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Are External Values to Competition Law Taken into Consideration by Judges in Recent Competition-Related Case Law of the Court of Justice of the European Union?[2]

The borrowing of concepts from other areas of law to interpret the rules of the area of law that the person is entitled to enforce is a relatively new phenomenon in EU competition law judgements of the CJEU. The digitalisation aspect characterised by fast and constant technical developments indisputably provided an occasion for EU judges to turn to external values in their judgements related to competition law. This aimed to cope with new challenges necessitating the incorporation of exogenous values by EU judges in the field of competition law. A spectacular illustration of such trend is the Meta Platforms Case in which the CJEU judgement came out in July 2023. Other novelties can, however, also appear even in the absence of rapid technical evolution necessitating the same recourse to external values, such as in relation to sport-related cases of Superleague, ISU and Royal Antwerp. The present paper aims to find the answer to what extent external values can be borrowed from other areas of law, by illustrating the cases mentioned above, which are limited to this aspect only, in order to allow EU judges to incorporate them into their competition law analysis.

Keywords: Meta Platforms, Superleague, Super League, UEFA, FIFA, International Skating Union, ISU, Royal Antwerp, Rantos, Szpunar, abuse of dominant position, consumer's welfare

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[1] Member of the General Court, the views and opinions expressed in the present paper are those of the author and do not reflect the views or positions of the General Court.

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Introduction

"Only the Paranoid Survive", stated the Intel CEO and founder of Hungarian origin, Andrew S. Grove (Gróf András István). He put it in a very appropriate manner that the crucial thing is how to exploit crisis points. How companies or undertakings should survive, and even more, how they should turn crises to their advantage or, so to speak, a change of paradigm. A radical change is even more complex, Grove calls it Strategic Inflection Point (SIP). In his book published at the end of the twentieth century, he spotted the future of the appearance of Internet as a point inducing extremely fast changes that could not be undone. For him, the most important point is to realise in time such a change and adopt a radically new behaviour, a radically new strategy.[3]

An undisputed phenomenon is that the world has changed and actually has never stopped changing. We are substantially facing more and more novel challenges compared to the past. Just to name a few: war, economic battle among the 'geopolitical' blocks, climate change or migration, and many more. In addition, one can also mention the appearance of artificial intelligence, increased levels of protection of personal data, GDPR[4] in the Union or the so-called Digital Markets Act[5] (DMA) in the Union, which entered into force on 2 May 2023. The legislation aimed at preventing the anti-competitive practices of the Internet giants and correcting the imbalances of their domination of the European digital market.

The digitalisation aspect characterised by fast and constant technical developments indisputably provided an occasion for EU judges to turn to external values in their judgements related to competition law in order to cope with new challenges necessitating the technique of incorporation of exogenous values by them[6] in the field of competition law. A striking illustration of this trend was the CJEU's Judgement, handed down on 4 July 2023 in the *Meta Platforms Case* with regard to data protection.[7]

Other novelties can also appear even in the absence of rapid technical evolution necessitating the same recourse to external values. This is the very spectacular case of Article 165 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") entered into force on 1 December 2009. Indeed, Article 165 TFEU has found its way into the Treaties with the Treaty of Lisbon and deals with three distinct, yet interrelated issues: education, youth and sport.[8] Whilst sport was not initially covered by the founding treaties of the European Union, the confirmation of its 'special nature'

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3 KECSMÁR 2018a.

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, *OJ L 119, 4.5.2016, 1–88.*

5 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, 1–66. In this respect see also the Judgement of 17 July 2024, *Bytedance*, T-1077/23, EU:T:2024:478.

6 NEBBIA 2023.

7 Judgement of 4 July 2023, C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* EU:C:2023:537.

8 Szpunar Royal Antwerp 2023, paragraph 49.

and its insertion into Article 165 TFEU by the Treaty of Lisbon marked the culmination of an evolution encouraged and promoted by the EU institutions.[9] The FIFA–UEFA and Super League 'battle' in the field of sport and the concept of 'Union Sports Model'[10] undoubtedly characterised by, beyond any doubt, a significant economic activity[11] involved discussions, among football stakeholders, primarily of a commercial and political nature, while EU competition law could also have a crucial impact on the success rate of these initiatives.[12] The *ISU,*[13] *Superleague*[14] and *Royal Antwerp*[15] *Cases* are to some extent "legally unprecedented" and "central to the issue of the relationship and interplay between competition law and sport".[16] The question of the degree of application of the provisions of Article 165 TFEU found itself from one day to another in the middle of every attention. Has it therefore become necessary to incorporate in the competition law reflection and to find the right level of interpretation of the provisions of Article 165 TFEU applicable in Union law since December 2009,[17] already "loosely" applied in the field of education by EU judges?[18]

The present paper is intended to focus on the two above issues even if other fields might also provide examples of the question of necessity of taking into account external considerations to competition law (e.g. public procurement).[19] It does so in light of the recent case law of the Court of Justice of the European Union (hereinafter the "Court" or "CJEU") including the General Court of the European Union in the field of competition law, where the EU judges were faced with unprecedented questions of law, and where the replies given raised or might raise questions about the clear delimitation of competition law and whether the incorporation of external values is of clear help to EU judges.

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9 Rantos Superleague 2022, paragraph 27.

10 Rantos Superleague 2022, paragraphs 27–32.

11 Rantos Superleague 2022, paragraphs 34, 90.

12 Blockx et al. 2022.

13 Judgement of 21 December 2023, C-124/21 P, *International Skating Union v Commission,* EU:C:2023:1012.

14 Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011.

15 Judgement of 21 December 2023, C-680/21, *Royal Antwerp Football Club,* EU:C:2023:1010.

16 Rantos ISU 2022, paragraph 3.

17 Szpunar Royal Antwerp 2023, paragraphs 48–55.

18 Szpunar Royal Antwerp 2023, Judgement of 7 September 2022, C-391/20, *Cilevičs and Others*, EU:C:2022:638, paragraph 59: "[W]hile EU law does not detract from the power of those Member States as regards, first, the content of education and the organisation of education systems and their cultural and linguistic diversity and, secondly, the content and organisation of vocational training, as is apparent from Article 165(1) and Article 166(1) TFEU, the fact remains that, when exercising that power, Member States must comply with EU law, in particular the provisions on freedom of establishment."

19 Judgement of 30 November 2022, T-101/18, *Austria v Commission,* EU:T:2022:728, paragraphs 15–49 and Opinion of Advocate General Medina delivered on 27 February 2025 in Case C-59/23 P, *Austria v Commission (Centrale nucléaire Paks II)*, EU:C:2025:125.

Short return to basics of EU competition law targeted to the problematics raised by the technique of incorporation of external values by EU judges in the field of competition law

EU competition law constitutes one of the first core policies within the European Union that applies to all undertakings carrying out an economic activity.

In fact, according to Article 3(1) point b), TFEU, the Union has exclusive competence in the area of "the establishing of the competition rules necessary for the functioning of the internal market".

Article 3(1) TFEU indeed lists the areas in which the European Union has (express) exclusive competence, namely the customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy and the common commercial policy.[20]

Also linked with the pursuit of the EU's objectives, as set out in Article 3 of the Treaty on European Union (hereinafter "TEU"), the pursuit of the said objectives is entrusted to a series of "fundamental provisions", such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and "competition policy". Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute – each within its specific field and with its own particular characteristics – to the implementation of the process of integration that is the "raison d'être" of the EU itself.[21]

It is, therefore not exaggerated to state that EU competition policy is the cornerstone of the EU development.[22]

Its origins in the EU go back to the founding treaties.

The Treaty establishing the European Coal and Steel Community (ECSC) was signed on 18 April 1951 in Paris (expired on 23 July 2002) and two treaties were signed on 25 March 1957 in Rome – the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (EAEC or Euratom).

Both of the above founding treaties clearly set out the objectives and rules that comprise the foundations of the currently effective EU Competition law policy partly also included in the European Coal and Steel Community.[23]

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20 Szpunar 2017, paragraph 74.

21 Opinion 2/13 of the Court (Full Court) of 18 December 2014, *Adhésion de l'Union à la CEDH,* EU:C:2014:2454, paragraph 172.

