Cambridge Yearbook of European Legal Studies (2025), 1–15
doi:10.1017/cel.2024.5

RESEARCH ARTICLE

Addressing the Unfettered Authority of Sport Governing Bodies through EU Competition Law: The Effect of *International Skating Union* and *European Super League*

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Abstract
The unfettered authority of sport-governing bodies (SGBs) has given rise to human rights claims and led to the distortion of EU free movement of persons and competition law. Following *International Skating Union* and *European Super League Company*, SBGs cannot exercise their right to achieve legitimate sporting aims like integrity and sporting fairness at the expense of competition rules. Nor are they allowed to prevent their member associations from organising/operating competitive leagues/events or to inflict sanctions on them for attempting to do so. These judgments will revolutionise the transnational sport law landscape, reshaping SGBs' institutional rules and member relationships.

Keywords: competition law; sport law; FIFA; human rights; CJEU

I. Introduction

Sport law hardly features heavily in the cases entertained by the Court of Justice of the European Union (CJEU); however, as will be shown, when such cases do appear, the Court's judgments produce wide-ranging effects.[1] The competition dimension arising from the near-monopolistic operation of sporting events by so-called sport governing bodies (SBGs), such as UEFA (Union of European Football Associations) and FIFA (Federation Internationale de Football Association), had long been overlooked by the European Commission. The FIFA World Cup and the UEFA Champions League allow the two SGBs in question to reap significant profits to the exclusion of other actors, in terms of both direct ticket sales and audiovisual distribution rights. These competitions also bind clubs and their athletes without the possibility of founding alternative competitions. Such restrictions impede freedom of movement, but most importantly dilute the EU's competition architecture.[2] This dilution

[1]For example, the Bosman case (*Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and Others*, and *Union des Associations Européennes de Football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995/463) is widely recognised as a significant legal precedent in the relations between sports and EU law. According to an empirical study by Derlén and Lindholm, the Bosman case is considered to be one of the most influential of all the cases heard by the CJEU. See M Derlén and J Lindholm, 'Goodbye van Gend En Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual CJEU Judgments' (2014) 20 *European Law Journal* 667.

[2]See J Kornbeck, 'Introduction: The Slow yet Steady Rise of EU Sports Anti-Trust Law (1882–2022)' in J Kornbeck (ed), *EU Antitrust Law and Sport Governance* (Routledge, 2022).

of competition, as will be demonstrated, produces a direct impact on the enjoyment of fundamental rights, particularly freedom from oppressive labour and restraint of trade.[3] In more extreme cases, it might further give rise to restrictions in access to justice and discrimination, among other things.

Unlike states, many of which have an interest in maintaining the unfettered authority of SGBs to self-regulate and bypass national laws, no such interest is entertained by EU institutions, particularly the Commission and the CJEU. Any distortion of competition rules or freedom of movement is a serious risk to the integrity of the system. And unlike states that stand to profit by hosting powerful SGBs on their territory, no such financial benefit can ever accrue to the EU by the flouting of competition and fundamental rights rules.[4] This short article explores two recent judgments adopted by the Court, namely *International Skating Union v Commission* and *European Super League Company v FIFA and UEFA*. It is argued that they make landmark inroads in the unfettered authority of SGBs to create transnational rules in what is known as *lex sportiva*. It is hoped that the CJEU's enforcement of competition law will succeed where national laws and even the European Court of Human Rights (ECtHR) have largely failed to make a visible difference.

II. The context: the unfettered nature of the *lex sportiva*

A. *The conflicting nature of sport governing bodies*

In order to fully comprehend why the prevalence of EU law, and particularly its anti-competition component, is not straightforward in the context of SGBs, the nature, structure, and outlook of SGBs are important. In their vast majority, SGBs are incorporated as non-profit entities in developed European countries, chiefly Switzerland,[5] although a small minority prefers the model of limited liability company seat outside Europe.[6] For those governed by Swiss law, the stipulation of being non-profit is contingent not solely on profitability but also on the core objectives of the organisations. As such, Swiss-based SGBs governed by Articles 60–79 of the Swiss Civil Code (SCC) are mandated to be 'non-commercial' (*pas un but économique, nicht wirtschaftlichen Aufgabe, fine non economico*). The legal justification for the strict adherence to these criteria is based on the argument that the primary focus of SGBs is to establish regulations, facilitate competitions, and support their respective sport.[7] This mission is often regarded as 'idealistic' and considered the core function of SGBs.[8]

Notwithstanding their legal status as non-profit organisations, SGBs are not precluded from generating revenues that surpass those of major international corporations.[9] Even so, SGBs such as FIFA have been granted exceptional tax privileges under Swiss law.[10] These privileges have come under

[3] In the sports law context, anti-competitive practices, particularly monopolies by domestic and international sports federations, are not necessarily addressed as restraint of trade, although there is no good reason why they cannot be. See K Pijetlovic, 'EU Competition Law and Organisational Rules' in A Duval and B Van Rompuy (eds), *The Legacy of Bosman* (TMC Asser Press, 2016), 117.

[4] See K Pijetlovic, 'Fundamental Rights of Athletes in the EU Post-Lisbon' in T Kerikmäe (ed), *Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights* (Springer, 2013).

[5] See DJ Ettinger, 'The Legal Status of the International Olympic Committee' (1992) 4 *Pace International Law Review* 97, 163; equally A Mestre, 'The Legal Basis of the Olympic Charter' (2008) 1 *International Sports Law Journal* 100, 101. The IOC's constitutional instrument is its Olympic Charter. Rule 15 (1) of the Charter states: 'The IOC is an international non-governmental not-for-profit organisation, of unlimited duration, in the form of an association with the status of a legal person, recognised by decree of the Swiss Federal Council in accordance an agreement entered into force on 1 November 2000.'

[6] ITF Constitution 2024 (preamble, Articles of Association), www.itftennis.com/media/2431/the-constitution-of-the-itf-2024.pdf. The ITF is incorporated as an LLC in the Commonwealth of the Bahamas.

[7] For instance, FIFA specifies as its primary objective 'to improve the game of football constantly and promote it globally in the light of its unifying, educational, cultural and humanitarian values, particularly through youth and development programmes'. See FIFA Statutes 2022, https://digitalhub.fifa.com/m/3815fa68bd9f4ad8/original/FIFA_Statutes_2022-EN.pdf.

[8] M Baddeley, *L'association sportive face au droit: les limites de son autonomie* (Helbing & Lichtenhahn, 1994), 72–73.

[9] See FIFA, 'FIFA Council Highlights Record-Breaking Revenue in Football' (2023), www.fifa.com/about-fifa/organisation/fifa-council/media-releases/fifa-council-highlights-record-breaking-revenue-in-football.

[10] Agreement between IOC and Switzerland, https://archive.icann.org/en/psc/annex6.pdf.

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significant scrutiny, particularly in cases where such organisations have been implicated in corrupt practices, exhibit poor governance standards, or pose human rights risks through their activities.[11] Such criticisms raise valid concerns regarding the efficacy and credibility of SGBs, necessitating a (re-)evaluation of their roles and responsibilities within the larger socio-political context.

