

‘Tu CASa no es mi casa’: Is the Autonomy of EU Law Looming over Sport Arbitration?

Francesco GRAVINA^{*}

This article examines whether arbitral proceedings before Arbitral Panels established under the procedural rules of the Court of Arbitration for Sport (CAS) breach the interpretative monopoly of the Court of Justice of the European Union (CJEU) over the definitive interpretation of EU law. As a starting point, the contribution briefly outlines the relationship between the Union’s legal order and sports rules up to the judgment of the CJEU of December 2023 in International Skating Union (ISU) v. Commission, whose findings concerning competition law are scrutinised in view of the case law of CJEU on the autonomy of Union law. In this respect, it concludes that incompatibility with the latter principle cannot be ruled out due to the exclusive jurisdiction of the Swiss Federal Supreme Court (FSC) to hear appeals against CAS awards within the scope of the EU treaties. In conclusion, the article discusses select possibilities designed to ensure, on the one hand, unity and consistency in the interpretation of international sports rules and, on the other hand, respect for the autonomy of EU law.

Keywords: Autonomy of the EU Legal Order, Sports Arbitration, Court of Arbitration for Sport, International Skating Union v. Commission, Achmea

1 INTRODUCTION: TWO (DIFFERENTLY) AUTONOMOUS ORDERS AND THEIR INTERACTION SO FAR

The word autonomy derives from the Greek syntagm *αὐτονομία*, which is composed of *αὐτός* (self) and *νόμος* (law). Its dictionary meaning is ‘the right of self-government’ and it is a polysemic formula usually encompassing different situations in which one or more individuals or groups, not necessarily within the ambit of inter-state relationships,¹ retain a degree of ruling over themselves without external interference.² In the context of sports law, some of the actors of the Olympic Movement³ have been granted by the states and required by the International

^{*} Doctoral Research, Universität St.Gallen. I would like to thank Prof. Dr Thomas Burri for the insightful comments on an earlier draft. Omissions and mistakes are exclusively attributable to the author. Email: francesco.gravina@unisg.ch.

¹ L. Swaine, *The Origins of Autonomy*, 37 Hist. Pol. Thought 216, 236 (2016).

² J. Odermatt, *The Principle of Autonomy: An Adolescent Disease of EU External Relations Law*, in *Structural Principles in EU External Relations Law* 291 (Marise Cremona ed. 2018).

³ According to the Olympic Charter, the Olympic Movement is composed of the ‘three main constituents’ listed in Art. 1.2 and the other persons indicated in Art. 1.3.

Olympic Committee (IOC)⁴ a level of vertical autonomy from various classical functions of the state. Among the tasks of public powers, the bodies governing sports have attained the power of norm-setting in connection with, inter alia, the participation of athletes in competitions and to settle disputes relating to those and other laws.⁵ For the connection with EU law that will be outlined *infra*, the present contribution will focus on the function to solve grievances raised by athletes or clubs administered by arbitral organs established by the Sports Governing Bodies (SGBs) at the international, including regional, level (e.g., the *Fédération Internationale de Football Association*, FIFA). Most SGBs have allowed, once ‘internal’ remedies have been exhausted, to appeal their decisions to Panels established under the aegis of the Court of Arbitration for Sport (CAS)⁶ seated in Lausanne, and, therefore, whose awards are amenable to set aside proceedings before the Swiss Federal Supreme Court (FSC).⁷ In that regard, it has been observed that global sports law has acquired an autonomous status⁸; moreover, Duval undertook an analysis of various branches of *lex sportiva* as an empirical demonstration of an ‘impure theory of transnational law’,⁹ notwithstanding –and given– the supervisory role of the Swiss FSC. Most notably, the function of hearing appeals against CAS awards is practically neglectable, as it has been pointed out that CAS awards are seldom annulled due to the strictness of the grounds for setting aside those awards and that that apparatus of settlement of sports controversies usually mandates the prohibition for ordinary courts of law on hearing these disputes pertaining to the sporting activity.¹⁰

With regard to the preclusion to institute proceedings before domestic courts, it can be noted that there is an inherent tension between sports arbitration and EU law owing to the fact that the Court of Justice of the European Union (CJEU or Court of Justice) has consistently ruled that Article 19(1) Treaty on European Union (TEU) entails that ‘it is for the national courts and tribunals [of the EU Member States] and the [CJEU] ... to ensure effective judicial protection of the rights of individuals under [EU] law, the Court having exclusive jurisdiction to give the definitive interpretation of that law’.¹¹ As a consequence, within that

⁴ Fifth Fundamental Principle of Olympism.

⁵ V. Boillet, S. Weerts & A. R. Ziegler, *Introduction*, in *Sports and Human Rights* 4 (V. Boillet, S. Weerts & A. R. Ziegler eds 2024). For all ‘the possibilities’ that the autonomy of sporting bodies entails J. L. Chappelet, *Autonomy of Sport in Europe* 49 (2010).

