European Super League and _International Skating Union_: two landmark cases that are bound to shape the European sport industry

On December 15, 2022 Advocate General Rantos ("**AG Rantos**") of the Court of Justice of the European Union ("**CJEU**") issued two non-binding opinions ("**Opinions**")[1] of major importance for the relationship and interplay between competition law and sports.

While the Opinions analyze the issue of compatibility with EU competition law of certain statutory rules of *the International Skating Union* ("**ISU**"), the *Fédération internationale de Football Association* ("**FIFA**") and of the *Union of European Football Associations* ("**UEFA**"), the analysis affects statutory rules commonly adopted by all official sports federations affiliated with the International Olympic Committee ("**official federations**"). In essence, such rules provide for: (i) a mandatory prior authorization requirement for member clubs or athletes willing to organize or participate in third-party sports competition or events that are not organized by the official federations; and (ii) heavy penalties for clubs or athletes that do not comply with said requirement, including lifetime exclusions from membership and from playing in any official competition (so called, "**eligibility rules**")**.**

The underlying questions of law addressed by Opinions, to be decided by the CJEU, are of paramount importance as they have the potential of undermining the very existence of the pyramid structure of the so called "European Sports Model", which is based on the motto "one sport, one federation"[2].

It is worth saying from the outset that the Opinions support, in principle, the argument that the prior authorization mechanism set out by the eligibility rules is not *per se* contrary to EU Competition law since the objective to protect and develop the specificities of the "European dimension in sport" – as enshrined in Article 165 of the Treaty on the Functioning of the European Union ("**TFEU**")[3] – may justify such mechanism. However, the reasoning of AG Rantos leaves room for courts or competition authorities to censor how the eligibility rules are applied in specific instances, as it apparently suggests doing in one of the analyzed cases. Indeed, according to the Opinions, the lawfulness of the eligibility rules should not be assessed in the abstract but according to a case-by-case assessment of (i) the effects that a specific application of the eligibility rules may have on competition in relevant markets; and (i) whether the restrictive effects on competition are "proportionate" or rather outweigh the risk of jeopardizing the achievement of the objectives set forth in Article 165 TFEU. Importantly, the Opinions provide guidance on the correct process to be followed in carrying out such assessment, which has an impact on the allocation of the burden of proof between a claimant and a defendant and thus may be decisive to the outcome of the matter.

Although AG opinions are not binding, they are usually very influential and followed by the CJEU in the majority of cases. AG Rantos has re-examined the whole past case law on the interplay between competition

---

[1] Opinion of Advocate General Rantos in Case C-124/21 P, *International Skating Union v. European Commission*; Opinion of Advocate General Rantos rendered in Case C-333/21, *European Superleague Company SL v. UEFA and FIFA*.
[2] Citing the wording of AG Rantos: "European sport federations are historically organized in accordance with the 'one-place' principle (*Ein-Platz-Prinzip*), under which the federations exercise, within their geographical jurisdiction, a monopoly over the governance and the organization of the sport, that model is now being called into question" (§ 31 of the Opinion rendered in Case C-333/21, *European Superleague Company SL v. UEFA and FIFA*).
[3] Article 165 TFEU is quite too long to report here in full but suffice it to mention that the "*Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function*". Further, it provides that Union action shall be aimed at, inter alia, "*developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen*".

law and sports, making a significant effort in extrapolating a rigorous legal test to assess the compatibility of the conduct of sport organizations with competition rules.

Background of the cases and the underlying questions of law

The Opinions stem from two distinct proceedings initiated, in one case, by two professional skaters against the ISU and, in the other case, by the European Super League Company SL ("**ESL**")[4] against FIFA and UEFA. Both the skaters and the ESL alleged a breach by the official federations of Article 101 or 102 of the TFEU, which prohibit, respectively, anti-competitive agreements and the abuse of a dominant position. In particular, the claimants argue that the eligibility rules, for how applied in practice by the defendants in the case under exam, have the object and effect of monopolizing the sport industry since they impede member athletes and teams to participate in, or organize, competing tournaments and sport events without the official federations' consent.

