *Hoffmann-La Roche* (n 132), para 91.
[156] Nicolas Petit, 'Intel, leveraging rebates and the goals of Article 102 TFEU' (2015) 11 European Competition Journal 26, 36.
[157] Whish & Bailey (n 48) 199.
[158] *Generics (UK) and Others* (n 63), para 162 and the case-law cited.
[159] *Hoffmann-La Roche* (n 132), para 6.
[160] Ibáñez Colomo (n 53) 709.
[161] *Deutsche Telekom v Commission* (n 154), para 177.
[162] Whish & Bailey (n 48) 200; see for example C-209/10 *Post Danmark I* [2012], para 22; Case C-413/14 P *Intel v Commission* [2017], para 134.
[163] *Post Danmark I* (n 162), para 22.
[164] COM 2009/C 45/02, para 5.
[165] *Continental Can* (n 133), para 26; see also Pinar Akman 'The Tests of Illegality Under Articles 101 and 102 TFEU' (2016) 61 The Antitrust Bulletin 84, 99.
[166] Pinar Akman (n 165) 100.
[167] Whish & Bailey (n 48) 210.

negatively affecting the structure of the market.[168] An example of exclusionary abuse is anti-competitive foreclosure, which occurs when a dominant undertaking prevents potential competitors from entering the market, thereby decreasing consumer choice and increasing price in the medium term.[169] Both horizontal and vertical anti-competitive foreclosure are prohibited by Article 102 TFEU. Other examples of exclusionary abuses are exclusive dealing agreements and refusal to supply.[170] The Commission's Guidance on Article 102 Enforcement Priorities displays how the Commission would normally deal with exclusionary behaviour, based on factors relating to inter alia the position of the dominant undertaking, the conditions of the relevant market, and the evidence of abuse.[171]

A last point regarding abuse is that it is not necessary that the dominance, abuse and effects of the abuse occur on the same market. For example, a dominant undertaking may be active on two separate markets and may act on one of those markets in order to obtain a benefit in the other.[172] This scenario would still fall under the scope of Article 102.[173] Another example is where anti-competitive foreclosure takes place in the upstream market, but harms competition in the downstream market.[174]

2.1.3.4. Defences

In contrast to Article 101 TFEU, there are no exemptions contained in Article 102 TFEU. However, undertakings can put forward 'objective justifications' for their conduct, and if these are accepted, their conduct is not considered abusive and Article 102 TFEU is not breached. This can be done by either 'demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers.'[175] In any case, the conduct has to be indispensable and proportionate to the objective pursued by the dominant undertaking.[176]

Firstly, a claim that the conduct is objectively necessary must be based on factors external to the dominant undertaking. The only example given by the Commission in its Guidance Paper is conduct necessary to guarantee health or safety considerations. However, the Commission stresses that it is usually for the public authorities to establish and impose

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[168] Van Bael & Bellis (n 16) 800; Hans W. Friederiszick & Linda Gratz, 'Hidden Efficiencies: The Relevance of Business Justifications in Abuse of Dominance Cases' (2015) 11 J Comp L & Econ 671, 674.
[169] Elisabeth de Ghellinck 'The As-Efficient-Competitor Test: Necessary or Sufficient to Establish an Abuse of Dominant Position?' (2016) 7 Journal of Competition Law & Practice 544, 545; Whish & Bailey (n 48) 215.
[170] Whish & Bailey (n 48) 218.
[171] COM 2009/C 45/02, para 20.
[172] Whish & Bailey (n 48) 216.
[173] *Tetra Pak v Commission* (n 154), para 27.
[174] Whish & Bailey (n 48) 215.
[175] COM 2009/C 45/02, para 28; see for an overview of Commission practice regarding defences under Article 102 TFEU Hans W. Friederiszick & Linda Gratz (n 168) 671. Another defence under Article 102 TFEU is the 'meeting-competition' defence, however, that defence is only applicable to pricing abuses and thus not relevant for this thesis. See Commission, 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses' (2005), 25.
[176] COM 2009/C 45/02, para 28.

such standards.[177] It can therefore be hard to justify abusive conduct by such considerations.[178] However, in *CEAHR*, the Commission decided that the likelihood of an infringement of Article 102 TFEU was limited, also by taking into account that the refusal to supply in that case could be explained by 'objective justifications and the pursuit of productivity gains, in particular the preservation of brand image and the quality of products, the prevention of counterfeiting and the increase in the technical complexity of mechanical watches, which makes high quality repair necessary.'[179] This approach was accepted by the General Court ('GC'). However, in the decisions *Google Search (Shopping)* and *Google (Android)* the Commission gives limited weight to the objective justifications put forward by the undertakings, which shows the high threshold to be met for objective justifications to be accepted.[180]

Secondly, conduct can be justified by the efficiency-defence, as the Court held in *Post Danmark I*.[181] The Court has described this assessment as a 'balancing of the favourable and unfavourable effects of the practice in question on competition'.[182] In order for such a defence to succeed, four cumulative criteria have to be fulfilled:

1) The efficiencies have been, or are likely to be, realised as a result of the conduct;
2) The conduct is indispensable to the realisation of those efficiencies;
3) The likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets;
4) The conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.[183]

However, this defence is rather theoretical. This is because the EU courts have taken a narrow approach to efficiency defences under Article 102 TFEU,[184] and at the time of writing, no efficiency claim under Article 102 TFEU has been successful.[185]

2.2. The organisation of sports in the EU

The previous paragraphs show what conduct is prohibited by Articles 101 and 102 TFEU. The following paragraphs will elaborate on how sports are organised in the EU, as this is important to understand the context of the Super League and the prior authorisation rules of FIFA and UEFA. The following paragraphs will first introduce the European Model of Sport

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[177] COM 2009/C 45/02, para. 29; Whish & Bailey (n 48) 220.
[178] See for example *Romanian Power Exchange/OPCOM* (Case AT.39984) Commission Decision C(2014) 1342 [2014] OJ C 314/7, paras 193-195.
[179] Case T-712/14 *CEAHR v Commission* [2017], para 18.
[180] Jones, Sufrin and Dunne (n 13) 382.
[181] *Post Danmark I* (n 162), para 42.
[182] *Intel v Commission* (n 162), para. 140.
[183] COM 2009/C 45/02, para 30.
[184] Patrick Rey & James S. Venit, 'An Effects-Based Approach to Article 102: A Response to Wouter Wils' (2015) 38 World Competition 3, 26.
[185] Whish & Bailey (n 48) 221; see also Jones, Sufrin and Dunne (n 13) 382.

('EMoS') and highlight its most important elements, after which the specificity of sport and Article 165 TFEU will be discussed.

2.2.1. The European Model of Sport

Before the end of the Cold War, there were two different sports models present in Europe. The model in Eastern Europe was highly state-regulated, whereas the model in Western Europe was more privately organised and both governmental and non-governmental organisations were involved. After the fall of communism, most countries in Eastern Europe switched to the Western European Model. This Western European Model still forms the basis of the present EMoS, which is laid down in several Commission documents, such as 'The European Model of Sport' (1999),[186] the 'White Paper on Sport' (2007),[187] and 'Developing the European Dimension in Sport' (2011).[188] More recently, the Council has adopted a resolution on the EU Work Plan for Sport (2020), which also refers to the EMoS.[189] In the following section, several key features of the EMoS will be discussed.

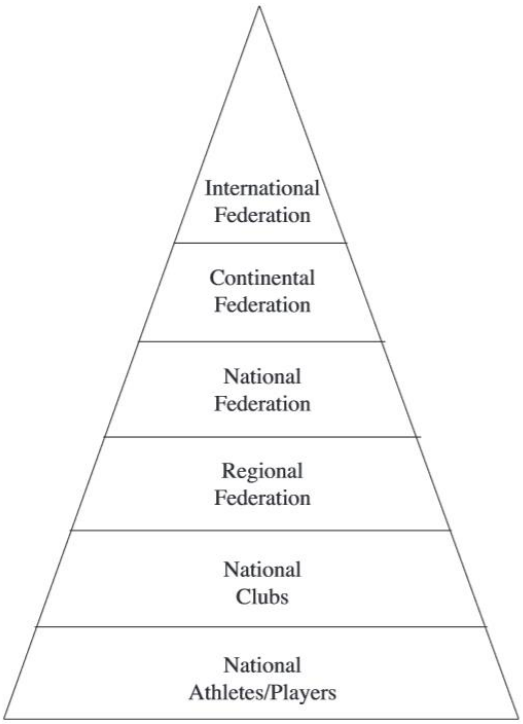

Figure 1 - Lars Halgreen, p. 64

The most significant feature of the EMoS is its hierarchal pyramid structure. The pyramid structure will be explained by applying it to the organisation of football. On the lowest level of the pyramid, national athletes (football players) can be found. Even though they might not be part of the organisational structure of sports in the strict sense, they are a prerequisite for national sports clubs to exist. The athletes are members of national clubs. This pyramid will be explained at the hand of the German football club Bayern München. The national clubs, together with other actors within a country, such as regional associations and amateur bodies, form the 'grassroots' of the pyramid. Going up one level in the pyramid, the national clubs are members of regional federations. For example, the club Bayern München is a member of the Southern German Football Association. The scope of action of the regional federations is limited to their territory, in

[186] Commission, 'The European Model of Sport - Consultation Document of DG X' COM 1999/C 374/14.
[187] COM(2007) 391 final.
[188] Commission, 'Developing the European Dimension in Sport' COM(2011) 12 final.
[189] Council, 'Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the European Union Work Plan for Sport (1 January 2021-30 June 2024)' COM 2020/C 419/01.

which they coordinate the sport and organise regional championships. The regional federations are members of the national federation, which in Germany is the German Football Association. The national federations exclusively organise all general matters of the sport within the national territory. They are also the sole representatives in continental and international federations, and have exclusive power to organise officially recognised tournaments and to select national teams to participate in international games organised by continental or international federations.[190] On the second highest place in the pyramid are the continental federations, which are generally organised in the same way as the national federations. Within football in Europe, this position left to UEFA. At the very top of the pyramid are the international federations, which are responsible for the overall guidelines and the international regulation of a sport.[191] In football, it is FIFA who fulfils this role. The different federations within the pyramid – regional, national, continental and international – thus all have the task to govern a sport within their territory. Therefore, they are generally referred to as 'sports governing bodies' or 'SGBs'.

