State of play in sports and competition law: AG Rantos' pass to the court in ISU and ESL and the challenges to scoring right

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Introduction

We all love sports and with the next round of competition law and sports cases soon to be decided by the Court of Justice (the Court), this article looks at the current state of play in European Union (EU) sports competition law. We highlight some specific oddities of the interaction between sports and EU competition law, showing how competition law in sports is applied rather strangely to arrive at specific results. In the first part of the article, we set out how the interaction between sports and competition law has developed over the years. We then focus on the latest two cases on sports and competition law, *International Skating Union* (*ISU*) and *European Super League* (*ESL*) and the proposed treatment of these cases in Advocate General (AG) Rantos' Opinions. While acknowledging the special nature of sports, we highlight five challenges that show how EU competition law is applied oddly in this field of economic activity. These challenges relate to AG Rantos' interpretation of the European Sports Model, the sports federations' prior authorisation systems, the sanctions imposed by the sports federations, and finally the assessment of the *Meca-Medina* test.[1] The court has the chance to address some of these challenges in the upcoming decisions in *ISU* and *ESL*.

The application of competition law to sports: the pathway to the current issues

Since the 1970s, the European courts have developed case law in the sports area, starting with the *Walrave* judgment that set the tone for the EU's approach.[2] The early case law in this field showed a relaxed attitude towards the authority of sports governing bodies.[3] In these cases, the Court established an explicit exception from competition law for sports governing bodies, that applied as long as the measure in question was a "purely sporting" measure.[4] Sports overall was unlikely to be considered an economic activity. Against the background of the commercialisation of sports in the 1980s,[5] the Court in 1995 changed its approach.[6] In *Bosman*, the Court ruled that the sporting exception must be narrowed, as sports should be considered an economic activity at this point.[7] However, the Court also explicitly recognised the social importance of sports and of football in particular. For that reason, the Court allowed for certain social elements of sports to be accepted as a legitimate interest capable of justifying a restriction of the free movement of workers.[8]

The landmark competition law case of *Meca-Medina* marked the beginning of a new development in the jurisprudence on competition law and sports. *Meca-Medina* concerned two professional swimmers who challenged the compatibility of the anti-doping rules adopted by the sports governing bodies with the Treaty rules on competition and free movement of services. The case of *Meca-Medina* is noteworthy for two reasons. First, it was the nail in the coffin for the broad sporting exception developed in *Walrave and Koch*, as the Court ruled that the General Court had made an error of law in "holding that rules could thus be excluded straightaway from the scope of those articles solely on the ground that they were regarded as purely sporting".[9] Second, the Court seemed to bridge free movement law and competition law within the field of sports. This is because in *Meca-Medina*, the Court relied on the case of *Wouters*, which laid down a proportionality test to exclude a measure from the scope of art.101(1) of the Treaty on the Functioning of the European Union (TFEU).[10] This test strongly resembles the justification assessment stemming from free movement case law. By applying the test of *Wouters*, the Court holds in *Meca-Medina* that not every agreement or decision that restricts competition necessarily falls within the prohibition of art.101(1) TFEU. In applying art.101(1) TFEU in the area of sports, account must first be taken of the overall context in which

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[1] This article only focuses on the competition law aspects of the Opinions, and does not address other aspects such as broadcasting rights.
[2] *Walrave v Association Union Cycliste Internationale* (36/74) EU:C:1974:140; [1975] 1 C.M.L.R. 320; see, for an overview of the Court's case law in this area, Rebecka Nordblad, "European Super League: Kicking off the match against FIFA and UEFA" (Master Thesis, Lund University 2022), pp.15–23.
[3] *Walrave* EU:C:1974:140; [1975] 1 C.M.L.R. 320; *Donà v Mantero* (13/76) EU:C:1976:115; [1976] 2 C.M.L.R. 578.
[4] *Walrave* EU:C:1974:140; [1975] 1 C.M.L.R. 320 at [8].
[5] Rusa Agafonova, "International Skating Union versus European Commission: Is the European sports model under threat?" (2019) 19 *International Sports Law Journal* 87.
[6] See, on the "post-Bosman effect", Nordblad, "European Super League: Kicking off the match against FIFA and UEFA" (2022), pp.17–18.
[7] *Union Royale Belge des Sociétés de Football Association ASBL v Bosman* (C-415/93) EU:C:1995:463; [1996] 1 C.M.L.R. 645.
[8] *Bosman* EU:C:1995:463; [1996] 1 C.M.L.R. 645 at [106].
[9] *Meca-Medina v Commission of the European Communities* (C-519/04 P) EU:C:2006:492; [2006] 5 C.M.L.R. 18 at [33].
[10] *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) EU:C:2002:98; [2002] 4 C.M.L.R. 27 at [97].

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 are proportionate to them".[11] If these requirements are fulfilled, the agreement or decision falls outside the scope of art.101(1) TFEU and thus competition law is not infringed. Nevertheless, the Court in *Meca-Medina* clearly indicated that competition law is in principle applicable to sports governing bodies, forcing these organisations to adopt a more cautious approach with regard to competition matters.