Moreover, despite the fact that non-profit SGBs lack shareholders in the conventional corporate sense, it is evident that they engage in commercial and, in several instances, investment activities.[12] As a result, some SGBs have been embroiled in legal proceedings where the nature of their activities has been scrutinised.[13] However, contrary to their *de iure* status, national federations can also be seen as de facto shareholders of the SGBs, exerting significant influence within the larger organisational structure.[14] This confluence of factors underscores the intricate intersection between the ostensibly non-profit nature of SGBs and their active engagement in commercial ventures, which has raised some questions in European courts.

B. *Lex sportiva* as the 'untouchable' legal framework

The body of institutional rules and their binding character among pertinent sports stakeholders has come to be known as *lex sportiva*.[15] It is clearly binding as a matter of industrial custom (*lex mercatoria*), and is further legitimised through the creation of arbitral or adjudicative entities within the constitutional structure of SGBs.[16] While this is also true of arbitration in the context of transnational commercial transactions, the interesting twist in the sphere of transnational sport law is the existence of a cassation-type mechanism, the Court of Arbitration for Sport (CAS),[17] which effectively serves as a court of last resort for sport disputes. The jurisdiction of CAS is mandatory because it is expressly demanded in SGB institutional rules,[18] which, as we have already alluded to, serve as a valid agreement to arbitrate.[19] Therefore, the CAS can be considered the epicentre of the *lex sportiva* by acting as a 'seamstress' that expertly weaves together a diverse range of legal constructs through a patchwork of authoritative awards.[20] In this particular framework, SGBs serve as guardians of the CAS, providing

[11] RE Bandeira, 'FIFA: For the Game or For-Profit Notes' (2016) 51 *New England Law Review* 445.

[12] See I Bantekas and H Sahin, 'Non-Profit Entities as Foreign Investors: The Case of Sport Governing Bodies' (2024) *Stanford Journal of International Law* 1 (arguing that despite their non-profit status, several commercial activities of SGBs have all the hallmarks of investments protected under bilateral investment treaties).

[13] For example, regarding the allegations around FIFA's responsibility for labour rights abuses in Qatar, see *The Dutch Trade Union, the Bangladeshi Free Trade Union Congress, the Bangladesh Building and Wood Workers Federation and Nadim Shariful Alam v. FIFA* (2017) Commercial Court of the Canton of Zurich 2017 – HG160261-O 6. For a commentary of the case, see T Grell, 'FIFA's Responsibility for Human Rights Abuses in Qatar – Part I: The Claims Against FIFA' (*Asser International Sports Law Blog*, 28 February 2017) https://shorturl.at/lC3zP.

[14] See I Bantekas, 'Political Neutrality in the Rules of International Sports Federations: Compatible with Fundamental Freedoms?' (2024) 34 *Fordham Intellectual Property, Media and Entertainment Law Journal* 193, 199.

[15] See A Duval, 'Transnational Sports Law: The Living Lex Sportiva' in P Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press, 2021), 493; L Casini, 'The Making of a Lex Sportiva by the Court of Arbitration for Sport' (2011) 12 *German Law Journal* 1317.

[16] See, eg, Arts 50 and 54, FIFA Statutes 2022 (setting out FIFA's judicial bodies and Football Tribunal respectively), https://shorturl.at/4zzGp.

[17] The Swiss Federal Tribunal has emphasised that CAS is an independent arbitration system, distinguishing it from other processes of adjudication operated by SGBs. See *A v International Biathlon Union*, Case 4A_232/2022 (22 December 2022). See Note at https://shorturl.at/pjdC4. See J Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence: An Empirical Inquiry into Lex Sportiva* (TMC Asser Press, 2019).

[18] Arts 56–58 FIFA Statutes. These provisions should be read in conjunction with Art 14(1), which obliges FIFA's member associations to cause their own members to comply with FIFA instruments and submit to CAS and the same is true of member associations themselves.

[19] The jurisdiction of CAS may be viewed as incorporation of an agreement to arbitrate by reference to a distinct document containing an arbitration clause. Such incorporation by reference is valid according to general practice and is enshrined in Art 7(6) of the UNCITRAL Model Law on International Commercial Arbitration.

[20] See A Duval, 'Seamstress of Transnational Law: How the Court of Arbitration for Sport Weaves the Lex Sportiva' in N Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press, 2021), 260.

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themselves with a commercially advantageous position and favouring the creation and development of 'an intellectually deft camouflage' founded on contractual obligations that protect them from legal scrutiny.[21]

At the same time, and this is perhaps more poignant, SGBs, just like other industries, have been allowed to undertake a great deal of self-regulation, particularly through the adoption of institutional rules and regulations that operate as *sui generis* contracts that bind national federations (members), private sports clubs (where applicable), as well as individual athletes. These institutional rules are an inescapable part of the transnational sport ecosystem, chiefly because SGBs control major sporting events, such as the Olympics or the FIFA World Cup, in which all athletes and clubs greatly desire to participate.[22] And it is through these events that SGBs also exercise a legislative strategy that allows them to permeate state law and further guarantee their autonomy and privileges. This process involves the development of a legal framework that recognises and protects their interests while promoting the continued economic growth and success of their operations. Specifically, SGBs devise a legislative approach that allows them to operate with greater freedom and flexibility while also ensuring that they remain almost 'untouchable' in their actions. To achieve this goal, SGBs may engage in a variety of activities, including lobbying for new legislation,[23] or working to strengthen existing laws and regulations.[24]

An instance of how SGBs can positively disrupt national legal-administrative spaces is exemplified by the Host City Contracts for the Olympic Games 2024 and 2028.[25] These contracts contain clauses that mandate the parties to 'protect and respect human rights and ensure any violation of human rights is remedied in a manner consistent with international agreements, laws, and regulations applicable in the Host Country and in a manner consistent with all internationally-recognized human rights standards and principles, including the United Nations Guiding Principles on Business and Human Rights, applicable in the Host Country'.[26] The clauses under these regulations, which are the result not of the initiative of the SGBs but of civil society, have resulted in greater control and regulation over the organisation of mega-sporting events. Nevertheless, it is essential to recognise that while the *lex sportiva* has been instrumental in improving the conditions of (some) mega-sporting events, its autonomy provided to SGBs often perpetuates their unfettered authority rather than seeking to improve social conditions.

Thus, the *lex sportiva* has established a framework that favours the development of an 'immune system' that is recognised and validated by national legal systems,[27] particularly the Swiss legal system.[28] This transnational and interlinked legal ecosystem has become largely 'untouchable', resulting in the ability of SGBs to circumvent national legislation. This is owing, in part, to the fact that SGBs' national

[21] See S Weatherill, *Principles and Practice in EU Sports Law* (Oxford University Press, 2017), 26.

[22] See M Baddeley, 'The Extraordinary Autonomy of Sports Bodies under Swiss Law: Lessons to Be Drawn' (2020) 20 *International Sports Law Journal* 3, 5.

[23] See HE Meier and others, 'The Capture of EU Football Regulation by the Football Governing Bodies' (2023) 61 *JCMS (Journal of Common Market Studies)* 692; B García and S Weatherill, 'Engaging with the EU in Order to Minimize Its Impact: Sport and the Negotiation of the Treaty of Lisbon' (2012) 19 *Journal of European Public Policy* 238.