An important characteristic of the EMoS is the 'one-federation-per-sport' principle, which entails that only one federation at the national and continental level is allowed to exist. This makes it easy to manage sports, and is recognised by the Commission as the most efficient way to organise sports.[192] However, this also means that sports federations are, by their very nature, in a monopolistic position, which may make it hard for new leagues to enter the market and may raise concerns under competition law.[193]

Another interesting aspect of the EMoS is that the SGBs govern all levels within one sport, which means that they have to uphold both the interests of professionals as well as amateurs.[194] Therefore, the EMoS contains a solidarity system. SGBs will exploit the commercial value of a sport on the professional levels to be able to re-distribute a part of the income towards the grassroots of the pyramid. This is vertical solidarity.[195] The EMoS also contains horizontal solidarity, however, this is deemed to be less prominent. Horizontal solidarity exists for example where teams share broadcasting revenues, or where a team buys a player from another team and pays a 'training compensation'.[196] Horizontal solidarity seeks to reallocate revenues between rich and poor clubs, with the aim to maintain an economic and competitive balance.[197]

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[190] Halgreen (n 25) 64.
[191] Halgreen (n 25) 65.
[192] COM 1999/C 374/14, 8.
[193] Halgreen (n 25) 65; see also Stephen Weatherill 'Is the Pyramid Compatible with EC Law?' in *European Sports Law: Collected Papers* (2nd end, Asser Press 2014) 3.
[194] Halgreen (n 25) 66.
[195] Halgreen (n 25) 67.
[196] See Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* [1995] ECR I-04921 on the legality of a training compensation in a specific case.
[197] Halgreen (n 25) 68.

A last key feature of the EMoS is the open nature of competitions. The eligibility of teams and athletes is based on their sporting merits, and not on, for example, the financial situation of the club or income from sponsorships. Every team or athlete is subject to the tournament system of promotion and relegation, which allows for new players, teams or clubs to enter the competitions.[198] However, a caveat must be placed on the openness of European sports competitions, as many sports have a license system in place, setting financial criteria for participation in certain competitions. Other sports, such as motor sport or cycling, have adopted a partially or completely closed system for participation in professional sports competitions, which greatly undermines the system of promotion and relegation under the EMoS.[199] In this regard, it is important to highlight that the EMoS is not binding and the organisation of sports may differ from this model. According to the Commission, it is unrealistic to impose a one-size-fits-all model upon all sports in the EU. It acknowledges that it is up to the SGBs and Member States to give substance to the organisation of sports.[200] However, the Commission also highlights that it will continue to scrutinise sports under EU law, irrespective of the way it is organised, with a focus on competition law, free movement law and rules on non-discrimination.[201]

2.2.2. The specificity of sport and Article 165 TFEU

The organisation of sports through the EMoS can be seen as one of the two prisms of the principle of 'specificity of sport'. The other prism, which is laid down in the Commission's White Paper on Sport, relates to sporting rules. This includes separate competitions for men and women, limitations on the number of participants in competitions, the need to ensure the uncertainty of outcome of sporting competitions, and the need to preserve a competitive balance between clubs participating in the same competitions.[202] In fact, sporting teams need other teams to compete against, otherwise sporting competitions cannot exist. This makes that sporting teams or clubs are interdependent, which is a specific feature of sporting competitions.[203]

The specificity of sport, both in the context of the EMoS and the sporting rules, does not have any binding legal force, as it is 'merely' Commission policy. However, the entry into force of the Lisbon Treaty in 2009 makes that there is some legal basis to a few elements of the specificity of sport.[204] The Lisbon Treaty introduced Article 165 TFEU, which grants the Union a mandate to support, coordinate or supplement the actions of the Member

[198] Halgreen (n 25) 67; COM 1999/C 374/14, 4.
[199] Halgreen (n 25) 68.
[200] COM(2007) 391 final, 12-13.
[201] Halgreen (n 25) 69.
[202] COM(2007) 391 final, 13.
[203] Robert Siekmann, *Introduction to International and European Sports Law* (Asser Press 2012), 86.
[204] Halgreen (n 25) 41.

States within the area of sport in the realm of Article 6 TFEU.[205] The nature of Article 165 TFEU makes that it contains a constitutionally based requirement in the enforcement of any Treaty rule.[206] Regarding the content, Article 165 TFEU states that Union action shall be aimed at the promotion of European sporting issues, while taking account of the specific nature of sports, its structures based on voluntary activity and its social and educational function. Moreover, Article 165 TFEU provides that Union action shall be aimed at promoting fairness and openness in sporting competitions, and protecting the integrity of athletes.[207] The acknowledgment of certain elements of the specificity of sport thus gives legal value to these elements. This is corroborated by the fact that the CJEU has recognised the importance of Article 165 TFEU. Regarding free movement law this was done for the first time in *Olympique Lyonnais* in 2010 and subsequently in for example *TopFit Biffi*.[208] With regard to competition law, the importance of Article 165 TFEU was highlighted for the first time in *ISU* in 2019, where the Court held that the specific characteristics of sport need to be taken into account when assessing the context of an agreement or decision that potentially restricts competition.[209] These cases, as well as other cases relevant to the development of EU law within the sports sector, will be discussed in the following paragraph.

2.3. The application of EU law to sports

The previous paragraphs have described what European competition law entails, and how sports in the EU are organised. In this paragraph, the application of EU law to sports will be examined by discussing the most relevant cases in this regard, in order to provide an answer to the first sub-question of this thesis: how are Articles 101 and 102 TFEU applied within the context of European sports? This paragraph will however not only focus on Articles 101 and 102, as the application of EU law in a broader sense is essential for the understanding of EU competition law to sports. Therefore, cases regarding free movement law and non-discrimination will also be included.

2.3.1. Walrave

In *Walrave* the Court for the first time applied the Treaty articles to a sports context.[210] At stake was a rule of the International Cyclist Association which required that pacers and stayers participating in motor-paced cycling have to be of the same nationality. The

[205] Jacob Kornbeck, 'Lisbonisation without regulation: engaging with sport policy to maximise its health impact?' (2015) 15 Int Sports Law J 112, 113.
[206] Katarina Pijetlovic, 'EU sports law: a uniform algorithm for regulatory rules' (2017) 17 Int Sports Law J 86, 94.
[207] Art 165(2) TFEU.
[208] Case C-325/08 *Olympique Lyonnais* [2010], para 40; Case C-22/18 *TopFit and Biffi* [2019], paras 33, 34 and 67.
[209] Case T-93/18 *International Skating Union v Commission (ISU)* [2020], para 78.
[210] Case C-36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* [1974] ECR 01405.

question was whether that was a breach of the freedom to provide services. The Court held that sport is only subject to EU law insofar as it constitutes an economic activity.[211] However, it then provided an important limitation, stating that the prohibition on discrimination based on nationality in the Treaty "does not affect the composition of sports 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."[212] This exclusion from the scope of EU law when it concerns a 'purely sporting interest' is often referred to as the sporting exception.

2.3.2. Bosman

In the landmark case *Bosman* the Court ruled on the legality of a football transfer system according to which a player, after expiration of his contract, could not transfer to a club in another Member State unless a transfer fee had been paid. [213] The Court held that the transfer rules restrict free movement of workers as they have a deterrent effect.[214] The ground-breaking aspect of this case is that the Court held that the application of the sporting exception must 'remain limited to its proper objective', meaning that it only applies to rules which are of a purely sporting interest only.[215] In *Bosman* the Court found that the transfer rules do not fall under the sporting exception as they refer to the essence of the economic activity of professional football players. Another important point of *Bosman* concerns the social importance of sports, in which regard the Court held that encouraging the recruitment and training of young players must be accepted as a legitimate aim.[216]

2.3.3. Deliège

In *Deliège* the Court established the 'Deliège exception', which entails that rules that are inherent to the organisation of sporting competitions do not constitute a restriction of the freedom to provide services.[217] The case concerned a Belgium judoka who was not selected by the Belgium Judo Federation to participate in leading international events, including the Olympic Games. The question before the CJEU was whether it was against the rules concerning free movement of services and EU competition law to require athletes to be authorised by their national federation to be able to compete in international competitions.[218] Although the question referred to Articles 101 and 102 TFEU, the Court only examined the case in light of the freedom to provide services.[219] Nevertheless, *Deliège*

[211] ibid, para 4.
[212] ibid, para 8.
[213] *Bosman* (n 196).
[214] ibid, para 99.
[215] ibid, para 127.
[216] ibid, para 106.
[217] Case C-51/96 *Deliège* [2000] ECR I-02549, para 69.
[218] ibid, para 22.
[219] Then Art 85 and 86 EC Treaty.

is relevant for this thesis as it elaborates on the concept of economic activity within sports and establishes that selection rules are inherent to the organisation of sporting competitions. The Court first highlighted that although Ms Deliège is classified as an amateur, that does not mean that she does not engage in economic activity. In fact, she receives grants and sponsorships for her sporting activities, and although it is for the national court to determine, she most likely engages in economic activity.[220] The then Court held that the limitation on the number of athletes participating in a tournament is inherent in the conduct on a sports event and may therefore not be regarded as a restriction of the freedom to provide services.[221] According to the Court, it naturally falls to the SGB's concerned to establish appropriate rules and to make their selections in accordance with them.[222]

2.3.4. Piau

In *Piau* the GC had to rule whether FIFA's rules, under which player's agents must possess a licence issued by the competent national football association,[223] infringed Articles 101, 102 and 56 TFEU. The GC held that football clubs are undertakings,[224] and consequently, the governing bodies – national football associations and FIFA – constitute undertakings of associations.[225] Furthermore, the GC held that the license constitutes a barrier to access the economic activity of being a player's agent, and therefore necessarily affects competition under Article 101. Therefore, the license requirement can only be accepted insofar as the conditions in Article 101(3) TFEU are satisfied.[226] According to the GC, the Commission did not commit a manifest error by considering that the restriction might benefit from Article 101(3).[227] This was inter alia because it raised professional and ethical standards for players' agents to protect the players, and because competition was not eliminated.[228] Lastly, the CJEU held that Article 102 TFEU was not applicable, as the most restrictive provisions of the regulation had been deleted and the license system could benefit from the exemption in Article 101(3) TFEU. Therefore abuse could not be established.[229]

2.3.5. Meca-Medina

In *Meca-Medina* two professional swimmers filed a complaint to the Commission in which they challenged the compatibility of anti-doping rules adopted by the IOC and International

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[220] *Deliège* (n 217), paras 52-53.
[221] ibid, para 64.
[222] ibid, para 67.
[223] *Piau* (n 39), para 14.
[224] ibid, para 70.
[225] ibid, paras 71, 78.
[226] ibid, para 101.
[227] ibid, para 104.
[228] ibid, paras 102-103.
[229] ibid, para 119.