In 2008, the Court in *MOTOE* applied art.102 TFEU to the sports sector for the first time.[12] The question in *MOTOE* was whether a non-profit-making association that has the power granted by law to authorise the organisation of motorcycling events, but also organises such events in a commercial manner itself, falls within the scope of art.102 TFEU. The Court highlighted that a system of undistorted competition can only be guaranteed if equality of opportunity is secured between undertakings. It also drew attention to a possible conflict of interests, which may arise when an undertaking which organises and commercially exploits sporting events is also vested with the power to authorise such events organised by other entities. The authorisation power places that entity at an obvious advantage over its competitors, as it can deny other operators access to the relevant market.[13] The Court held that if such power is not made subject to restrictions, obligations and review, it could lead the entity to distort competition by favouring events which it organises itself or those in whose organisation it participates, thereby infringing art.102 TFEU.[14]

The opinions delivered by AG Rantos

The Court is now at a crossroads when it comes to the future of the interaction of competition law and sports in the EU. The Court is expected to rule on *ISU* and *ESL* within the next months, thereby establishing important markers in this field of law. These cases pose important questions about the margin of discretion and prerogative enjoyed by sports governing bodies, especially in the fields of sanctions and authorisation. In December 2022, AG Rantos handed down two complementary opinions, examining the application of competition law to sports. These opinions provide strong support for sports and their organisations when faced with competition law challenges. Although without binding force, the opinions provide important pathways indicating possible directions for the Court. In the following sections we will briefly summarise the facts and proceedings leading up to the AG opinions, subsequently we will look at the relationship between the two cases and opinions. We then highlight five challenges that the Court faces when deliberating about whether these opinions provide the sensible way forward.

International Skating Union

Background of the case

International Skating Union (*ISU*) concerns two ice skaters who complained to the Commission that the eligibility rules of ISU—the sole international sports federation for ice skating—were incompatible with arts 101 and 102 TFEU. The eligibility rules stated that ice skaters were not allowed to participate in competitions not authorised by ISU, upon breach of which the ISU could invoke severe penalties. The Commission initiated proceedings against ISU and found that their eligibility rules constituted a restriction of competition 'by object' under art.101 TFEU.[15] On appeal, the General Court 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 arts 101 and 102 TFEU.[16] Applying the framework set out in *Wouters* and *Meca-Medina*, the General Court analysed the context and content of the eligibility rules, and took account of any possible legitimate objectives justifying the rules. With regard to the context of the case, the General Court held that it is necessary to take into account the specific characteristics of sports and its social and educational function.[17] Regarding the content of the rules, the General Court found that the rules do not provide for clearly defined, transparent, non-discriminatory, reviewable authorisation criteria that are capable of ensuring competing event organisers effective access to the relevant market.[18] Instead, the General Court highlighted that "the applicant had broad discretion to refuse to authorise events proposed by third parties…which could lead to the adoption of refusal decisions on grounds which are not legitimate".[19] As the eligibility rules also contained sanctions for participation in non-authorised competitions, the General Court also takes these sanctions into account by analysing the content of the rules. The General Court found that the eligibility rules did not precisely set out the conditions for the penalties that could be imposed for

[11] *Meca-Medina* EU:C:2006:492; [2006] 5 C.M.L.R. 18 at [42]; *Wouters* EU:C:2002:98; [2002] 4 C.M.L.R. 27 at [97].
[12] *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* (C-49/07) EU:C:2008:376; [2008] 5 C.M.L.R. 11.
[13] *MOTOE* EU:C:2008:376 at [51].
[14] *MOTOE* EU:C:2008:376 at [51].
[15] Commission Decision C(2017) 8230 of 8 December 2017 in Case AT.40208—*International Skating Union's Eligibility rules*; *International Skating Union v European Commission (ISU)* (T-93/18) EU:T:2020:610; [2021] 4 C.M.L.R. 9 at [32].
[16] *ISU* EU:T:2020:610 at [70]–[71].
[17] *ISU* EU:T:2020:610 at [79]; see *Olympique Lyonnais SASP v Bernard* (C-325/08) EU:C:2010:143 at [40].
[18] *ISU* EU:T:2020:610 at [88].
[19] *ISU* EU:T:2020:610 at [89].

participation in unauthorised events. This lack of conditions presented a risk of arbitrary application, which led to the penalties having an excessive deterrent effect.[20]

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.[21] While the General Court acknowledged that protecting the integrity of sports is indeed a legitimate objective,[22] it found that the penalties in the present case go beyond what was necessary to pursue that legitimate objective.[23] As the penalty regime within the eligibility rules is not proportionate, these eligibility rules were found to restrict competition "by object". The General Court thereby upheld the Commission's findings.[24]

The appeal against this judgment by the General Court is essentially based on two pleas. The first plea regards the General Court's finding of a restriction "by object", and the second plea the alleged failure to consider ISU's potentially legitimate interest behind the strict eligibility rules.