22 DUMEZ–JEUNEMAÎTRE 1991.

23 KECSMÁR 2021.

Article 65 of the ECSC Treaty, terminated on 23 July 2002,[24] prohibited agreements restricting competition in the field of policies covered by said treaty, while its Article 60 prohibited unfair and discriminatory competition in terms of prices, and its Article 66 already foresaw merger rules under certain conditions. Articles 85 and 86 of the Treaty of Rome prohibited agreements restricting competition and the abuse of a dominant position. The concept of State aid was already included in the Treaty of Rome in its Article 92, and its wording barely evolved during the process of the European integration,[25] such as the content of Articles 85 and 86. However, merger control on a standalone basis came into effect in the EU only in 1989 with the adoption of Regulation 4064/89/EEC,[26] when EU merger control was subject to *ex post* rather than *ex ante* scrutiny.[27]

Actually, Article 101 TFEU prohibits cartels, meaning all agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Additionally, Article 102 TFEU prohibits abuse of dominant position in the following terms: any abuse by one or more undertakings of a dominant position within the internal market, or in a substantial part of it, shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States.[28]

Procedural rules for the application of Articles 101 and 102 TFEU had been laid down in 1962 in Regulation 17,[29] which were reviewed with the entry into force of Regulation 1/2003/EC[30] in view of the substantial changes resulting from the then planned accession of 10 new Member States.[31]

Merger control is regulated today via regulation 139/2004/EC,[32] while State aid is governed by Articles 107–109 TFEU[33] and Regulation 2015/1589/EU,[34] having entered into force in mid-October 2015 by replacing Regulation 659/1999/EC.[35]

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24 Judgement of 9 December 2014, T-70/10, *Feralpi v Commission,* EU:T:2014:1031, paragraphs 3, 4.

25 Nyikos 2018.

26 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *OJ L 395, 30.12.1989, 1–12.*

27 Judgement of 16 March 2023, C-449/21, *Towercast,* EU:C:2023:207, paragraph 49.

28 Csépai 2018; Tóth 2018.

29 EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, *OJ 13, 21.2.1962, 204–211.*

30 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L 001, 4.1.2003, 1–25.*

31 Wils 2022; Dorich 2023.

32 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, *OJ L 24, 29.1.2004, 1–22.*

33 Tóth 2020.

34 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, *OJ L 248, 24.9.2015, 9–29.*

35 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, *OJ L 83, 27.3.1999, 1–9.*

As already pointed out, in light of Article 3(1) point b) TFEU, the aim of the EU Competition law policy is to make sure the proper functioning of the internal market. Beyond this simple statement, a deeply different and complicated question however underlies.

The aim of EU competition policy was to remove and prevent barriers to trade erected by companies and state-owned enterprises. In addition, in the Treaties, it was sought to encourage competition, efficiency, innovation and lower prices in order to optimise the functioning of the single European market.[36]

According to the website of the European Commission dedicated to Competition policy: "[C]ompetition policy encourages undertakings to offer consumers goods and services on the most favourable terms. It encourages efficiency and innovation and reduces prices. To be effective, competition requires undertakings to act independently of each other, and subject to the pressure exerted by their competitors."

It is fully in line with Mario Monti's 2001 speech in London at the Merchant's Taylor Hall where he stated that "the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer" before adding that the EU's "merger policy aims at preventing the creation or strengthening of dominant positions through mergers or acquisitions. Such a market power produces competitive harm, which manifests either directly through higher post-merger prices or reduced innovation or, indirectly, through the elimination of competitors, leading ultimately to the same negative results in terms of prices or innovation" making it clear that preserving competition in itself does not constitute the aim of EU competition policy.[37]

Notwithstanding, two remarks shall be made. First, it is true that considerations related to "consumer goodwill",[38] consumers' welfare are of dominant nature in the CJEU's case law as regards all the competition tools, including fight against cartels on the basis of Article 101 TFEU,[39] prohibition of abuse of dominant position by Article

36 PAASMAN 1999.

37 MONTI 2011.

38 HOVENKAMP 2008.

39 KECSMÁR 2020a; Judgements of 2 April 2020, C-228/18, *Budapest Bank and Others,* EU:C:2020:265, paragraph 36: "[…] certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) TFEU, to prove that it has actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers"; 11 September 2014, C-67/13 P, *CB v Commission,* EU:C:2014:2204, paragraphs 51, 73.

102 TFEU,[40] merger control[41] and even[42] State aid.[43] Nevertheless, protection of competition itself as a "l'art pour l'art" approach can be adopted by the Court in some circumstances. This is done regardless of the fact whether the given measure constitutes a concrete negative impact on the interests of consumers, certainly in a case of application of Article 106(1) TFEU in conjunction with Article 102 TFEU.[44] Second, the notion of consumer welfare has a broad meaning in Union law including "among other things, price, choice, quality or innovation".[45]

It is also constant that EU Competition law applies exclusively to undertakings.[46] Undertakings are any entity engaged in an economic activity, regardless of their legal status and the way in which they are financed,[47] and any activity consisting of offering goods and services on a given market constitutes an economic activity.[48] That is, services normally provided for remuneration, is an economic activity. The essential characteristic of remuneration lies in the fact that it is consideration for the service in

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40 Kecsmár–Keidel 2015; Tóth 2018; Judgement of 6 September 2017, C-413/14 P, *Intel v Commission,* EU:C:2017:632, paragraph 134: "[…] not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation"; Judgements of 17 February 2011, C-52/09, *TeliaSonera Sverige,* EU:C:2011:83, paragraphs 22, 24; 27 March 2012, C-209/10, *Post Danmark,* EU:C:2012:172, paragraph 20; 12 May 2022, C-377/20, *Servizio Elettrico Nazionale and Others,* EU:C:2022:379, paragraphs 41, 44: "The purpose of Article 102 TFEU is to prevent competition from being restricted to the detriment of the public interest, individual undertakings and consumers, by sanctioning the conduct of undertakings in a dominant position that has the effect of hindering competition on the merits and is thus likely to cause direct harm to consumers, or which causes them harm indirectly by hindering or distorting that competition."

41 Judgements of 10 July 2008, C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala,* EU:C:2008:392, paragraphs 120, 122; 13 July 2023, C-376/20 P, *Commission v CK Telecoms UK Investments,* EU:C:2023:561, paragraphs 2, 3, 12, 31, 32, 34, 225, 258; 13 July 2022, T-227/21, *Illumina v Commission,* EU:T:2022:447, paragraph 33: "[P]rima facie, the potential impact of the concentration at issue on competition in the internal market and on European consumers is significant"; 7 March 2017, T-194/13, *United Parcel Service v Commission,* EU:T:2017:144, paragraph 77; 9 March 2015, T-175/12, *Deutsche Börse v Commission,* EU:T:2015:148, paragraphs 236, 238, 262, 268, 269, 270; 3 September 2024, *Illumina v Commission,* C-611/22 P, EU:C:2024:677, paragraph 216: "Even if the effectiveness of the thresholds determining competence on the basis of turnover provided for in Regulation No 139/2004 were to prove insufficient to scrutinise some transactions capable of significantly affecting competition, it is for the EU legislature alone to review those thresholds or to provide for a safeguard mechanism enabling the Commission to scrutinise such a transaction."

42 Cseres–Reyna 2021: 620: "[A] crucial difference to other areas of competition policy is that in State aid law total welfare does not only include the sum of producer and consumer surplus but also the costs of state measures to taxpayers."

43 Cseres–Reyna 2021; Judgement of 15 June 1993, C-225/91, *Matra v Commission,* EU:C:1993:239, paragraphs 41–42.

44 Judgement of 17 July 2014, C-553/12 P, *Commission v DEI,* EU:C:2014:2083, paragraphs 33, 43, 68.

45 Judgements of 10 November 2021, T-612/17, *Google and Alphabet v Commission (Google Shopping),* EU:T:2021:763, paragraph 157; 15 June 2022, T-235/18, *Qualcomm v Commission,* EU:T:2022:358, paragraph 351; 27 March 2012, C-209/10, *Post Danmark,* EU:C:2012:172, paragraph 22; 6 September 2017, C-413/14 P, *Intel* v *Commission,* EU:C:2017:632, paragraph 134; 12 May 2022, C-377/20, *Servizio Elettrico Nazionale and Others,* EU:C:2022:379, paragraph 45.