Swimming Federation with the rules on competition and freedom of services. First, with regard to the applicability of EU law, the CJEU reiterated its statement in *Bosman* and held that the sporting exception should remain limited to its proper objective and cannot be used to exclude the whole of a sporting activity from the scope of the Treaty.[230] The mere fact that a rule is purely sporting in nature does not remove it from the scope of the Treaty.[231] If a sport constitutes an economic activity and therefore falls within the scope of the Treaty, it is necessary to examine whether the rules governing that activity comply with the Treaty rules, including Articles 56, 101 and 102 TFEU, irrespective of the nature of the rule.[232] The CJEU then moves on to apply Article 101 TFEU to the present case. In citing the case of *Wouters* and applying the doctrine of restraints in the pursuit of legitimate objectives, the Court holds that the compatibility of rules with EU competition law cannot be assessed in the abstract, and that not every agreement or decision that restricts competition necessarily falls within the prohibition of Article 101(1) TFEU. In applying Article 101(1) to sports, account must first be taken of the overall context in which the decision was taken and of its objectives. Subsequently, it has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives, and whether they are proportionate to them.[233] In the case of *Meca-Medina*, the CJEU held that the anti-doping rules are inherent and proportionate to the legitimate objective of the organisation and proper conduct of sports.[234]

2.3.6. MOTOE

The question in *MOTOE* was whether a non-profit-making association that has the power to authorise the organisation of motorcycling events, but also organises such events in a commercial manner itself, falls within the scope of Articles 102 and 106 TFEU. The Court held that such an organisation constitutes an undertaking,[235] and it was for the national court to decide whether it had a dominant position.[236] Moving on, the Court highlighted that a system of undistorted competition can only be guaranteed if equality of opportunity is secured as between undertakings.[237] When an undertaking which itself organises and commercially exploits specific events, also has the power to authorise such events organised by other entities, such power can give rise to a possible conflict of interests and places that entity at an obvious advantage over its competitors as it can deny other operators access to the relevant market.[238] When such power is not made subject to

[230] *Meca-Medina* (n 105), para 26.
[231] ibid, para 27.
[232] ibid, para 30; Halgreen (n 25) 51.
[233] *Wouters* (n 26), para 97; *Meca-Medina* (n 105), para 42.
[234] *Meca-Medina* (n 105), paras 42, 45, 55.
[235] Case C-49/07 *MOTOE* [2008] ECR I-04863, para 29.
[236] ibid, para 36.
[237] *MOTOE* (n 235), para 51.
[238] ibid.

restrictions, obligations and review, it could lead the entity entrusted with giving that consent to distort competition by favouring events which it organises or those in whose organisation it participates, infringing Article 102 TFEU.[239]

In *MOTOE*, the CJEU for the first time applied EU competition law to a prior authorisation scheme in the field of sports.[240] It is interesting to note that prior authorisation has long been subject to free movement law, where it is closely connected to the principles of proportionality and transparency.[241] For example, in *Canal Satélite Digital*, the CJEU held that a system of prior authorisation does not legitimise discretionary conduct, and therefore, such a system must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned.[242] The case of *MOTOE* shows that similar reasoning can be applied to competition law. This has been confirmed by the CJEU in *ISU*.[243]

2.3.7. Olympique Lyonnais

A French football player signed a three-year training contract ('joueur espoir') with Olympique Lyonnais in 1997. Before the contract expired, they offered the player a professional contract, which he did not sign. Instead, in August 2000, he signed a professional contract with Newcastle United FC. Olympique Lyonnais sued the player and Newcastle United FC for damages. The question before the Court was whether the rules, upon which the claim for damages was based, infringe the free movement of workers.[244] The Court held that the rules indeed infringe the free movement of workers, as they make it less attractive for athletes to sign a contract with a club in another Member State.[245] However, the rules pursue a legitimate objective, which is the encouraging and training of young players, as recognised in *Bosman*.[246] In considering whether the rules are suitable to achieve that objective, account must be taken of the specific characteristics of sports in general, and football in particular, and of their social and educational function. The Court notes that the relevance of those factors is also corroborated by Article 165 TFEU.[247] In Olympique Lyonnais, the Court found that the rules would be suitable to attain the objective. However, the damages go beyond what is necessary and the rules are therefore not proportionate.[248]

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[239] ibid, para 52.
[240] See, on the application of Article 101 TFEU to a prior authorisation scheme *ISU* (n 209).
[241] Groussot X and Lindholm J, 'Principle of Legality and *Lex Sportiva* in EU law' (forthcoming), 10.
[242] Case C-390/99 *Canal Satélite Digital* [2002] ECR I-00607, para 35; see also Case C-205/99 *Analir and Others* [2001] ECR I-01271, para 38.
[243] *ISU* (n 209), para 32.
[244] *Olympique Lyonnais* (n 208), para 16.
[245] ibid, paras 34-37.
[246] ibid, para 39; *Bosman* (n 196), para 106.
[247] *Olympique Lyonnais* (n 208), para 40.
[248] ibid, paras 44- 48.

2.3.8. TopFit and Biffi

TopFit and Biffi concerned an Italian national living in Germany, who was not allowed to register for the national running championship, as he did not have the German nationality. Mr Biffi challenged this nationality-rule under free movement law. For the purposes of this thesis, here are two relevant aspects to this case. Firstly, the Court makes explicit reference to Article 165 TFEU, which reflects the considerable social importance of sports in the EU. Secondly, the Court held that a system of prior authorisation (in this case for the selection of players participating in the national championship) can only be justified in the light of Articles 18 and 21 TFEU if it is 'based on objective and non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of […] discretion so that it is not used arbitrarily'.[249] In the present case, the Court held that the total non-admission of an athlete on account of nationality is in any event disproportionate.[250] This case thus, once again, highlights the importance of transparency and proportionality when scrutinising a prior authorisation system under EU law.[251]

2.3.9. ISU

The last case that will be discussed here is arguably the most important one with regard to the ESL. Two Dutch ice skaters filed a complaint to the Commission that the eligibility rules of ISU – the sole international sports federation for ice skating – were incompatible with Articles 101 and 102 TFEU, as they prevented ice skaters from participating in competitions not authorised by ISU. The Commission held that the eligibility rules constitute a restriction of competition by object under Article 101 TFEU.[252] The GC referred to *MOTOE* and held that a system of prior authorisation by a company that also organises competitions itself must be subject to restrictions, obligations and review, both under Article 101 and 102 TFEU.[253] Applying the framework set out in *Wouters* and *Meca-Medina*, the GC analyses the context and content of the eligibility rules, and takes into account any possible legitimate objectives justifying the rules. With regard to the context of the case, the GC holds that it is necessary to take into account the specific characteristics of sports and its social and education function.[254] Regarding the content of the rules, the GC finds that the rules do not provide for clearly defined, transparent, non-discriminatory, reviewable authorisation criteria that are capable of ensuring organisers of events of effective access to the relevant market.[255] As a consequence, ISU had broad discretion to refuse to authorise events proposed by third parties, based on grounds that are not

[249] *TopFit and Biffi* (n 208), para 65.
[250] ibid, para 66.
[251] *Canal Satélite Digital* (n 242), para 35; *Analir and Others* (n 242), para 38.
[252] *ISU* (n 209), para 32.
[253] ibid, para 70-71.
[254] ibid, para 79; see *Olympique Lyonnais* (n 208) para 40.
[255] *ISU* (n 209), para 88.

legitimate.[256] Moreover, the eligibility rules do not precisely set out the conditions for the penalties that can be imposed for participation in an unauthorised event, which makes that the system of penalties is unpredictable and thus presents a risk of arbitrary application, which leads to the penalties having an excessive deterrent effect.[257] ISU had put forward that the eligibility rules pursue a legitimate objective, namely protecting the integrity of speed skating from the risks associated with betting.[258] The GC acknowledges that the protection of the integrity indeed constitutes a legitimate objective,[259] however, the penalties in the present case go beyond what is necessary to pursue that legitimate objective.[260] As the eligibility rules are not proportionate, they cannot be justified. For these reasons, the GC held that the Commission was right to conclude that the eligibility rules constitute a restriction of competition by object under Article 101 TFEU.[261]

2.4. Conclusion

From the previous paragraphs it can be derived how competition law is applied to the sports sector. Although this sector is organised in a particular manner (EMoS) and has some special features (specificity of sport) to be taken into account while applying EU law, competition law nevertheless applies. The sports sector is not excluded from the scope of EU law, and EU competition law applies when the relevant entities constitute undertakings and their actions relate to economic activity. As can be derived from *Bosman* and subsequent case law, the threshold for economic activity is low as the sporting exception must be interpreted narrowly. This means that the sports sector is subject to EU competition law and SGB's and other actors must adhere to these rules. Regarding Article 101 TFEU, a restriction of competition under Article 101(1) TFEU can fall outside the scope of that Article if it fulfils the criteria under the framework set out in *Meca-Medina*. Alternatively, an undertaking could rely on Article 101(3), as was done in *Piau*. With regard to Article 102 TFEU, the Court in *MOTOE* stated that the entrustment of the right to authorise sporting events with an undertaking that itself also organises those events puts that undertaking at a competitive advantage, which creates a risk that the undertaking will distort competition under Article 102 TFEU. That power must thus be subjected to restrictions, obligations and review, to prevent that undertaking from distorting competition by favouring events which it organises itself or in which organisation it participates.

[256] ibid, paras 86-87.
[257] ibid, para 94.
[258] ibid, para 80.
[259] *ISU* (n 209), parqa 102.
[260] ibid, para 103.
[261] ibid, para 120.

3. The FIFA and UEFA rules in light of Article 101 TFEU

Having established how EU competition law is applied to the sports sector, this Chapter applies the framework set out to analyse whether FIFA's and UEFA's rules regarding prior authorisation infringe Article 101 TFEU. This is done by analysing whether there is a restriction under Article 101(1) TFEU, after which potential legitimate objectives capable of justifying a restriction are discussed. Finally, it is examined whether the legal exception under Article 101(3) TFEU can be applied to the prior authorisation rules.