AG Rantos' opinion

Preliminary observations

AG Rantos begins his opinion in *ISU* by highlighting the specific nature of the case by putting it in the light of art.165 TFEU, which states that Union action shall be aimed at the promotion of the social and educational aspects of sports, by highlighting the importance of fairness and openness in sporting competitions. AG Rantos contends that art.165 TFEU may be capable of justifying a potential restriction of competition law.[25] He further highlights that the assessment of potential justifications must be conducted separately to the assessment of a restriction of competition law "by object", and that the General Court had failed to separate these two assessments. Lastly, emphasis is given to the difference between the analysis under the *Meca-Medina* test and the assessment under art.101(3) TFEU.[26]

The finding of a restriction of competition "by object"

AG Rantos first points out that a "restriction by object" must be interpreted narrowly and needs to reveal a sufficient degree of harm. He then puts forward three reasons as to why the prior authorisation system cannot be regarded as a restriction of competition "by object".

First, AG Rantos criticises the General Court's finding that the anti-competitive object of the ISU rules stemmed from ISU's broad discretion to refuse events proposed by third parties. The Commission, in relying on *T-Mobile*,[27] had supported this argument by adding that the discretionary power enjoyed by the ISU results in their capability of restricting competition. However, according to AG Rantos, the mere existence of discretionary power is not sufficient to establish a restriction of competition "by object", as a theoretical capability to restrict competition cannot fall within the narrow interpretation of the "by object" box.[28]

Secondly, AG Rantos puts forwards that the very existence of the mechanism does not completely close off the market, but—at least in theory—allows for third party market access, and therefore does not constitute a restriction "by object".[29]

Thirdly, AG Rantos addresses the General Court's finding that the lack of authorisation criteria that are clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring the organisers of events effective access to the relevant market (as established by the Court in *OTOC*[30] and *MOTOE*[31]) automatically leads to a restriction "by object". AG Rantos criticises this conclusion and explains that the Court held in *OTOC* that such a situation *may* lead to a restriction of competition, and therefore does not warrant an automatic "by object" classification.[32] Yet, AG Rantos confirms the relevance of the deterrent effect that the severity of the penalties imposed by ISU may have on athletes from taking part in events not authorised by the ISU. Nevertheless, he argues that such an assessment must not be made in the abstract but requires the analysis of the overall context and has therefore to take place in the analytical framework of anti-competitive effects. As the ISU's prior authorisation mechanism does not constitute a restriction "by object", AG Rantos contends that the potential anti-competitive effects of the prior authorisation mechanism must be analysed instead.[33]

The objectives pursued by the eligibility rules in the "by object" assessment

As mentioned above, AG Rantos distinguishes between the assessment of objective justifications and "by object" restrictions. He specifically points out that in the "by object" stage of the assessment, regard is taken to the measure's aim or objective only in order to determine whether the aim is anti-competitive. Legitimate objectives

[20] *ISU* EU:T:2020:610 at [94].
[21] *ISU* EU:T:2020:610 at [80].
[22] *ISU* EU:T:2020:610 at [102].
[23] *ISU* EU:T:2020:610 at [103].
[24] *ISU* EU:T:2020:610 at [120].
[25] Opinion of AG Rantos: *International Skating Union v Commission (ISU)* (C-124/21 P) EU:C:2022:988 at [38].
[26] Opinion of AG Rantos: *ISU* EU:C:2022:988 at [42].
[27] *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) EU:C:2009:343.
[28] Opinion of AG Rantos: *ISU* EU:C:2022:988 at [72].
[29] Opinion of AG Rantos: *ISU* EU:C:2022:988 at [73].
[30] *Ordem dos Tecnicos Oficiais de Contas (OTOC) v Autoridade da Concorrencia* (C-1/12) EU:C:2013:127; [2013] 4 C.M.L.R. 20.
[31] *MOTOE* EU:C:2008:376.
[32] Opinion of AG Rantos: *ISU* EU:C:2022:988 at [77]–[81].
[33] Opinion of AG Rantos: *ISU* EU:C:2022:988 at [73].

that do not pursue an anti-competitive aim and their subsequent proportionality assessment related to the measure must therefore be conducted within the framework of the analysis of anti-competitive effects. This is because a measure that is disproportionate to a legitimate aim does not automatically lead to the classification of a restriction of competition "by object" but might restrict competition by effect. As the General Court had determined that the measures taken to pursue the legitimate objectives were disproportionate, and therefore restricted competition "by object", AG Rantos suggests that the General Court has erred in law in not sufficiently separating the two assessments.[34] AG Rantos notes that such an analysis would unduly widen the "by object" category which is supposed to be constructed narrowly.

ISU's protection of their economic interest

AG Rantos proceeds to address the claim that the General Court had erred in law in finding that protecting one's economic interest is in itself anti-competitive. He begins by stating that the protection of the economic interests of a sports federation is only problematic from a competition law perspective if the federation unjustifiably deprives a competitor of market access. He further regards sports federations as undertakings, for which the protection of their economic interest is inherent to their activity. Therefore, it cannot be inferred that adopting a measure with the aim of protecting one's economic interest is in itself anti-competitive.

Overall, AG Rantos suggests that the case should be referred back to the General Court in order to allow it to conduct an assessment of the anti-competitive effects.

European Super League

The other case that will soon be decided by the Court is *ESL*.