46 Kecsmár 2018b.

47 Judgement of 12 September 2000, C-180/98, *Pavlov a. o.,* EU:C:2000:428, paragraph 74.

48 Judgement of 19 February 2002, C-309/99, *Wouters and Others,* EU:C:2002:98, paragraph 47.

question.[49] Also, under Article 57 TFEU, services normally provided for remuneration, including activities of a commercial character, are considered to be 'services' within the meaning of the Treaties[50] and Article 57 TFEU fulfils the objective of liberalising "all gainful activity".[51] However, it is not necessary that the service be paid for, by those for whom it is performed.[52] Nevertheless, the Treaty rules on competition do not apply to an activity, which, by its nature, its aim and the rules to which it is subject, does not belong to the sphere of economic activity, or which is connected with the exercise of the powers of a public authority. A professional body is neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies, nor exercising powers that are typically those of a public authority. It indeed acts as the regulatory body of a profession, the practice of which constitutes an economic activity.[53]

These prior considerations were necessary to the apprehension of the subject of interaction of internalisation of exogenous values within the assessment of issues related to EU Competition Policy.

Exogenous values adopted in EU competition law with regard to data protection

What does interaction of internalisation of exogenous values mean?

Interaction of competition, consumer and data protection laws via the Meta Platforms CJEU case

Interaction

Such an interaction may be governed by at least two different dynamics, one based on the transfer of concepts and principles over from one area of law into the other.

One possible technique consists, indeed, in borrowing the concepts of another area of law to interpret the rules of the area of law it is empowered to enforce, or that constitute the primary legal basis for adjudication. Alternatively, another technique consists in relying on the existence of different legal bases for each of these areas to initiate an enforcement action, or adjudicate upon.[54]

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49 Judgements of 6 November 2018, C-622/16 P, *Scuola Elementare Maria Montessori v Commission,* EU:C:2018:873, paragraph 104; 11 September 2007, *Schwarz and Gootjes-Schwarz,* C-76/05, EU:C:2007:492, paragraphs 37, 38.

50 Judgement of 23 February 2016, C-179/14, *Commission v Hungary,* EU:C:2016:108, paragraph 151.

51 Judgement of 31 January 1984, C-286/82, *Luisi and Carbone v Ministero dello Tesoro,* EU:C:1984:35, paragraph 10.

52 Judgement of 11 April 2000, C-51/96 and C-191/97, *Deliège,* EU:C:2000:199, paragraph 56.

53 Judgement of 19 February 2002, C-309/99, *Wouters and Others,* EU:C:2002:98, paragraphs 57–58.

54 NEBBIA 2023.

With regard to the first scenario, one must mention that such technique was recently applied by the CJEU in its judgement of 4 July 2023 in the *Meta Platforms Case*.

Prior to shortly analysing the added value of this case law, what can one understand under the interaction of competition, consumer and data protection laws?

Interaction of competition, consumer and data protection laws

Consumer and competition laws have long been considered complementary instruments to ensure consumer welfare.

Consumer law addresses market failures affecting consumers' subjective ability to choose, which are "internal" to them, in the sense that they prevent them from effectively choosing among the available options. Consumer law seeks to ensure that consumers' critical faculties remain unimpaired by preventing the adoption, by traders, of unfair commercial practices capable of distorting consumers' choices.

Competition law, on the other hand, and as already pointed out, ensures that the market place remains competitive, so that a meaningful range of options remains open to consumers, unimpaired by restrictive practices such as, for example, price-fixing agreements. It addresses market failures that are "external" to the consumer, and lead to an objective inability of the market to provide sufficient options to the consumer.

In a sense, Consumer law addresses distortions at the level of demand, while competition law addresses distortions at the level of the offer. In a way, they represent two sides of the same coin.

Compared to these, the orbit of data protection law is slightly eccentric. EU *data protection law* aims to safeguard the fundamental right to data protection, giving data subjects control over their personal data and by setting limits on the collection and use of personal data. Such protection is ensured at the EU level via Article 8(2) of the Charter of Fundamental Rights (hereinafter "the Charter") but also Article 16 TFEU, introduced in the Lisbon Treaty.

It is undeniable that we are currently witnessing an expansive interpretation of the notion of personal data. In particular, the identifiability threshold is perceived as very low; at the same time, the ways in which the information can be said to be relating to a natural person are manifold. The combination of these two aspects leads to an extremely wide material scope for EU data protection legislation.[55]

All these elements underlie the *Meta Platforms Case*.

The Meta Platforms Case

This "historical"[56] preliminary ruling case essentially concerned, inter alia, the competence of a national competition authority (hereinafter "NCA") such as the German Federal Cartel Office (Bundeskartellamt) to examine the conduct of an undertaking

[55] Nebbia 2023.

[56] Giovannini 2023.

under Article 102 TFEU in the light of certain provisions of the GDPR – Regulation (EU) 2016/679, commonly known as the General Data Protection Regulation.

More specifically, the German Federal Cartel Office (Bundeskartellamt) initiated proceedings against Meta Platforms, as a result of which it prohibited them from processing data as provided for in the terms of service of Facebook, and from implementing those terms, imposing measures to prevent Meta from doing so. The NCA in question based its decision on a domestic data protection legal provision to state that the processing in question constituted an abuse of the undertaking's dominant position in the social media market for private users in Germany.

In its opinion of 22 September 2022, AG Rantos took the position that, although an NCA is not competent to establish a breach of the GDPR, the latter, does not, in principle, preclude authorities other than the supervisory authorities, when exercising their own powers, from being able to take account, as an "incidental"[57] question to the enforcement of the prohibition of Article 102 TFEU, of the compatibility of conduct with the provisions of the GDPR.[58] In fact, the examination of the abusive nature of a dominant undertaking's practice pursuant to Article 102 TFEU must be carried out by taking into consideration all the specific circumstances of the case.[59]

Confirming the incidental nature of the findings by a national authority, the judgement of 4 July 2023 marks also by its spectacular way of imposing cooperation among the different national competent authorities, deriving from Article 4(3) TEU and the principle of "sincere cooperation".

The CJEU states in it[60] that, in the context of the examination of an abuse of a dominant position by an undertaking, it may be necessary for the Member State's NCA to "also" examine whether that undertaking's conduct complies with rules other than those relating to competition law. This may include rules laid down by the GDPR, since the compliance or non-compliance of that conduct with the provisions of the GDPR may, depending on the circumstances, be a vital clue among the relevant circumstances of the case to establish whether that conduct entails resorting to methods governing standard competition and to assess the consequences of a certain practice in the market or for consumers.[61] However, where the NCA identifies an infringement of the GDPR, it does

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57 MARTÍNEZ 2022: "'Incidental analysis of the GDPR' qualified as 'artificial construction on the primary and incidental analysis of the protection of personal data in competition law proceedings'."

58 Rantos Meta Platforms 2022, paragraph 33.

59 Judgement of 25 March 2021, *Deutsche Telekom v Commission,* C-152/19 P, ECLI:EU:C:2021:238, paragraph 42.

60 Judgement of 4 July 2023, C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* EU:C:2023:537, paragraph 36: "By Questions 1 and 7, which it is appropriate to examine together, the referring court asks, in essence, whether Article 51 et seq. of the GDPR must be interpreted as meaning that a competition authority of a Member State can find, in the context of the examination of an abuse of a dominant position by an undertaking within the meaning of Article 102 TFEU, that that undertaking's general terms of use relating to the processing of personal data and the implementation thereof are not consistent with the GDPR, and if so, whether Article 4(3) TEU must be interpreted as meaning that such a finding, of an incidental nature, by the competition authority is also possible where those terms are being investigated, simultaneously, by the competent lead supervisory authority in accordance with Article 56(1) of the GDPR."