However, before going into the assessment of those rules, it is necessary to determine the relevant market. As stated previously, the relevant market is needed to determine a potential dominant position under Article 102 TFEU. However, the relevant market is also important with regard to Article 101 TFEU, for example to analyse whether access to the market is hindered.[262] Therefore, as a first matter, the relevant market of the present case is established.

3.1. The relevant market

For the purposes of this thesis, the main question is whether the ESL would be part the same market as the Champions League, Europe League and Conference League organised by FIFA and UEFA, or whether it would create a new market of its own. If the latter would be the case, it could be argued that the FIFA and UEFA rules do not violate Article 101(1) TFEU.[263] Therefore, it is important to establish the relevant market.

The relevant *geographical market* of the ESL is the European market. Currently, UEFA organises the Champions League, Europa League and Conference League on this market. The geographical market of these leagues consists of all countries where UEFA is active, which is the whole of Europe.[264] As the ESL would only exist of 15 Founding Clubs and 5 annual participators, it is not possible that the ESL will have clubs from every country in Europe. However, it can be assumed that football consumers in the whole of Europe will be interested, as the Founding Clubs include of the 'best' football clubs of Europe. Therefore, the geographical market is the same and must be characterised as European.

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[262] COM 2011/C 11/01, para 10; Alexander Egger and Christine Stix-Hackl, 'Sports and competition law: a never-ending story?' (2002) 23 ECLR 81, 85.
[263] 'The European Super League: opening the floodgates of competition law' (*Maastricht University,* 20 May 2021) <www.maastrichtuniversity.nl/blog/2021/05/european-super-league-opening-floodgates-competition-law> accessed 28 March 2022.
[264] Valerie Kaplan, 'UEFA Financial Fairplay Regulations and European Union Antitrust Law Complications' (2015) 29 Emory Int. Law Review 799.

The definition of the *product market* is less clear. The issue of defining the relevant product market in the sports sector was brought up before the CJEU in *Balog*. However, this case between the Hungarian footballer Tibor Balog and FIFA was settled before the CJEU had the chance to rule on the preliminary questions referred. The AG in *Balog* was Stix-Hackl, and her article on sports and competition law, written together with Egger, is widely seen as an informal opinion on this matter.[265] Following Egger and Stix-Hackl, three interconnected product markets need to be distinguished when it comes to football: the exploitation market, the contest market, and the supply market.[266]

First, the *exploitation market* concerns the market in which clubs and SGB's exploit their performances. Examples are ticket sales, merchandise, sponsorship, advertising and exploitation of broadcasting sales.[267] SGB's like UEFA and FIFA, but also the ESLC, are on the supply side. On the demand side are spectators, sponsors and broadcasting companies. The interest of the demand is dependent on the attraction of a league to the masses,[268] which makes that the substitutability for consumers determines the substitutability on the demand side.[269] Applying the SSNIP-test, the question is whether consumers would switch to the ESL in case the Champions League, Europa League and Conference League would increase in price. With regard to spectators, this is hard to predict as there are different groups of spectators. There are those who watch the best game that is available, regardless of the clubs participating in the league, and these spectators are likely to switch to the ESL if it would offer a better quality of games. However, there are also spectators who feel an emotional connection to 'their' club and would only watch the league in which their club participates, regardless of the price.[270] This means that this group of spectators is unlikely to switch to the ESL if their club would not participate in that league. In fact, the enormous backlash from fans following the announcement of the ESL can be seen as a sign that even fans from clubs that would participate in the ESL would not switch to the ESL.[271] This might however be different for sponsors and broadcasting agencies. Seeing the enormous amount of money that is connected to the ESL, it might be attractive for these groups of consumers to switch to the ESL, especially if the Champions League, Europa League, and Conference League would increase in price. Seeing that the exploitation of broadcasting

[265] An Vermeersch, 'All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport' (2007) 3 JCER 238, 246.
[266] Egger and Stix-Hackl (n 262) 86.
[267] Deloitte Sports Business Group, 'Football Money League' (January 2019) 2.
[268] Jay Meliëzer, 'The European Super League, Super Anti-Competitive?' (Master thesis, University of Amsterdam 2019).
[269] *British Interactive Broadcasting/Open* (Case Comp IV/36.539) Commission Decision [1999] OJ L 312/1.
[270] 'The European Super League: opening the floodgates of competition law' (*Maastricht University,* 20 May 2021) <www.maastrichtuniversity.nl/blog/2021/05/european-super-league-opening-floodgates-competition-law> accessed 28 May 2022.
[271] Simon Collings, 'European Super League: Fan backlash to crush breakaway 'strongest message sent in football', says Mikel Arteta' *Evening Standard* (London, 22 April 2021).

rights is the biggest source of income for UEFA[272] (and would presumably also be for the ESL), while acknowledging the difficulties in predicting the behaviour of spectators, this thesis assumes that the ESL will be part of the same exploitation market as the Champions League, Europa League and Conference League organised by UEFA and FIFA, which is the commercial exploitation of transnational club football.

Secondly, the *contest market* must be assessed. This market is upstream from the exploitation market and concerns the market in which the performances which are exploited are produced.[273] In the present case, this concerns football matches in the context of transnational leagues. Particular to this market is that the matches are a joint production of clubs, which requires a given standard of teams and uncertainty of results.[274] Moreover, the fact that clubs need other clubs to compete against makes that the clubs are interdependent, which is a specific feature of sporting competitions.[275] On the supply side of the contest market are the SGB's organising such leagues, such as UEFA and FIFA. Within the EU, the ESL would thus compete with UEFA to supply a transnational football league. On the demand side of the contest market are the football clubs which are willing and able to participate in the transnational leagues. Applying a simplified SSNIP-test to assess the demand-substitutability on the contest market, it is likely that clubs are willing to switch from the UEFA leagues to the ESL, especially seeing that the secured revenue for participating in the ESL will be substantially higher than the potential revenue that can be received by participating in the Champions League, Europa League or Conference League.[276] It is thus attractive for the demand side to switch to the ESL. Within the contest market, it is thus clear that the leagues organised by UEFA and the ESL would be in the same relevant market, which is the organisation of transnational club football leagues.

Lastly, the supply market must be examined. The supply market is upstream from the contest market and concerns the market where the football clubs 'sell' and 'buy' players.[277] The football players form one of the most important sources of supply for individual clubs, as they enable the clubs to actually participate in matches and leagues.[278] The football clubs are on the demand side, as well as on the supply side. This is because the football clubs are the entities that both 'sell' and 'buy' players.[279] However, as FIFA, UEFA and ESLC

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[272] Justin Birnbaum, 'European Super League Aims To Swipe Champions League's $2.4 Billion In TV Money — And Bury UEFA' (*Forbes,* 19 April 2019) <www.forbes.com/sites/justinbirnbaum/2021/04/19/new-european-super-league-taking-a-swipe-at-champions-leagues-24-billion-annual-broadcast-revenues/?sh=55c9ac311d05> accessed 5 April 2022.
[273] Egger and Stix-Hackl (n 262), 86.
[274] ibid.
[275] Robert Siekmann (n 203) 86.
[276] Justin Birnbaum (n 272).
[277] Egger and Stix-Hackl (n 262), 87.
[278] ibid.
[279] ibid.

do not have control over which football clubs buy which players, this market is not relevant for this thesis.

From the above, it can be derived that the ESL would become part of the already existing relevant market, which is the *market for the organisation of transnational club football leagues in Europe together with the commercial exploitation those leagues.* This is similar to the relevant markets that the Commission established in both *MOTOE* and *ISU*, which also concerned both the organisation of sporting events as well as the commercial exploitation of those events.[280] The European Courts have confirmed the relevant market assessment of the Commission in these cases, and in *MOTOE* the CJEU held that the 'two types of activities [organisation and commercial exploitation] are not interchangeable but are rather functionally complementary.'[281]

3.2. Application of Article 101(1) TFEU

3.2.1. Undertaking, effect on trade, appreciability

Before analysing whether FIFA's and UEFA's prior authorisation rules infringe Article 101 TFEU, it must first be considered whether FIFA and UEFA are undertakings in the sense of EU competition law. In *Piau*, the CJEU held that FIFA, its member associations and football clubs can be considered (associations of) undertakings.[282] In *ISU*, the Commission was of the opinion that ISU constituted an association of undertakings, as it conducts 'commercial activities related to the organisation and marketing of international ice sport events'.[283] This reasoning applies to UEFA and FIFA as well, as they – besides their regulatory activities – also engage in commercial activities, such as regulating the broadcasting rights of football matches.[284] As FIFA and UEFA engage in economic activity, they can be regarded undertakings. Moreover, FIFA's and UEFA's members are national associations, and those national bodies also engage in economic activity as they are required by the FIFA and UEFA Statutes to participate in competitions organised by them and are holders of exclusive broadcasting and transmission rights for the sporting events.[285] Consequently, by being the governing bodies of those national associations, FIFA and UEFA can also be regarded as associations of undertakings in the sense of Article 101 TFEU,[286] and the rules in their

[280] *MOTOE (n 235)*, para 33; *ISU* (n 209), paras 29 and 88.
[281] *MOTOE* (n 235), para 33.
[282] *Piau* (n 39), paras 70, 71 and 78.
[283] *International Skating Union's Eligibility rules* (Case AT.40208) [2017] OJ C148/9, para 147.
[284] See for example Gaurav Laghate, 'Sony renews media rights deal with UEFA for 3 years' *The Economic Times* (29 October 2021) <www.economictimes.indiatimes.com/industry/media/entertainment/sony-renews-media-rights-deal-with-uefa-for-3-years/articleshow/87361405.cms?from=mdr> accessed 25 March 2022.
[285] *Piau* (n 39), para 71.
[286] ibid, para 72.

statutes amount to decisions by associations of undertakings within the meaning of Article 101 TFEU.[287]

As FIFA and UEFA are cross-border organisations, and the ESL is set up by football clubs established in several different Member States, the refusal to authorise the ESL will most likely have an appreciable effect on trade between Member States. Furthermore, seeing that ESLC has been granted a loan amounting to 3,983,000,000 Euro by JP Morgan,[288] and seeing that the ESLC was expecting solidarity payments up to 10 billion Euro in line with league revenues,[289] it must be concluded that a potential refusal to authorise this league by FIFA or UEFA would have an appreciable effect on competition.