Background of the case

In April 2021, 12 European elite football clubs announced the creation of the ESL, a new football league. This league would not be regulated by Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA), which are the governing bodies of global and European football.[35] FIFA and UEFA asserted that the ESL would infringe their prior authorisation rules as contained in their statutes, which effectively state that clubs require prior authorisation by FIFA and/or UEFA if they want to play in competitions that are not organised by FIFA or UEFA.[36] The European Super League Company (ESLC) challenged the legality of these prior authorisation rules in light of competition law before a commercial court in Madrid. The Madrid court referred a number of preliminary questions to the Court, essentially asking whether arts 101 and 102 TFEU prohibit FIFA's and UEFA's prior authorisation rules and the sanctions deriving from them.

AG Rantos' Opinion

AG Rantos, as in the *ISU* case, highlights the importance of art.165 TFEU. In *ESL*, he additionally highlights the European Sports Model which he defines as a pyramid structure with amateur sport at its base and professional sport at its summit. According to AG Rantos, the model is further characterised by promoting open competitions and is based on a financial solidarity regime.[37] AG Rantos asserts that the EU Member States decided to incorporate the concept of the European Sports Model into art.165 TFEU in order to guarantee its protection.[38] He identifies the rationale behind art.165 TFEU as emphasising the special social character of sports, which may justify a different treatment.[39] Moreover, as the context of sports is characterised by a high degree of interdependence, a certain degree of equality and competitive balance are necessary, further distinguishing sports from other sectors.[40] AG Rantos also notes that the sports federations hold a regulatory power but also perform an economic activity, which could lead to a conflict of interest.[41] As UEFA also performs this double role, *MOTOE* suggests that an association like UEFA has a duty to ensure that third parties are not unduly denied access to the market.[42] However, this also means that sports federations may legitimately refuse third parties access to the market, provided that that refusal is justified by legitimate objectives and the steps taken by the federation are proportionate to those objectives.[43]

Restriction of article 101 TFEU "by object"

AG Rantos then addresses the compatibility of the prior authorisation rules with art.101 TFEU. Just like in his opinion on ISU, AG Rantos denies that the mere existence of prior authorisation rules constitute a restriction of competition "by object".[44] The prior authorisation system can nevertheless prevent third parties access to the market, which raises questions as to the harmful effects on competition. AG Rantos concludes that the prior

[34] Opinion of AG Rantos: *ISU* EU:C:2022:988 at [91]–[93].
[35] UEFA, "What UEFA does" (22 January 2019), available at: *www.uefa.com/insideuefa/about-uefa/what-uefa-does*.
[36] Articles 22, 71 and 73 of the FIFA Statutes; arts 49 and 51 of the UEFA Statutes.
[37] Opinion of AG Rantos: *European Superleague Company (ESL)* (C-333/21) EU:C:2022:993 at [30].
[38] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [33].
[39] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [34].
[40] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [41].
[41] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [43].
[42] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [47].
[43] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [49].
[44] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [65].

authorisation system needs to be examined in light of its anti-competitive effects, rather than in the context of a "by object" assessment.[45] AG Rantos puts forward several factors on which he bases his suggestion that there is no restriction "by object" in the present case. As in his *ISU* opinion, he clarifies that the lack of compliance with the *OTOC* and *MOTOE* criteria does not automatically lead to a "by object" classification.[46] He also highlights that from a (purely) legal perspective, prior authorisation by FIFA and UEFA is not essential for participating in other competitions, as these entities have no public law power.[47]

AG Rantos then concludes that the prior authorisation system cannot be seen as a restriction "by object" as the anti-competitive object cannot be established in the abstract and the effect in the concrete situation needs to be examined.[48]

Additionally, AG Rantos examines the sanctions which can be imposed on clubs and players participating in a non-authorised league. He recognises that these sanctions are liable to deter clubs from taking part in non-authorised competitions and therefore liable to close off the market for the organisation of football competitions in Europe to a potential competitor.[49] Yet, he is of the opinion that such considerations need to be weighed against the possibility of potential competitors disregarding the sanctions if they decide not to adhere to FIFA's and UEFA's rules. AG Rantos thus concludes that the sanctions would not have a deterrent effect on a breakaway league, and therefore the sanctions do not justify the classification as restricting competition "by object".[50]

Application of the Meca-Medina test

AG Rantos then moves on to the question whether the prior authorisation rules and their sanctions fall outside the scope of art.101(1) TFEU, by applying the framework as set out in *Wouters* and *Meca-Medina*.[51] He notes that the application of this framework for sports differs from that for purely commercial restraints, since the "sports restraints" are based on a whole range of (non-commercial) objectives, for example non-doping or sporting merit.[52]

Legitimate objective

Applying this framework to the present case, AG Rantos notes that most of the objectives invoked by UEFA and FIFA stem from the European Sports Model and are therefore expressly covered in art.165 TFEU, with the result that their legitimacy cannot be contested.[53] These include the openness of competitions, protecting health and safety of players, guaranteeing solidarity and redistribution of revenue, and maintaining the integrity of competitions and the balance between clubs in order to preserve equality and uncertainty.[54]

