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The Interplay between EU Competition Law and Professional Sports:

Recent Developments and Their Potential Impact on Small States

Abstract. In its December 2023 judgements delivered in the *European Superleague Company* and *International Skating Union v Commission* cases, the Court of Justice of the European Union concluded that the rules established by such sports governing bodies as FIFA, UEFA, and the International Skating Union with regard to prior authorisation of alternative competitions falling outside their jurisdiction were restrictive ‘by object’ under the union’s competition law, thus forming a pathway to creating such alternative competitions in one respect. Analysing these rulings’ potential impact on professional sports, the article discusses possible harmful effects that certain alternative competitions could have on sports in small states in particular. The author advocates taking the potential for such effects into account when national courts direct their attention to further assessing the governing bodies’ pre-authorisation rules and their specific refusals to authorise certain alternative competitions.

Keywords: sports law, competition law, competition law and sports, CJEU

1. The context at large

On 21 December 2023, the Court of Justice of the European Union (hereinafter ‘the CJEU’ or ‘the Court’) delivered three landmark judgements on the interplay between professional sports and European law, especially competition law. Two of those judgements – in the cases *European Superleague Company* (or *ESL*) and *International Skating Union v Commission* (or *ISU*) discussed, *inter alia*, whether the rules established by sports governing bodies such as FIFA^{*2}, UEFA^{*3}, and the International Skating Union (ISU)^{*4}

¹ This paper presents the author’s personal views, which do not reflect the official position of the Ministry of Justice of Estonia.

² The International Association Football Federation is the international governing body of association football, beach soccer, and futsal.

³ The Union of European Football Associations is one of six continental bodies of governance in association football, governing football, futsal, and beach football for Europe, certain transcontinental countries, and some West Asian nations.

⁴ The International Skating Union is the international governing body for competitive ice-skating disciplines, among them figure skating, synchronised skating, speed skating, and short-track speed skating.

are in compliance with EU competition law when dealing with prior authorisation of alternative competitions falling outside the ‘umbrella’ of the governing body in question.

The *ESL* judgement in particular has received considerable public attention, while also eliciting official reactions from numerous states, alongside football clubs and fans, who have emphasised the importance of safeguarding the European Sports Model – a pyramid structure that forms the basis for organising most sports across Europe.⁵ Although the *ISU* judgement received much more modest coverage, its effects on the future of skating competitions might turn out similar to those that the *ESL* decision could well have on football.

In the course of analysing the potential impact of the *ESL* and *ISU* judgements on the future of professional sports, especially in ‘small states’, the article presents an argument that, even though the CJEU in some respects provided a pathway to the creation of alternative competitions beyond the jurisdiction of sports governing bodies, that does not necessarily mean that **any** such competition is going to be, let alone should be, approved. The paper focuses in particular on possible harmful effects that could arise for sports in smaller states from such competitions. A central conclusion is that these effects should be taken into account by the national courts that will further assess the compliance of the governing bodies’ (now amended) rules and their specific refusals to authorise certain alternative competitions with competition law.

2. The cases contributing to the developments in question

2.1. The *ESL* case

In April 2021, a group of 12 leading European football clubs, acting through the Spanish company European Superleague Company, announced their wish to set up a new football competition project called the Super League (*ESL*). Both FIFA and UEFA objected to the project, and the two issued a joint statement refusing to recognise the *ESL* and announcing that any football club or player choosing to participate in the project would be expelled from FIFA/UEFA-affiliated competitions, among them flagship competitions such as the UEFA Champions League and the FIFA World Cup.⁶ Justification for the statement was anchored in the FIFA and UEFA statutes, which did not permit matches or competitions to take place without prior authorisation by the relevant governing body. In essence, their statutes granted them full discretion to either authorise or ban projects such as the *ESL*.⁷ The rules also contained a prohibition of FIFA and UEFA members’ participation in any competitions not authorised by the governing bodies, on pain of sanctions.⁸

In response, the European Superleague Company brought an action against FIFA and UEFA before the Madrid Commercial Court, arguing that, *inter alia*, the two bodies’ rules on approval of competitions are contrary to the EU law. The Spanish court referred certain questions to the CJEU.⁹ The CJEU, in turn, concluded that both FIFA’s and UEFA’s rules on prior authorisation and the prohibition of participation in alternative competitions were restrictive of competition ‘by object’ and hence constituted a breach of Article 101 (1) (in the form of anti-competitive agreement) and Article 102 of the Treaty on the Functioning of the European Union (TFEU)¹⁰ (in the form of abuse of dominant position).¹¹

Following the CJEU ruling, the Madrid Commercial Court delivered its final decision on 27 May 2024: the national court endorsed the CJEU findings but did not pass judgement on the *ESL* as a specific project,

⁵ Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the European Union Work Plan for Sport (1 January 2021–30 June 2024) [2020] OJ C419.