It is not controversial that, according to the consolidated case law of the CJEU, official federations can be deemed dominant firms under Article 102 TFEU in the market for the organization and sale of their respective sport events. This because historically, by law or statute, the official federations jointly own with member clubs the exclusive intellectual property rights related to their official events and centrally govern their marketing. Further, each official sport competition may define a separate relevant market for the purposes of antitrust analysis, considering that they could be deemed substitutable with other sport events from the standpoint of European purchasers of such rights (e.g. broadcasters and final viewers). At the same time, pursuant to Article 101 TFEU, the sport associations' rules and decisions constitute "agreements" between their members – i.e. the individual clubs and teams that also act as competing undertakings participating in economic activity and generating revenues on their own. Hence, the essential question of law raised by these cases is whether the ISU and the FIFA/UEFA, by prohibiting the two skaters and the ESL to be involved in competing sport events, abused of their dominant position or, alternatively or simultaneously, concluded an anti-competitive agreement.

Additionally, all the claimants have argued that the anticompetitive or abusive nature of the alleged conduct is further substantiated by a conflict of interest, in that the official federations carry out a dual function: (i) regulating, governing and promoting the sport; and (ii) carrying out the economic activity of organizing and marketing the sport competitions. The latter function includes, for instance, deciding how to share the revenues generated by such events between their members and along the overall "supply chain" of the sport industry. On this ground, the claimants' argument entails that, to end the infringement, it would be necessary to separate these functions and attribute them to separate entities.

Moreover, in the ESL case, the Opinion also addresses whether the eligibility rules are compatible with the provisions of the TFEU which guarantee fundamental economic freedoms by prohibiting Member States to maintain or introduce measurer restricting the free movement of workers, the freedom of establishment and the free circulation of services and capitals within the Single Market[5].

International Skating Union vs European Commission (Case C-124/21 P).

---

[4] At midnight of 18 April 2021, a press release suddenly announced that twelve European tier-1 football clubs had agreed to establish a new competition named "*European Super League*" (ESL), which would be alternative to the UEFA's Champions League and in criticism to the overall management of the UEFA.

[5] Namely Articles 45, 49, 56 and 63 TFEU. It is established case law of the CJEU that these provisions concur with Article 101 and 102 to the same overall objective of ensuring the development of an environment of genuine and undistorted competition within the EU, which is not restricted along national lines.

The ISU case started with complaints filed by two professional skaters with the European Commission ("**Commission**") for being prevented by ISU's eligibility rules to participate to a third-party skating event, known as "Icederby", to be held in Dubai.

Notably, in addition to contesting the eligibility rules vis-à-vis competition law, the claimants also complained that the arbitration clause set forth in the ISU's membership rules – which would require athletes wishing to challenge a decision on ineligibility to bring appeal exclusively Court of Arbitration for Sports (CAS) – reinforced the restriction of competition deriving from the eligibility rules as it precluded an effective review of the legality of such rules under competition law.

The ISU has always argued that it refused to authorize the athletes' participation to that event on the ground that its Code of Ethics prohibits any form of support for betting with a view to protect the integrity of speed skating. The athletes were threatened by the ISU with a lifetime ban from participating to any competition organized by the ISU if they failed to comply.

on December 8, 2017, at the outcome of the investigation prompted by the complaint, the Commission concluded that the ISU's eligibility rules constitute an anti-competitive agreement "by object" pursuant to Article 101 TFEU: *i.e.*, an agreement inherently capable of effectively restricting competition without being necessary to examine actual effects of the conduct on competition in the relevant market. As a result, the Commission required the ISU to end the conduct and to refrain from repeating it (also imposing periodic penalties for failure to comply). The Commission reached this conclusion on the ground that the content of the eligibility rules, their objectives and the economic and legal context of which they formed part showed that they could be used to prevent potential competing organizers of international speed skating events from entering the relevant market and to restrict the possibilities for professional skaters to take part freely in such events, thus depriving potential competing organizers of the services of the athletes whose participation was necessary for such events to be held.