AG Rantos then goes on to analyse the application of the UEFA prior authorisation and sanction rules in the present case, focusing on the ESL itself. AG Rantos finds that the ESL would negatively impact the national championships (organised by FIFA and UEFA), as the outcome of these championships would not be relevant to qualify for the ESL, which is not based on "sporting merit".[55] Moreover, the ESL could have a negative impact on the principle of equal opportunities, as clubs participating in the ESL would generate more revenue. This would (even further) increase the disparities between clubs taking part in UEFA's leagues.[56] Additionally, AG Rantos notes that the ESL would run counter to the "European dimension" of the European Sports model, as it would be impossible for all Member States to have their clubs participating in the ESL.[57] According to AG Rantos, the ESL also calls into question the principle of solidarity of the European Sports Model. This solidarity mechanism aims to redistribute revenue generated in the top layers of the pyramid to the grassroots divisions. AG Rantos argues that the ESL would undermine the appeal of UEFA's competitions and therefore infringe this principle by limiting UEFA's profitability.[58] With regard to the penalties, AG Rantos states that these could prove necessary to avoid "dual membership" and free riding, which would risk weakening UEFA's and FIFA's position on the market.[59]

Inherency

Regarding the questions whether the prior authorisation system and the sanctions are inherent in the pursuit of the legitimate objectives, AG Rantos notes that the fact that other sporting disciplines operate on the basis of different sports models under which the organisation of

[45] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [66].
[46] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [73].
[47] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [74]–[75].
[48] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [77].
[49] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [83].
[50] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [84].
[51] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [89].
[52] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [91].
[53] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [93].
[54] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [93].
[55] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [102].
[56] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [103].
[57] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [104].
[58] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [105].
[59] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [106].

independent competitions is not subject to a prior authorisation system, does not call into question the inherency of the prior authorisation scheme established by UEFA. In addition, AG Rantos argues that the prior authorisation system can be regarded as inherent in the pursuit of safeguarding the current structure of European football and the objective of solidarity.[60] AG Rantos finally concludes that the non-recognition by FIFA and UEFA of the ESL is "inherent in the pursuit of […] legitimate objectives".[61]

Proportionality

As a preliminary mark on proportionality, AG Rantos notes that the prior authorisation criteria must be objective, transparent and non-discriminatory,[62] and the sanctions must be sufficiently clear, foreseeable and proportionate.[63] However, these principles only apply in relation to independent competitions which themselves comply with the legitimate objectives as pursued by the sports federation.[64] According to AG Rantos, even if the prior authorisation criteria established by UEFA are not transparent and non-discriminatory, this would not mean that a third-party competition running counter to legitimate sporting objectives (such as the ESL) should be authorised and that UEFA's refusal to authorise such a competition could not be justified.[65] AG Rantos thus refrains from applying a traditional proportionality test to the prior authorisation system.

AG Rantos does however apply a proportionality test to the sanctions. He notes that the threats of sanctions made by UEFA against players (namely that the players participating in the ESL would be banned from participating in their national teams) are disproportionate, as the players have no say in the decision of their clubs to join the ESL. Additionally, depriving the national teams of some of their players would amount to sanctioning these national teams indirectly too, which is also disproportionate.[66] However, AG Rantos finds that the threatened sanctions against clubs participating in the ESL (namely a ban on participation in any competition organised by FIFA and UEFA) to be proportionate, as the ESL does not comply with the fundamental principles of European football.[67]

Suggested solution

AG Rantos concludes that, taking into account the characteristics of the ESL, the restrictive effects arising from the prior authorisation scheme as laid down in the FIFA and UEFA Statutes appear inherent in, and proportionate for achieving the legitimate objectives pursued by UEFA and FIFA which are related to the specific nature of sport.[68] AG Rantos then notes that for the same reasons, UEFA's refusal may be objectively justified under art.102 TFEU[69] and therefore does not infringe art.102 TFEU either.[70]

The focus of and relationship between the two opinions

The cases of *ISU* and *ESL* have for long been considered similar to each other, due to the competition law aspects and the chance for the Court to expand on the *lex sportiva*, specifically within the area of prior authorisation and sanctions. As such, the opinions were delivered on the same day by the same AG and were therefore expected to align with each other. AG Rantos is indeed consistent in some aspects, such as recognising the special nature of sports through art.165 TFEU and the narrow interpretation of "by object" restrictions. However, there appears to be an imbalance in the treatment of the two cases. For example, the *ISU* opinion focuses purely on the competition law issues of the case, whereas the *ESL* opinion places the emphasis on the importance of preserving the current model of football by adopting a lenient approach. While AG Rantos might be more of a football fan than an ice-skating fan, his concern about the nature of the ESL and its alleged harmful effects on football stands out. In the *ISU* opinion, there is barely any discussion of the potential harmfulness of competing ice-skating events on the sports model. AG Rantos further omits to mention the European Sports Model in his opinion relating to *ISU*, which implies that the situation does not fall within the scope of the model. We would consider this to be problematic if it were to indicate that the football model receives more protection than the ice-skating model. Although there are possible justifications for the different focus of the opinions, namely that the *ISU* case is an appeal from the General Court whereas the *ESL* case is a preliminary ruling, the difference in treatment still seems remarkable.

