



Accounting for the specificities of sport in EU law: Old and new directions in the 21 December 2023 judgments

Aurélie Villanueva¹

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Abstract

This article reflects on sport interests as accounted for by the European Court of Justice in the three judgments delivered on the 21st of December 2023: *Case C-333/21 European Superleague Company SL v FIFA, UEFA*, *Case C-680/21 UL, SA Royal Antwerp Football Club v URBSFA, UEFA* and *Case C-124/21 P International Skating Union v Commission*. In the cases, the Court does not treat sport as a special interest that would justify excluding the application of European Union (EU) substantive law to the situations at hand. Rather, the Court adopts a strict reading of Article 165 TFEU as a provision that does not shield the sport sector from the application of EU law. However, the paper demonstrates that the Court does recognise the particularities of sport and accounts for them in the application of EU free movement and competition law. This is especially when characterising rules as object or effect restrictions, but also when exploring the defence under Article 102 TFEU, the justifications under Article 101(3) TFEU as well as under free movement law. The Court guides and encourages the referring courts to pay attention to the specific content of the rules and the context in which they are implemented. The Court thereby follows the traditional assessment of a measure and its context under EU substantive law while devoting great attention to the specific characteristics of the sport sector in its substantive analysis.

Keywords Specificities of the sport sector · Competition law · Governance · Restrictions · Justifications

1 Introduction

On December 21st, 2023, the Grand Chamber of the European Court of Justice (the Court) delivered three milestone judgments related to the application of European Union (EU) law to sport and the compatibility of rules adopted by sport associations with EU competition and free movement law.¹ This paper explores the sport interests and sport characteristics that are discussed and balanced in the three cases. It identifies characteristics of sport and explains how they

are integrated in the substantive analysis of the Court. The paper demonstrates that despite the absence of references to Article 165 TFEU and policy documents on sport, the ideals and principles that Article 165 TFEU and the European Sport Model carry are not disregarded in the cases.² This is because the Court explains and guides the referring courts as to where and how to account for the specific characteristics of sport in the application of EU substantive law.

The paper starts by an analysis of the Court's interpretation of Article 165 TFEU, the main particularity of the cases is that apart from the part devoted to Article 165 TFEU, the Court rarely refers to Article 165 TFEU in its substantive assessment. In fact, the Court in its substantive assessment extracts characteristics of the sport sector and guides the national court as to how to account for such characteristics. The paper discusses two such characteristics. The first is the importance of the values and principles of sport and the specific role that Sport Governing Bodies (SGBs) have in

¹ Case C-333/21 *European Superleague Company SL v FIFA, UEFA* ECLI:EU:C:2023:1011; Case C-680/21 *UL, SA Royal Antwerp Football Club v URBSFA, UEFA* ECLI:EU:C:2023:1010; Case C-124/21 *P International Skating Union v Commission* ECLI:EU:C:2023:1012, (hereinafter *ESL*, *Royal Antwerp* and *ISU*).

✉ Aurélie Villanueva
a.a.villanueva@rug.nl

¹ Faculty of Law, Department of Business Law, European Law and Tax Law, University of Groningen, Groningen, The Netherlands

² This piece reflects on EU's action in the field of sport, especially the Commission White Paper on Sport COM(2007) 391 final, 11.7.2007 and the Council Resolution on the Key features of a European Sport Model OJ C 501, 13.12.2021, p. 1–7.

making sure they are respected. The second characteristic is the legitimacy of SGBs when they adopt rules regarding the recruitment and training of young players. Although it recognises such characteristics, which ground the legitimate objectives pursued by the rules of SGBs, the innovative aspect of the cases is the push of the Court for transparent and non-discriminatory rules of SGBs. Reflecting on the characteristics of the sport sector as recognised and accounted for by the Court in the three judgments, the paper finds that although references to Article 165 TFEU and policy papers relating to the EU's sport action are scarce, the Court nevertheless embraces in substance the same characteristics and priorities. This is especially the case for good governance principles. The paper therefore concludes that the Court protects fundamental ideas and ideals of sport in Europe.