61 Judgement of 4 July 2023, C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* EU:C:2023:537, paragraph 47, 48.

not replace the supervisory authorities established by that regulation. The sole purpose of such assessment is merely to establish an abuse of a dominant position and impose measures to put an end to that abuse on a legal basis derived from competition law.[62]

Indeed, access to and use of personal data are of great importance in the context of the digital economy. Further, such access and the fact that it is possible to process this data have become a significant parameter of competition between undertakings in the digital economy.[63] Therefore, goes on the Court, when they apply the GDPR, the various national authorities involved are all bound by the duty of "sincere cooperation" enshrined in Article 4(3) TEU.[64] Such sincere cooperation deriving from EU law between Members States and Union institutions[65] results in an obligation of cooperation between national authorities.[66]

When, in the context of the examination, seeking to establish whether there is an abuse of a dominant position within the meaning of Article 102 TFEU by an undertaking, an NCA takes the view that it is necessary to examine whether that undertaking's conduct is consistent with the provisions of the GDPR, that authority must ascertain whether that conduct or a similar conduct has already been the subject of a decision by the competent national supervisory authority or the lead supervisory authority or the Court. If that is the case, the NCA cannot depart from it, although "it remains free to draw its own conclusions from the point of view of the application of competition law".[67] Indeed, it is true that the illegality of abusive conduct under Article 82 EC is unrelated to its compliance or non-compliance with other legal rules and, in the majority of cases, abuses of dominant positions consist of behaviours which are otherwise lawful under branches of law other than competition law.[68]

It follows that an NCA can find, in the context of examining an abuse of a dominant position by an undertaking within the meaning of Article 102 TFEU, that the undertaking's general terms of use relating to the processing of personal data, and the implementation thereof, are not consistent with the GDPR, where that finding is

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62 Judgement of 4 July 2023, C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* EU:C:2023:537, paragraph 49.

63 Judgement of 4 July 2023, C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* EU:C:2023:537, paragraphs 50, 51.

64 Judgement of 4 July 2023, C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* EU:C:2023:537, paragraph 53.

65 Kecsmár 2024.

66 Judgement of 4 July 2023, C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* EU:C:2023:537, paragraph 54: "In the light of this principle, when national competition authorities are called upon, in the exercise of their powers, to examine whether an undertaking's conduct is consistent with the provisions of the GDPR, they are required to consult and cooperate sincerely with the national supervisory authorities concerned or with the lead supervisory authority, all of which are then bound, in that context, to observe their respective powers and competences, in such a way as to ensure that the obligations arising from the GDPR and the objectives of that regulation are complied with while their effectiveness is safeguarded."

67 Judgement of 4 July 2023, C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* EU:C:2023:537, paragraph 56.

68 Judgement of 6 December 2012, *AstraZeneca v Commisson,* C-457/10 P, ECLI:EU:C:2012:770, paragraph 132.

necessary to establish the existence of such an abuse.[69] Nevertheless, the NCA cannot depart from a decision by the competent national supervisory authority or the competent lead supervisory authority, concerning those general terms or similar general terms.[70]

Data protection, as pointed out, is enshrined in the Charter. Therefore, recourse to it as an external value taken into account within competition law analysis does not cause uproar.[71] Is it also the case concerning Article 165 TFEU?

The Superleague, International Skating Union and Royal Antwerp Cases in light of Article 165 TFEU and the 'European Sports Model' concept

All three cases are related to the power of international sport governance bodies (SGBs) in light of Union law.

Factual backgrounds

The International Skating Union Case

On 23 June 2014, the Commission received a complaint filed by two Dutch professional speed skating athletes, namely Mr. Jan Hendrik Tuitert and Mr. Niels Kerstholt. In their complaint, they put forward that the rules of the International Skating Union (hereinafter "ISU") banning skaters who participate in unauthorised events – i.e. events organised without the approval of the ISU – violate Articles 101 and 102 TFEU. Their complaint followed the ISU preventing Icederby – a Korean private company – to organise international speed skating events in Dubai in 2011 and 2014. The block was defended on integrity grounds as Icederby planned to offer betting services.[72]

Indeed, skaters affiliated to national federations that are members of the ISU are subject, under the statutes of the ISU, to a pre-authorisation system, which includes 'eligibility rules'. By virtue of those rules, in the version applicable to that period, the participation of a skater in an unauthorised competition exposed him or her to a penalty of a lifetime ban from any competition organised by ISU.[73]

On 8 December 2017, the Commission adopted Decision C(2017) 8230 final relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement[74] (Case AT.

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69 Judgement of 4 July 2023, C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* EU:C:2023:537, paragraph 62.

70 Judgement of 4 July 2023, C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* EU:C:2023:537, paragraph 63.

71 GIOVANNINI 2023.

72 Judgement of 16 December 2020, T-93/18, *International Skating Union v Commission,* EU:T:2020:610, paragraphs 20, 50, 80, 100; Rantos ISU 2022, paragraph 15; MELI–TROCH 2020.

73 Judgement of 16 December 2020, T-93/18, *International Skating Union v Commission,* EU:T:2020:610, paragraph 6.

74 Agreement on the European Economic Area, OJ L 1, 3.1.1994, 3–36.

40208 – International Skating Union's Eligibility rules), which relates both to the ISU rules adopted during 2014, and to those resulting from the revision which was carried out in 2016.[75]

The Commission considered that the eligibility rules of the ISU were incompatible with EU competition rules (Article 101 TFEU), in so far as their object was to restrict the possibilities for professional speed skaters to take part freely in international events organised by third parties. Consequently, they deprived those third parties of the services of athletes necessary in order to organise those competitions. Thus, the Commission, ordered the ISU, subject to a periodic penalty payment, to put an end to the infringement found, without, however, imposing a fine on it.[76]

The ISU brought an action against the contested decision before the General Court of the European Union on 19 February 2018.[77]

In its Judgement of 16 December 2020, the General Court found that the Commission was right to conclude that the eligibility rules have as their object the restriction of competition within the meaning of Article 101 TFEU. Indeed, the Judgement endorsed the Commission's conclusion that the rules of the ISU banning athletes for participation in unauthorised events organised by third parties constituted a "by object" infringement of Article 101 TFEU.[78] Indeed, "severity may dissuade athletes from participating in events not authorised by the ISU, even where there are no legitimate objectives that can justify such a refusal, and, consequently, is likely to prevent market access to potential competitors who are deprived of the participation of athletes that is necessary in order to organise their sporting event".[79]

The Judgement explicitly recognised therefore that authorisation rules for events organised by third parties – and an associated ban for participation in unauthorised events – may be legal if they "pursue legitimate objectives" and their restrictive effects on competition are "inherent" to the pursuit of those objectives and "proportional". However, *in casu,* the General Court ruled that the sanction to ban included in the eligibility rules of the ISU was "disproportionate".[80] As a matter of fact, the General Court made clear in its Judgement that "[i]t is true that, as is apparent from paragraph 10 above, in 2016, the system of penalties was relaxed in so far as it no longer provides for a single penalty of a lifetime ban for all infringements. [H]owever, it must be noted that the average length of a skater's career is eight years – a fact that the applicant moreover does not dispute. It must therefore be held that the penalties set out in the 2016 eligibility

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75 Judgement of 16 December 2020, T-93/18, *International Skating Union v Commission,* EU:T:2020:610, paragraph 28; Rantos ISU 2022, paragraph 18.

76 Judgement of 16 December 2020, T-93/18, *International Skating Union v Commission,* EU:T:2020:610, paragraphs 29–37; Rantos ISU 2022, paragraphs 19–25.

77 Judgement of 16 December 2020, T-93/18, *International Skating Union v Commission,* EU:T:2020:610, paragraph 38; Rantos ISU 2022, 27.

78 Judgement of 16 December 2020, T-93/18, *International Skating Union v Commission,* EU:T:2020:610, paragraphs 62, 121 or 121; Rantos ISU 2022, paragraph 15; Meli–Troch 2020.