[24] See MM Parent, C Rouillard, and ML Naraine, 'Network Governance of a Multi-level, Multi-sectoral Sport Event: Differences in Coordinating Ties and Actors' (2017) 20 *Sport Management Review* 497.

[25] See Z Calo, K Moloney, and K Swart, 'Legal-Administrative Implications of International Sport for Public Administration' (2023) *Administrative Theory and Praxis* 1.

[26] International Olympic Committee, *Host City Contract – Principles – Games of the XXXIII Olympiad in 2024* , https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Principles.pdf. For an analysis and implications of the provisions, see D Heerdt, 'A Rights-Holder View on Human Rights Provisions in Olympic Bidding and Hosting Regulations' (2020) 114 *AJIL (American Journal of International Law) Unbound* 356.

[27] See K Foster, 'Is There a Global Sports Law?' (2003) 2 *Entertainment and Sports Law Journal* 1.

[28] For an analysis of the influence and importance of the Swiss legal system in the development of the *lex sportiva*, see A Duval, 'Embedded Lex Sportiva: The Swiss Roots of Transnational Sports Law and Governance' in A Duval, A Krüger, and J Lindholm (eds), *The European Roots of the lex sportiva: How Europe Rules Global Sport* (Hart, 2024).

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association members are required to operate independently from their mother state, thus allowing them to bypass national legislation with relative ease.[29] And in instances where national governments have infringed upon the 'independent' exercise of the functions of national associations, the international SGB has sought to impose sanctions and limitations on such countries.[30] The reinforcement of this legal and political autonomy in SGBs has served only to further solidify their independence from scrutiny, leaving little room for challenges to their autonomy and authority.[31] This is because the social authority of the *lex sportiva* is not inherent to the *lex sportiva* itself.[32] Rather, it is conferred upon it by external actors. In this case, the primary actors that have bestowed authority upon the *lex sportiva* are the SGBs, who have done so with little to no oversight by states or other regulatory authorities. This has resulted in a transnational space in which the *lex sportiva* is rarely challenged by actors outside the sports ecosystem.

C. From Europe to the world? Challenging the *lex sportiva* in European courts

However, even if states are unwilling or uninterested in decreasing SGB self-regulation or demanding that their laws be enforced (for fear that SGBs may incorporate elsewhere), surely this is not the case with regional intergovernmental organisations whose institutional rules are binding by reason of treaty, as is the case with the EU and the Council of Europe; the latter with particular reference to the ECtHR. Surprisingly (or not), there have been no major challenges to the *lex sportiva* from other intergovernmental organisations.[33] This lack of challenge is rather remarkable, suggesting a potential acquiescence or implicit endorsement of the *lex sportiva*'s dominance within the European legal framework. Such apparent acceptance may reflect a deeper entrenchment of power dynamics, hinting at the possibility of imperialistic tendencies inherent within the European legal system, where the *lex sportiva* acts as a tool of influence and control.[34]

Meanwhile, the ECtHR has emphasised numerous occasions on which member states of the European Convention on Human Rights (ECHR) that host SGBs must enforce pertinent rights irrespective of the *lex sportiva*. This has led to some cases before the ECtHR shaking some of the foundations of the *lex sportiva*, though such cases have not caused a major upheaval so far. However, the most far-reaching cases have been those that have challenged the sports arbitration system, represented by both the CAS and the internal and national federative mechanisms. These cases have caused considerable concern among SGBs and been treated as hostile by stakeholders who view the

[29] Art 19 FIFA Statutes, regulating the independence of member associations, failing which they are amenable to suspension.

[30] In 2014, owing to governmental interference, the IOC suspended the Indian Olympic Association, preventing its athletes from competing in the Sochi Winter Olympics. Other national Olympic committees that have been subject to sanctions or warnings include Kuwait, Hungary, Kenya, and Mexico. Also, FIFA has suspended several national football associations, such as India in 2022, Trinidad and Tobago in 2020, and Nigeria in 2010.

[31] See JL Chappelet, 'The Autonomy of Sport and the EU' in J Anderson, R Parrish, and B García (eds), *Research Handbook on EU Sports Law and Policy* (Edward Elgar, 2018).

[32] According to Cohen, 'the sociological issue at stake in the making of a transnational [European] space, where law appears both dominant and relatively "naked", lies in the social conditions of possibility of the law itself, its "force", that is, the force that specific social groups authorised to speak in its name succeeded in conferring upon law'. See A Cohen, 'The European Court of Justice in the Emergent European Field of Power: Transnational Judicial Institutions and National Career Paths' in Y Dezalay and B Garth (eds), *Lawyers and the Construction of Transnational Justice* (Routledge, 2012), 239.

[33] Within the Human Rights Council, however, there have been pronouncements criticising the institutionalised system of the *lex sportiva*. See, eg, Report on Intersection of Race and Gender Discrimination in Sport, adopted on 15 June 2020, A/HRC/44/26. For further analysis of the role of United Nations (UN) bodies regarding SGBs, see C Pérez González, 'The Effective Application of International Human Rights Law Standards to the Sporting Domain: Should UN Monitoring Bodies Take Central Stage?' (2022) 22 *International Sports Law Journal* 152.

[34] In this line of argument, Duval, Krüger, and Lindhold expound on the notion that 'European laws are travelling the world on the back of the lex sportiva, shaping the way non-Europeans experience sports. This raises difficult questions linked to the legitimacy of such legal imperialism through the back door.' See A Duval, A Krüger and J Lindholm, 'Made in Europe: Lex Sportiva as Embedded Transnational Law' in A Duval, A Krüger, and J Lindholm (eds), *The European Roots of the lex sportiva: How Europe Rules Global Sport* (Hart, 2024), 3.

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SGB in question as supreme and outside the reach of the law.[35] For example, in *Mutu and Pechstein v Switzerland*,[36] the ECtHR held that the CAS proceedings amounted to compulsory arbitration,[37] and hence it is obliged to introduce the entire gamut of fair trial guarantees.[38] However, in a paradoxical stance,[39] the Court rejected the arguments that the CAS could not be considered an impartial and independent tribunal owing to a structural issue arising from a lack of balance between federations and athletes and players in the appointment mechanism of arbitrators.[40] A similar outcome was observed in the case of *Ali Rza and Others v Turkey*.[41] However, this time, the matter was not related to the CAS or the Swiss Federal Tribunal (SFT). Instead, it pertained to an arbitral tribunal of a member association, the Turkish Football Federation (TFF). The Court reiterated the applicability of Article 6 §1 to sport arbitration proceedings[42] and the compulsory nature of these proceedings.[43] However, in this instance, the Court went beyond the previous rulings and raised significant doubts regarding the impartiality and independence of the tribunal, as well as the safeguards that it provides.[44] Nevertheless, despite these and other cases,[45] the ECtHR has not expressed a desire to undertake a more comprehensive assessment of the autonomy and independence of the CAS as several authors have suggested,[46] and even some of its judges have reiterated in dissenting opinions.[47] Nonetheless, there are open proceedings that could change the course in which the *lex sportiva* has been operating.