⁶ ‘Statement by FIFA and the Six Confederations’ (21 January 2021) <<https://www.uefa.com/insideuefa/news/0265-1162b4daabdc-011165939444-1000--statement-by-fifa-and-the-six-confederations/>> accessed on 10 March 2024.

⁷ FIFA Statutes 2021, art 71; UEFA Statutes 2020, art 49.1.

⁸ FIFA Statutes 2021, art 72; UEFA Statutes 2020, art 51.2.

⁹ ‘The FIFA and UEFA Rules on Prior Approval of Interclub Football Competitions, Such As the Super League, Are Contrary to EU Law’ (CJEU press release 203/23, 21 December 2023) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-12/cp230203en.pdf>> accessed on 10 March 2024.

¹⁰ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326.

¹¹ Case C-333/21 *European Superleague Company (ESL)* ECLI:EU:C:2023:1011 [2023], [39].

stating that at the time of the ruling the project in its initial state had been abandoned^{*12}. The Spanish court also acknowledged that, with UEFA having already amended its rules on prior authorisation, the decision did not affect the rules currently in force.^{*13}

While the majority of clubs that had originally participated in the project ended up publicly withdrawing from the ESL^{*14}, Spanish clubs Real Madrid CF and FC Barcelona continue expressing public support for the initiative.

2.2. The ISU case

ISU was an appeal case that arose out of a complaint that two Dutch professional speed skaters filed with the European Commission. They claimed that the ISU's rules, which empowered said union to subject alternative skating competitions to its approval and to impose severe penalties on athletes who take part in unauthorised competitions, violated articles 101 (1) and 102 of the TFEU.

One such alternative competition was proposed in December 2011 by Icederby International, a Seoul-based theme-park developer that intended to organise an alternative international speed-skating event called the Dubai Icederby Grand Prix (hereinafter 'Icederby') in co-operation with a private company owned by the royal family of Abu Dhabi. Icederby had allocated a sum of EUR 1.4 million as prize money and would have paid 37,650 US dollars at minimum to any skater merely taking part in it, to a maximum of 130,000 US dollars.^{*15} However, the project failed to go forward, because of the above-mentioned restrictions articulated in the ISU rules.

Some years later, in 2017, the European Commission decided in favour of the applicants. The decision was taken further via an appeal by the ISU to the General Court of the EU, which in 2020 dismissed the action pertaining to prior-authorisation rules. Thereby, it confirmed that these were unlawful.^{*16}

Finally, the ISU submitted an appeal to the CJEU, which provided confirmation that the rules in question were indeed incompatible with EU competition law. The conclusions stated by the Court were fundamentally the same as those it articulated with regard to the FIFA/UEFA rules in *ESL*.^{*17}

2.3. The future of alternative sporting competitions

The Court did not exempt the rules of sports governing bodies, such as FIFA, UEFA, and the ISU, from the application of Article 101 (1) and Article 102 TFEU. This could have been done on the basis of Article 165 TFEU, which provides that the EU 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' as well as by following the case-law precedents from *Wouters* and *Meca-Medina*^{*18} – in other words, taking into account the 'specific nature of sports' or applying public-interest-linked justifications.

The Court very clearly ruled out the possibility of Article 165 constituting objective justification for completely rescinding competition rules in the sports sector, stating that, in terms of the economic activity

¹² As opposed to the initial 'closed competition' model, a more 'open', two-tier league structure is now being proposed, per A22 Management, introduced at <<https://a22sports.com/en/>> accessed on 28 June 2024. Also see LALIGA Group, 'The Madrid Commercial Court Ruling Does Not Endorse the Abandoned European Super League' (press release, 6 May 2024) <<https://www.laliga.com/en-GB/news/madrid-commercial-court-ruling-does-not-endorse-the-abandoned-european-super-league>> accessed on 28 June 2024.

¹³ 'UEFA Statement on Today's Judgment of the Madrid Commercial Court No.17 in the European Super League Case' (27 May 2024) <<https://www.uefa.com/news-media/news/028d-1afd49655461-f39aac5241e7-1000--uefa-statement-on-today-s-judgment-of-the-madrid-commercial-/>> accessed on 28 June 2024.

¹⁴ As of 1 June 2024, Juventus FC was the last to withdraw officially from the ESL, with the BBC reporting 'Juventus withdraw from European Super League' on that date. By the time this article is published, the number of ESL supporters and their positions may have changed further.