79 Judgement of 16 December 2020, T-93/18, *International Skating Union v Commission,* EU:T:2020:610, paragraph 95.

80 Judgement of 16 December 2020, T-93/18, *International Skating Union v Commission,* EU:T:2020:610, paragraphs 10, 93; Rantos ISU 2022, paragraphs 90, 91; Meli–Troch 2020.

rules, even those with a fixed time limit of 5 to 10 years continue to be disproportionate in so far as they apply, inter alia, to participation in unauthorised third-party events".[81]

In addition, the General Court referred to Article 165 TFEU, and the applicable case law in its Judgement of 16 December 2020.[82]

By its appeal brought on 26 February 2021, the ISU asked, in substance, the CJEU to set aside the Judgement of 16 December 2020 and to annul the underlying Commission decision of 8 December 2017 bearing the case number C-124/21 P – *International Skating Union v Commission*.[83]

The Superleague Case

On Sunday 18 April 2021, six English football clubs, three Spanish teams and three Italian teams, announced that they would start a new football competition, called the "European Super League" (hereinafter the "ESL") under the aegis of the European Superleague Company (hereinafter the "ESLC"). It was described as "a company seeking to organise and market a new European football competition that would be an alternative or competitor to those organised and marketed to date" by the Fédération Internationale de Football Association (hereinafter "FIFA") and the Union of European Football Associations (hereinafter "UEFA"). This would consist of 20 clubs, with 15 of them permanently part of the competition and five additional clubs able to qualify annually. The purpose of the new competition was "improving the quality and intensity of existing European competitions throughout each season, and of creating a format for top clubs and players to compete on a regular basis".[84]

The two federations were quick to dismiss the proposed "breakaway" competition and, in the days following the announcement, many other clubs, football fans and politicians said they were against this idea as well.[85] In addition, public statements were made by FIFA and UEFA, making clear of their refusal to authorise that new competition and warning that any player or club participating in it would be expelled from the competitions organised by FIFA and UEFA.[86]

These threats of sanctions or warnings triggered the preliminary ruling of 27 May 2021 by the Juzgado de lo Mercantil n.º 17 de Madrid (Commercial Court, Madrid, Spain) in proceedings between, on the one hand, the FIFA and the UEFA and, on the other, ESLC, based on Article 267 TFEU.[87]

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81 Judgement of 16 December 2020, T-93/18, *International Skating Union v Commission,* EU:T:2020:610, paragraph 93.

82 Judgement of 16 December 2020, T-93/18, *International Skating Union v Commission,* EU:T:2020:610, paragraphs 78, 79, the latter making reference to paragraph 40 of the Judgement of 16 March 2010, C-325/08, *Olympique Lyonnais,* EU:C:2010:143.

83 Rantos ISU 2022, paragraph 29; OJ C 163, 3.5.2021, 19–21.

84 Rantos Superleague 2022, paragraphs 2, 3; BLOCKX et al. 2022.

85 BLOCKX et al. 2022.

86 Rantos Superleague 2022, paragraph 3.

87 Rantos Superleague 2022, paragraphs 3, 18; OJ C 382, 20.9.2021, 10–11.

In essence, the Madrilène jurisdiction at the origin of the preliminary ruling in question sought the Court's wisdom on whether the said threats of sanctions or warnings were compatible with Articles 101 and 102 TFEU. By its questions submitted for a preliminary ruling, the referring court indeed asked the Court to give a ruling on the following points: firstly, on the compatibility with the rules of competition and, secondarily, with the fundamental economic freedoms guaranteed by TFEU. Such compatibility concerned a series of rules adopted by FIFA and UEFA, in their capacity as federations governing all aspects of football at the world and European levels, and concerning the organisation and the marketing of football competitions in Europe.[88]

The Royal Antwerp Case

Almost thirty years after the *Bosman Judgement,*[89] the *Royal Antwerp Case* is once again related to transfer rules of professional football players in the EU.

Jean-Marc Bosman, a Belgian former professional footballer who used to play as a midfielder in FC Liège (hereinafter "Royal club liégeois SA" or "RCL"), challenged the latter opposing to his transfer to the then second division French football club Dunkerque in the absence of the payment by Dunkerque of an important one-off fee. Bosman originally brought an action against this decision before the Belgian judiciary. There, the Cour d'Appel (Appeal Court) of Liège referred to the Court for a preliminary ruling on the basis of Article 177 of the EEC Treaty (Article 267 TFEU), a question on the interpretation of Articles 48, 85 and 86 of the EEC Treaty (Articles 45, 101 and 102 TFEU) in relation to the rules governing transfers of professional players in the EU. In essence, the Court held, having only analysed the question in respect of Article 45 TFEU, that football players should be free to move following their contracts having expired, and that clubs within the European Union could take any number of players of nationals of other Member States, and therefore UEFA quotas linked to nationality with regard to nationals of Member States were contrary to EU law.[90]

In the *Royal Antwerp Case,* the factual background is indeed certainly different but nevertheless retains some similarities with the *Bosman Case*.

On 2 February 2005, the UEFA Executive Committee adopted rules requiring professional football clubs taking part in the interclub competitions of the UEFA to enter a maximum number of 25 players on the "squad size limit list", which, in turn must include a minimum number of 'home-grown-players' (hereinafter "HGP" or "HGPs"). Such players are defined by UEFA as players who, regardless of their nationality, have been trained by their club or by another club in the same national association for at least three years between the ages of 15 and 21. On 21 April 2005, the HGP rule was approved by the 52 member associations of the UEFA, including the Royal Belgian Football Association

88 Rantos Superleague 2022, paragraphs 18, 25.

89 Judgement of 15 December 1995, C-415/93, *Union royale belge des sociétés de football association and Others v Bosman and Others,* EU:C:1995:463.

90 Judgement of 15 December 1995, C-415/93, *Union royale belge des sociétés de football association and Others v Bosman and Others,* EU:C:1995:463, paragraphs 1, 2, 26, 27, 30, 31, 34, 35, 40, 46, 114, 137, 138.

(hereinafter the "URBSFA"), at the Tallinn Congress. Since the 2008–2009 season, the UEFA regulation has required clubs registered for one of its competitions to include a minimum of 8 home-grown players in a list of maximum 25 players. Out of those eight players, at least four must have been trained by the club in question.[91]

UL is a football player, born in 1986, who holds the nationality of a third country as well as Belgian nationality. He has been professionally active in Belgium for many years. He played for Royal Antwerp, a professional football club based in Belgium, for several years and is now playing for another professional football club in Belgium. On 13 February 2020, he brought an action before the Cour belge d'arbitrage pour le sport (Belgian Court of Arbitration for Sport) seeking, inter alia, a declaration that the HGP rules put in place by UEFA and the URBSFA were unlawful on the ground that they infringed Article 45 TFEU and related compensation for the damage caused to UL. Royal Antwerp subsequently voluntarily intervened in the proceedings, also seeking compensation for the damage caused by those rules. UEFA was not a party to the arbitration proceedings. By an arbitration award made on 10 July 2020, the Belgian Court of Arbitration for Sport partly dismissed the action as inadmissible, partly rejecting the claims put forward by UL. On 1 September 2020, UL and Royal Antwerp brought an action before the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance [French-speaking]) for the annulment of the arbitration award on the ground that it was contrary to public policy, in accordance with Article 1717 of the Belgian Judicial Code. In November 2021, FIFA intervened in this proceeding.[92]

By order of 15 October 2021, received at the Court on 11 November 2021, the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance [French-speaking]) sought the guidance of the CJEU on the compatibility with Union law, of the HGP rules of UEFA in respect of Article 101 TFEU and of the URBSFA with regard to Articles 45 and 101 TFEU.[93]

Taking into account the fact that "various parties to the proceedings resort to Article 165 TFEU throughout their submissions", the *Royal Antwerp Case* also raises the question of its degree of applicability.[94]

Before making known the Opinions of Advocates General in the *ISU, Superleague* and *Royal Antwerp Cases,* it is useful to analyse the case law of the CJEU in the field of sport and Article 165 TFEU.

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91 Szpunar Royal Antwerp, paragraphs 1, 2, 7.