Challenges

While the opinions of AG Rantos are thorough and provide a welcomed analysis of the relationship between sports and competition law, the ball is now in the court of the Court of Justice. The Court will have to face the five following challenges when considering whether to follow the paths suggested by AG Rantos.

[60] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [98].
[61] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [110].
[62] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [113].
[63] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [115].
[64] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [118].
[65] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [118].
[66] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [121].
[67] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [122].
[68] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [123].
[69] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [143].
[70] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [144].

The role of the European Sports Model

The invocation of the European Sports Model by AG Rantos in the *ESL* opinion is inconsistent and, at times, contradictory so that the Court will need to clarify the role that the European Sports Model should have in the context of EU competition law. For instance, AG Rantos highlights the importance of the European Sports Model, which can be considered as a limb of the specific structure and values of sport that are mentioned in art.165 TFEU. Article 165 TFEU is an integration clause with specific aims of protecting the social and educational nature of sports, including amateur sports.[71] The European Sports Model is not mentioned in art.165 TFEU, but it is a concept introduced by the Commission prior to the introduction of art.165 in the Lisbon Treaty.[72] According to the Commission, the European Sports Model includes the autonomy and diversity of sports organisations, a pyramid structure of competitions from grassroots to elite level, solidarity mechanisms between the different levels of the pyramid, the organisation of sports on a national basis, and the principle of a single federation per sport (the "one-place" principle).[73] AG Rantos considers that the European Sports Model has been constitutionalised by art.165 TFEU but fails to acknowledge that the former includes elements that are not reflected in the latter.[74] For example, the "one-place" principle is not included in the Treaty, and neither is the pyramidal structure. Using the two concepts interchangeably in order to justify a restriction of competition may result in a widening of legitimate interests beyond the original intention behind art.165 TFEU. The wording of art.165 TFEU[75] seems to suggest that it seeks to protect the social rather than the economic nature of sports. It therefore seems rather far removed from the aim of protecting the economic superpower that the football industry with UEFA and FIFA at the pinnacle has reached. Whilst the nature of sports may necessitate a special interpretation within competition law compared to other industries, AG Rantos' reference to the European Sports Model seems excessive at times.[76] For example, AG Rantos argues that a restriction of competition law may be justified to avoid dual membership or free riding, as it would run counter to the integrity of the organisational system of football under the European Sports Model. However, this argument could also be advanced without relying on the European Sports Model.[77] In *ESL*, AG Rantos places a stronger emphasis on safeguarding the European Sports Model (specifically in football) than on safeguarding a competitive market. This is in contrast with his opinion in *ISU*, which does not even mention the European Sports Model. Thus, it begs the question of consistency: how can the European Sports Model be so central in the *ESL* opinion, but irrelevant in *ISU*?

The use of the European Sports Model to protect UEFA and FIFA from competition law challenges gives rise to further inconsistencies. A recurring argument throughout the *ESL* opinion is that prior authorisation by UEFA and FIFA is legally not needed for setting up a new tournament. While one might criticise such a statement as legalistic and disregarding market realities,[78] it also seems to contradict AG Rantos' own willingness to uphold the pyramidal structure of the European Sports Model. On the one hand, AG Rantos states that the "one-place" principle is a key element of the European Sports Model, but on the other hand, AG Rantos opens up the possibility of the federations' authority not being respected by pointing out that breakaway leagues are not legally subject to the prior authorisation system. As such, he thus accepts that these breakaway leagues would then act *outside* the scope of the European Sports Model. These contradictory statements undermine his own reasoning for upholding the European Sports Model while casting doubt on the importance of that model. Thus, clear statements by the Court on the relevance of the European Sports Model and its role in the competition law assessment would be needed.

The relevance of characteristics of the ESL

Another challenge in the *ESL* opinion concerns the relevance of the nature of the European Super League under the test deriving from *Meca-Medina*. This question arises from the fact that the opinion seems to shift focus to the nature and set-up of the Super League itself, instead of focusing on the legality of the prior authorisation mechanism set out in the FIFA and UEFA Statutes. Rantos rightly highlights the *MOTOE* and *OTOC* conditions which are applicable to prior authorisation systems. These require that prior authorisation criteria must be clearly defined, transparent, non-discriminatory and reviewable.[79] However, AG Rantos considers that these principles can only apply in relation to "independent competitions which themselves comply with the

[71] *TopFit e.V. v Deutscher Leichtathletikverband e.V* (C-22/18) EU:C:2019:497; [2020] 1 C.M.L.R. 3.
[72] Commission, White Paper on Sport COM(2007) 391 final; see also European Commission Consultation Document of DG X, The European Model of Sport [1999] OJ C374/56.
[73] Commission, White Paper on Sport COM(2007) 391 final; see also European Commission Consultation Document of DG X, The European Model of Sport [1999] OJ C374/56; see, for a comparison between the European and American sports model, Nordblad, "European Super League: Kicking off the match against FIFA and UEFA" (2022), pp.25–27.
[74] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [31].
[75] Article 165 TFEU specifically sets out in its first paragraph 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". The second paragraph highlights that "Union action shall aim at…developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen".
[76] G. Monti, "Sports Governance after the Opinions of Advocate General Rantos in Superleague and International Skating Union" (2023) TILEC Discussion Paper 1.
[77] Monti, "Sports Governance after the Opinions of Advocate General Rantos in Superleague and International Skating Union" (2023) TILEC Discussion Paper 1, 13.
[78] See below under challenge number 3: A formalistic stance as to the necessity to obtain prior authorisation.
[79] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [113]–[116].