In the ongoing saga of Caster Semenya, a former World Athletics (originally known as IAAF) medium distance runner from South Africa, access to the ECtHR was the last and ultimate refuge of justice in her battle against the forced supremacy of World Athletics institutional rules over and above fundamental human rights considerations.[48] In short, Semenya was asked by World Athletics to undergo hormonal treatment under its Eligibility Regulations for the Female Classification – Athletes with Differences of Sex Development (DSD Regulations) in order to decrease her testosterone levels.[49] When Semenya refused on medical and privacy grounds, she realised that she could not contest the violation of her constitutional rights before any national court and was forced to succumb to the

[35] In its submissions to the *Šimunič* appeal before the CAS, FIFA contended that the ECHR was not applicable because 'these are not criminal law proceedings, but disciplinary proceedings and … such dispute is not governed by criminal law, but by civil law'. *Josip Šimunič v Fédération Internationale de Football Association (FIFA)* (2014) CAS 2014/A/3562, para 40.

[36] *Mutu and Pechstein v Switzerland* (Application nos 40575/10 and 67474/10) (2018).

[37] Ibid, para 115.

[38] Ibid, para 123.

[39] L Freeburn understands the judgment as paradoxical in substance because 'rejecting the appeals of Pechstein and Mutu on the basis that CAS's procedures are independent and impartial leads to the forced application of a regulatory regime unilaterally determined by one of the parties to the disputes and which cannot be logically considered independent or impartial'. See L Freeburn, 'Forced Arbitration and Regulatory Power in International Sport – Implications of the Judgment of the European Court of Human Rights in Pechstein and Mutu v Switzerland' (2020) 31 *Marquette Sports Law Review* 287, 321.

[40] See *Mutu and Pechstein v Switzerland*, para 157.

[41] *Ali Rza and Others v Turkey* (Applications nos 30226/10 and four others) (2020).

[42] Ibid, §161.

[43] Ibid, §181.

[44] The Court stated that 'justice must not only be done, it must also be seen to be done'. Ibid, §199.

[45] Besides *Mutu and Pechstein v Switzerland* and *Ali Rza and Others v Turkey*, other cases related to sports arbitration are *Ali Rza v Switzerland* (Application no 74989/11) (2021); *Platini v Switzerland* (Decision 526/18) (2020), and *Bakker v Switzerland* (Application) (2019).

[46] See, eg, A Duval, 'Lost in Translation? The European Convention on Human Rights at the Court of Arbitration for Sport' (2022) 22 *International Sports Law Journal* 132; F Shahlaei, 'The Collision between Human Rights and Arbitration: The Game of Inconsistencies at the Court of Arbitration for Sport' (2024) 40 (2) *Arbitration International* 169.

[47] In *Mutu and Pechstein v Switzerland*, Judges Keller and Serghides, in a partly dissenting opinion, expressed that 'the structure of the CAS does not meet the requirements of independence and impartiality provided for in Article 6 § 1 of the Convention'. See *Mutu and Pechstein v Switzerland*, para 5 of Joint Partly Dissenting, Partly Concurring Opinion of Judges Keller and Serghides.

[48] See L Holzer, 'What Does It Mean to Be a Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport' (2020) 20 *Human Rights Law Review* 387.

[49] DSD Regulations, 2019 version, https://shorturl.at/laj48.

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World Federation's judicial entities and subsequently to the CAS, but only on the basis of the DSD Regulation, as opposed to constitutional or human rights.[50] She resorted to the ECtHR when the Swiss Federal Supreme Court, acting as a competent court against set aside (annulment) suits against awards rendered by the CAS,[51] took no note of her human rights claims and instead vindicated World Athletics under the narrow terms of the DSD Regulation.[52] Although the case is currently pending before the Grand Chamber, the ECtHR emphasised not only Semenya's discrimination but also the abject failure of Switzerland to grant her access to any meaningful justice, among others.[53] This judgment dealt a significant blow to the prowess of the *lex sportiva* and its repercussions will be felt not only by the World Federation but by all SGBs.

While the ECtHR remains a valued forum through which to address the unchecked boundaries of the *lex sportiva*, the application and implementation of EU competition law is an equally important tool, aided by the 'prosecutorial' function of the EU Commission. The CJEU has on several occasions made it clear that non-profit SGBs and their members cannot prevent or distort freedom of movement,[54] nor are they allowed to operate monopolies in a manner that obliges athletes and clubs to set up their own competitions. In equal measure it has pronounced on whether a sport may be exempt from the EU's Value Added Tax (VAT) Directive.[55] In a stark warning to SGBs based in the EU, the CJEU emphasised that they must ensure that both the CAS and the Swiss Federal Court fully apply EU judicial review standards or come up with alternative mechanisms to the same effect. It emphasised in no uncertain terms that:

> The Court of Justice has held previously that, while having legal autonomy entitling them to adopt rules relating, inter alia to the organisation of competitions, their proper functioning and the participation of athletes in those competitions[56] sports associations cannot, in doing so, limit the exercise of rights and freedoms conferred on individuals by EU law, which include the rights that underlie Articles 101 and 102 TFEU.[57]

This is serious encroachment of the *lex sportiva* and one should be in no doubt that it was not well received by the CAS or the SGBs. Yet, there is little they can do, excepting relocate their headquarters to a jurisdiction outside the EU area in order to avoid the application of EU law. But even so, given that major sporting competitions take place in Europe, it is doubtful that such a move would have shielded them from being referred to the CJEU. The next section will highlight the key principles enunciated in the ISU and ESL cases decided by the CJEU and which make it impossible to further create sporting monopolies within the EU.

[50] Article 5.4 of the DSD Regulations goes on to provide that: 'The law governing the dispute or appeal will be the IAAF Constitution and the IAAF Rules and Regulations (including these Regulations), with the laws of Monaco applying subsidiarily, and in the case of any conflict between any of the above instruments and the CAS Code currently in force, the above instruments will take precedence.'

[51] *Mokgdadi Caster Semenya v IAAF* (2018) CAS 2018/O/5794 and *Athletics South Africa v IAAF* (2018) CAS 2018/O/5798, paras 50–55. The award was delivered in 2023.

[52] Case 4A_248/2019 and Case 4A_398/2019, Judgment of the Swiss Federal Supreme Court (2020), https://shorturl.at/2siNB, paras 9.4 and 11.

[53] *Semenya v Switzerland* (Application no 10934/21) (2023) ECHR 219, para 169.

[54] *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and Others*, and *Union des Associations Européennes de Football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995/463.

[55] See *English Bridge Union Ltd v Commissioners for Her Majesty's Revenues and Customs*, C-90/16, EU:C:2017:814, holding that duplicate bridge is not a 'sport' for the purposes of the VAT Directive and cannot therefore be exempt as such.

[56] Particularly, *Christelle Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL*, C-51/96 and C-191/97, EU:C:2000:199, paras 67 and 68, and *TopFit e.V. and Daniele Biffi v Deutscher Leichtathletikverband e.V*, C-22/18, EU:C:2019:497, para 60.

[57] *International Skating Union v EU Commission and Others*, C-124/21 P, EU:C:2023:1012, para 196.