Further, the Commission held that the eligibility rules could not be deemed "ancillary" (*i.e.*, directly related and necessary, or proportionate) to the pursuit of legitimate sports objectives and, thus, to fall entirely outside the scope of Article 101 TFEU. According to the ISU, these objectives are the adequate protection of the ethical values, jurisdiction objectives and other legitimate interests of an official sport organization, which uses its financial revenues for the administration and development of sport disciplines and for the support and benefit of its members and their athletes. However, the Commission held that, because of the broad wording of the eligibility rules and lack of specific criteria for their application, the ISU enjoyed disproportionate discretion and could apply such rules arbitrarily or discriminatorily. On similar grounds, the Commission found that the same rules did not fulfil the cumulative conditions provided for in Article 101(3) TFEU to qualify for individual exemption from the prohibition[6].

Notably, the Commission also held that, though the arbitration rule adopted by the ISU did not in itself constitute a restriction of competition, nonetheless it contributed to "reinforce" the restriction of competition deriving from the eligibility rules.

The ISU challenged the Commission's decision before the General Court of the EU ("**GC**"), which however, by judgment of December 16, 2020 confirmed the conclusions of the Commission in relation to the eligibility rules being a by-object as well as a by-effect restriction. However, it annulled the part of the decision relating

[6] Article 101(3) requires, in essence, that the positive effects of the restriction for the efficiency of the market and for consumers counterweigh the negative effects on competition; and that no less restrictive measure is identifiable that can comparably achieve such positive effects.

to the ISU's arbitration clause since it could not be established by the Commission's reasoning how such rule could be deemed an "aggravating circumstance" of the infringement, considering in particular that the arbitration clause did not prevent athletes to act before ordinary courts in the EU or the Commission to ensure effectiveness of EU competition rules and of the right to judicial protection. The ISU however challenged the GC judgement before the CJEU, in which context AG Rantos issued one of the Opinions under exam.

European Super League vs FIFA and UEFA (Case C-333/21).

Differently from the ISU case, this controversy was initiated by a private action in court filed by the ESL before the *Juzgado of Madrid* (where the ESL is established). The action was aimed at obtaining urgent injunctive measures against UEFA and FIFA to stop them threatening to sanction the ESL's founding clubs[7] (and their players) pursuant to the eligibility rules in case they were to implement the announced decision to set up the Super League tournament (which would directly compete with the official Champions League tournament). As for the ISU case, the ESL action was based on allegations of breach by FIFA/UEFA of Article 101 and 102 of the TFEU. Notably, the ESL and its founding clubs were seeking to obtain the authorization from FIFA/UEFA (or, alternatively, legal protection from the courts and/or authorities) whilst continuing to participate in their respective national leagues, official competitions and tournaments[8].

On April 20, 2021, the *Juzgado of Madrid* – also referring to the ISU case – upheld the ESL's interim injunction request and provisionally prohibited FIFA and UEFA from applying any disciplinary sanction or adopt any measure that could prohibit, restrict, limit or prevent in any way the ESL from running[9]. Meanwhile, the same court referred a set of preliminary questions to the CJEU pursuant to Article 267 TFEU seeking – in essence – advice on whether the eligibility rules of the FIFA and UEFA are compatible with EU rules on competition and with the fundamental economic freedoms guaranteed by the TFEU[10]. In this context, AG Rantos issued its other Opinion on the same day as in the ISU case.

The reasoning and conclusions of the Opinions

Unsurprisingly, the two Opinions have a common reasoning since they address substantially the same issues of law. However, less intuitively, they point to divergent conclusions on the merits of the specific cases under exam.

Most importantly, both the Opinions consider the objectives and specific characteristics of the European Sports Model enshrined in Article 165 TFEU as relevant to assess whether any justification may apply to the restriction of competition entailed by the official federations' eligibility rules. Indeed, while sport involve important economic activities that cannot be generally exempted from the application of EU competition