3.2.2. Restriction of competition

Secondly, it needs to be assessed whether the rules of FIFA and UEFA regarding prior authorisation have as their object or effect the restriction of competition. In *ISU* it was held that to analyse whether prior authorisation rules constitute a restriction of competition by object, regard must be had to the content of the provisions, the objectives they seek to attain, and the economic and legal context of which they form part.[290] The GC in *ISU* reiterated *MOTOE*, where it was held that when an entity organises competitions itself, but also holds the power to authorise events organised by third parties, this power grants that entity an obvious advantage over its competitors and may lead to a conflict of interest. The exercise of the authorisation must be subject to restrictions, obligations and review, not to let that undertaking distort competition by preventing market access.[291] Following the case of *Ordem*, the reasoning flowing from *MOTOE* can also be applied to Article 101 TFEU.[292] In the present case, FIFA and UEFA organise and commercially exploit football competitions themselves, but also hold the exclusive power to authorise such events, without that power being subject to restrictions, obligations and review. This places FIFA and UEFA at a competitive advantage over their competitors and may lead to a conflict of interest when receiving requests for prior authorisation filed by their (potential) competitors. By virtue of their prior authorisation rules, FIFA and UEFA thus have the power to restrict market access and distort competition. Following *ISU*, this amounts to a restriction of competition by object.[293]

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[287] *ISU* (n 209), para 31.
[288] *European Super League Company* (n 9), para 9.
[289] European Super League Company, 'The Super League' <www.thesuperleague.com> accessed 27 March 2022.
[290] *International Skating Union's Eligibility rules (Case AT.40208) [2017] OJ C148/9,* para 155; *ISU* (n 209), para 67; *GlaxoSmithKline* (n 54), para 58; *CB v Commission* (n 55), para 53.
[291] *ISU* (n 209), para 70; *MOTOE (n 235)*, paras 51-52.
[292] Case C-1/12 *Ordem dos Técnicos Oficiais de Contas* [2013], paras 88-92; *ISU* (n 209), para 71.
[293] *ISU* (n 209), para 75.

3.2.3. Application of Meca-Medina

However, not every agreement or decision of an association of undertakings which restricts competition is necessarily caught by the provision laid down in Article 101(1) TFEU, as was also acknowledged by the Commission and GC in *ISU*. Referring to *Meca-Medina*, the GC states that the application of Article 101(1) in a particular case requires the overall context and objectives of the decision to be taken into account, after which it must be examined whether the restrictions arising therefrom are inherent in the pursuit of legitimate objectives and are proportionate to those objectives.[294] The following paragraphs apply this framework to FIFA's and UEFA's prior authorisation rules.

3.2.3.1. Context and content

The context of the prior authorisation rules must be defined as the field of sports. Therefore, it is necessary to consider the specific characteristics of sports in general and of its social and education function, as the GC also acknowledged in *ISU*.[295]

Secondly, the content of the rules must be assessed. A first problematic aspect of the FIFA and UEFA rules is that they do not provide for authorisation criteria which are clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring the organisers of events effective access to the relevant market, which was found to be problematic in *ISU*.[296] This grants FIFA and UEFA broad discretion to refuse authorisation of events proposed by third parties, which could lead to refusal based on grounds which are not legitimate.

Additionally, the content of the penalties for participation in an unauthorised event must be considered. In *ISU*, the Commission and CG found that the severity of penalties can be taken into account when determining whether the system of prior authorisation has the object of restricting competition. In *ISU*, the penalties were disproportionally high and could dissuade athletes from participating in unauthorised events.[297] In the case of the ESL, FIFA and UEFA adopted a joint statement saying that the clubs participating in the ESL would be banned from participating in any other competition at domestic, European or world level, and their players could be denied to represent their respective national teams.[298] The extent of these penalties is uncertain, however, in light of the GC's reasoning in *ISU*, a complete ban would be likely to be disproportionate, especially since UEFA and FIFA are the most important organisers of football competitions, and because football

[294] *ISU* (n 209), para 77; *Meca-Medina* (n 105), para 42; *Wouters* (n 26), para 97.
[295] *ISU* (n 209), para 79.
[296] ibid, para 88.
[297] ibid, para 95.
[298] UEFA, 'Statement by UEFA' (n 4).

players have a limited amount of years in which they can perform at a professional level.[299] Moreover, although the UEFA Statutes allow for a ban on clubs and players,[300] they do not precisely set out the conditions on how the penalties can be imposed. For example, the rules allow for a suspension of a player 'for a specified number of matches or for a specified or unspecified period'.[301] This creates an unpredictable system of penalties and 'presents a risk of arbitrary application which leads to those penalties having an excessive deterrent effect', as the GC also held in *ISU*.[302]

3.2.3.2. Legitimate objectives

The *Meca-Medina* framework also requires possible legitimate objectives to be taken into account. In *ISU*, the Commission clarified that legitimate objectives within the field of sports may, inter alia, be the protection of integrity of sports, protection of health and safety, the organisation and proper conduct of sports, and the protection of the solidarity model, in particular within a sports pyramid.[303] Furthermore, the Commission accepts that the protection of the volunteer model of sports, as laid down in Article 165 TFEU, may be considered a legitimate objective.[304] The legitimacy of these objectives was not questioned by the GC. In the following paragraphs, three potential legitimate objectives justifying the prior authorisation rules will be identified.

In the case of the ESL, there are no legitimate objectives included in the FIFA or UEFA rules. However, in their joint statement condemning the ESL, UEFA and FIFA hold that 'football is based on open competitions and sporting merit; it cannot be any other way.'[305] This may refer to the openness in sporting competitions upon which the EMoS is based, which is also laid down in Article 165(2) TFEU. Applying the Commission's reasoning to the volunteer model of sports – which is also an element of the EMoS and laid down in Article 165 TFEU – it must be concluded that protecting the openness in sporting competitions can constitute the first potential legitimate objective. However, the strength of this legitimate objective is questionable. As stated in paragraph 2.2.1 of this thesis, not all sports competitions in the EU are entirely open competitions. SGB's may have a licensing system in place, which set financial criteria for participation in certain competitions, and in some sports, a partly or even completely closed system is already adopted.[306] In this regard, it must also be highlighted that the ESL would not constitute a completely closed

[299] See by analogy *ISU* (n 209), para 94; Robby Houben, Jan Blockx and Steve Nuyts, 'UEFA and the Super League: who is calling who a cartel?' [2022] International Sports Law Journal, para 7.1.3.
[300] UEFA (n 8), arts 52, 53 and 54.
[301] UEFA (n 8), art 54(1)(d).
[302] *ISU* (n 209), para 94.
[303] *International Skating Union's Eligibility rules* (n 290), paras 219, 221, 22.
[304] ibid, para 223.
[305] UEFA, 'Statement by UEFA' (n 4).
[306] Halgreen (n 25) 68.

competition: out of the twenty participating teams, fifteen teams would have a secured spot. The other five teams will be 'annual qualifiers', which means that this leaves room for a partly open competition. For the foregoing reasons, it is doubtful whether the protection of openness in sporting competitions would be accepted as a legitimate objective in the case of the ESL.

A second possible legitimate objective could be the organisation and proper conduct of competitions.[307] This includes the protection and good functioning of the sports calendar.[308] Central coordination of the sports calendar is beneficial to avoid conflict between matches organised by FIFA, UEFA and national member associations, and could therefore justify a pre-authorisation system.[309].

A third possible legitimate objective could be to protect the solidarity model of sports. This relates to the social function of sports as recognised by the CJEU in *Bosman* and laid down in Article 165(1) TFEU.[310] Article 2(1)(h) of the UEFA Statutes provides that UEFA's objective is to redistribute revenue generated by football in accordance with the principle of solidarity and to support reinvestment in favour of all levels and areas of football, especially the grassroots of the game.[311] Within the current football model, solidarity is embedded in several levels of the pyramid, for example within solidarity payments for player transfers, distribution schemes for broadcasting profits and funding of grassroots projects.[312] This way, revenue streams are redistributed within the football pyramid. A breakaway league is placed outside the existing football pyramid, and redistribution may very well only take place amongst the participating teams of the breakaway league. If all key football clubs would leave the current football pyramid, this would mean the downfall of the existing solidarity model.[313] Therefore, the protection of the solidarity model of sports could constitute a legitimate objective.

3.2.3.3.Inherency and proportionality

For a restriction to fall outside the scope of Article 101(1) TFEU, the restriction must be inherent in the pursuit of the legitimate objectives, and must be proportionate to those objectives. In the following section, it will first be assessed whether the restriction of competition is inherent in the pursuit of the three identified potential legitimate objectives, and secondly, whether they are proportionate.

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[307] *International Skating Union's Eligibility rules* (n 290), para 242.
[308] ibid, para 219.
[309] Houben, Blockx and Nuyts (n 299), para 6.1.
[310] *Bosman* (n 196), para 106.
[311] UEFA (n 8).
[312] Houben, Blockx and Nuyts (n 299), para 6.1.
[313] ibid.

Firstly, regarding the objective of preserving openness in sporting competitions, it is already highlighted how this is not an absolute criterion, as there are sporting competitions in the EU which are partly or completely closed.[314] In fact, UEFA itself uses a licensing system for clubs to be able to participate in UEFA competitions, which means that even competitions organised by UEFA are not entirely open.[315] Additionally, as the ESL would not constitute a *completely* closed competition, it might be hard to argue that the restriction of competition is inherent to the protection of openness in sporting competitions.

Secondly, with regard to the protection and well-functioning of the sports calendar, the Commission in *ISU* did not accept that the eligibility rules were inherent to the legitimate objective, as ISU failed to show that it would conflict with other ice skating matches.[316] In the present case, the ESL games would be played mid-week, to avoid conflicts with domestic leagues.[317] The ESL games would overlap with the leagues organised by FIFA and UEFA, but since the ESL clubs would not participate in those leagues anymore, this would not cause a problem. The lack of overlap will make it difficult for UEFA and FIFA to show that it conflicts with the match calendar,[318] and the restriction of competition can therefore not be regarded as being inherent to the protection and well-functioning of the sports calendar.

Thirdly, concerning the protection of the solidarity model, the Commission in *ISU* did not accept that this legitimate objective was inherent to the negative effects on competition, as the solidarity model could also be preserved by requesting a solidarity payment from third party organisers.[319] In the present case, the ESL would include a solidarity system, which would 'follow a new model with full transparency and regular public reporting.'[320] It is unclear how this solidarity system would function, however, this makes that UEFA and FIFA can, at this time, not convincingly show how solidarity in football would be undermined. Therefore, it would also be hard to argue that the restriction of competition is inherent to the protection of the solidarity system.