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III. The prevalence of EU competition law on SGBs

The CJEU judgments under consideration concern the commercial and investment dimension of SGBs, including their profits from audiovisual rights arising from sporting events to the exclusion of third parties, as well as the preclusion of their members from organising breakaway alternative sporting events. Both are clearly issues falling within the subject matter of the EU competition law. The non-profit nature of SGBs is insignificant and what is at stake is whether sporting events are economic in nature, in which case any proclivity to a monopoly would no doubt stifle competition, save where third parties are not unfairly excluded from accessing the relevant market and the underlying protectionism serves legitimate sporting goals, such as integrity and sports fairness.[58]

A. ISU and superleague judgments

The CJEU has consistently maintained that where a particular sporting activity clearly constitutes an 'economic activity' it falls within the realm of EU law.[59] This is equally the case where the rules of a sporting association's exercise of powers require its prior approval for sporting competitions, the organisation and marketing of which constitute an economic activity for the undertakings involved or planning to be involved therein.[60] With this in mind, on 20 October 2015, the International Skating Union (ISU) published Communication No 1974, entitled 'Open International Competitions', which set out the procedure to follow in order to obtain advance authorisation to organise an international skating competition and which was applicable both to national associations that are ISU members and to any third-party entity or undertaking ('the prior authorisation rules'). That communication stated that the organisation of ISU competitions was subject to prior authorisation by the ISU and conducted in accordance with the regulations set out by that association. According to Rule 102(7) of the ISU Statutes, an athlete's participation in an event not authorised by the ISU and/or by one of the national associations that make up its members could culminate in a warning or 'loss of eligibility' entailing a ban from any competition organised by the ISU, whether for a specific period or for life. The General Court of the EU, following a decision by the EU Commission,[61] held in 2020 that eligibility rules of the ISU restricting athletes from participating in rival events infringed Article 101 of the Treaty on the Functioning of the EU (TFEU).[62] Even though the General Court recognised the paramount role of SGBs in securing the integrity of sports through their pyramidal structure,[63] as well as the privilege by which to protect their own economic interests given their long-term investment in the competition in question,[64] it emphasised that pre-authorisation/eligibility rules must be fair and proportionate and under no circumstances should they unduly deprive third-party organisers from

[58] See *Deutscher Tennis Bund v ATP Tour Inc*, 610 F.3d 820 (3d Cir. 2010), *cert. denied*, 562 US 1064, 131, which confirmed that the Association of Tennis Professionals (ATP) can reorganise professional tournaments and relegate one or another to a lower tier without breaching anti-trust rules (in this case the Hamburg and Qatar tournaments).

[59] *BNO Walrave and LJN Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C 36/74, EU:C:1974:140, para 4; *Olympique Lyonnais v Olivier Bernard, Newcastle United*, C-325/08, EU:C:2010:143, para 27.

[60] *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, C-49/07, EU:C:2008:376, para 28.

[61] EU Commission, Case AT-40208, International Skating Union's Eligibility Rules, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40208/40208_1579_5.pdf.

[62] *International Skating Union v Commission*, C T-93/18, EU:T:2020:610.

[63] Ibid, para 78. This right was equally confirmed by the CJEU in *Meca-Medina and Majcen v Commission*, C-519/04 P, EU:C:2006:492, Judgment of 18 July 2006, para 43. The same Court recently held that national and international sports federations equally enjoy authority to protect the structure and functioning of their sporting ecosystem and that by doing so, even by fencing their sport, they were not acting in an abusive manner. See *Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball*, C-176/96 *(FRBSB)*[2000] ECR I-02681, para 54.

[64] *International Skating Union v EU Commission and Others*, EU:C:2023:1012, para 109.

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market access, especially when an SGB is reaping dividends from a sporting event under its aegis.[65] What is important for the purposes of this article is that the General Court recognised that the ISU, a relatively small SGB, was clearly engaged in an economic activity.

The judgment of the General Court was appealed to the CJEU, which gave its judgment in late December 2023.[66] In line with the approach of the Commission and the decision of the General Court, the CJEU confirmed that the ineligibility rules of the ISU on the prior authorisation of skating competitions infringed EU competition law.[67] With respect to anti-competitive practices as such, the CJEU iterated the general exceptions applicable to SGBs[68] as follows:

> Indeed, the examination of the economic and legal context of which certain of those agreements and certain of those decisions form a part may lead to a finding, first, that they are justified by the pursuit of one or more legitimate objectives in the public interest which are not per se anticompetitive in nature; second, that the specific means used to pursue those objectives are genuinely necessary for that purpose; and, third, that, even if those means prove to have an inherent effect of, at the very least potentially, restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition. That case-law applies in particular in cases involving agreements or decisions taking the form of rules adopted by an association such as a professional association or a sporting association, with a view to pursuing certain ethical or principled objectives and, more broadly, to regulate the exercise of a professional activity.[69]

The CJEU, in siding with the General Court, confirmed that the ISU's eligibility rules had the 'object' of restricting competition on the relevant market.[70] This anti-competitive stance of the ISU, which was meant to further its economic activity through its eligibility rules,

> excluded from that market any competing undertaking, even an equally efficient undertaking, or at least restrict the creation and marketing of alternative or new competitions in terms of their format or content. In so doing, they also completely deprive athletes of the opportunity to participate in those competitions, even where they could be of interest to them, for example on account of an innovative format, while observing all the principles, values and rules underpinning the sporting discipline concerned. Ultimately, they are such as to completely deprive spectators and viewers of any opportunity to attend those competitions or to watch a broadcast thereof.[71]

The Court reiterated that private associations like SGBs are de facto regulators in the sports context, even if there is an absence of explicit delegation of power from the states.[72] This often places SGBs in a conflict of interest between their regulatory powers and the performance of their commercial activities, leading to situations of abuse of a dominant position as the ones commented here. Despite this, the CJEU has sought to question not the legitimacy of the regulatory powers of SGBs but the limits of it.[73] Consequently, in the ISU case, the Court emphasised the importance of conducting

[65] Ibid, para 67. See, equally, *MOTOE v Elliniko Dimosio*, which concerned the failure of a third party to gain permission to organise an alternative motor-racing event from the Greek Motorcycling Federation (MOTOE). See Weatherill, *Principles and Practice in EU Sports Law*, at 253.

[66] *International Skating Union v EU Commission and Others*, EU:C:2023:1012.

[67] Ibid, paras 136–138.

[68] A good example being the IOC's anti-doping rules, which apply without exception to all athletes and no other entity is permitted as an alternative anti-doping entity. *Meca-Medina and Majcen v Commission*, paras 43–55.

[69] *International Skating Union v EU Commission and Others*, EU:C:2023:1012, para 111.

[70] Ibid, para 139.

[71] Ibid, para 146.

[72] Ibid, paras 125–126.

[73] See also *MOTOE v Elliniko Dimosio*, paras 50–53.