¹⁵ In comparison, a long-track speed skater could earn as much as 109,000 US dollars and a short-track skater 31,900 US dollars in a season from ISU competitions: D Rossingh, 'Skater's Lawsuit May End Sports Bodies' Grip on Competition' (Bloomberg, 3 December 2014).

¹⁶ Case T-93/18 *International Skating Union v Commission* ECLI:EU:T:2020:610 [2020].

¹⁷ Case C-124/21 P *International Skating Union v Commission (ISU)* ECLI:EU:C:2023:1012 [2023], [33].

¹⁸ Case C-309/99 *Wouters and others* EU:C:2002:98 [2002] [97]; C-519/04 P *Meca-Medina and Majcen v Commission* EU:C:2006:492 [2006], paras 42–48.

that it generates, the sporting sector is subject to the rules of the TFEU just as any other sector of the economy is.^{*19} The bodies' conduct might also have escaped the prohibition laid down in Article 101 (1) TFEU insofar as it satisfied a three-pronged test (the so-called *Wouters/Meca-Medina* test). The three layers to this proceed as follows: (i) the conduct must pursue a legitimate objective of public interest, (ii) the specific conduct in question must be genuinely necessary for pursuing that objective, and (iii) the conduct's competition-restricting effects must not eliminate all competition. However, the Court addressed this by stating that the *Wouters/Meca-Medina* test for competition constraints inherent to the pursuit of a legitimate objective is applicable only to 'by effect' restrictions of competition. As both FIFA/UEFA and the ISU rules were regarded as encompassing 'by object' restrictions of competition instead, the test could not apply to them.^{*20} Restrictions 'by object' may only escape prohibition if they fulfil 'individual exemption' requirements under Article 101 (3) of the TFEU.

Although the conditions described above may seem to represent a decisive victory for new projects of such types as the ESL or Icederby, it is important to clarify two key points:

- a) the Court did not state in its judgements that FIFA and UEFA may not impose prior-authorisation and sanctioning rules at all; it merely concluded that such rules must be subject to transparent and precise objective criteria with corresponding procedural rules.^{*21} Also, the Court did not question the legitimate objectives pursued by sports governing bodies, acknowledging explicitly that some restrictions may be necessary. The Court neither approved nor prohibited specific projects (whether the ESL, Icederby, or any others);
- b) the Court considered the rules of FIFA, UEFA and the ISU as they stood at the time of submission of the appeal or request for a preliminary ruling. Any determination with regard to amended versions would require assessing the rules again, in their newer form, on the basis of the criteria specified above under 'a'.

3. The European Sports Model's importance for small states

The term 'small state' has thus far evaded consensus-based definition, and individual studies may approach it differently. In fact, there is substantial disagreement even over what type of criteria, quantifiable values or qualitative standards, would be more appropriate for assigning states to this category.^{*22} Relying on statistical data for both size and population, one could cite such EU members as Malta, Luxembourg, Cyprus, Estonia, Latvia, Lithuania, Slovenia, Croatia, Ireland, and Slovakia^{*23} and the non-EU countries Iceland, Montenegro, Kosovo, Albania, Moldova, and Gibraltar as small states; these states are classed thus for purposes of this article^{*24}. Given that the European Sports Model and most European sporting competitions are not restricted to EU members, all of the nations listed above as small states may be relevant in consideration of current circumstances.

The European Sports Model rests on two fundamental principles: open competition (which features inclusion on the basis of sporting merits, also in conjunction with promotion and relegation between sports leagues) and solidarity (not least financial solidarity).^{*25} The latter involves, alongside other elements, the facilitation of financial transfers between levels and between operators, with circulation specifically from

¹⁹ *ESL*, para 100; G Monti, 'EU Competition Law after the Grand Chamber's December 2023 Sports Trilogy: European Super-league, International Skating Union and Royal Antwerp FC' (Tilburg Law and Economics Center forthcoming discussion paper, 7 January 2024). – DOI: <https://doi.org/10.2139/ssrn.4686842>.

²⁰ *ESL*, para 186; *ISU*, para 113.

²¹ *ESL*, para 144; *ISU*, para 33.

²² M Maass, 'The Elusive Definition of the Small State' (2009) 46 *International Politics* 65. – DOI: <https://doi.org/10.1057/ip.2008.37>.

²³ Statista, 'Estimated Population of Selected European Countries in 2023' <<https://www.statista.com/statistics/685846/population-of-selected-european-countries/>>; Statista, 'Countries in Europe, by Area' <<https://www.statista.com/statistics/1277259/countries-europe-area/>> both accessed on 3 July 2024.