Lastly, the restriction of competition must also be *proportionate* to the pursuit of the legitimate objectives. In *ISU*, the Commission considered that the prior authorisation system was in any event disproportionate, as the rules did not set out any criteria and left a very broad margin of discretion to the ISU to decide whether to accept or reject an

[314] Halgreen (n 25) 68.
[315] UEFA, 'UEFA Club Licensing and Financial Fair Play Regulations' (Edition 2018).
[316] *International Skating Union's Eligibility rules* (n 290), para 242-245.
[317] European Super League Company, 'The Super League' <www.thesuperleague.com> accessed 3 January 2022.
[318] Houben, Blockx and Nuyts (n 299), para 7.1.
[319] *International Skating Union's Eligibility rules* (n 290), para 247.
[320] European Super League Company, 'The Super League' <https://thesuperleague.com/#who_we_are> accessed 25 May.

application filed by a third party.[321] For the same reasons, proportionality might be a difficult hurdle to take for UEFA and FIFA, as their rules do not set out any criteria as to the approval of competitions, but merely that prior authorisation is required. The lack of criteria within the FIFA and UEFA prior authorisation rules has also been highlighted as problematic by the Commission.[322] It can therefore be assumed that, regardless of whether the objectives put forward by UEFA and FIFA would be accepted as legitimate objectives, and regardless of whether the restriction of competition would be inherent to the pursuit of those objectives, the restriction is in any case not proportionate. Therefore, the prior authorisation rules cannot be justified by legitimate objectives and constitute a restriction of Article 101(1) TFEU.

3.3. Application of Article 101(3) TFEU

Having established that the UEFA rules infringe Article 101(1), it must be analysed whether they can enjoy the exception under Article 101(3) TFEU. As stipulated in paragraph 2.1.2.6 of this thesis, four cumulative criteria need to be fulfilled for Article 101(3) to apply. For the application of Article 101(3) to the sports sector, inspiration can once again be drawn from the Commission decision in *ISU*. With regard to the first two criteria, requiring that the decision leads to efficiency gains and consumers are allowed a fair share of those benefits, the Commission in *ISU* was of the opinion that the eligibility rules did not lead to any efficiency gains.[323] On the contrary, the Commission even stated that the ISU rules limit consumer choice, as consumers are deprived of a wider choice of competing events, offered by competitors.[324] The third criterion – the decision must be indispensable to the attainment of the benefits – was also not fulfilled in *ISU*, as the rules could not be considered proportionate. Lastly, the Commission found that the fourth criterion – that competition is not eliminated – was not fulfilled, as the ISU rules create an entry barrier for potential competitors.

Applying this framework to the ESL, it must be concluded that it might be hard for UEFA and FIFA to successfully rely on Article 101(3). Firstly, it would be hard to show any efficiencies, as the protection of the pyramid structure of sports and the functioning of the sports calendar were not accepted as constituting efficiencies in *ISU*.[325] Even if the existence of efficiencies would be accepted, it would be even harder to show that consumers are allowed a fair share of the benefits, especially seeing that UEFA's and FIFA's rules limit consumer choice by depriving them from an alternative football competition.

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[321] ibid, para 257.
[322] 'Half-time analysis: what's next for the European Super League?' (22 Feb 2022) <https://www.osborneclarke.com/insights/half-time-analysis-whats-next-european-super-league> accessed 26 March 2022.
[323] *International Skating Union's Eligibility rules* (n 290), paras 294-297.
[324] ibid, para 298.
[325] ibid, paras 295.

Moreover, as stated in paragraph 3.2.3.3 of this thesis, the rules cannot be considered proportionate due to the lack of criteria regarding prior authorisation, which makes that the rules are not indispensable to the attainment of any objectives. Lastly, the prior authorisation rules constitute an entry barrier for potential competitors by limiting market access, which makes it difficult to fulfil the fourth criterion, under which an agreement must not eliminate competition. For these reasons, it is highly unlikely that UEFA and FIFA can successfully rely on Article 101(3) TFEU.

3.4. Conclusion

In light of the foregoing, it must be concluded that the FIFA and UEFA rules on prior authorisation form a restriction of competition by object under Article 101(1) TFEU. The rules constitute an entry barrier for potential competitors by limiting market access. Taking into account their content, the prior authorisation rules lack authorisation criteria which are clearly defined, transparent, non-discriminatory and reviewable. Additionally, FIFA's and UEFA's penalty system for participation in unauthorised events is unpredictable due to the lack of criteria. For these reasons, FIFA's and UEFA's prior authorisation rules must be deemed disproportionate, which leads to the conclusion that even if there would be legitimate objectives, or even if there would be efficiencies in the sense of Article 101(3), the rules cannot be justified. Therefore, the FIFA and UEFA rules on prior authorisation restrict competition by object under Article 101(1) TFEU.

4. The FIFA and UEFA rules in light of Article 102 TFEU

Having established that the prior authorisation rules restrict competition under Article 101 TFEU, this Chapter will analyse whether the rules infringe Article 102 TFEU. This will be done by first analysing whether it can be said that FIFA and UEFA hold a dominant position, after which it is examined whether abuse of a dominant position has occurred. Finally, potential defences will be assessed.

4.1. Dominance and internal market

In paragraph 3.2.1 of this thesis, it has already been established that FIFA and UEFA constitute associations of undertakings. However, for Article 102 TFEU to apply, an association of undertakings must also have a dominant position on the relevant market. As established in paragraph 3.1 of this thesis, the relevant market in the present case is the organisation and commercial exploitation of transnational club football in the EU. It could be argued that on this market, FIFA and UEFA have a 100% market share, as all club

football competitions in the EU are either organised or authorised by FIFA and UEFA.[326] This is corroborated by the structure of the EMoS and its one-federation-per-sport principle,[327] which means that sports federations are often, by their very nature, in a monopolistic position.[328] This would mean that FIFA and UEFA have a 100% market share. In *Tetrapak*, the GC agreed with the Commission that the fact that an undertaking holds 90% of the market shares is in itself and in the absence of exceptional circumstances evidence of the existence of a dominant position.[329] In fact, the Court has even held that a market share of 50% is, in the absence of exceptional circumstances, evidence of a dominant position.[330] Therefore, it must be concluded that both FIFA and UEFA have a dominant position on the relevant market. For Article 102 TFEU to apply, the dominant position must be held in the whole or a substantial part of the internal market. As FIFA and UEFA organise and commercially exploit transnational club football within the whole of the EU, this requirement is fulfilled.

4.2. Abuse

Merely holding a dominant position is not prohibited by Article 102 TFEU; it is the abuse of such a position which is illegal.[331] The question is whether the rules in the FIFA and UEFA Statutes can be seen as competition on the merits, or whether they amount to abuse of a dominant position.[332] As previously highlighted, it can be derived from *MOTOE* that a system of undistorted competition can only be guaranteed if equality of opportunity is secured between undertakings.[333] When undertakings which themselves organise and commercially exploit specific events – such as FIFA and UEFA organise and commercially exploit transnational club football leagues in Europe – also have the power to authorise such events organised by other entities, this power can give rise to a possible conflict of interests and places those entities at an obvious advantage over their competitors.[334] By having this power, FIFA and UEFA can deny other operators access to the relevant market at the advantage of the leagues they organise themselves.[335] To ensure equality of opportunity between undertakings and to prevent distortion of competition by favouring specific events or organisers, this power must be subject to restrictions, obligations and review.[336] However, in the case of FIFA and UEFA, there are no such safeguards, as was

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[326] FIFA (n 7), art 71; UEFA (n 8), art 49.
[327] Richard Parrish, *Sports law and policy in the European Union* (Manchester University Press 2003), 119.
[328] Halgreen (n 25) 65; Stephen Weatherill (n 193) 3.
[329] Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-00755, para 109; confirmed by the CJEU in *Tetra Pak v Commission* (n 154).
[330] *AKZO v Commission* (n 144), para 60.
[331] *Michelin I* (n 130), para 57.
[332] *Deutsche Telekom v Commission* (n 154), para 177; Whish & Bailey (n 48) 200.
[333] *MOTOE* (n 235), para 51.
[334] ibid.
[335] ibid.
[336] ibid, para 52.

also highlighted by the Commission.[337] Therefore, it must be concluded that FIFA's and UEFA's rules on prior authorisation amount to exclusionary abuse of dominance under Article 102 TFEU, as they do not guarantee equality of opportunity between undertakings and may deny undertakings access to the relevant market. More specifically, the exclusionary abuse can be regarded as anticompetitive horizontal foreclosure, as the rules may deny FIFA's and UEFA's potential competitors (such as the ESLC) access to the relevant market.[338] Therefore, the FIFA and UEFA rules on prior authorisation amount to abuse of dominance under Article 102 TFEU.

4.3. Defences

Undertakings can justify their conduct under Article 102 TFEU either by demonstrating that the conduct is objectively necessary or by successfully relying on the efficiency defence. In any case, the conduct would have to be indispensable and proportionate to the objective pursued by the dominant undertaking.[339] The following section will first examine whether it can be argued that the prior authorisation rules are objectively necessary, after which it will be examined whether there are any efficiencies upon which FIFA and UEFA could rely to justify their conduct under Article 102 TFEU.

Under the assessment of the UEFA and FIFA rules in light of Article 101 TFEU, possible legitimate objectives have been examined. It was concluded that protecting the openness in sporting competitions, protecting the sports calendar, and protecting the solidarity model of football could potentially constitute legitimate objectives (see paragraph 3.2.3.2). These legitimate objectives could possibly also constitute objective justifications under Article 102 TFEU, seeing that they are external to UEFA and FIFA. However, to demonstrate that UEFA's and FIFA's conduct is objectively necessary, their conduct must also be indispensable and proportionate to the objectives pursued. As was highlighted in paragraph 3.2.3.3 of this thesis, the UEFA and FIFA prior authorisation rules cannot be regarded as such. The rules are not inherent in the pursuit of the legitimate objectives, which means that the rules are not necessary. Moreover, the rules are not proportionate in the pursuit of the legitimate objectives, as they do not set out any authorisation requirements and therefore grant a broad margin of discretion to FIFA and UEFA. It must therefore be concluded that UEFA and FIFA would fail to demonstrate that their conduct is objectively necessary.