---

[7] The initial group of founding clubs of the ESL were A.C. Milan, Arsenal FC, Atlético de Madrid, Chelsea FC, FC Barcelona, FC Internazionale, Milano, Juventus FC, Liverpool FC, Manchester City, Manchester United, Real Madrid and Tottenham Hotspur.
[8] Including e.g. the UK Premier League, the Italian Serie A, the Spanish La Liga, the German Bundesliga, the UEFA Champions League and FIFA World Cup tournaments, etc.
[9] The Madrid appeal commercial court accepted UEFA's appeal against the interim measures and lifted them in April 2022. However, on January 30, 2023 the Audiencia Provincial de Madrid accepted a further appeal brought by the European Super League and re-instated the interim measures.
[10] Namely Articles 45, 49, 56 and/or 63 TFEU on prohibition for Member States to maintain or introduce public measures restricting the freedom of movement, establishment and circulation of services and capitals within the EU.

law, at the same time Article 165 TFEU is a specific provision that can be used as a specialty standard in the interpretation and application of Article 101 and 102 in the field of sports.

The objectives of sport enshrined in the TFEU and their interplay with competition law.

Interestingly, in this regard AG Rantos highlights that the introduction of Article 165 in the TFEU crystallized the conclusions of a series of policy initiatives taken by the EU institutions, from the early '90 onwards, aimed at incorporating the social, educational and cultural functions inherent in sports in the EU treaty provisions. According to these policy objectives, Article 165 gives "constitutional" recognition to a European model of sport based on a "pyramid structure" having at its base amateur sport and, at its summit, professional sport. Primary objectives of this model of sport includes the promotion of "open competitions", which are accessible to all by means of a transparent system and a "competitive balance" that gives priority to sporting merits. Another key feature of the model appears to be the "financial solidarity regime" which allows the revenue generated through events at the elite level to be distributed and reinvested at the lower levels of the sports. AG Rantos highlights that the CJEU has recognized the key role played by official federations in ensuring compliance with these policy objectives, in particular from an organizational standpoint, considering that they have the necessary knowledge and experience to set out and uniformly apply appropriate rules governing the organization of sporting disciplines[11].

On this premise, AG Rantos concludes that "*the 'European Sports Model' is characterised in particular by the openness of its competitions, participation in which is based on 'sporting merit' through a promotion and relegation system. It thus differs from the North American model, which is primarily based on 'closed' competitions or leagues, in which the participation of clubs, which are franchised businesses, is guaranteed, pre-determined and based on an entrance fee*[12]*. It could be observed that it is precisely in response to the other models which exist that the EU legislature decided to incorporate the concept of the 'European Sports Model' into the Treaty in order to draw a clear distinction between it and those other models and to guarantee its protection through the adoption of Article 165 TFEU*"[13].

Notably. AG Rantos acknowledges that the structure and governance of this model of sport is not static and may evolve under the influence of other non-European models; and that there is a diversity in European sports structures in certain respects[14]. However, he maintains that the emergence of such diversity cannot call into question the principles set out in Article 165 as illustrated[15].

Against this backdrop, the reasoning goes that certain features of sporting activities set them apart from other economic sectors. In particular, sport is characterized by a high degree of interdependence between competing clubs, which necessarily need a certain degree of equality and competitive balance in order to be able to organize and develop fair sporting competitions and preserve uncertainty of results. By contrast, in

---

[11] CJEU judgement of 11 April 2000, *Deliége*, in Case C-51/96 and C-191/97, §§ 67-68 (cited in § 31 of the ESL Opinion).
[12] Reference is made to most popular American sports leagues as, for instance, the National Basketball Association (NBA), the National Football League (NFL), Major League Baseball (MLB) and the National Hockey League (NHL).
[13] §§ 33-37 of the ESL Opinion and §§ 36-39 of the ISU Opinion
[14]Noteworthy, in a footnote of the ESL Opinion AG Rantos states in this regard that the creation of closed (or semi-open) leagues within certain sports in Europe seems justified by their lesser popularity (depending on Member States), with the result that a competition format that limits participation of clubs appears the most appropriate to maximize the competitive balance between the participating clubs and the commercial interest (and thus the economic return) in such events. This is not the case of European football, which is probably the most popular and commercially interesting of sports across all Member States.
[15] See § 32 of the ESL Opinion.

other economic sectors competition between economic operators ultimately leads to inefficient companies being driven out of the market.