²⁴ European Union Directorate-General for Communication, 'Facts and Figures on Life in the European Union' <https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/life-eu_en> accessed on 3 July 2024.

²⁵ European Commission, *White Paper on Sport* (White Paper) COM (2007) 391 final.

the top to the bottom of the pyramid, thereby channelling revenue generated by elite competitions toward developing grassroots sports. The European Sports Model is followed by the exponents of most sporting disciplines.

While there are definitely certain differences in sports policies among various of the small states, it would be fair to state that strong links between sport and the community generally characterise small states and that sport evokes a strong feeling of nationhood. Also, in many small states, professional sport performance is seen as a resource that holds great value for striving toward a wide range of non-sportive objectives – such as social and political benefits connected with asserting national sovereignty and some degree of cultural distinctiveness.^{*26} The latter is especially important to small states, whose claims to statehood may be contested/vulnerable or were so at some point in history.^{*27}

At the same time, the narrow resource base of many small states, their limited domestic market, and the concentration of elite sport resources in a small set of sports all contribute to vulnerability and reflect small states' position in international sport policy as predominantly policy-takers rather than policy-makers.^{*28} Although it can be argued that such vulnerability of small states should not be overemphasised and that they may differ in capacity (also with that capacity depending on the sporting discipline considered), it is still objectively justified to say that most of the small states may not exhibit the same extent of prestige, international visibility, and influence in certain contexts when it comes to both decision-making and participation in professional sports. In the majority of cases, small states are unable to invest as extensively in sports as bigger states can, so they are more reliant on the funding they receive from sports governing bodies. Therefore, it remains particularly important for small states that competitions not become elitist, exclusionary, and commercial-profit-oriented but continue to be rooted in merit, a level playing field, and financial solidarity. This is crucial to safeguard balanced competition among all the athletes and clubs, from big and small states alike.

In looking at the football sector, it is important to consider that, while revenues have increased over the past few decades, also the sector's differences in revenue are growing.^{*29} For instance, the gap between the Big Five leagues and the other national leagues is widening. Similarly there is a large gulf between the Premier League and the other national leagues. In many countries, the number of clubs with a serious chance of winning national and European championships has declined over the years. The increasing differences in profit are leading to widening differences in expenditure on players, which, in turn, have led to a trend of erosion in the competitive balance between clubs and, subsequently, countries.^{*30} When it comes to reflecting on alternative competitions such as the ESL's, it is crucial to understand that the intention of its creators, who already represent top European clubs (the clubs with the largest revenue streams), is not to create a closed and independent 'breakaway' league but to set up a competition rivalling UEFA's in the market for the organisation of European football competitions while continuing to be a part of the UEFA ecosystem by participating in national championships.^{*31} It was rightly pointed out by Advocate General Rantos, in the opinion he issued in *ESL*, that, thanks to their participation in the ESL, the already top-performing football clubs could book significant additional revenue and simultaneously keep participating in national competitions, in which they would face other clubs – clubs unable to generate revenue on a comparable scale, let alone on a permanent and constant basis.^{*32} Therefore, the additional revenue arising from participation in the alternative competitions could be regarded as conferring a significant competitive advantage by contributing to financing the signing and remuneration of new players, which is a decisive parameter of competitive sport.^{*33} The acquisition of new players and increasingly attractive remuneration conditions would be expected to secure dominance by the leading clubs or even increase it, making them

²⁶ B Houlihan and J Zheng, 'Small States: Sport and Politics at the Margin' (2015) 7(3) *International Journal of Sport Policy and Politics* 329, 332. – DOI: <https://doi.org/10.1080/19406940.2014.959032>.

²⁷ H Sherwood, 'Palestinian Runner Uses Gaza Marathon To Prepare for London 2012 Olympics' (*The Guardian*, 29 February 2012); BBC, 'London 2012: Judoka's Kosovo Olympic Bid Turned Down' (25 May 2012).

²⁸ Maass (n 22).

²⁹ Deloitte, 'Deloitte Football Money League 2024' (16 March 2022) <<https://www2.deloitte.com/uk/en/pages/sports-business-group/articles/deloitte-football-money-league.html>> accessed on 25 March 2024.

³⁰ H Beck, A Prinz, and T van der Burg, 'The League System, Competitive Balance, and the Future of European Football' [2022] *Managing Sport and Leisure*. – DOI: <https://doi.org/10.1080/23750472.2022.2137056>.

³¹ *ESL* (2022), Opinion of AG Rantos, para 107.

³² *Ibid*, para 103.