92 Szpunar Royal Antwerp, paragraphs 4, 11, 12–14, 15, 17.

93 Szpunar Royal Antwerp, paragraphs 20, 22. Indeed, the referring Court referred the following questions to the CJEU for a preliminary ruling seeking to reply to the questions, (1) whether Article 101 TFEU is to be interpreted as precluding the plan relating to "HGPs" adopted on 2 February 2005 by the Executive Committee of UEFA, approved by the 52 member associations of UEFA at the Tallinn Congress on 21 April 2005 and implemented by means of regulations adopted both by UEFA and by its member federations and whether Articles 45 and 101 TFEU are to be interpreted as precluding the application of the rules on the inclusion on the match sheet and the fielding of locally trained players, as formalised by Articles P335.11 and P.1422 of the federal regulation of URBSFA and reproduced in Articles B4.1[12] of Title 4 and B6.109 of Title 6 of the new URBSFA regulation.

94 Szpunar Royal Antwerp, paragraphs 48, 55.

Sport, sporting activities and the 'European Sports Model' concept under Article 165 TFEU and in the case law of the CJEU prior to 2023

Article 165 TFEU

According to AG Rantos, the wording of Article 165 TFEU crystallised the conclusions of a series of initiatives that had been taken by the EU institutions, from the 1990s onwards, following the judgements delivered by the Court – and in particular, the Judgement in the *Bosman Case* – in the context of establishing a European sports policy. Thus, the groundwork for the recognition of the specific nature of sport was laid by a joint declaration on sport annexed to the Treaty of Amsterdam, followed by the Commission report,[95] which recognised the "specific nature of sport" in particular in the context of the application of competition law.[96] On the basis of that report, the Nice European Council issued a declaration, marking a further step in the recognition of the specific nature of sport by requiring the Community, in its action under the various Treaty provisions, to take account of the social, educational and cultural functions inherent in sport, in order to preserve its social role.[97] That initiative was followed, in the course of 2007, by the Commission's White Paper on Sport,[98] the final stage before the insertion of Article 165 TFEU into the Treaty of Lisbon in 2009.[99]

Article 165 TFEU deals with three distinct, yet interrelated issues: education, youth and sport and is structured into four paragraphs.

Paragraph 1 sets out the general aim and rationale of the provision, which is that the Union is to 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.

Paragraph 2 then specifies what precisely Union action is aimed at, with which it is impossible to disagree: developing the European dimension in sport, by promoting fairness and openness in sporting competitions, cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest.

Paragraph 3 stresses the importance of fostering cooperation with third countries and international organisations, in particular with the Council of Europe.

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95 Declaration No. 29 on sport, 2 October 1997 (OJ 1997 C 340, 136).

96 Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework of 10 December 1999 (The Helsinki Report on Sport) [COM(1999) 644 final], 4.2.1.: "[T]he application of the Treaty's competition rules to the sporting sector must take account of the specific characteristics of sport, especially the interdependence between sporting activity and the economic activity that it generates, the principle of equal opportunities and the uncertainty of the results."

97 Nice European Council, 7–9 December 2000, Conclusions of the Presidency, Annex IV: Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, paragraph 1.

98 White Paper on Sport, 11 July 2007 [COM(2007) 391 final].

99 Rantos Superleague 2022, paragraph 29.

Finally, *Paragraph 4* allows the political institutions of the Union "in accordance with the ordinary legislative procedure" to "adopt incentive measures, excluding any harmonisation" and the Council (alone), on a proposal from the Commission, to adopt recommendations.[100]

The Court's case law on sport, sporting activities and the 'European Sports Model' concept under Article 165 prior to 2023

Sport, in general, has been considered for a long time by the Court to be of "specific characteristics" and to constitute an activity falling under the EU law in some circumstances.[101]

Indeed, sport has a "considerable social importance" in the Union[102] and sport is subject to EU law, and in particular to the provisions of the Treaty related to the economic law of the European Union, to the extent that it constitutes an economic activity.[103]

Indeed, having regard to the objectives of the Community, sport is subject to Community law only in so far as it constitutes an economic activity.[104] This is the case as regards the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service.[105] Therefore, where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of semi-professional or professional sportsmen, it falls, more specifically, within the scope of Article 45 TFEU or Article 56 TFEU.[106]

It is also constant case law with regard to the notion of economic activity in the field of "sporting activities" that it is not necessary that the service be paid for by those for whom it is performed. The Court explained in this respect that an organiser of an international competition involving a high-ranking athlete's participation "may offer athletes an opportunity of engaging in their sporting activity in competition with others and, at the same time, the athletes, by participating in the competition, enable the organiser to put on a sports event which the public may attend, which television

100 Szpunar Royal Antwerp 2023, paragraph 49.

101 Judgements of 12 December 1974, C-36/74, *Walrave and Koch,* EU:C:1974:140, paragraph 8; 15 December 1995, C-415/93, *Union royale belge des sociétés de football association and Others v Bosman and Others,* EU:C:1995:463, paragraph 73; 16 March 2010, C-325/08, *Olympique Lyonnais,* EU:C:2010:143, paragraph 40.

102 Rantos Superleague, paragraph 28; Judgements of 15 December 1995, C-415/93, *Union royale belge des sociétés de football association and Others v Bosman and Others,* EU:C:1995:463, paragraph 106; 13 April 2000, *Lehtonen and Castors Braine,* C-176/96, EU:C:2000:201, paragraph 32.

103 Rantos Superleague, paragraph 39.

104 Judgements of 12 December 1974, C-36/74, *Walrave and Koch,* EU:C:1974:140, paragraph 8; 15 December 1995, C-415/93, *Union royale belge des sociétés de football association and Others v Bosman and Others,* EU:C:1995:463, paragraph 73; 25 April 2013, C-81/12, *Asociația Accept,* EU:C:2013:275, paragraph 45.

105 Judgements of 15 December 1995, C-415/93, *Union royale belge des sociétés de football association and Others v Bosman and Others,* EU:C:1995:463, paragraph 73; 16 March 2010, C-325/08, *Olympique Lyonnais,* EU:C:2010:143, paragraphs 27, 28.

106 Judgement of 18 July 2006, C-519/04 P, *Meca-Medina and Majcen v Commission,* EU:C:2006:492, paragraph 23.

broadcasters may retransmit and which may be of interest to advertisers and sponsors. Moreover, the athletes provide their sponsors with publicity the basis for which is the sporting activity itself".[107]

The Court has also already held that, in considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the "objective of encouraging the recruitment and training of young players"[108] is attained, and does not go beyond what is necessary to attain it, the sport's "specific characteristics" in general, and football in particular, and of their social and educational function must be taken into account. The relevance of those factors is also corroborated by their mention in the second subparagraph of Article 165(1) TFEU.[109]

In fact, the Court has previously recognised the considerable social importance of sport in the European Union, in particular amateur sport, as reflected in Article 165 TFEU, and the role of that sport as a factor for integration into the society of the host Member State.[110]

Indeed, the Court held that Article 165 TFEU reflects the considerable social importance of sport in the European Union, in particular amateur sport, as highlighted in Declaration No. 29 on sport annexed to the Final Act of the conference which adopted the text of the Treaty of Amsterdam, and the role of sport as a factor for integration in the society of the host Member State.[111]

Opinions of Advocates General in the Superleague, International Skating Union and Royal Antwerp Cases with focus on the provisions of Article 165 TFEU

Opinions of Advocate General Rantos of 15 December 2022 in Superleague and ISU Cases

Article 165 TFEU played a central role in the Opinion of AG Rantos.[112] Indeed, AG Rantos strongly advocates for taking into account the "specific nature" of sport,[113] and takes the view that Article 165 TFEU reflects the "constitutional recognition" of the "European

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107 Judgement of 11 April 2000, C-51/96 and C-191/97, *Deliège,* EU:C:2000:199, paragraphs 56, 57.

108 Judgement of 15 December 1995, C-415/93, *Union royale belge des sociétés de football association and Others v Bosman and Others,* EU:C:1995:463, paragraph 106: "[I]n view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate."

109 Judgement of 16 March 2010, C-325/08, *Olympique Lyonnais,* EU:C:2010:143, paragraphs 39, 40.

110 Kecsmár 2020b; Judgements of 18 December 2019, C-447/18, *Generálny riaditeľ Sociálnej poisťovne Bratislava,* EU:C:2019:1098, paragraph 52; 13 June 2019, C-22/18, *TopFit and Biffi,* EU:C:2019:497, paragraph 33.