objectives recognised as legitimate",[80] and that even if the prior authorisation rules in the FIFA and UEFA Statutes did not fulfil these requirements, that "would not mean that a third-party competition running counter to legitimate sporting objectives should be authorised and that UEFA's refusal to authorise such a competition could not be justified".[81] Apart from the question of whether this conclusion might be right, it seems that the question of *who* requests market access from FIFA and UEFA is irrelevant under the previous case law. The Court's case law does not require an assessment of the body asking for authorisation but instead mandates that the prior authorisation rules comply with certain principles so as not to infringe EU competition law. In other words, AG Rantos' argument that the *MOTOE* and *OTOC* requirements would not apply if the tournaments themselves are not compliant with legitimate sporting objectives, wrongly shifts the focus to the party requesting market access, instead of the prior authorisation rules. This shift in focus leaves the question of the legality of UEFA's and FIFA's prior authorisation systems unanswered. How would the prior authorisation rules be judged if the European Super League complied with the legitimate objectives? By shifting the focus, AG Rantos sidesteps this key question. It should not matter which party requests market access, but what is important is that the prior authorisation rules adhere to the requirements laid down in case law. Thus, a view from the Court as to whether the nature and organisational structure of the organisation of the competing tournament are relevant in the assessment of the *MOTOE* and *OTOC* requirements would be needed.

Formalism in assessing prior authorisation schemes

Another challenge connected to the prior authorisation system concerns AG Rantos' stance on the necessity to obtain prior authorisation from FIFA and UEFA in order to create a new tournament. AG Rantos considers that "from a (purely) legal perspective, such approval is not essential" and that a new football league can be created "freely and without UEFA's intervention".[82] According to the AG, this is because these institutions are not public entities, nor have any special exclusive right granted by public power.[83] Hence, the only reason why the prior authorisation system may constitute a barrier to market entry is because the ESL clubs also wish to remain affiliated to UEFA.[84] According to AG Rantos, these are rules against "dual membership" and do not infringe competition law.[85] Yet, this "purely legal" view undermines one of the most fundamental principles of competition law, namely that competition law is concerned about the *effects* of particular behaviour on the market. This principle even applies with regard to restrictions "by object". The reason why it is not necessary to examine the effects in the case of a "by object" restriction is the presumption—based on experience—that particular behaviour is likely to produce negative *effects* on the market.[86] However, by taking such a "purely legal" approach, AG Rantos seems to ignore the effects of FIFA's and UEFA's prior authorisation rules on the market. After all, as was also acknowledged by AG Rantos, "UEFA holds a dominant position (if not a monopoly) on the market for the organisation and the commercial exploitation of international competitions between football clubs at European level".[87] The same is true for FIFA, which holds a similar position worldwide. When the Super League was announced, FIFA, UEFA, and UEFA's members threatened that the clubs partaking in the ESL would be banned from participating in UEFA's and FIFA's competitions.[88] Considering FIFA's and UEFA's positions, executing the threat would mean that ESL clubs would not be allowed to participate in any football competitions worldwide. Although from a "purely legal" point of view, it may be true that there is no obligation to require prior authorisation from FIFA and UEFA, in reality such approval is indeed necessary for football clubs and players. The prior authorisation rules in combination with this threat of exclusion clearly have negative effects on market access, in particular due to their strong deterrent effect. As such, they constitute a barrier to entry which in turn restricts competition. By ignoring these effects, AG Rantos' focus on whether an authorisation was legally necessary may be seen as a return to formalism and undermining established principles in competition law. Thus, the Court should provide us with a view on the extent that such formalist arguments carry weight in the assessment of restrictions "by object" or "by effect".

The proportionality test for prior authorisation systems

The previously mentioned shift in focus to the ESL instead of the authorisation rules is also visible in AG Rantos' proportionality assessment of the prior authorisation system in his *ESL* opinion. The need to assess the proportionality of a prior authorisation system flows from the case of *OTOC*, where the Court provided

[80] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [118].
[81] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [118].
[82] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [74].
[83] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [75].
[84] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [76].
[85] Opinion of AG Rantos: *ESL* EU:C:2022:993at [76], [140].
[86] European Commission, Guidelines on the application of Article 81(3) TFEU (2004/C 101/08) [2004] OJ C101/97 at 21.
[87] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [129].
[88] 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), available at: *https://www.uefa.com/insideuefa/news/0268-12121411400e-7897186e699a-1000--statement-by-uefa-the-english-football-association-the-premi/*.

the national court with guidance on how to apply the necessity limb of the proportionality assessment by looking at the restrictive effects on competition and "whether those effects do not go beyond what is necessary to ensure the pursuit of that objective".[89] However, when AG Rantos in the *ESL* opinion arrives at the proportionality assessment of the prior authorisation system, he fails to provide the sufficient guidance to the referring court. Instead, AG Rantos refers to the *MOTOE* and *OTOC* criteria, and subsequently states that these criteria can only become relevant "in relation to independent competitions which themselves comply with the objectives recognised as legitimate that are pursued by a sports federation".[90] Whilst this shift in focus seems unfounded,[91] it also does not provide the referring court with sufficient guidance to conduct the required proportionality assessment. While a complete proportionality assessment is not expected of an AG's opinion, a reference to the proportionality test as laid down in *OTOC* would have clarified the assessment to be conducted by the national court. By simply stating that the assessment cannot be done because of the characteristics of the ESL, the preliminary question regarding art.101 TFEU remains partially unanswered. This further seems to highlight the lack of interest in addressing the effects that the prior authorisation system have on competition.