³³ *Ibid*, paras 103–104.

stronger and even more difficult to defeat in competitions. We might find the same pattern emerging when we examine the nature of an alternative set of competitions among the best European clubs – those clubs and athletes already holding a position at the top of the sport gain additional possibilities to compete against each other, further improving their techniques and skills all the while. In simple terms, the strongest get even stronger, while the weaker and more vulnerable are forced to stay even further behind.

As for skating disciplines that fall under the jurisdiction of the ISU, the overall statistics for European speed-skating championships show that, overall, large and medium-size states have dominated the competitions over the years.³⁴ The main statistics for European championships in figure skating manifest dominance by such states as Austria, Russia (until its 2022 ISU ban from attending all international competitions), and France, with smaller states lying a significant distance behind them. In international competitions, the presence of large non-European countries such as the United States, Canada, and China renders the position of even some of the larger European countries rather modest. Presumably, alternative competitions such as Icederby, following a show format at least partially and offering quite considerable monetary prizes, would want to attract the participation of top athletes from the most successfully performing countries. Assuming that the athletes taking part in such alternative projects would most likely continue participating in the traditional ISU competitions, one may again argue that such alternative competitions would bring participating countries additional revenue that they could then invest in high-standard professional training facilities, alongside opportunities for already top-performing athletes to hone their skills still further through additional experience. Negative effects on the fragile competitive balance between big and small states in skating disciplines would be bound to follow.

Arguably, alternative competitions bring benefits to consumers – in this case, on-site spectators and television-viewers both – by giving them an opportunity to attend new competitions or watch broadcasts thereof.³⁵ However, this is not necessarily true, on account of the context of the erosion in the balance of the competition landscape, as discussed above. Balanced competition is one of the most fundamental concepts in sports economics, with notions of its importance being derived from the uncertainty-of-outcome hypothesis: fan interest in sporting contests depends crucially on the tightness of the competition.³⁶ If competitive balance continues to degrade amid stratification, the outcomes of sports competitions are going to grow more predictable, thereby reducing consumers' pleasure in witnessing them. It is highly plausible that the present level of uncertainty of outcome is below the welfare-maximising level in most competitions and that it falling further will precipitate a further reduction in welfare.³⁷ Therefore, even though alternative competitions such as ESL or Icederby events might, if successful, attract in-person spectators and other viewers by offering high-quality competitions involving 'star athletes', whether the impact on consumer welfare would be entirely positive remains debatable, in light of the simultaneous reduction in balance in the traditional competitions. This is particularly problematic if said decrease entails no longer being able to see one's national athletes or clubs perform or seeing them perform but only with a predictable negative outcome and with little likelihood of vying for, let alone winning, European or international titles. Also, it bears remembering that the attractiveness of competitions held by FIFA, UEFA, the ISU, and other sports governing bodies is a result of history, culture, and tradition. If an alternative competition ultimately goes against some of the values represented, the relevant discipline's popularity in general might well suffer. Hence, a substantial reduction in consumer welfare could emerge.³⁸ The foregoing arguments are consistent with the resistance that many football fans have mounted against the ESL.³⁹

Let us return to the issues specific to small states, especially how the creation of alternative competitions in which – whether because of financial requirements or because the threshold for admission involves a prerequisite of being in the sport's top tier – they would not be able to participate could harm the positions

³⁴ ISU, 'European Allround Championships Country Medal Table' <<https://www.isu.org/speed-skating/entries-results/biographies-statistics>> accessed on 12 March 2024.

³⁵ *ESL*, para 176.

³⁶ B Gerrard and BM Kringstad, 'The Multidimensionality of Competitive Balance: Evidence from European Football' (2022) 4 *Sport, Business and Management* 382. – DOI: <https://doi.org/10.1108/sbm-04-2021-0054>.

³⁷ T van der Burg, 'Competitive Balance and Demand for Football: A Review of the Literature' (Beiträge der Hochschule Pforzheim series, no 179) <https://www.hs-pforzheim.de/fileadmin/user_upload/uploads_redakteur/Die_Hochschule/Oeffentlichkeit/05.Publikationen/Beitraege/Pforzheimer_Betraege_Nr._179_van_der_Burg.pdf> accessed on 3 July 2024.

³⁸ *Ibid* 27.