2 Looking beyond Article 165 TFEU

The Court notes that Article 165 TFEU was given great attention at the hearing and devotes attention to the provision in its preliminary observations in the *ESL* and *Royal Antwerp* judgments. The Court legally de-operationalises Article 165 TFEU but recognises its symbolic function within the European Union. In other words, Article 165 TFEU cannot be relied on as a legal argument when the applicability of EU law is concerned. It can, however, support the contextualisation within the objectives of the Treaties, of legitimate aims and objectives related to sport as an activity and to the sport sector. This part reflects on four lessons to learn from the Court's interpretation of Article 165 TFEU.

First, the reading of Article 165 TFEU by the Court is tied to Article 6(e) TFEU which grants the EU a supporting competence in the field of sport. To recall, Article 165 TFEU was introduced in the Treaty of Lisbon alongside the reference to sport under Article 6(e) TFEU. The combination of these two provisions suggests that Article 6(e) TFEU conditions the scope of Article 165 TFEU since the Court reads the former in light of the limits imposed by Article 6(e) TFEU by detailing the 'objectives assigned to Union action and the means which may be used to contribute to the attainment of those objectives.'³ The Court further reads the two provisions together to infer that the drafters of the Treaties intended to confer a supporting competence on the Union, allowing it to pursue not a 'policy', but an 'action' in the field of sport.⁴ Which, according to Article 165(4) TFEU the Parliament and the Council can adopt supporting legislative acts and long as they exclude harmonization of

the legislative and regulatory provisions adopted at national level.

Second, the Court reads Article 165 TFEU in the context of the Treaties. It reminds that Article 165 TFEU has been inserted in part three of the TFEU, which regards 'union policies and internal actions', and not in part one of the TFEU, which includes under Title II 'provisions having general application', the Court concludes that Article 165 TFEU is not a cross-cutting provision having general application.⁵ This implies that the institutions are to take into account the objectives of Article 165 TFEU, when they adopt incentive measures or recommendations in the field of sport. However, Article 165 TFEU does not impose in a binding manner to account for the objectives it promotes, nor the actions and recommendations adopted on its basis, in the application of the substantive rules at play in the preliminary references scrutinised here.⁶ The Court also recalls that Article 165 TFEU does not create a special rule having the effect to exempt sport from all or some of the provisions of the Treaties, nor does it mandate a specific application of EU law to sport.⁷ Hence, Article 165 TFEU does not shield the Member States from the application of EU law. The Court already established in *Bosman* that the specificities of sport cannot have as a consequence the exclusion of the whole of a sporting activity from the scope of EU law.⁸

Advocate General Rantos had suggested in his Opinion of the *ESL* case that Article 165 TFEU 'gives expression to the constitutional recognition of the European Sport Model'.⁹ Further, that the relation between the competition rules and Article 165 TFEU is to be governed by the principle of speciality.¹⁰ Instead, the Court considers that this article cannot be relied on to exclude sporting activity from the scope of EU law. This is in line with the approach of the Court when it is faced with claims that a specific interest, sector or activity is 'special' and deserves a specific treatment under EU law. This approach is observable for example in cases which relate to culture, but also where national identity claims are invoked under Article 4(2) TEU.¹¹ In sum, the Court finds that Article 165 TFEU is neither a shield, nor a sword for the sport sector and SGBs.

⁵ *ESL* para. 100, *Royal Antwerp* para. 68.

⁶ *ESL* para. 101.

⁷ *ESL* para. 101.

⁸ *Bosman* para. 76.

⁹ Opinion of Advocate General Rantos in *ESL* 30. See on this approach Jan Zgliniski <https://blogs.lse.ac.uk/europpblog/2022/12/16/constitutionalising-the-european-sports-model-the-opinion-of-advocate-general-rantos-in-the-european-super-league-case/> accessed on 8 January 2024.

¹⁰ Opinion of Advocate General Rantos in *ESL* para. 35.

¹¹ Villanueva, 2023, p. 62; Faraguna, 2017; von Bogdandy and Schill, 2011.

³ *ESL* para. 96.

⁴ *ESL* para. 99.