111 Judgements of 13 June 2019, C-22/18, *TopFit and Biffi,* EU:C:2019:497, paragraph 33; 13 April 2000, *Lehtonen and Castors Braine,* C-176/96, EU:C:2000:201, paragraph 33.

112 Da Cruz Vilaça – Martins Pereira 2024.

113 Rantos Superleague 2022, paragraphs 28, 29, 39, 42, 67, 91, 93, 117, 123, 144, 169, 187.

Sports Model", being based, first, on *a pyramid structure* with, at its base, amateur sport and, at its summit, professional sport.[114] However, sport constitutes a "significant economic activity" marked by an important "special social character",[115] making sporting activities including the "activities of sports federations" clearly subject to competition law.[116] Nevertheless, the references to that specific nature and to the social and educational function of sport, which appear in Article 165 TFEU, may be relevant for the purposes, inter alia, of analysing, in the field of sport, any objective justification for restrictions on competition or on fundamental freedoms.[117] In essence, as a result of such analysis, AG Rantos considers that the FIFA–UEFA rules under which any new competition is subject to prior approval are compatible with EU competition law.[118] He also proposes to set aside the General Court's Judgement of 16 December 2020 in the *ISU Case*.[119]

Opinion of Advocate General Szpunar of 9 March 2023 in Royal Antwerp Case

AG Szpunar has a more conservative approach as for the importance of Article 165 TFEU underlying only once the "specific nature of sport" in his Opinion.[120] He puts emphasis on the clear lack of possibility, deriving from Article 165, paragraph 4, TFEU, for the "political institutions of the Union" ("the Commission, the Council and the Parliament") to adopt harmonisation acts on the basis of Article 165 TFEU. He further added that "[a]dmittedly, it takes some time to get one's head around this provision which, in Orwellian-like fashion, allows the political institutions to resort to the ordinary legislative procedure in order to adopt [...] anything but legislation".[121] Without denying the legal value of Article 165 TFEU, he believes that this provision is helpful in two respects: first, to identify a ground of justification for a restriction of Article 45 TFEU, known as an overriding reason in the public interest, and secondly, as an indication of what is acceptable in and throughout the Union when it comes to carrying out the proportionality test. This is, moreover, exactly what the Court has done in the past in the field of education in his view.[122] Therefore, he rejoins AG Rantos on this and considers, in essence, that Article 165 TFEU is indeed relevant and useful in the analysis of objective justification for restrictions on competition or on the fundamental freedoms without, however, allowing "private bodies exercising economic functions" such as UEFA to implement Union action

114 Rantos Superleague 2022, paragraph 30; AGAFONOVA 2024.
115 Rantos Superleague 2022, paragraph 34.
116 Rantos Superleague 2022, paragraph 90.
117 Rantos Superleague 2022, paragraph 42.
118 Rantos Superleague 2022, paragraph 187.
119 Rantos ISU 2022, paragraph 170.
120 Szpunar Royal Antwerp 2023, paragraph 49.
121 Szpunar Royal Antwerp 2023, paragraph 49.
122 Szpunar Royal Antwerp 2023, paragraph 55.

under Article 165 TFEU.[123] As a result, AG Szpunar considers that the UEFA rules on home-grown players are partially incompatible with EU law.[124]

Judgements of the Court of 21 December 2023 in the Superleague, International Skating Union and Royal Antwerp Cases

Article 165 TFEU

It appears that the Court adopted a rather conservative, dogmatic approach as for Article 165 TFEU when it stated that "nor must Article 165 TFEU be regarded as being a special rule exempting sport from all or some of the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application".

Though let us start with the beginning.

According to the Court, Article 165 TFEU must be construed in the light of Article 6(e) TFEU, which provides that the Union has "competence" to carry out actions to "support", coordinate or supplement the actions of the Member States in the areas of education, vocational training, youth and sport. Article 165 TFEU gives specific expression to that provision by specifying both the "objectives" assigned to Union action in the areas concerned and the means which may be used to contribute to the attainment of those objectives.[125]

Thus, as regards the "objectives" assigned to Union action in the area of sport, the second subparagraph of Article 165(1) TFEU states that the Union is to contribute to the promotion of European sporting issues, while taking into account the "specific characteristics of sport", its structures based on voluntary activity and its "social and educational function". Further, in the last indent of paragraph 2, Union action in that area is to be aimed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between sport governance bodies (SGBs), and by protecting the physical and moral integrity of sportspersons, especially the youngest sportspersons.

As regards the means which may be employed to contribute to the attainment of those objectives, Article 165(3) TFEU provides that the Union is to foster cooperation with third countries and the competent international organisations in the field of sport. Moreover, in Paragraph 4, the European Parliament and the Council of the European Union, acting in accordance with the ordinary legislative procedure, or the Council, acting alone on a proposal from the Commission, may adopt incentive measures or recommendations.

As follows from both the wording of Article 165 TFEU and Article 6(e) TFEU, by those provisions, the drafters of the Treaties intended to confer a "supporting competence"

123 Szpunar Royal Antwerp 2023.

124 Szpunar Royal Antwerp 2023, paragraph 83.

125 Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraph 101.

on the Union, allowing it to pursue not a "policy", as provided for by other provisions of the TFEU, but an "action" in a number of specific areas, including sport. Thus, those provisions constitute a legal basis authorising the Union to exercise that "supporting competence", on the conditions and within the limits fixed thereby. These being, inter alia, as provided for in the first indent of Article 165(4) TFEU, or the exclusion of any harmonisation of the legislative and regulatory provisions adopted at national level. That "supporting competence" also allows the Union to adopt legal acts solely with the aim of supporting, coordinating or completing Member State action, in accordance with Article 6 TFEU.

By way of corollary, and as is also apparent from the context of which Article 165 TFEU forms a part, its insertion in Part Three of the TFEU, devoted to "Union policies and internal actions", and not in Part One, containing provisions of principle, including, under Title II, "provisions having general application". These relate, inter alia, to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against any discrimination, environmental protection and consumer protection, meaning Article 165 TFEU is not a cross-cutting provision having general application.[126]

Nonetheless, the fact remains that, as observed by the Court on numerous occasions, sporting activity carries considerable social and educational importance, henceforth reflected in Article 165 TFEU, for the Union and its citizens.[127]

Sporting activity also undeniably has "specific characteristics" which, whilst relating especially to amateur sport, may also be found in the pursuit of sport as an economic activity.[128]

Such "specific characteristics" "may potentially be taken into account" along with other elements and provided they are relevant in the application of Articles 45 and 101 TFEU, although they may be so only in the context of and in compliance with the conditions and criteria of application provided for in each of those articles. The same assessment holds true in respect of Articles 49, 56, 63 and 102 TFEU.[129]

Therefore, sport is not taken into account as an exception or an exogenous value in the Union competition law in the field of sport on the basis of Article 165 TFEU, since the Court clearly adopted a very moderate, classical interpretation of competition law. Notwithstanding some criticism voiced for not recognising the European sports model as such,[130] the Court, indeed, sharply separated different areas, EU policy and its case law, from each other dogmatically.[131]

Indeed, goes on the Court, when it is argued that a rule adopted by a sporting association constitutes an impediment to the free movement of workers or an anticompetitive

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126 Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraphs 96–100.

127 Judgements of 15 December 1995, C-415/93, *Union royale belge des sociétés de football association and Others v Bosman and Others,* EU:C:1995:463, paragraph 106; 13 June 2019, C-22/18, *TopFit and Biffi,* EU:C:2019:497, paragraphs 33, 34.

128 Judgement of 13 April 2000, C-176/96, *Lehtonen and Castors Braine,* EU:C:2000:201, paragraph 33.

129 Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraphs 96–104.