³⁹ Football Supporters Europe, 'European Fans Restate Opposition to Super League' (statement of 11 July 2022) <<https://www.fanseurope.org/news/european-fans-restate-opposition-to-super-league/>> accessed on 25 March 2024.

of their athletes and clubs on the European and international stage. The associated conditions could bring about a decline in the level of these nations' sport in general: the fact that their athletes do not count among probable participants or winners in major competitions might discourage small states' decision-makers from supporting their participation in these and from developing local sporting excellence in general. Consequently, the chances for a young person in such a country to become an elite athlete might be jeopardised in two respects. Firstly, national sports policy might not favour promoting elite sport. Secondly, factors such as limited resources from low socioeconomic status can limit youngsters' options for reaching high levels in the specific sport in which they are talented.^{*40}

Therefore, while alternative competitions should not be completely ruled out, it is vital to make sure that they are kept consistent with qualification criteria based on sporting merits and equal opportunities, thus ensuring that all states, big and small, receive a chance to remain competitive in the relevant sporting discipline. In other words, alternative competitions should to the greatest extent possible follow the same values as the European Sports Model. Alternative competitions organised by the strongest for the strongest, to which small states may have very limited access, if any at all, might in the long run pose a risk to the future of professional sports in these states and to the balance of competitions in general.

4. Further actions

Although the focus of this article is on small states, attention to possible negative effects is by no means confined to their sphere. Various possible effects of alternative competitions (the ESL in particular) were acknowledged also by big states. Several interesting concerns have been identified.

In the wake of the *ESL* judgement, France rallied for support from fellow Member States for a joint statement supporting a guaranteed 'link between annual performance in domestic competitions and all European competitions'. The resulting statement has been signed by all EU members apart from Spain. President Emmanuel Macron's government has been urging the European Commission to draft legislation that deals with appropriate ways to safeguard the openness of competitions, sporting merit, solidarity, and values in sport.^{*41} The government of the United Kingdom has articulated a commitment to regulatory reform specifically for men's elite football, which should have implications for any 'breakaway league'.^{*42} In addition, top English clubs Manchester United, Manchester City, Chelsea, Tottenham, Arsenal, and Liverpool all appear to have turned their back on any further involvement in the ESL, and each has published a press release to this effect.^{*43} Also, Germany's Bundesliga said in an official statement that it would continue supporting the European Sports Model and rejecting competitions other than those organised by corresponding associations and leagues.^{*44}

Behind these statements of rejection might lie concerns about the same risks that small states face. After all, erosion to the landscape of competition is relevant also for smaller clubs and 'runner-up' athletes in big countries – for instance, less popular or relatively small football clubs. In England, while such clubs as Southampton and Everton are popular, their fan base and revenue base are far smaller than what top clubs such as Manchester United, Liverpool, and Arsenal command^{*45}; Germany exhibits a vast chasm that separates the top clubs, Bayern Munich and Borussia Dortmund, from the rest in terms of both popularity

⁴⁰ P Shippi, 'Social and Political Factors Affecting Sporting Success in Small Countries: The Case of Cyprus' (2012) 4 *Biomedical Human Kinetics* 38. – DOI: <https://doi.org/10.2478/v10101-012-0007-z>.

⁴¹ N Camut and A Walker, 'France Shoots To Kill the Football Super League, Once and for All' (Politico, 7 February 2024).

⁴² UK Department for Culture, Media & Sport, *A Sustainable Future – Reforming Club Football Governance* (White Paper, CP 799, 2023) 3.

⁴³ Among the club statements made on the European Super League are 21 December 2023's Manchester United, 'Statement on European Super League' <<https://www.manutd.com/en/news/detail/club-statement-reacting-to-european-court-of-justice-ruling-on-european-super-league>>; Manchester City, 'Club Statement' <<https://www.mancity.com/news/mens/manchester-city-statement-esl-63838777>>; Tottenham Hotspur, 'Club Statement' <<https://www.tottenhamhotspur.com/news/2023/december/club-statement/>>; the next day yielded Arsenal, 'Club Statement' <<https://www.arsenal.com/news/club-statement-2>>; Liverpool FC, 'Liverpool FC Statement' <<https://www.liverpoolfc.com/news/liverpool-fc-statement-7>> all accessed on 18 March 2024.

⁴⁴ Deutsche Fussball Liga, 'DFL Statement on the Super League Ruling' (21 December 2023) <<https://www.dfl.de/en/news/dfl-statement-on-the-super-league-ruling/>> accessed on 18 March 2024.

⁴⁵ Statista, 'Most Followed Premier League Clubs in the United Kingdom in 2023' <<https://www.statista.com/statistics/890430/fans-of-premier-league-clubs-in-england/>> accessed on 3 July 2024.

and revenue^{*46}; and additional revenues and experience gained from the ESL would make it even easier for an already top club to beat its domestic rivals, thus increasing its market power in the national market for top-level football and bringing harm to the national league's competitive balance and, accordingly, to consumer welfare as the chances for a smaller club's fans to see that club win a national title fall further.^{*47} It is true that the UEFA Champions League exerts a similar effect, but one could argue that the ESL's detrimental effects on the competitive balance would be more severe because of scale: any proposal for the latter lets the participants take part in more matches against the strongest top clubs than the Champions League does.^{*48} Another important difference is that the UEFA solidarity payments allocate a set percentage of the revenue from that association's top-level competitions (such as Champions League events) for distribution to non-participating clubs^{*49}, while alternative competitions may be designed to benefit only their participants and commercial actors.