Third, the Court does recognise the importance and special characteristics of sport, as laid down in Article 165 TFEU. The Court first acknowledges the relevance of sport in the broader context of today's societies 'sporting activity carries considerable social and educational importance [...] for the Union and for its citizens'.¹² Second, it recognizes that sport is special, it has specific characteristics, both at amateur and professional level.¹³ The recognition of the social and educational function of sport in the cases of the 21st December 2023 complement the Court's previous case law. In *Bosman*, the Court recognised the 'considerable social importance of sporting activities and in particular football in the Community'.¹⁴ In *Bernard*, the Court referred to the 'specific characteristics of sport in general, and football in particular, and their social and educational function'.¹⁵ This is what I have called the societal recognition of sport, that is, a recognition beyond economic interest but that places sport in the broader societal context of European society.¹⁶

Fourthly, as regards the interaction between Article 165 TFEU and the account of the specific characteristic of sports in EU substantive law, the Court develops two approaches. What is common in all the cases, but best explained in *ESL*, is that in the assessment of an impediment to free movement or a restriction of competition, especially when qualifying a rule as a restriction by object or by effect, the characteristics of the sector can be accounted for, especially because it requires a 'specific assessment of the content of that rule in the actual context in which it is to be implemented'.¹⁷ In the same vein, the specific characteristics of the sport sector may be relied when determining whether a specific rule pursues legitimate objectives at the justification stage.¹⁸ This is, however, operationalised differently in the cases. Depending on the case, the Court ties or not the account of the specificities of sport in its substantive analysis with Article 165 TFEU.

In *ESL*, the Court does not refer to Article 165 TFEU whereas in *ISU*, the Court explains:

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.¹⁹

The reference to Article 165(3) TFEU is the only reference to Article 165 TFEU in *ISU* and deserves to be scrutinised in detail. Article 165 TFEU paragraph 3 refers to the cooperation between the EU and the Member States with third countries and the competent international organisations in the field of sport, particularly the Council of Europe. This is different from the reference to Article 165(1) TFEU which regards the contribution of the European Union to the promotion of European sporting issues, which seems to be relevant in *Royal Antwerp*.

In *Royal Antwerp*, the recognition of the legitimate aim to encourage the training and recruitment of young players is contextualised within 'the social and educational function of sport, recognized in Article 165 TFEU, and, more broadly, the considerable importance of sport in the European Union'.²⁰ Yet, the Court does not mention a specific paragraph of Article 165 TFEU. In *Bernard* after determining that the objective of encouraging the recruitment and training of young players was a legitimate objective without referring to Article 165 TFEU, the Court added that in carrying the suitability test of the proportionality assessment, account must be taken of 'the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU'.²¹ The Court thereby did not intermingle the determination of the legitimate objective pursued and the substantive assessment under the proportionality test, as it referred to Article 165(1) TFEU only in the latter case. This approach is close to the one developed in the cases of the 21st December 2023, although the reference to Article 165 TFEU has been removed from the substantive analysis.

What is however distinct between *Bernard* and *Royal Antwerp*, and that is also found in *ISU* is that the Court separates the account of the specific characteristics of the sport sector in the substantive analysis under competition law and free movement law from Article 165 TFEU. I agree with the argument that the reference to Article 165 TFEU did not change the approach of the Court in the post-Lisbon context.²² This is especially because the Court had already found as legitimate several objectives pursued by sport

¹² *ESL* para. 102.

¹³ *ISU* para. 95.

¹⁴ *Bosman* para. 106.

¹⁵ *Bernard* para. 40.

¹⁶ Villanueva, 2024, 216.

¹⁷ *ESL* para. 105; *ISU* para. 96, *Royal Antwerp* para. 110.

¹⁸ *ESL* para. 106.

¹⁹ *ESL* para. 105; *Royal Antwerp* para. 73; *ISU* para. 96.

²⁰ *Royal Antwerp* para. 144.

²¹ Case C-325/08 *Bernard* ECLI:EU:C:2010:143, 40.

²² Duval 2015, 219–220.

association in its previous case law. The first mention of Article 165 TFEU in the context of legitimate aims, as well as in *Royal Antwerp* serve, in my view, a symbolic function. The one to contextualise within the narrative of the Treaties, the objectives pursued in the sport sector, as, under Article 165(1) TFEU the EU is to contribute to the promotion of European sportive issues while accounting for the specific nature of sport.