The legal test applied to assess compatibility of the sporting rules with EU Competition law

This said, the Opinions set out the logical steps of the legal test that, according to the consolidated case law of the CJEU, should be followed to assess the compatibility of the eligibility rules with Article 101 and 102 TFEU. In this respect, AG Rantos points out that, in applying Article 101 TFEU to a specific conduct, one cannot conflate the "ancillarity" test (i.e., the question whether a restriction of competition is directly related and necessary to the pursuit of legitimate objectives) with the "by-object/by-effect" test (i.e., whether the same conduct has the object or rather the effect of restricting competition on a relevant market).

Indeed, the concept of "ancillary restraint" pertains to whether a theoretically restrictive conduct is indispensable or proportionate to attain a legitimate commercial or regulatory objective and therefore does not go beyond what is necessary to that end, in such a case falling out of the scope of Article 101(1) entirely as deemed not even restrictive of competition. By contrast, the concept of "by-object or by-effect" restriction is a separate and subsequent one that pertains to whether or not a restrictive conduct (which is not deemed ancillary to a legitimate objective) reveals in itself, and having regard to the content of its provisions, its objectives and the economic and legal content of which it is part, a "sufficient degree of harm" to the proper functioning of normal competition that makes the analysis of competitive effects redundant. Moreover, the ancillarity test does not require the balancing of pro-competitive and anti-competitive effects, since such balancing analysis can be carried out only within the assessment of whether a restriction of competition (either by-object or by-effect) may benefit of an individual exemption pursuant to Article 101(3) of the TFEU (which requires an evidentiary burden that is usually challenging to satisfy). AG Rantos also affirms that the assessment whether a conduct of a dominant company can be "objectively justified" under Article 102 TFEU does not differs from that under Article 101(3) in the substance.

Another fundamental common premise of AG Rantos' reasoning is that it is not possible to apply the legal test unfolded above to the eligibility rules considered in the abstract. Rather, the assessment must consider all the factual, legal and economic circumstances in which the eligibility rules were applied (or threatened to be applied) in the specific case under exam. In this respect, the fact that the wording of the eligibility rules is very broad and lacks specific criteria guiding their application, thus enabling official federations to apply such rules with too a wide discretion and potentially arbitrarily or discriminatorily, cannot be deemed *per se* sufficient to a finding that such rules constitute a by-object restriction. This because, considering the legitimate objectives pursued by the official federations and the context in which they operate, the eligibility rules do not seem inherently anti-competitive. To support this conclusion, AG Rantos also compares the eligibility rules with vertical non-compete clauses (or "single-branding") that can be commonly found in commercial distribution agreements and that are not deemed hardcore or by-object restrictions of competition under EU competition law (though they may be deemed by-effect restrictions in specific circumstances).

Therefore, the Opinions conclude that the eligibility rules can be deemed contrary to Article 101 only on consideration of the effects they might produce on competition on the relevant market(s) concerned and, thus, on the analysis of such effects in the specific circumstance of the case[16]. Indeed, since the factual and

[16] This analysis must be carried out by the authority or court invested with the task to assess the case and is not for the CJEU to conduct such factual assessment.

economic circumstances of the ISU and ESL cases are significantly different, the outcome of the AG Rantos' assessment in the two Opinions finally diverges.

The differences in the substantive assessment of the two cases.

In the ISU Opinion AG Rantos seems to support the GC's analysis of disproportion of the lifetime penalties threatened to the individual skaters for failure to comply with the prohibition to participate to the Icederby. He reached this conclusion by analyzing the predictable impact that such participation could have had on the integrity of the sport of skating and on the revenues' opportunities of individual skaters. Nonetheless, the Opinion censors the GC's reasoning for wrongfully combining the ancillarity test with the assessment on the by-object/by-effect nature of the eligibility rules, thus failing to correctly assess whether and to what extent the specific conduct under exam needed a further analysis of effects.