However, in addition to actions taken by relevant actors in various states, as described above, competition law may yet prove to be an important tool of influencing the fate of alternative competitions, through the national courts.

4.1. Assessment of the amended rules of sports governing bodies in national courts

Importantly, as the discussion earlier in this article stressed, the CJEU judgements dealt with the FIFA, UEFA, and ISU rules that were in force at the time of the proceedings, with the Madrid Commercial Court pointing out, when acknowledging this fact in connection with *ESL*, that '[a]lready in 2022, before the CJEU final judgment, UEFA has issued the authorisation rules governing international club competitions, which set out detailed criteria implementing the respective provisions of the UEFA Statutes. Authorisation rules explain how European clubs can request authorisation for a new competition outside of UEFA's remit, as well as disciplinary measures which can be imposed for breaches of these rules'.^{*50} The ISU is expected to follow suit, amending its rules likewise or devising appropriate implementing regulations. Proceeding from the CJEU judgements, one could reason that as long as the rules of the sport's governing body are **transparent, objective, non-discriminatory, and proportionate**, there is no restriction of competition by **object**, since the rules are not designed to exclude any alternative competition from the market. There might, however, still be a restriction **by effect**.

In this author's view, if the new sets of rules are designed well enough to guarantee that some alternative competitions satisfying the appropriate criteria are authorised, the national courts' application of the *Wouters/Meca-Medina* test in the event of disputes over new rules may again become possible. Hence, it would be up to competent national courts to decide whether the rules are indeed balanced enough and satisfy the criteria for exemption from the application of articles 101 (1) and 102 TFEU. Failing that, one could appeal to the efficiency defence under Article 101 (3) and Article 102 – though this might prove to be more difficult, given that the efficiency gains would have to be translated into actual economic benefits.^{*51}

In both *ESL* and *ISU*, the Court recognised but did not question a dual function of a sports governing body insofar as its purpose is, on one hand, to regulate, organise, govern, and promote sporting competitions and, on the other hand, to carry out the economic activity of organising such competitions. Therefore, sports governing bodies are not classic monopolies: while from the 'outside' they may be regarded as economic operators competing with any market entrant willing to organise alternative competitions, on the 'inside'

⁴⁶ Statista, 'Level of Interest in Bundesliga Clubs in Germany in 2020, by Club' <<https://www.statista.com/statistics/595662/german-bundesliga-leading-clubs-based-on-popularity/>>; GlobalData, 'Top 10 German Bundesliga Soccer Clubs in Germany in 2021 by Sponsorship Revenue' <<https://www.globaldata.com/companies/top-companies-by-sector/sport/soccer-german-bundesliga-clubs/>> both accessed on 3 July 2024.

⁴⁷ Houlihan and Zheng (n 26).

⁴⁸ T van der Burg, H Beck, and A Prinz, 'Why the European Court of Justice Should Rule against the European Super League' (*EUROPP*, 6 December 2022) <<https://blogs.lse.ac.uk/europpblog/2022/12/06/why-the-european-court-of-justice-should-rule-against-the-european-super-league/>> accessed on 14 March 2024.

⁴⁹ UEFA, 'How UEFA Competitions Support the European Sports Model' (8 February 2024) <<https://fr.uefa.com/insideuefa/news/028a-1a218d534e25-9e485d36877e-1000--how-uefa-competitions-support-the-european-sports-model/>> accessed on 21 March 2024.

⁵⁰ UEFA Authorisation Rules Governing International Club Competitions 2022.

⁵¹ *ESL*, para 189.

they contribute to so-called ecosystems within which another kind of competitive process is active – a competition between athletes and/or clubs and, ultimately, between countries. Hence, sports governing bodies are faced with two objectives – to ensure compliance with competition law as dominant undertakings conducting economic activities and effectively fill the role of regulatory bodies ensuring well-functioning competition between athletes or clubs on equitable, fair, transparent, and non-discriminatory terms. The challenge for the various sports' governing bodies, then, lies in adopting rules that allow reaching the first objective without irreparable harm to pursuit of the second. It should still be possible for sports governing bodies to rely on their rules to limit those alternative competitions that could, *inter alia*, pose a risk to financial solidarity and preservation of a level playing field for the various states. Restrictions of other sorts might be unavoidable in order to preserve the integrity, health, and safety of athletes and to ensure respect for the rules of specific competitions and the sporting calendar.