In other words, Article 165 TFEU does not impose specific values and objectives on courts when they apply EU law to the rules of SGBs. Apart from the symbolic mention of Article 165 TFEU in *Royal Antwerp*, the Court separates Article 165 TFEU from the substantive analysis it carries under free movement and competition law. The Court tends to rely on its own legal toolbox in *ISU* and *ESL* and creates a distinction between Article 165 TFEU and legitimate objectives which might be pursued in the context of sport. The Court thereby limits the legal reach of Article 165 TFEU while it opens the door for an account of the specificities of the sport sector in the legal analysis. This seems much in line with research on the balancing of a diverse set of interests in EU competition law.²³ In my view, in the case of the sport sector, especially of professional football, which is greatly commercialised, such interests do not need to be strictly non-economic to be accounted for. As will be explored in the last part of this paper.

3 Characteristics of sport accounted for in the substantive analysis of the court

This part turns to examine selected excerpts of the cases, where the Court accounts, or suggests the national court to account, for the specific nature of the sport sector. A first finding in the analysis of the cases, is that the Court makes clear how to account for the characteristics of the sport sector under Articles 101(1) and 102 TFEU as well as their respective defences or justifications. However, this is not the case in free movement law where the Court does not give guidance to the national court in the characterisation of a free movement restriction, but only in the justification assessment. This is why this part focuses on the characterisation of restrictions of competition under Article 102 and 101(1) TFEU and the justifications under Article 102 TFEU, 101(1) TFEU and free movement law.

3.1 The reinforced narrative on the values and principles of sport

In the *ESL* and *Royal Antwerp* cases, the Court starts its reasoning by stating: ‘The sport of football is not only of considerable social and cultural importance in the European Union’ it also attracts great interest from the media.²⁴ The Court then identifies two aspects which characterise football in Europe. Firstly, it gives rise, both at the European and national level, to numerous competitions involving many clubs and players. Secondly, football competitions rest on sporting merit which is possible only to the extent that teams compete in homogenous regulatory and technical conditions which ensures a certain level of equal opportunity.²⁵

In *ESL*, the Court finds that based on the specificities of the sport sector, rules aiming to guarantee a level playing field for sporting competition based on *the principles of equal opportunities and sporting merit* can be legitimate.²⁶ Thereby the rules which impose a prior authorisation to third-party organisers and regulate the participation of clubs and players in alternative events can be legitimate tools to ensure the respect of the fundamental principles of the sport sector.²⁷ In a similar vein, the Court finds that sanctions aimed to ensure compliance with such rules can also be legitimate.²⁸ Accordingly, prior authorisation rules can in principle be legitimate and are not per se an abuse of a dominant position.²⁹ The same conclusion is reached in the context of Article 101(1) TFEU.³⁰

In its analysis of potential justifications of restrictions by object, the Court further develops a legitimate objective in rules that ensure the respect of the principles and values of sport. A conduct found incompatible under Article 101(1) TFEU can be found compatible under Article 101(3) TFEU to the extent that it makes it possible ‘to achieve efficiency gains, by contributing either to improving the production or distribution of the products or services concerned, or to promoting technical or economic progress’, that an equitable part of the profit resulting from those efficiency gains is reserved for the users, that it does not impose indispensable restriction in attaining the objective and does not eliminate competition.

The Court makes observations and gives guidance to the national court in both the *ESL* case and in *Royal Antwerp*, the Court integrates the specific aspects of sport and balances

²³ Townley 2009; Kingston 2010; Brook 2022.

²⁴ The Court refers to *Bosman* para. 106 and *Bernard* para. 40.

²⁵ *ESL* para. 143, *Royal Antwerp* para. 105.

²⁶ *ESL* para. 144.

²⁷ *ESL* para. 144.

²⁸ *ESL* para. 146.

²⁹ *ESL* para. 147.