Secondly, it must be assessed whether there are any efficiencies capable of justifying the prior authorisation rules. Again, it has already been assessed whether UEFA and FIFA could

[337] 'Half-time analysis: what's next for the European Super League?' (n 322).
[338] Whish & Bailey (n 48) 216.
[339] COM 2009/C 45/02, para 28.

successfully rely on efficiencies under Article 101 (see paragraph 3.3). It was concluded that it would be hard for UEFA and FIFA to rely on Article 101(3), as there would probably not be any efficiencies, and even if the existence of efficiencies would be accepted, the prior authorisation rules would not be indispensable to the attainment of any objectives as they are not proportionate. The same reasoning can be applied to the efficiency defence under Article 102 TFEU. Even though the efficiency defences are not completely identical, they are very similar: both defences require that the efficiencies result from the conduct, they must not be indispensable, and they must not eliminate (effective) competition. The difference is that the efficiency defence of Article 101(3) requires a fair share of the benefit to flow to the consumer, whereas the efficiency defence under Article 102 requires that the efficiencies outweigh any negative effects on competition. However, it could even be argued that these requirements come down to the same thing, as they both require a balancing of pro- and anti-competitive effects. Applying this framework to Article 102 TFEU, it would, first of all, be hard to prove that there are any efficiencies flowing from UEFA and FIFA's abusive conduct, as the Commission has not accepted the protection of the pyramid structure of sports and the functioning of the sports calendar as efficiencies.[340] Secondly, the prior authorisation rules cannot be considered proportionate due to the lack of criteria, which makes that the rules are not indispensable to the attainment of any objectives. Thirdly, as there are no efficiencies to be found, it would mean that they cannot outweigh any likely negative effects on competition and consumer welfare in the affected markets. Fourth and last, the prior authorisation rules grant FIFA and UEFA the possibility to prevent market access, which makes that their conduct eliminates competition and the fourth criterion of the efficiency defence is not fulfilled. It must therefore be concluded that it is unlikely that UEFA and FIFA can successfully rely on an efficiency defence to justify their abusive conduct under Article 102 TFEU.

4.4. Conclusion

It must be concluded that both FIFA and UEFA hold a dominant position on the relevant market of the organisation and commercial exploitation of transnational club football in the EU. Their rules on prior authorisation constitute abuse of dominance under Article 102 TFEU, as they do not guarantee equality of opportunity between undertakings and may deny undertakings access to the relevant market. More specifically, the abuse can be regarded as anticompetitive horizontal foreclosure. As the rules on prior authorisation are disproportionate and allow for the elimination of competition, it is unlikely that their conduct can be justified based on objective necessity or efficiencies. Therefore, FIFA's and

[340] *International Skating Union's Eligibility rules* (n 290), para 295.

UEFA's rules on prior authorisation amount to abuse of a dominant position under Article 102 TFEU.

5.The ESL in light of Article 101 TFEU

It has now been established that FIFA's and UEFA's prior authorisation rules restrict competition. However, the question remains whether the ESL itself is free of any competition concerns. Therefore, this Chapter will analyse whether the ESL infringes Article 101 TFEU. This will again be done by first examining whether there is a restriction of competition under Article 101(1) TFEU, after which it will be analysed whether there are legitimate objectives able to justify the restriction. Lastly, attention will be paid to Article 101(3) TFEU. By analysing the ESL, it is important to keep in mind that the set-up of the ESL was only a draft at the moment it was announced. Seeing that the plan has not been executed, the details of the ESL are unknown. This means that this assessment necessarily is incomplete. However, the assessment will be executed based on the limited facts that are known.

5.1. Application of Article 101(1) TFEU

5.1.1. Undertaking, effect on trade, appreciability

For the ESL to fall within the scope of EU competition law, there must be several undertakings engaging in collusive behaviour, or one association of undertakings. As stated in *Piau*, football clubs engage in economic activity and are therefore undertakings in the sense of Article 101(1) TFEU.[341] The creation of the ESL by the founding football clubs shows a 'concurrence of wills' between the those clubs as to their future behaviour, which makes that the creation of the ESL amounts to an agreement.[342] As the founding clubs act on the same level of the market, and provide competing services, the ESL can be characterised as a horizontal, inter-brand agreement.[343] As stated in paragraph 3.2.1 of this thesis, the ESL is set-up by football clubs established in different Member States and will therefore most likely have an appreciable effect on trade between Member States. Moreover, as stated in the same paragraph, the ESL was expecting solidarity payments up to 10 billion euro, which gives ground to assume that a potential restriction of competition would be appreciable.

5.1.2. Restriction of competition

The main question is whether the ESL would restrict competition, either by object or effect. A restriction by object must be interpreted restrictively and must, by its very nature, reveal

[341] *Piau* (n 39), para 69.
[342] *Bayer v Commission* (n 34).
[343] *Generics (UK) and Others* (n 63), para 32.

a sufficient degree of harm to competition.[344] To establish a restriction by object, regard must be had to the content, objectives and context of the agreement.[345] Concerning the *objectives* of the agreement, it can be derived from the ESL press release that the objective of the ESL is to improve the quality and intensity of football, and to provide for additional financial resources.[346] With regard to the *context* of the agreement, it must be highlighted that the relevant market has entry barriers.[347] This is due to the EMoS within the field of football, which includes the one-federation-per-sport principle.[348] As UEFA, under the authority of FIFA, is the only federation governing the organisation of football in the EU, it is hard for potential competition to enter the market. Lastly, having regard to the *content* of the agreement, it is clear that the most problematic aspect of the ESL is the partly closed nature of the league. As the fifteen founding clubs are guaranteed a spot in the ESL, it could be argued that the agreement amounts to a market-sharing agreement, only leaving room for a limited amount of non-founding clubs to participate. The Court has held that market-sharing agreements constitute particularly serious breaches of the competition rules,[349] and are considered to restrict competition by object.[350] However, seeing that there is still some room for non-founding clubs to participate, it might be a stretch to regard the ESL as a restriction by object. Another reason for the ESL not to be regarded as a by-object restriction is the existence of pro-competitive effects. It could for example be argued that there is currently no alternative to UEFA's club leagues, and the ESL, by providing an alternative club league, would increase competition on the relevant market, while also increasing consumer choice. Moreover, competitive pressure following from the ESL could potentially lead to FIFA and UEFA improving their own product, being the Champions League, Europa League and Conference League.[351] Taking into account the potential pro-competitive effects of the ESL, and the fact that the ESL would not constitute a completely closed league, it would be hard to argue that the ESL restricts competition by object. It is therefore necessary to examine the effects.

To amount to a restriction of competition by effect, the parties to the agreement must have some degree of market power, and the agreement must contribute to the creation, maintenance, or strengthening of that market power or allow the parties to exploit it.[352] In this regard, it must be kept in mind that agreements between competitors are often more

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[344] *CB v Commission* (n 55), paras 50 and 58.
[345] *Generics (UK) and Others* (n 63), para 67.
[346] European Super League Company, 'The Super League' <www.thesuperleague.com/press> accessed 18 May 2022.
[347] See *Generics (UK) and Others* (n 63), para 69, where the CJEU also took into account the strong barriers to entry when determining the context of the agreement.
[348] Halgreen (n 25) 65; see also Weatherill (n 193) 3.
[349] Case C-373/14 P *Toshiba Corporation v Commission* [2016], para 28.
[350] Whish & Bailey (n 48) 133.
[351] 'Half-time analysis: what's next for the European Super League?' (n 322).
[352] COM 2004/C 101/08, paras 17–27, as summarised by Jones, Sufrin and Dunne (n 13) 246.

restrictive on competition than agreements between non-competitors.[353] Applying this to the ESL, it could be argued that the founding clubs, by securing their spots in the ESL without any sporting risk and especially in light of the anticipated increase in TV rights and sponsorships,[354] will be able to increase their market power.[355] This raises even more concerns seeing that the founding clubs already have a high degree of market power, as they are leading clubs within European football. Moreover, the removal of relegation threat and the additional revenues obtained in the ESL would allow the founding clubs to invest in better players, and consequently become more dominant within their domestic leagues, with the result that they would receive more income through their domestic leagues as well.[356] All these factors amount to a strengthening of market power of the founding clubs to the detriment of other clubs, thereby negatively affecting the structure of the market. Therefore, it can be concluded that the ESL restricts competition by effect.

5.1.3. Application of Meca-Medina

If the ESL could benefit from the justification laid down in *Meca-Medina*, the agreement would fall outside the scope of Article 101(1) TFEU and would not restrict competition. For this justification to apply, regard must be had to the overall context and objectives of the agreement, after which it must be examined whether the restrictions arising therefrom are inherent in the pursuit of legitimate objectives and are proportionate to those objectives.[357]

5.1.3.1. Context and content

The context is similar to the context of the FIFA and UEFA rules, as they both occur within the field of sports. Therefore, it is necessary to take into account the specific characteristics of sports in general and of its social and education function, as the GC also acknowledged in *ISU*.[358]

Secondly, with regard to the content of the ESL agreement, it has already been highlighted that the most problematic aspect is the partly closed nature of the ESL. Related to this, and while acknowledging that the ESL was not yet crystallised at the time of the announcement, another problematic aspect of the ESL is that it does not provide for criteria which are clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring the clubs willing to participate in the ESL effective access to the relevant

[353] COM (2010) 411, para 98; Van Bael & Bellis (n 16) 67.
[354] Rupert Macey-Dare, 'A League of Their Own – Logic of the Super League' (*SSRN*, 20 April 2021) <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3830436> accessed 29 March 2022.
[355] Andreas Stephan, 'Do Plans for a European Super League Breach Competition Law?' (*Competition Policy Blog*, 20 April 2021) <www.competitionpolicy.wordpress.com/2021/04/20/do-plans-for-a-european-super-league-breach-competition-law/> accessed 29 March 2022.
[356] Stephan (n 355); Tsjalle van der Burg, 'EU competition law, football and national markets' [2020] *Managing Sport and Leisure* 1, 8; Bach (n 10).
[357] *Meca-Medina* (n 105), para 42; *Wouters* (n 26), para 97.
[358] *ISU* (n 209), para 79.

market.[359] It is not clear on what basis the five 'guest' clubs would be chosen to participate in the ESL, which gives way to favouring certain clubs based on unjustified grounds. However, as previously stated, as the ESL was only a sketch at the time of the announcement, chances are that the qualification criteria would be set out more precisely if the ESL would ever happen to be realised.