The national courts, when faced with legal challenges to such rules and charged with their interpretation, will have to keep all these important objectives in mind as they seek balance of their own. They need to ensure that the authorisation rules' threshold does not remain so high that no alternative competition has any real chance of getting authorised in practice but at the same time is not brought so low that the core standards and values discussed above could come under threat.

4.2. Assessments of 'refusals to authorise' in national courts

If the sports governing bodies manage to establish rules that are in full compliance with competition law (as described in Subsection 4.1, above), it is still unlikely that every new project will meet the criteria established and become authorised. Presumably, lawsuits filed with national courts will follow on the heels of the ensuing 'refusals to authorise' on the part of the sports governing bodies. Encountering challenges to such refusals, the national courts will again find themselves responsible for conducting an assessment of whether a specific refusal was justified or, in contrast, flouted appropriate authorisation rules. Presumably, proper evaluation of the correspondence of a certain alternative project with relevant authorisation rules is going to be necessary. All the important arguments regarding positive and negative effects that a proposed event could have on the well-being of athletes and on the essence and future of the relevant sporting discipline will once again come into play.

4.3. Claims of anti-competitive agreements under Article 101 (1) TFEU

All along, the ESL project has been based on agreements among representatives of big football clubs or at least on concerted practices of such big clubs. Icederby was intended for top speed-skaters, and competitors were particularly interested in participating because they would have been handsomely compensated for doing so. Similarly, the organisation of other alternative competitions presumably will more often than not be based on agreements between parties and for those parties having an objective advantage or even dominance on the relevant market that is due to their sporting performance and financial position.

Therefore, such projects themselves may be fundamentally incompatible with Article 101 (1) TFEU, as they imply that in every country involved the single club, few clubs, or individual athlete(s) participating in the alternative competition on the given country's behalf will grow much stronger, thereby giving other clubs and athletes (primarily from smaller countries) fewer chances to compete for customers.⁵²

At this juncture, it is worth addressing how competition between athletes or sports clubs differs from other forms of competition, forms more typically manifested in the market. Companies competing in a certain market are not normally provided with equal opportunities to begin with, and it is natural for less efficient competitors to eventually be driven from said market by more successful entities. Features particular to sporting activities set them apart from activities in other sectors of the economy. One characteristic trait of sport is a high degree of interdependence – athletes and clubs depend on one another for being able to organise themselves and for developing in the context of sporting competitions.⁵³ Therefore, sporting

⁵² Opinion of AG Rantos in *ESL* para 32, *ESL* para 25.

⁵³ Houlihan and Zheng (n 26) 41.

activities have been described as **co-opetitive**: participants both compete and co-operate.⁵⁴ In contrast against companies, it is essential that athletes and clubs be provided with objectively equal opportunities from the outset. It is safe to assume that no state, big or small, would wish to see a home athlete or club be driven completely 'off the market' by means that have nothing to do with that participant's merit.

In line with this argumentation and upon failure to achieve results from the measures described in the two preceding subsections, small states may find it possible to seek protection from the courts under Article 101 (1) TFEU and/or corresponding national provisions, if an alternative competition that threatens to drive them from the market, as it were, does get approved. However, this is a more drastic measure, and one would hope that the situation does not develop such that it becomes necessary.

5. Concluding words

The European Sports Model is an essential pillar of the organisation of sports in Europe. The central values that it represents – equality of opportunities, fair play, and solidarity – must be propagated by sporting competitions. Among other nourishing effects, this system exerts an influence that gives small states a stronger opportunity to have their clubs and athletes compete at European and international level.

While the CJEU's judgements in *ESL* and *ISU* created solid potential for alternative competitions' creation in various sporting disciplines, further legal disputes and assessments of how well both amended rules from sports governing bodies and specific alternative competitions comply with competition law will eventually come into play.

When conducting such assessments, the national courts should take an open-minded approach. There are many factors and interests to be considered in endeavours to reach a fair decision regarding the future of any given alternative competition. Preserving equal opportunities and solidarity between big and small states is definitely one that should not be overlooked in this effort.

⁵⁴ PI Colomo, 'EU Competition Law and Sports' (presentation at L'Institut d'études européennes, 12 March 2024) <<https://chillingcompetition.com/wp-content/uploads/2024/03/ibanez-colomo-eu-competition-law-and-sports-3.pdf>> accessed on 14 March 2024.