³⁰ *ESL* para. 176.

them against the conditions of Article 101(3) TFEU. The Court recalls that Article 101(3) TFEU ‘can require taking into account the particularities and specific characteristics of the sectors or markets concerned by the agreement, decision by an association of undertakings or concerted practice at issue, if those particularities and specific characteristics are decisive for the outcome of that examination’.³¹

In *ESL*, as to the second condition of Article 101(3) TFEU, the Court does find that the rules could potentially be legitimate, because they guarantee the *respect of principles, values, and rules of the game inherent in professional football*.³² This is especially the case because they promote *an open, meritocratic nature of the competitions and they also ensure a form of solidarity redistribution within football*.³³

Under free movement law, the Court finds in *ESL* a public interest objective which consists in ensuring ‘prior to the organisation of such competitions, that they will be organised in observance of the principles, values and rules of the game underpinning professional football, in particular the values of openness, merit and solidarity, but also that those competitions will, in a substantively homogeneous and temporally coordinated manner, integrate into the ‘organised system’ of national, European and international competitions characterising that sport.’³⁴ The Court thereby relies on the very characteristics of the sport sector to make such observations and advises the national court to account for them.

Along its analysis the Court recognises and develops the legitimate objective of respect of the principles and values of sport. By making references to principles and values such as equal opportunities, sporting merit, the rules of the game, solidarity redistribution and openness, the Court accounts for the particularities and functioning of football in its inherent characteristics. The Court nevertheless leaves the final assessment to the national courts, while giving it guidance as to elements that can be taken into account in the substantive analysis under EU law.

3.2 The reaffirmed legitimacy of rules on the recruitment and training of young players

In *Royal Antwerp*, in its analysis of the legal and economic context under Article 101(1) TFEU the Court recalls that sport competitions are specific ‘products’ from an economic

perspective, it is thereby coherent that associations responsible for a sport discipline adopt rules relating to the organization of competition or their well-functioning, and as to the participation of athletes in it.³⁵ This is if such rules do not limit the exercise of rights and freedoms granted to individuals by EU law.³⁶ The Court recognises that given the conditions of the functioning of professional football, it can in some instances be legitimate to impose nationality requirements.³⁷

The Court then refers to the submissions of the national court, recalling that the contested rules do limit and control the parameters of competition on the market, especially the recruitment of young players which can give a significant advantage to a team compared to another. This impacts both the upstream market, namely the recruitment of young players and the downstream market, inter-club competitions.³⁸ The Court leaves to the national court to determine if this constitutes an object restriction. It however gives them some guidance ordering them to account for the economic and legal context in which the rules were adopted, as well as the specific characteristics of football.³⁹

In the analysis under Article 101(3) TFEU in *Royal Antwerp*, the Court observes that the rules in question may *encourage professional football clubs to recruit and train young players*, and therefore intensify competition through training. It is, however, for the referring court alone to balance the efficiency gains linked to the increase in training with the effects of the restriction of competition.⁴⁰

In *Royal Antwerp*, the Court identifies categories of users and consumers as professional football clubs, the players themselves but also the final consumers, which are the spectators or television viewers.⁴¹ On this point, the Court notes that when it concerns spectators or television viewers, their interests in football competitions can be based on the location of the club and the presence of locally trained players.⁴² It will thereby be for the national court to balance that argument against the one that the rules benefit some clubs at the detriment of others, namely bigger clubs vis-à-vis local clubs.

Under free movement law, in *Royal Antwerp* the court recalls the recognition of the *objective to encourage the recruitment and training of young players* as a legitimate objective in the general interest, as recognized in its previous

³¹ *ESL* para. 200, *Royal Antwerp* para. 126. The Court makes reference to Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* EU:C:2009:610, 103, and Case C-382/12 P *MasterCard and Others v Commission*, EU:C:2014:2201, 236.

³² *ESL* para. 196.

³³ *ESL* para. 196.

³⁴ *ESL* para. 253.

³⁵ *Royal Antwerp* para. 103.

³⁶ *Royal Antwerp* para. 103.

³⁷ *Royal Antwerp* para. 106.

³⁸ *Royal Antwerp* para. 107.

³⁹ *Royal Antwerp* para. 110.