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sports activities within a framework that fosters the 'appropriate and effective' organisation of competitive sporting events based on the principles of equal opportunity and merit.[74] Simultaneously, the CJEU stipulated that it is imperative that actions are taken in a non-discriminatory manner, meaning that:

> they must not subject the organisation and marketing of third-party competitions and the participation of athletes in those competitions to requirements that either differ from those applicable to competitions organised and marketed by the decision-making entity, or are identical or similar but impossible or excessively difficult to fulfil in practice by an undertaking that does not have the same status as an association or does not have the same powers at its disposal as that entity and which is therefore in a different situation to it.[75]

Following, the Court also established that the criteria governing the determination of sanctions must be in compliance with the principle of proportionality.[76] This means that the nature, duration, and severity of the infringement found must be considered in each specific case. Moreover, and it is discussed in the next section, the established criteria must be capable of being subject to effective review,[77] which in the majority of instances will be carried out by the CAS.

On the back of this case, a Spanish court requested a preliminary reference from the CJEU seeking clarification as to whether UEFA and FIFA regulations were compatible with EU competition law. The context of the reference arose from the failed attempt of certain European football clubs, such as Juventus, Barcelona, and Real Madrid, to set up a rival competition, namely the European Super League (ESL).[78] This is a far cry from earlier cases where it seemed that ISFs were immune from any regulatory framework pertaining to competitive practices as turned out in the *Oldfield* case.[79] This concerned the eligibility of an athlete who participated in an unsuccessful venture to create a professional track and field athletics league, whereupon the US Ninth Circuit Court of Appeals determined that the Amateur Sports Act of 1978 did not offer legal recourse for athletes to challenge ISFs, such as the IAAF, in court.

On the same day the CJEU delivered its judgment in the ISU case, it released its judgment in the ESL reference. Despite the fact that UEFA and the proposed ESL do not hide the fact that their key concern is financial and by extension each sees the relevant football competitions as lucrative investments, including also for broadcasting purposes, the question is how far ISFs as investors can stifle competition by sanctioning clubs and athletes participating in unauthorised competitions. In the ESL case, the exploitation and marketing of all commercial and media rights by UEFA and FIFA was at the heart of the referral to the CJEU. The monopolistic rules designed by UEFA and FIFA enabled them to exert full control over those rights to the exclusion of others and, in the process, it meant that it could charge abusive prices and fees.

The Court argue that the object restriction of competition is found 'where there is no framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory, and proportionate', as the one established in the case.[80] In addition, the absence of this framework means that regulations concerning prior approval,

[74] *International Skating Union v EU Commission and Others*, EU:C:2023:1012, para 132.

[75] Ibid, para 133.

[76] Ibid.

[77] Ibid, para 134.

[78] On 1 July 2021, the Madrid Commercial Court ruled that UEFA cannot force the organising members of the ESL to formally dissolve it, nor did it possess the authority to impose a EUR 100 million fine on clubs that sought to join the breakaway ESL. See 'Spanish Court Rules Against UEFA in Case over European Super League' Reuters (1 July 2021), https://shorturl.at/XnEKx.

[79] *Oldfield v Athletic Congress*, 779 F.2d 509 (9th Cir. 1985).

[80] *European Super League Company, SL v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA)*, C-333/21, EU:C:2023:1011, para 178.

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participation, and sanctions display a 'sufficient degree of harm to competition'.[81] Therefore, these criteria are 'more necessary when an undertaking in a dominant position, through its own conduct and not by virtue of being granted exclusive or special rights by a Member State, places itself in a situation where it is able to deny potentially competing undertakings access to a given market'.[82] Such anti-competitive rules, argued the CJEU, affected competition in the downstream media markets, which ultimately impacts spectators of UEFA competitions as consumers.[83] It is instructive that the CJEU reached this outcome despite the fact that several governments[84] and the EU Commission argued that UEFA and FIFA used a significant portion of its revenues on 'solidarity redistribution' within football. The CJEU was not convinced by the argument that while broadcasting and audiovisual rights can only be acquired from UEFA and FIFA, competition was still possible through auctions in an open, transparent, and non-discriminatory manner.[85] In any case, the Court leaves it up to the tribunals of the member states to determine the extent of the efficiency gains that SGBs might argue.[86]

B. *The ripple effect of the judgments: how far will it go?*

Similar to the impact of a pebble thrown into a pond, the issues presented in the *ISU* and *Superleague* judgments have a ripple effect that extends beyond their competition law scope. This effect produces insights that are not limited to the specifics of the cases themselves. By examining the outward-reaching ripples, one can gain a deeper understanding of the underlying factors and potential consequences of the cases within the unfettered authority of SGBs.

Both judgments under consideration fail to address the legitimacy of the regulatory authority wielded by SGBs. While they do discuss the various limitations of SGBs' power with respect to competition law, they neglect to examine the foundation of this authority. This oversight is of critical concern, particularly in light of the central role that SGBs play as regulatory and powerful organisations. Questions of legitimacy are common in transnational law debates, as the entities accountable for establishing these systems are frequently not democratically accountable.[87] According to Freeburn, SGBs have perpetuated a 'false veneer of legitimacy derived from misconceptions as to the voluntary, contractual foundation of these regulatory powers'.[88] In its rulings related to the *ISU* and *Superleague* cases, the CJEU appears to skirt around the issue of the de facto nature of certain powers and, in doing so, tacitly legitimises them. Despite this acknowledged reality, the CJEU seems reluctant to address the matter head-on. As a result, these powers continue to operate in a quasi-legal space, raising questions about the legitimacy of the affected parties' actions. As Weatherill suggested, SGBs should not have autonomy 'to decide for themselves what is the nature of the sport and the rules necessary to protect and promote it'.[89] And by doing so, we allow SGBs to operate as 'self-serving oligarchies'.[90]

[81] Ibid.

[82] Ibid, para 137.

[83] Request for a preliminary ruling from the Juzgado de lo Mercantil No 17 de Madrid (Spain) lodged on 27 May 2021 – *European Super League Company, SL v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA)*, C-333/21, EU:C:2023:1011, paras 129–130.

[84] The significance and importance of the issue can be observed in the fact that more than 20 governments submitted observations to the Court and the Commission, and the heads of government of France, the United Kingdom, and Spain publicly opposed the Superleague project. See L Abboud, M Johnson, and J Pickard, 'European Political Leaders Vow to Block Super League Football Plan' (20 April 2021) www.ft.com/content/4f7291cf-1225-4127-8972-6e46cc3f1ce1.

[85] *European Super League Company, SL v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA)*, EU:C:2023:101, paras 232, 234 and 240.

[86] Ibid, para 233.

[87] KD Wolf, 'The Non-existence of Private Self-Regulation in the Transnational Sphere and Its Implications for the Responsibility to Procure Legitimacy: The Case of the Lex Sportiva' (2014) 3 *Global Constitutionalism* 275.

[88] L Freeburn, *Regulating International Sport Power, Authority, and Legitimacy* (Brill Nijhoff, 2018), 170.

[89] S Weatherill, 'Is the Pyramid Compatible with EC Law?' (2005) 3 *International Sports Law Journal* 3.

[90] S Katwala, *Democratising Global Sport* (Foreign Policy Centre, 2000), 91.