By contrast, in the ESL Opinion AG Rantos suggests that the UEFA/FIFA's intimidations to fully enforce the eligibility rules onto the ESL's founding clubs – including lifetime exclusion form their national leagues and official competitions – can be deemed inherently necessary and proportionate to the objective of effectively preserving the attainment of the legitimate objectives enshrined in Article 165 TFEU. To support this argument, AG Rantos pointed to the foreseeable significant impact that the pan-European size and closed (or semi-open) nature of the ESL competition can have on the overall calendar, organization and finances of the official competitions and to the competitive balance between clubs. To reach this conclusion, he took into account the likely adverse economic impact on official competitions involved by the fact that the ESL's founders are the most popular and media-exposed international clubs in the official federations; and that – at least in the original project existing when the dispute arose – those founding clubs reserved to themselves the right to participate in the ESL championship, and to share the revenues generated by its marketing, irrespective of sporting merits to a large extent. Further, AG Rantos considered the lack of transparency on how the revenues generated by the ESL would have been used to finance "solidarity" objectives to the benefits of the lower levels of the sport of football. Considering this overall context, the ESL Opinion concludes that the ESL project would risk undermining the ability of official federations to pursue their legitimate objectives in line with Article 165 TFEU, without ensuring an equivalently effective alternative.

However, consistently with the ISU case, AG Rantos also suggests that the sanctions involving exclusion of individual players from official events (particularly from national teams) appear disproportionate if such players are uninvolved in the organization or promotion of the ESL project[17].

Can official federations be deemed "essential facilities" bearing a duty to deal?

Importantly, AG Rantos also rejects the ESL's thesis that the UEFA and FIFA ecosystem satisfies the strict conditions developed by the CJEU under Article 102 TFEU to be deemed an "essential facility", as such *per se* obliged to concede dual-membership and access to official competitions to any club or player. Indeed, AG Rantos correctly noted that the prior approval by UEFA and FIFA is only necessary to enable the clubs participating in the ESL to continue participating in the official federations' competitions (dual membership). Therefore, even without a prior authorization from the official federations, a third party like the ESL would not be prevented from establishing and marketing a breakaway competition. Moreover, AG Rantos noted that a refusal of authorisation by the official federations seems "objectively justified" as indispensable to

[17] § 146 of the ESL Opinion.

preserve the legitimate objectives they pursue according to the same assessment carried out under Article 101[18].

Is the conflict of interest of official federations anti-competitive?

As to the issue of conflict of interest which has been contested by the claimants in both cases, the Opinions affirm that the combination of regulatory and marketing roles is a common feature of official federations and appears ancillary to the pyramid structure of sport governance which characterizes the European Sport Model. Therefore, AG Rantos also rejects the thesis that this circumstance supports, autonomously or in combination with other factors, a finding of infringement or competition law, or compels the official federations to split up the functions of regulating the sport, organizing competitions and marketing them.

May an exclusive arbitration clause "aggravate" or "reinforce" a restriction of competition?

In the ISU Opinion, AG Rantos holds that a non-State mechanism for dispute resolution at first or second instance, such as the CAS, with a possibility of appeal, however limited, before a national court in the last instance, is adequate in the field of international sports arbitration. He reached this conclusion on the grounds that such a mechanism has been deemed legitimate by the European Court of Human Rights[19] as well as by the CJEU, including in the field of competition law where the arbitral tribunal is subject to a full review of compliance with EU law by national courts[20]. The Opinion therefore rejects the argument that the anticompetitive object or effect of the eligibility rules can be "aggravated" or "reinforced" by such an arbitration clause in the field of sports (or *a fortiori* constitute an autonomous infringement).

Do the eligibility rules breach the TFEU provisions on free movement and circulation within the EU?

As said, the question of compatibility of the eligibility rules with the provisions of the TFEU establishing the four fundamental economic freedoms was raised in the ESL case only[21]. On this regard, AG Rantos first points out that, according to the consolidated case law of the CJEU, these fundamental provisions not only apply to public regulatory measures of Member States but also to rules or measures established by private organizations like the sport federations, except for those rules that strictly concern matter of "pure sporting interest" and thus unconnected with economic activity. The "sporting exception" thus does not apply to the eligibility rules, since they confer official federations the ability to raise barriers to access the market for the organization of sporting competitions.