⁴⁰ *Royal Antwerp* para. 129.

⁴¹ *Royal Antwerp* para. 130.

⁴² *Royal Antwerp* para. 130.

case law.⁴³ The Court however voices some doubts as to the capacity of the rules to constitute real and significant incentives for clubs with significant financial resources to recruit young players with a view to training them inhouse. The Court explains that recruitment and training of young players is not only costly and time-consuming but also uncertain, yet it is placed on the same level as the recruitment of young players already trained by any other club affiliated to the same association.⁴⁴ However, it is precisely local investment in the training of young players, in particular when it is carried out by small clubs, where appropriate in partnership with other clubs in the same region and possibly with a cross-border dimension, which contributes to *fulfilling the social and educational function of sport*.⁴⁵ Ultimately, the Court leaves the assessment of the proportionality of the measure, especially its suitability, to the national court.⁴⁶

The Court thereby clearly encompasses a wide range of sports stakeholders in its consideration of the relevant users/consumers under Article 101(3) TFEU. Hence, it considers the sport sector in a broad context, encompassing numerous actors. The Court shows sensibility in its definition of users, and in taking into account the specific nature of football in its connection to the local and amateur level, where grassroots sports start and local players grow, which, after all are aspects close to end users. The Court also shows understanding for the difficulties of small clubs in recruiting and training players in order to comply with the home-grown players (HGP) rules of the national and European football federations.⁴⁷ It guides the national court to take the impact of the HGP rules on clubs depending on their size and geographical location into account. These are also specificities of the sport sector which form part of the Court's analysis. This sensitivity of the Court deserves to be noted and confirms that it accounts for the specificities of the sector in different parts of its reasoning in *Royal Antwerp*.

4 A new push for transparent and non-discriminatory rules and procedures of SGBs

After recognising that the rules in question could pursue legitimate objectives, the analysis of the Court takes a different (and until now unknown) analytical turn in *ESL*, both under Article 101(1) TFEU and Article 102 TFEU. The Court explains that, the adoption and implementation of rules on prior-approval and participation in competition, confer on

SGBs the power to restrict market access.⁴⁸ When such rules and their implementation are not subject to restrictions, obligations and review, they are not capable of eliminating a risk of abuse of a dominant position.⁴⁹ This is especially where there is *'no framework for substantive criteria and detailed procedural rules for ensuring that they are transparent, objective, precise and non-discriminatory'*.⁵⁰ Therefore the Court concludes that such rules without procedural safeguards, must be held to infringe Article 102 TFEU. This constitutes in competition law, a new abuse.⁵¹

Under Article 101(1) TFEU, on the same grounds, the Court finds that the rules at stake allow UEFA and FIFA to exclude from the market competing undertakings which would provide for new competitions, depriving the end users from the possibility to benefit from them.⁵² The Court concludes that the nature of the rules on prior approval, participation and sanction at issue, reveal a sufficient degree of harm to competition which qualifies as a restriction of competition by object.⁵³

In *ISU*, the parties challenged the application by the General Court of the *MOTOE* case.⁵⁴ The Court recalls that rules which confer to a dominant undertaking the power to determine which competing undertakings may or may not enter the market as well as imposing conditions on market entry are likely to impede the development of a healthy competition based on merits.⁵⁵ Consequently, such a power must be subject to restrictions, obligations and review in order to exclude its arbitrary use, which constitutes an abuse of dominant position.⁵⁶ In particular, the Court recalls that the pre-authorisation criteria must be transparent clear and precise, and that sanctions must be objective and proportionate.⁵⁷

Apart from the characterization of a restriction or an abuse of a dominant position under Article 102 TFEU, this reasoning is also relied on in the analysis of justifications under Article 102 TFEU, Article 101(3) TFEU and free movement law.

The Court addresses the possibility for the rules qualifying as an abuse of dominant position under Article 102 TFEU to be justified. The Court however finds that because of their discretionary nature, the rules can in 'no way' be

⁴⁸ *ESL* para. 147.

⁴⁹ *ESL* para. 147.

⁵⁰ *ESL* para. 147.

⁵¹ *Monti* 2024 p. 16.