130 BORJA 2023.

131 ROSIN 2024.

agreement, the characterisation of that rule as an obstacle or anticompetitive agreement must, at any rate, be based on a specific assessment of the content of that rule in the actual context in which it is to be implemented.[132] Such an assessment may involve taking into account, for example, the nature, organisation or functioning of the sport concerned and, more specifically, how professionalised it is, the manner in which it is practised, the manner of interaction between the various participating stakeholders and the role played by the structures and bodies responsible for it at all levels, with which the Union is to foster cooperation, in accordance with Article 165(3) TFEU.[133]

Moreover, once the existence of an obstacle to the free movement of workers is established, the association which adopted the rule in question may yet demonstrate that it is justified, necessary and proportionate in view of certain objectives, which may be regarded as legitimate,[134] which themselves are contingent on the specific characteristics of the sport concerned.[135]

The Court concluded in the *Superleague Case* that 1. Article 102 TFEU must be interpreted as meaning that the adoption and implementation of rules by associations which are responsible for football at world and European levels and which pursue in parallel various economic activities related to the organisation of competitions, making subject to their prior approval the setting up, on European Union territory, of a new interclub football competition by a third-party undertaking, and controlling the participation of professional football clubs and players in such a competition, on pain of sanctions, where there is no framework for those various powers providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate, constitutes abuse of a dominant position[136] that 2. Article 101(1) TFEU must be interpreted as meaning that the adoption and implementation, directly or through their member national football associations, of rules by associations which are responsible for football at world and European levels and which pursue in parallel various economic activities related to the organisation of competitions, making subject to their prior approval the setting up, on European Union territory, of a new interclub football competition by a third-party undertaking, and controlling the participation of professional football clubs and players in such a competition, on pain of sanctions, where there is no framework for those various powers providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate, constitutes a decision

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132 Judgements of 15 December 1995, C-415/93, *Union royale belge des sociétés de football association and Others v Bosman and Others,* EU:C:1995:463, paragraphs 98–103; 11 April 2000, C-51/96 and C-191/97, *Deliège,* EU:C:2000:199, paragraphs 61–64; 13 April 2000, C-176/96, *Lehtonen and Castors Braine,* EU:C:2000:201, paragraphs 48–50.

133 Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraph 105.

134 Judgement of 15 December 1995, C-415/93, *Union royale belge des sociétés de football association and Others v Bosman and Others,* EU:C:1995:463, paragraph 104.

135 Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraph 106.

136 Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraph 152.

by an association of undertakings having as its object the prevention of competition,[137] that 3. Article 101(3) and Article 102 TFEU must be interpreted as meaning that rules by which associations which are responsible for football at world and European levels and which pursue in parallel various economic activities related to the organisation of competitions make subject to their prior approval the setting up, on European Union territory, of interclub football competitions by a third-party undertaking, and control the participation of professional football clubs and players in such competitions, on pain of sanctions, may benefit from an exemption to the application of Article 101(1) TFEU or be considered justified under Article 102 TFEU only if it is demonstrated, through convincing arguments and evidence, that all of the conditions required for those purposes are satisfied,[138] or 4. that Article 56 TFEU must be interpreted as precluding rules by which associations which are responsible for football at world and European levels and which pursue in parallel various economic activities related to the organisation of competitions make subject to their prior approval the setting up, on European Union territory, of interclub football competitions by a third-party undertaking, and control the participation of professional football clubs and players in such competitions, on pain of sanctions, where there is no framework for those rules providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate.[139]

Similar assessments and conclusions characterise the *ISU* and *Royal Antwerp FC Cases,* as well.

What is next for sport governance bodies (SGBs)?

The scope and the added value of the *Superleague, ISU and Royal Antwerp FC judgements* go far beyond the question of how to take into account Article 165 TFEU in competition law related cases.

To start with, in the *ISU judgement,* the Court took the stance that, in line with the Commission's initial position, the arbitration rules of ISU applied before the Court of Arbitration for Sport (CAS) to deprive skaters, seeking for prior authorisation to participate in events in competition with the own competitions of ISU, of effective access to the courts, by reinforcing the restriction of competition and set aside the General Court's decision in that respect.[140]

Then, as for the question of uniform interpretation of EU law, in particular the competition law and more particularly as for the question of simultaneous application of provisions of Articles 101 and 102 TFEU, the judgement in the *Superleague Case* provides

[137] Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraph 179.

[138] Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraph 209.

[139] Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraph 257.

[140] Judgement of 21 December 2023, C-124/21 P, *International Skating Union v Commission,* EU:C:2023:1012, paragraphs 12, 19, 25, 32, 184–204.

very important learnings in that respect. Indeed, the Court states that the same conduct may give rise to an infringement of both Articles 101 and 102 TFEU, even though they pursue different objectives and have distinct scopes. Those articles may thus apply simultaneously where their respective conditions of application are met. They must, accordingly, be "interpreted and applied consistently", although in compliance with each Article's specific characteristics.[141]

The takeaway is that while both Articles 101 and 102 TFEU can be simultaneously applied, this must be done with respect to each Article's specific characteristics. Indeed, while in paragraph 119 of the judgement in the *Superleague Case,* the Court makes reference to three cases already providing for the possibility of not excluding the simultaneous application of the said TFEU provisions,[142] this is for the first time the Court clarifies the modalities of their interpretation and application.

In the field of the considerations related to the "by effect", "by object" problematic in the application of the provisions of Article 101 TFEU,[143] the Court specified in its *Superleague judgement* that the concept of anticompetitive "effect" must be interpreted as referring "solely" to certain types of coordination between undertakings, which reveal a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects.[144] First, this clarification is more than welcome. Second, its exact scope can be measured in light of the application of the *Wouters judgement*[145] and the future possible boundaries of sport regulation, SGBs.

Indeed, according to the latter, not every agreement between undertakings or every decision of an association of undertakings, which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 101(1) TFEU. For the purposes of application of that provision to a particular case, account must first be taken of the overall context in which the decision of the association of undertakings was taken or effects it produces. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience.[146]

The Court held that the *Wouters judgement* is not applicable either in situations involving conduct which, far from merely having the inherent "effect" of restricting competition, at least potentially, reveals a degree of harm in relation to that competition that justifies a finding that it has as its very "object" the prevention, restriction or distortion

141 Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraph 119.

142 Judgements of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro,* C-66/86, EU:C:1989:140, paragraph 37; 16 March 2000, *Compagnie maritime belge transports a. o. v Commission,* C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 33; 30 January 2020, *Generics (UK) a. o.,* C-307/18, EU:C:2020:52, paragraphs 146, 147.

143 Kecsmár 2020a.

144 Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraphs 161–162.

145 Judgement of 19 February 2002, C-309/99, *Wouters and Others,* EU:C:2002:98.

146 Judgement of 19 February 2002, C-309/99, *Wouters and Others,* EU:C:2002:98, paragraph 97.

of competition, by limiting the freedom of action of certain undertakings.[147] Therefore, the *Wouters judgement* is only applicable to conducts restricting competition "by effect" and not those ones "by object".

It follows that once a restriction of competition by object in the sense of Article 101 TFEU is established, the possibility to invoke the *Wouters* exception is no longer available. The one and only fallback position consists in invoking Article 101(3) TFEU leaving less chances of success to SGBs.[148]

Conclusion

External values are sometimes taken into account by the CJEU in its analysis of competition law and/or policy. The strength of impact depends, however, on the degree of value in question and at stake. One can think about the fact that data protection is a fundamental right protected by the Charter while the force of Article 165 TFEU was found much less by the Court following a conservative, dogmatic interpretation of that provision in the *Superleague, ISU* and *Royal Antwerp FC Cases*.

Interestingly, the *Meta Platforms Case* perhaps signalled a paradigm shift for NCAs, who are experiencing an expansion of their competence. While the CJEU noted that the primary competence for GDPR protection rests with the supervisory authorities designed for such purpose, this acquisition of competence on the side of NCAs allows them to cover markets from a broader perspective. Notwithstanding, while the *Superleague, ISU* and *Royal Antwerp FC Cases* may only have marginal relevance from this perspective, it is worth noting that, where necessary, markets not initially conceived as falling under the remits of NCAs and the Commission may come into play. This sample of recent judgements from the CJEU signals that Competition enforcement evolves with time. This means that, in the context of the Digital Markets Act, data protection may play an even bigger and more substantial role in how digital markets are regulated, as might signal the ongoing Commission investigation into Meta's "pay or consent" model for data processing.[149]

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148 Judgement of 21 December 2023, C-333/21, *European Superleague Company,* EU:C:2023:1011, paragraph 183; AGAFONOVA 2024; ROSIN 2024; IBÁÑEZ COLOMO 2023.

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