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Within the context of the *lex sportiva*, as a 'non-state legal system', it is essential to bear in mind that such systems are no less susceptible than state systems to being 'dominated and distorted by unequal aggregations of power'.[91] It is, therefore, imperative that such systems are subject to rigorous scrutiny and oversight to ensure the protection of individuals against the SGBs (or other organisations). We acknowledge that this mission 'cannot and should not be done only by non-majoritarian institutions such as courts'.[92] Nevertheless, considering the patronising attitude of several states, particularly Switzerland, towards the significant power amassed by SGBs at the highest levels, it appears that we are compelled to rely on the (European) courts to restrict the unfettered authority of these bodies.

The nature of judgments cannot be disregarded, especially the *Superleague* one, as it leaves several crucial issues in the hands of national courts. As emphasised in the judgment,[93] the national courts must account for the specific characteristics and particulars of the market or sector, such as the sports sector and the various sports under scrutiny. Concurrently, national courts must analyse whether the measures implemented by SGBs comply with equal opportunities, sporting merit, the rules of the game, solidarity redistribution, and openness. Although the judgment provides sufficient guidance, it remains to be seen how the Spanish court (in the *Superleague* case) will interpret and apply the ruling. Consequently, neither SGBs nor the European Super League Company can claim victory since we are still in the extra time of the match.

Setting aside potential areas in which the Court could have conducted a more stringent analysis, it is essential to recognise that both rulings, to some degree, curtail the unfettered authority of SGBs. Firstly, because it establishes what Lindholm refers to as 'substantive good governance requirements'.[94] The requirements outlined in both *ISU* and *Superleague* serve to advance greater transparency within the decision-making processes of the SGBs, particularly in relation to the approval and management of competitive leagues and events. The significant responsibility now rests with the major SGBs, as they are no longer at liberty to wield their authority without due justification. The key question is the establishment of the benchmark for 'good governance'. Will this standard be set at the state level? Will the EU seek to exert influence in this matter? It is important to note that this will not have a global impact on the regulatory authority of SGBs but will specifically affect situations that directly intersect with Articles 101 and 102 of the TFEU. In this line, Zglinski suggests that the new framework, while expanding the opportunities for litigation and enforcement, might not tackle numerous urgent concerns in sports governance, such as human rights abuses, gender disparities in decision-making bodies, and inadequate safeguards for fans in clubs and federations.[95]

However, it remains to be seen how SGBs will need to empirically substantiate, setting aside idealistic objectives, the repercussions of their actions and sanctions. In previous instances, FIFA presidents, for example, have leveraged the redistribution model as deliberate instruments aimed at consolidating their positions of authority within the organisation.[96] This raises questions about the true motives behind SGB actions and the potential for regulatory capture or manipulation for personal gain. Therefore, from now on, not only convincing arguments will be needed but also evidence that the actions of SGBs do not contravene competition law. As such, while the recent rulings represent

[91] See HW Arthurs, *Connecting the Dots: The Life of an Academic Lawyer* (McGill-Queen's University Press, 2019), 136.

[92] See F Snyder, 'Bamboo, or Governance Through Soft Law: Hybridity, Legitimacy, and Sustainability' in M Eliantonio, E Korkea-aho, and U Mörth (eds), *Research Handbook on Soft Law* (Edward Elgar, 2023), 19.

[93] *European Super League Company, SL v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA)*, C-333/21, EU:C:2023:1011, paras 178–200.

[94] See J Lindholm, 'Requiring Good Governance from Private Regulators: What About the Rest of Us After ESL and ISU?' (2024) 23 *International Sports Law Journal* 460.

[95] See J Zglinski, 'Can EU Competition Law Save Sports Governance?' (2024) 23 *International Sports Law Journal* 475.

[96] See RK Storm and HA Solberg, 'European Club Capitalism and FIFA Redistribution Models: An Analysis of Development Patterns in Globalized Football' (2018) 21 *Sport in Society* 1850.

https://doi.org/10.1017/cel.2024.5 Published online by Cambridge University Press

a step towards greater accountability and transparency, they may only scratch the surface of deeper systemic issues within sports governance.

Additionally, to the degree that mega-sporting events organised under the aegis of ISFs do not unduly – chiefly on the basis of vague, overly restrictive contractual terms – preclude their members from forming alternative competitions, or by dominating the particular sports market by effectively denying access to third parties, SGBs are generally not in violation of anti-competition rules. In this sense, they also enjoy unhindered access to the fruit of their investment, and the relevant bilateral investment treaties and host state agreements are consistent with said competition rules. And while such an approach to competition rules is possible for the CJEU on the basis of EU law, it is doubtful if the World Trade Organization (WTO) could ever take an approach of this nature, unless it is somehow suggested that SGBs are employed by national governments in order to stifle free trade in accordance with WTO treaties and practice. When this article was going to press, the dispute between the PGA Tour and LIV Golf was definitively culminating in a merger between the two professional golf tours,[97] thus pre-empting any judgment from US courts as to whether the sanctioning of PGA Tour golfers participating in LIV Golf tournaments is monopolistic. Much like the professional tennis model, the PGA Tour is structured as a corporate entity under US law, whose business model is predicated almost entirely on revenues from broadcasting and associated rights.[98]

Finally, and perhaps one of the most relevant and overlooked potential effects of the rulings, is with regard to the CAS. The Court underscored that while CAS intervention to review ISU decisions is not the primary issue, the concern lies in subjecting the review of CAS decisions and ISU's last-instance decisions to a court of a third state.[99] The Grand Chamber also points out that the need for judicial review arises to ensure compliance with fundamental provisions of EU public policy, including Articles 101 and 102 TFEU, particularly when such arbitration mechanisms are imposed on athletes by private entities like international sports associations.[100] Therefore, without such review, the Court suggests that there is a risk of undermining the protection of rights derived from EU law.[101] According to Duval, the ruling will empower athletes to engage in strategic litigation against SGBs in EU Member States' national courts,[102] leading to increased risks and costs for the SGBs.[103] At the same time, he suggests that the ruling may prompt various alternative scenarios, including potential shifts in the seat of the CAS or a bet by international SGBs on their societal significance to sway judicial interpretations in their favour. Therefore, the CJEU decision in the *ISU* case calls into question the foundational role of the sports judicial system, particularly the pivotal position occupied by the CAS. The ruling, through its emphasis on the importance of judicial review, challenges the traditional authority of SGBs, which is intricately intertwined with the functioning of the CAS as the 'Supreme Court of Sport'.[104]

[97] See J Golden, 'PGA Tour and LIV Golf Are Working to Extend Merger Deadline into 2024' CNBC (1 January 2024), www.cnbc.com/2024/01/01/pga-tour-liv-golf-working-to-extend-merger-deadline-into-2024.html.

[98] JA Fortunato, 'Debating Outcomes of the Anti-Trust Challenges between the PGA Tour and the LIV Golf Tour' (2023) 33 *Marquette Sports Law Journal* 751, 752.

[99] *International Skating Union v EU Commission and Others*, EU:C:2023:1012, para 191.

[100] Ibid, paras 191, 193.

[101] Ibid, para 198.

[102] As an example, the case of the Dutch cyclist Amy Pieters could be one of the first ones challenging the CAS arbitration system in national courts, according to C Hosking. See C Hosking, 'Amy Pieters' Legal Battle Could Revolutionise Athletes' Rights in Cycling' LinkedIn (2024), https://shorturl.at/IjLr6.