⁵² *ESL* para. 176.

⁵³ *ESL* para. 178.

⁵⁴ Case C-49/07 *MOTOE* ECLI:EU:C:2008:376, 38, 49, 51, 52. For more details on the reasoning in *MOTOE* in the *ISU* case, see Agafonova 2019, p. 93.

⁵⁵ *ISU* para. 125.

⁵⁶ *ISU* para. 126–127.

⁵⁷ *ISU* para. 131–132.

⁴³ *Royal Antwerp* para. 144. The Court refers to *Bosman* para. 106 and *Bernard* para. 39.

⁴⁴ *Royal Antwerp* para. 147.

⁴⁵ *Royal Antwerp* para. 147. The Court refers to *Bernard* para. 44.

⁴⁶ *Royal Antwerp* para. 146.

⁴⁷ *Royal Antwerp* para. 147.

regarded as being objectively justified by technical or commercial necessities, unlike what could be the case if there was a framework for those rules providing for substantive criteria and detailed procedural rules meeting the requirements of transparency, clarity, precision, neutrality and proportionality which are imperative in this field.⁵⁸ Again, it is the discretionary nature of the rules that is key in excluding any justification under Article 102 TFEU.

It is also important to note that in *ESL* and to a certain extent in *ISU*, the Court does not challenge the legitimacy or necessity of the rules as such, but is critical of their form and lack of transparency. The Court's proportionality assessment stresses further the need for transparent and non-discriminatory rules of SGBs. This is the most innovative part of the cases because of the underlying principles and vices of SGBs. SGBs have considerable and multi-dimensional powers over the sport sector. By focusing on the form of the rules rather than on their substance the Court openly criticises the quality of governance within SGBs, and implicitly their functioning. Although the critique of the governance of SGBs is familiar to supporters and affiliates of sport, it now finds expression in the law.

The relevance of procedural safeguards also applies to the analysis of possible justifications under free movement law in *ESL*. The legitimate objectives identified by the Court cannot justify rules that do not include criteria which are transparent, objective, precise and non-discriminatory.⁵⁹ In other words, they must 'be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the discretion conferred thereby on the body empowered to grant or refuse that prior approval, so that that power is not used arbitrarily'.⁶⁰ The Court insists on *how* the powers of SGBs are exercised and imposes strict legal thresholds on their procedures. SGBs will have to comply with procedural requirements if they wish to ensure the legal validity of the rules they adopt. From a legal standpoint, the requirements created by the Court can apply to a wide range of rules adopted by SGBs which therefore points at the wide-ranging consequences of the judgements for sport governance.

The focus of the Court on the transparent, objective, precise and non-discriminatory nature of pre-authorization rules is surely a fundamental aspect of the *ESL* and *ISU* judgments. This is a strong position for the Court to hold and imposes on SGBs to consider seriously their governance structures and procedures.

⁵⁸ *ESL* para. 203.

⁵⁹ *ESL* para. 253. The Court makes a cross reference to *ESL* para. 147, 175, 176 and 199.

⁶⁰ *ESL* para. 255.

5 The European sport model thriving through law

The characteristics of sport that the Court mentions in the extracts of the parts discussed here are intrinsic to professional football such as the principles of equal opportunities and sporting merit, the pyramidal structure of the game, the recruitment of young players, such characteristics of sport have been mentioned by the Court itself in its previous case law.⁶¹

Such characteristics of sport are also present in the EU's policy papers and political declarations on sport. For example, in the 2007 Commission White Paper on Sport, the Commission identified as a possible initiative the development of a common set of principles for good governance in sport.⁶² In the sport work plans, proposed by the Commission and adopted by a Council Resolution, the integrity of sport is one of the central priorities, it covers good governance and the specificity of sport.⁶³ In the Resolution of the Council on the key features of a European Sport Model, the Council identified the key features of sport in Europe as:

An organization of sport that is autonomous, democratic and territorial based on a pyramidal structure, that encompasses all levels of sport from grassroots to professional sport, comprising both club and national team competitions and including mechanisms to ensure financial solidarity, fairness and openness in competitions, such as the principle of promotion and relegation.⁶⁴

Yet, the concept of the European Sport Model is also dear to sport associations because it provides a certain legitimacy to the pyramidal structure of the governance of European sports, and a justification to the regulatory interventions of SGBs. Accordingly, they tried to mobilize the policy documents of the European Commission and the Council Resolution as a defense against the applicability and application of EU competition law to their regulations. In her article on the *ISU* case, Russa Agafonova examines such arguments

⁶¹ This is clear from the numerous cross-references the Court has made in the judgments of the 21 December 2023. See also, Villanueva, 2024, pp. 213–216.