The relevance of market realities v theoretical possibilities

A fifth challenge is AG Rantos' examination of whether the sanctions in the *ESL* case restrict competition "by object". UEFA and FIFA had threatened the clubs that would participate in the ESL with a ban and players participating in the ESL could be denied the opportunity to represent their national teams.[92] These are severe sanctions which AG Rantos admits may deter clubs or players from taking part in competitions not authorised by FIFA and UEFA. These sanctions are therefore "liable to close off the market for the organisation of football competitions in Europe to a potential competitor", as competitors would risk being denied access to the relevant resources (the clubs and players).[93] This reasoning is also found in AG Rantos' opinion in *ISU*, where he argued that the severity of the penalties for participating in non-authorised events may dissuade the athletes from participating in such events. Consequently, the penalties could prevent market access to potential competitors as competitors are deprived of athletes that are essential for the organisation of a sporting event.[94] This is a sound reasoning. However, in the *ESL* opinion, AG Rantos takes it one step further by stating that the assessment of the sanctions should take into account the possibility that the players and the clubs decide to "disregard the risk of sanctions being imposed on them", as the disciplinary power of sports federations depends on the recognition by the clubs and players affiliated to it.[95] He further adds that a decision to break away from the federation by creating and participating in a new independent competition, reduces the risk of the sanctions having a deterrent effect.[96] While this may be true in theory, it is not a reflection of the reality of the football market, as the ESL did not intend to be completely independent from FIFA and UEFA. Moreover, most football players are dependent on FIFA and UEFA to advance in their careers. In reality, there is no difference to the dependence of the ice skaters on ISU. Ice skaters (as football players) seem to have a merely theoretical choice of whether or not to be affiliated with ISU (or FIFA and UEFA).[97] It is, therefore, remarkable that the two opinions do not align on this matter, considering the resemblance in the authority held by ISU and FIFA and UEFA respectively. A more consistent approach is needed and an approach closer to *ISU* seems to better reflect market realities.

Conclusion

In this short piece we have charted the way that the interaction between sports and EU competition law has taken until the current cases of *ISU* and *ESL*. Then, we elaborated on the *ISU* and *ESL* opinions by AG Rantos and the challenges that these proposals to the Court may bring about.

The *ISU* and *ESL* cases could mark a turning point in the relationship between sports and competition law in the EU. AG Rantos has paved the way for the Court, but the path took some unexpected turns. The relationship between the two opinions is at points fragmented and AG Rantos seems to be more concerned about the football market than the ice skating market. This is inter alia reflected in the lack of a strict application of competition law in the *ESL* opinion, and the shift of focus from the legality of FIFA's and UEFA's rules towards the alleged harmful characteristics of the ESL itself.

We hope that the judgment by the Court addresses the challenges we highlighted, in particular the margin of discretion of sports governing bodies in the context of prior authorisations and competition law. Although it is recognised that the current organisation of sports, including the "one-place" principle, might be the traditional way of organising sports in Europe, it remains

[89] *OTOC* EU:C:2013:127; [2013] 4 C.M.L.R. 20 at [96].
[90] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [118].
[91] As AG Rantos does not justify this position, neither by explaining it further, nor by referring to case law.
[92] UEFA, "Statement by UEFA, the English Football Association, the Premier League, the Royal Spanish Football Federation (RFEF), La Liga, the Italian Football Federation (FIGC) and Lega Serie A" (18 April 2021).
[93] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [83].
[94] Opinion of AG Rantos: *ISU* EU:C:2022:988 at [83].
[95] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [84].
[96] Opinion of AG Rantos: *ESL* EU:C:2022:993 at [84].
[97] While we acknowledge the different financial situation of athletes in football and ice skating, the dependence on a monopolistic sports federation is the same.

rather unclear when and how this can be compliant with competition law, if there are no clear safeguards regarding proportionality and transparency applicable to the sports federations' decision making. The rather lenient approach to sport federations differs from how competition law is applied in other sectors. The Court will have to address the challenges ahead, otherwise there is a risk that the *ESL* opinion provides FIFA and UEFA a *carte blanche* to continue operating unsupervised and unscrutinised on the football market. While addressing the challenges we identified, the Court has the chance in the *ESL* and *ISU* judgments to scrutinise the position of sports federations more intensely and to recognise that in some fields, sport has developed from being considered a non-economic activity to a major worldwide industry. It is time for the Court to explain to sports federations which violations lead to yellow or even red cards under competition law.