[103] A Duval, 'The International Skating Union Ruling of the CJEU and the Future of CAS Arbitration in Transnational Sports Governance' (2024) 23 *International Sports Law Journal* 467.

[104] RH McLaren, 'Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror' (2010) 20 *Marquette Sports Law Review* 305.

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C. The saga continues

In the aftermath of the recent rulings by the CJEU, it becomes evident that the legal landscape surrounding competition law and the regulatory power of SGBs is entering a period of heightened scrutiny and potential transformation. However, the resolution of these cases does not mark the end of legal challenges within the sports sector; instead, they serve as precursors to a wave of forthcoming litigation that will shape the future of sports governance and competition regulation. A wide range of cases related to sports is pending at the CJEU encompassing issues ranging from anti-doping regulations to the legality of football transfer rules and the rights of sportspersons.[105] Each of these cases holds the potential to further refine the boundaries of EU law within sports governance and competition regulation.

The impact of the *ISU* and *Superleague* decisions, coupled with the third judgment regarding Royal Antwerp on that day, has already been partially reflected in the recent decision of Advocate General Szpunar in Case C-650/22.[106] This case involves the analysis of the FIFA Transfer System[107] from the perspective of EU competition law and freedom of movement for workers. Szpunar contends that Article 17 RSTP, which addresses the consequences of terminating a contract without just cause, prohibits the restriction of competition between professional football clubs, through either their object or their effect.[108] However, in the second scenario, he demands that it must be proven 'through convincing arguments and evidence, that they are both justified by the pursuit of one or more objectives that are legitimate and strictly necessary for that purpose'.[109] The decision, therefore, bears a striking resemblance to the transparency and proportional requirements outlined in both *ISU* and *Superleague*.[110]

As these legal proceedings unfold, from those at the national courts, the ECtHR, or the CJEU, they are poised to have far-reaching implications for the current sports model, potentially leading to positive shifts in regulatory frameworks, governance practices, and the balance of power between sports organisations and athletes. In essence, the journey towards challenging the legal unfettered authority of SGBs is far from over, and the CJEU recent rulings mark only the beginning of a new chapter in this ongoing saga.

IV. Conclusion

This article addressed the CJEU's stance towards an enduring and vexing problem, namely, the relationship between the *lex sportiva* and national and supranational rules that should prevail. While issues of forced arbitration, procedural fair trial guarantees, and access to justice are still up for debate, particularly before the ECtHR, the CJEU leaves no room for debate. While the CJEU recognises the paramount role of SGBs in maintaining and safeguarding the integrity of their sport, as well as their investments thereto, it makes it clear that SGBs cannot impede clubs, athletes, and national sport associations from operating parallel events in direct competition to those set up by SGBs and under no circumstances are they to penalise said stakeholders for attempting to do or actually doing so. The recent rulings signal not just a legal verdict but a call to action for a (re-)evaluation of the foundational principles underpinning the authority of SGBs. These rulings, while offering some degree of

[105] For an overview of all the cases, see M Araujo, 'Who's Next in the Queue? Sports Cases Pending Before the European Court', EU Law Live (14 February 2024), https://shorturl.at/dfNBr.

[106] Case C-650/22: Request for a Preliminary Ruling from the Cour d'appel de Mons (Belgium) lodged on 17 October 2022 – *Federation Internationale de Football Association (FIFA) v BZ*. This case is commonly referred to as the *Diarra case* as it involves French player Lassana Diarra.

[107] *FIFA Regulations on the Status and Transfer of Players (RSTP)*, May 2023, https://shorturl.at/P8BxX.

[108] *Federation Internationale de Football Association (FIFA) v BZ*, paras 56 and 59 respectively.

[109] Ibid, para 88(1).

[110] It is important to note that Advocate General opinions do not have binding authority over the final ruling of the CJEU. For example, it is noteworthy that in the Superleague case, Advocate General Rantos expressed the view that the FIFA-UEFA regulations were compliant with EU competition law.

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restraint on the unfettered power of SGBs, also spotlight critical issues that directly affect athletes' rights. The rulings may represent a step towards greater transparency and accountability, but they also underscore the need for a holistic approach that addresses systemic issues such as human rights abuses, gender disparities, and/or monopolist regulatory systems.

When the dust from the *ISU* and *ESL* judgments settles, their human rights implications will equally be exposed with more clarity. Indeed, the competition dimension of these judgments perhaps hides the reality that professional athletes earn their livelihood from their chosen sport and that being forced to succumb to the contractual demands of an SGB for the entirety of their professional life is tantamount to a restraint of trade.[111] These judgments will pave the way for additional competitions and may even give rise to a contractual overhaul within SGBs, especially if athletes and clubs are able to freely choose the sporting events of their choice, as opposed to being constrained eternally to the whims of a single and ever-powerful SGB.

While much ink will be spilt on analysing the importance of the *ESL* and *ISU* judgments from the perspective of EU and general sport law, there is generally little interest about the international law implications of these judgments. The transnational character of the *lex sportiva* largely allows SGBs to bypass domestic laws and manipulate regional laws; the two CJEU judgments merely highlight one field of application, namely, competition law, but not other fields of enquiry. From an international law perspective, it is wrongly considered that states hosting sporting events are able to regulate SGBs through arm's-length host state agreements.[112] This assumption is wrong, chiefly because host states are in fierce competition to secure the organisation of mega-sporting events such as the Olympics or the FIFA World Cup, and so by extension they have no issue entering into agreements effectively imposed by SGBs. That is to say that the *ISU* and *ESL* judgments, while going a long way to addressing the unfettered authority of SGBs, are only the start to an otherwise more complicated and multifaceted process.

[111] *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444 is a notable case in the sports context, as is also *Zverev v Ace Group International Ltd* [2020] EWHC 3513 (Ch), which ultimately settled because it became clear to the sporting agent in question that its contract with Zverev (a professional tennis player) was tantamount to restraint.

[112] See FIFA Government Guarantees and Government Declaration, https://digitalhub.fifa.com/m/502252882e0edd0e/original/ufybnq0f1kd2g1nhw5pc-pdf.pdf; 2024 Host City Contract Principles: Article 3.1, https://library.olympics.com/Default/doc/SYRACUSE/171363/host-city-contract-principles-games-of-the-xxxiii-olympiad-in-2024-international-olympic-committee?_lg=en-GB; J Borowick, 'The Olympic Host City Contract: Achieving Relational and Referential Efficiencies to Deliver the Best Games Ever' (2012) 12 *Virginia Sports and Entertainment Law Journal* 126; R Gauthier, *The International Olympic Committee, Law, and Accountability* (Routledge, 2017), 136–137; see also A Duval, 'From Global City to Olympic City: The Transnational Legal Journey of London 2012' in HP Aust and JE Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar, 2022).

Cite this article: I Bantekas and P Mercado Jaénj, 'Addressing the Unfettered Authority of Sport Governing Bodies through EU Competition Law: The Effect of *International Skating Union* and *European Super League*' (2025) *Cambridge Yearbook of European Legal Studies* pp. 1–15. https://doi.org/10.1017/cel.2024.5