⁶² Commission White Paper on Sport COM(2007) 391 final, 11.7.2007, 12. For more context and details on the White Paper on Sport see Weatherill 2014, pp. 425–441.

⁶³ Council Resolution on a European Union Work Plan for Sport for 2011–2014 OJ C 162 1.6.2011 pp. 1–6; Council Resolution on the European Union Work Plan for Sport (2014–2017) OJ C 18 14.6.2014 pp. 12–17; Council Resolution on the European Union Work Plan for Sport (1 July 2017–31 December 2020) OJ C 189 15.06.2017 pp. 5–14.

⁶⁴ Council Resolution on the Key features of a European Sport Model OJ C 501, 13.12.2021, p. 1–7, 8.

but concludes that the European Sport Model is safe in the hands of the Court.⁶⁵ Miguel Mota Delgado reaches a similar conclusion as regards the judgment of 21 December 2023 in *ESL*.⁶⁶

Taking this into account, it is worth recalling that the concept of the European Sport Model has been instrumentalised by many parties at the hearing. The specificity of these arguments, and this is also reflected in the opinion of Advocate General Rantos, is that they tied the European Sport Model to Article 165 TFEU. Yet, in the judgments the Court does not make a reference to the concept of the European Sport Model. As Giorgio Monti sees it, the message of the Court is ‘do not use Article 165 TFEU to try and justify restrictive business practices in the name of the social and educational values of sport’.⁶⁷ In other words, by refusing to Article 165 TFEU nor the policy documents and political declarations on the European Sport Model, the Court opted to interpret EU law outside of (even against) its political and policy context.

Yet, ironically, the specific characteristics of sport embraced by the Court in its judgments are substantially the same as the ones referred to in the European Commission’s policy documents. This indicates that the characteristics of the European Sport Model remain, although not under this name, central in the analysis of the Court. What remains puzzling is that the Court does not mention policy documents nor political declarations on the European Sport Model in its rulings. Instead, the Court relied on its traditional analytical toolbox to account for the specific characteristics of the sports sector, while pushing SGBs to adopt transparent and non-discriminatory rules and procedures.

6 Conclusion

Overall, the Court accounts for several characteristics of the sport sector, at the heart of its competition law analysis and in discussing whether the restrictions to free movement and competition law can be justified. The specific characteristics that were discussed in this paper are the reflection of sport’s values, the recruitment and training of young players, and the more general requirement for transparent and objective procedures accompanying the rules of governing bodies.

As regards Article 165 TFEU, at first view it can seem as if the Court had neutralized this provision. However, I argue in this paper that the approach of the Court is more subtle. It reaffirms that sport is of special relevance in the European Union, and such specificities are to be accounted for in

the substantive analysis, when applying free movement and competition law.

The Court has been, and continues to be, at the forefront in shaping the interaction between sport and EU law. In doing so it does not bow to the European Commission’s policy papers or the political declarations of the Council, but follows its own path. In fact, the December rulings should be seen as a conscious push by the Grand Chamber for good governance reforms at SGBs. Indeed, what in my view is most remarkable with these cases is how good governance has become central in the assessment of the conformity with EU law of the decisions and regulation of the SGBs.

Author contributions A.V. wrote the entire manuscript.

Data availability No datasets were generated or analysed during the current study.

Declarations

Competing interests The authors declare no competing interests.

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⁶⁵ Agafonova 2019, p. 100.

⁶⁶ Mota Delgado 2024 <https://verfassungsblog.de/the-european-game/> accessed on 7 January 2024.

⁶⁷ Monti 2024, p.6.

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