5.1.3.2. Legitimate objectives

As a next step within the *Meca-Medina* framework, possible legitimate objectives must be identified. As stated before, legitimate objectives within the field of sports may, inter alia, be the protection of integrity of sports, protection of health and safety, the organisation and proper conduct of sports, the protection of the solidarity model, and the protection of the volunteer model of sports.[360] In the press release, the ESL stated that over the years, the founding clubs have had the objective to improve the quality and intensity of football, and to create a format for top clubs and players to compete on a regular basis. Based on this, it could be argued that any negative effects on competition are justified in light of the organisation and proper conduct of sports.[361]

A second possible legitimate objective that could be derived from the press release, is to ensure financial viability of the ESL. The creation of a new league, such as the ESL, requires clubs to make financial commitments. If these founding clubs could be relegated from the league and do not share the revenues raised by the league, clubs might not be willing to invest and the ESL cannot exist.[362] Therefore, the negative effects on competition flowing from the partly closed league of the ESL are potentially justified to ensure the financial viability of the league.

5.1.3.3. Inherency and proportionality

For the exception of *Meca-Medina* to apply, the restriction of competition must also be inherent in the pursuit of the legitimate objectives, and must be proportionate to those objectives. With regard to the legitimate objective of the organisation and proper conduct of sports, the CJEU in *Deliège* held that selection rules are 'inherent in the conduct of an international high-level sports event'.[363] Although *Deliège* concerned the free movement of services, this conclusion can also be applied to competition law. This is because *Meca-Medina* converges free movement law and competition law, as was noted in paragraph 2.1.2.5 of this thesis.[364]

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[359] *ISU* (n 209), para 88.
[360] *International Skating Union's Eligibility rules* (n 290), paras 219, 221, 222, 223.
[361] Houben, Blockx and Nuyts (n 299), para 6.2.
[362] ibid.
[363] *Deliège* (n 217), para 64.
[364] *Meca-Medina* (n 105), paras 28-30.

The restriction of competition must not only be inherent in the pursuit of a legitimate objective, but it must also be proportionate. Concerning the mainly closed nature of the ESL and the exemption from relegation for the founding clubs, it would be hard to argue that the restrictions of competition that these aspects bring are proportionate to the organisation and proper conduct of sports. This is especially so seeing that for example the Champions League, Europa League and Conference League do not have such a system in place, even though those leagues are also limited in the number of clubs that can participate each year. Therefore, it must be concluded that the predominantly closed model of the ESL goes beyond what is necessary to ensure the organisation and proper conduct of sports and the ESL cannot rely on the justification laid down in *Meca-Medina* in this regard.

With regard to ensuring financial viability of the ESL, it is hard to accept that the restriction of competition would be inherent in the pursuit of that legitimate objective. One could think of several alternatives to ensure that the founding teams will receive a return on their investment, without resorting to a mainly closed league where the founding teams cannot be relegated. The assured participation of those clubs could for example be limited in time, or another option is for the founding clubs to be able to withdraw a part of their investment in case they relegate.[365] It could also be agreed that all founding teams, even if some of them get relegated, would still receive broadcasting revenues of the ESL.[366] For these reasons, the restriction of competition cannot be perceived inherent in the pursuit of the legitimate interest of ensuring financial viability.

5.2. Application of Article 101(3) TFEU

A final step in the application of Article 101 TFEU to the ESL concerns the assessment whether the ESL can benefit from the exception under Article 101(3) TFEU. Under the first criterion of Article 101(3), the agreement must contribute to objective benefits, which includes the improvement in the quality of services.[367] In *UEFA,* the Commission held that the financial solidarity model of EU football improves production and stimulates the development of sports, and therefore amounts to a benefit in the sense of Article 101(3) TFEU.[368] Moreover, in *Piau*, the CJEU accepted that mandatory licensing for football players' agents could contribute to economic progress by 'raising professional and ethical standards for the occupation of players' agent in order to protect players, who have a short career'.[369] Keeping these cases in mind, it could be argued that by raising more revenue and therefore

[365] Houben, Blockx and Nuyts (n 299), para 7.2.
[366] ibid.
[367] COM 2004/C 101/08, paras 69-72.
[368] *Joint selling of the commercial rights of the UEFA Champions League* OJ [2003] L 291/25, para 164.
[369] *Piau* (n 39), para 102.

allowing the founding clubs to invest in their squads, the ESL results in a higher quality of matches, which could be identified as a benefit in the sense of Article 101(3) TFEU.

Secondly, the agreement must allow consumers a fair share of the benefit. In case of the ESL, it could be argued that for example spectators, sponsors and broadcasting agencies benefit from a better quality of matches. For spectators, it could be more interesting to watch football on a(n) (even) high(er) level. As the ESL would potentially attract more spectators due to the high quality of matches, it would make it more attractive for sponsors and broadcasting agencies to invest in the ESL as well, which could in turn lead to an increased turnover for these consumers. Therefore, it could be argued that the pass-on requirement of Article 101(3) TFEU would be fulfilled.

However, it would be difficult to argue that the third criterion, requiring that the agreement is not indispensable to the achievement of the benefits, would be fulfilled. As highlighted in paragraph 5.1.3.3 of this thesis, the predominantly closed nature and the exclusion from relegation for the founding clubs cannot be considered proportionate, and therefore not indispensable to the achievement of the benefits.

Lastly, the fourth criterion – no elimination of competition – is also unlikely to be fulfilled. As stated in paragraph 5.1.2 of this thesis, the ESL would allow the founding clubs to invest in their squads, which possibly results in them achieving an even greater advantage over the remaining clubs in their domestic leagues than they currently have.[370] In the long run, this could damage the competitive structure of the market and could lead to the elimination of competition.[371] As the third and fourth requirement will most likely not be fulfilled, it is unlikely that Article 101(3) TFEU could be relied upon to justify the ESL agreement.

5.3. Conclusion

In light of the foregoing, it must be concluded that the ESL agreement most likely violates of Article 101(1) TFEU. The agreement must be seen as restricting competition by effect, as it would allow the founding clubs to increase their market power. The possible legitimate objectives of safeguarding the organisation and proper conduct of sports and ensuring financial viability of the league cannot be used to justify the restriction of competition, as they do not fulfil the inherency and proportionality criteria. Similarly, Article 101(3) TFEU cannot be relied upon to justify the agreement, as the agreement is not indispensable to the achievement of the potential benefits, and because the agreement could possibly damage the competitive structure of the market.

[370] Stephan (n 355); Van der Burg (n 356) 8; Bach (n 10).
[371] Jones, Sufrin and Dunne (n 13) 271.

6. Conclusion and final remarks: A red card?

The previous Chapters have attempted to provide an answer to the research question upon which this thesis is based, namely whether the rules on prior authorisation by FIFA and UEFA infringe Article 101 and/or Article 102 TFEU, and whether the ESL infringes Article 101 TFEU. In light of the findings described above, it can be concluded that FIFA's and UEFA's rules on prior authorisation infringe Articles 101 and 102 TFEU, and that the ESL itself infringes Article 101 TFEU.

More specifically, FIFA, UEFA and the ESL are subject to competition law as the sports sector is not excluded from the scope of EU law. FIFA's and UEFA's rules on prior authorisation amount to a restriction of competition by object under Article 101(1) TFEU and abuse of a dominant position under Article 102 TFEU. The reason for these infringements is that their rules restrict market access. FIFA and UEFA organise and commercially exploit transnational football leagues themselves, and by holding the power to authorise third parties to organise such events, FIFA and UEFA are in an obvious advantage over their competitors. This may lead to a conflict of interest when reviewing prior authorisation requests filed by (potential) competitors. Seeing that the prior authorisation rules do not set out any criteria as to the approval of such requests, and seeing that FIFA's and UEFA's power to authorise is not subject to restrictions, obligations and review, the prior authorisation rules are disproportionate. Therefore, the rules cannot benefit from any objective justifications or efficiency defences under both Article 101 and 102 TFEU. It would thus be likely that the preliminary questions referred to the CJEU in the case *European Superleague Company* would be answered in the affirmative, meaning that FIFA's and UEFA's prior authorisation rules indeed restrict Articles 101 and 102 TFEU.

Such a judgment would, however, not entail that the ESL itself is not restricting competition. In contrast, if the ESL would be executed in the way it was announced in 2021, this breakaway league would most likely restrict competition by effect under Article 101 TFEU as it would allow the founding clubs to increase their market power. The agreement cannot be justified under legitimate objectives or the efficiency defence, as the agreement is disproportionate and could damage the competitive structure of the market. Therefore, the ESL itself infringes Article 101 TFEU.

Even though the pending case before the CJEU is thus a case of the pot calling the kettle black, it is interesting to see how the Court will rule, especially in light of the great impact the judgment will have on the future of the EMoS and the legality of breakaway leagues. Would the Court follow the reasoning provided in this thesis, it would have no choice but to condemn the prior authorisation rules of FIFA and UEFA. However, by doing so, the nuances of this case should not be overlooked and FIFA and UEFA should not bluntly be

given a red card for infringing competition law. This is because both the stances taken by FIFA and UEFA and by the ESL are too firm and – as is often the case in legal procedures – the solution would be a middle ground: a yellow card. This is because, if the Commission is of the view that the EMoS, including its one-federation-per-sport principle, should be the way in which sports in the EU are governed, this must be respected. However, such a policy must nevertheless be in line with European competition law, which means that the power of SGB's must be subject to restrictions, obligations and review, as was also highlighted by the Commission in its reaction to the ESL case. That way, the EMoS and the one-federation-per-sport principle can be respected while also respecting EU competition law. Moreover, such a judgment would also mean that the EMoS is not overturned by the CJEU, but only further specified.

For now, it remains uncertain whether the CJEU will give FIFA and UEFA a yellow card, a red card, or no card at all, and what the consequences of the Court's judgment will be. In any event, the ESLC will not receive any card from the Court at this point, seeing that the questions referred to by the Madrid court do not force the CJEU to also rule on the legality of the proposed ESL format, which consequently remains a question for the future. Another query that remains is what happens if the Court condemns the FIFA and UEFA prior authorisation rules: will such a judgment set aside these rules, thereby opening up for a breakaway league to exist, assuming that the breakaway league itself would not restrict competition? Or will the CJEU rule in favour of FIFA and UEFA, thereby strengthening the existence of the EMoS, including the one-federation-per-sport principle? In any way, it is clear that the case will be of great importance to the development of EU sports law, and regardless of the decision the CJEU will take, the judgment will cause quite a stir and will lead to much debate in the legal world.

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