Nonetheless, the Opinion concludes that these provisions, even if theoretically applicable to the case, are not violated since the restrictions that the eligibility rules may pose to such freedoms seem appropriate, coherent and proportionate to the objective of general interest pursued by the official federations. Such "proportionality test", according to AG Rantos, must be carried out on a case-by-case basis (and not in the abstract) and largely overlaps with the that carried out under the "ancillarity" test with respect to Article 101 and 102. Indeed, the objectives of general interest pursued by the official federations that can justify such restrictions are the same analyzed under Article 165 TFEU. Some of them have already been recognized by

[18] §§ 137-144 of the ESL Opinion.
[19] Judgment of the ECtHR, 2 October 2018, *Mutu and Pechstein v Switzerland*, §§ 98 and 159.
[20] In this respect, AG Rantos also rejects the argument that the arbitration clause in question is not of a genuine commercial nature but rather comparable to an arbitration clause for disputes between States, which therefore can prevent review by EU courts considering that the CAS is established in Switzerland. See §§ 161-169 of the ESL Opinion, which refers to GC Judgment of 9 February 2022, *Sped-Pro v Commission*, Case T-791/19, § 91; and CJEU judgments of 26 October 2021, *PL Holdings*, C-109/20, § 45, and of 6 March 2018, *Achmea*, C-284/16, §§s 58-60.
[21] Se footnote 10 above.

the CJEU and are particularly relevant in the ESL case, namely: ensuring the regularity and proper functioning of competitions by means of appropriate rules and criteria[22]; and maintaining the competitive balance between the clubs to guarantee equal opportunities and preserving the uncertainty of the results[23].

Comments and takeaways: different sports may entail different assessments of the same measures

The single most important takeaway emerging from the analysis of the Opinions is that there is no one-size-fits-all response to whether the pyramid structure and "monopolistic" approach to the organization of the European Sport Model is compatible with the fundamental provisions of the TFEU protecting competition and economic freedom. If the CJEU had to write off a unique response, the only possible correct one would be that the eligibility rules of official federations – which are the foundation of their quasi-monopolistic power – are neither *per se* lawful nor *per* se unlawful in this respect; instead, they are subject to a case-by-case analysis of effects, taking into account all the factual and economic circumstances of the specific case.

Ultimately, the outcome of the assessment may even depend on the kind sport under exam and the overall importance in terms of popularity, sporting or commercial interest it may have across Member States. For how distant this approach may appear – at a first look – from a proper legal test, it is not at all unusual in EU competition law analysis. It is in fact well established principle in the case law of the CJEU that the assessment of compliance of a commercial conduct or measure vis-à-vis competition law must always be based on solid factual, legal and economic analysis of the specific context of which it is part. In the EU system, this standard also applies to the finding of so called "by-object" or "naked" restrictions of competition (often compared to *per se* restrictions under the US antitrust system); and all the more applies to "by effect" restrictions (comparable to "a rule of reason" in US). It therefore should not raise eyebrows that the outcome of the assessment may depend on the sport in question, as in Europe it also entails a different relevant market concerned.

This explains why the two Opinions, though perfectly consistent in the reasoning and principles they propose to follow, still may bring to opposite outcomes in the ISU and ESL cases on whether the sports rules at issue have been applied compatibly with EU competition law. What strikes most in comparing the two Opinions is probably the different weight given by AG Rantos to the sportive and commercial importance of the third-party events that was opposed by the official federations. Such different weight is connected to the different impact that the two alternative events may have on the ability of the official federations to perform their functions normally; as well as to the undermining potential that such events – for how organized and their dimension – may have on the objective of maintaining the "competitive balance" needed to guarantee equal opportunities between clubs or athletes and preserve the uncertainty of the results.

Of course, it is now necessary to wait and see if and to what extent the CJEU will side with these Opinions in its final judgements, which are expected within 2023. It is foreseeable that the most critical issue to be decided by the EU top Court will center around whether Article 165 TFEU indeed "constitutionalizes" the "European Sport Model", as suggested by AG Rantos in its Opinions.

[22] CJEU judgment of 13 April 2000, *Lehtonen and Castors Braine*, Case C-176/96, § 53; CJEU judgement of 13 June 2019, *TopFit and Biffi*, Case C-22/18, § 60.
[23] CJEU judgement of 15December 1995, *Bosman*, Case C-415/93, § 196.