⁶ For example, FIFA Statutes, Art. 57(2).

⁷ Federal Act on Private International Law (PILA), Arts 176(1), 190(2) & 191.

⁸ J. Lindholm, *Court of Arbitration for Sport and Its Jurisprudence: An Empirical Inquiry into Lex Sportiva* 197 (2019).

⁹ A. Duval, *What Lex Sportiva Tells You About Transnational Law*, in *The Many Lives of Transnational Law: Critical Engagements With Jessup’s Bold Proposal* 282–291 (Peer Zumbansen ed. 2020).

¹⁰ S. Weatherill, *Saving Football from Itself: Why and How to Re-make EU Sports Law*, 24 Cambridge Y.B. Eur. Legal Stud. 5–6 (2022), doi: 10.1017/cel.2022.3; on the jurisprudence regarding PILA, Art. 190, A. Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1(1) J. Int’l Disp. Settlement 264 (2010), doi: 10.1093/jnlids/idp010.

¹¹ Cases C-741/19, *République de Moldavie*, 2 Sep. 2021, ECLI:EU:C:2021:655, para. 45 and C-516/22, *Commission v. United Kingdom*, 14 Mar. 2024, ECLI:EU:C:2024:231, para. 68.

framework, the CJEU and the ‘ordinary’ courts of the EU legal order are the guardians of the EU law,¹² for whose uniformity of interpretation the treaties have established a procedure for dialogue between those judicial bodies.¹³ Furthermore, the courts and tribunals of the Member States of the EU must safeguard the essential characteristics of the Union legal order,¹⁴ related to the constitutional framework that is unique to it,¹⁵ from which its autonomy flows.¹⁶ Two reflections may be made in connection with these remarks coming from established case law. Firstly, it is apparent that the principle of jurisdictional autonomy of EU law denotes a different facet of the notion of *αὐτονομία* in comparison to the SGBs’ vertical autonomy, *viz.* the CJEU’s exclusive jurisdiction to determine the final interpretation of the provisions contained in the sources of EU law.¹⁷ Secondly, it appears that different philosophies underpin EU law and sports arbitration; while the former structurally depends on the courts of the Member States of the EU and their cooperation with the CJEU for its (decentralized) enforcement, the latter seeks to be independent of interferences from ordinary courts.¹⁸

Nonetheless, the relationship between EU competition law and the SGBs has been said to be influenced hitherto by the formula of conditional autonomy,¹⁹ whereby their nature of gatekeepers of the market of sporting competitions, where participants compete and cooperate at the same time,²⁰ has been permitted. A constraint to this permission is that the sporting rules are necessary and

¹² Opinion 1/09, 8 Mar. 2011, ECLI:EU:C:2011:123, para. 66.

¹³ Opinion 2/13, 18 Dec. 2014, ECLI:EU:C:2014:2454, para. 176.

¹⁴ Case C-284/16, *Achmea*, 6 Mar. 2018, ECLI:EU:C:2018:158, para. 33.

¹⁵ Opinion 1/17, 30 Apr. 2019, ECLI:EU:C:2019:341, para. 110.

¹⁶ Case C-741/19, *République de Moldavie*, *supra* n. 11, para. 44. Underlining the CJEU’s circular reasoning in this case law, M. Karayığit, *The Compatibility of the ISDS Mechanism under the Energy Charter Treaty With the Autonomy of the EU Legal Order*, 29 Eur. Foreign Aff. Rev. 1, 85 (2024), doi: 10.54648/EERR2023031.

¹⁷ C. Eckes, *The Autonomy of the EU Legal Order: The Case of the Energy Charter Treaty*, Amsterdam Ctr. Eur. Law & Governance Res. Paper 21 (2023); C. Rapoport, *Balancing on a Tightrope: Opinion 1/17 and the ECJ’s Narrow and Tortuous Path for Compatibility of the EU’s Investment Court System (ICS)*, 57 Com. Mkt. L. Rev. 1743 (2020), doi: 10.54648/COLA2020766.

¹⁸ This parallel was drawn from Ivana Damjanovic, *The European Union and International Investment Law Reform: Between Aspirations and Reality* 123–125 (2023). Regarding the purpose of the CAS ‘to take international sports disputes out of national courts’, see L. Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, 2012 J. Disp. Resol. 1, 63 (2012). Further on the autonomy of EU law: K. Lenaerts, J. A. Gutiérrez-Fons & S. Adam, *Exploring the Autonomy of the European Union Legal Order*, 81(1) Heidelberg J. Int’l L. 47 (2021); C. Eckes, *The Autonomy of the EU Legal Order*, 4 Eur. & World L. Rev. 19 (2020), doi: 10.14324/111.444.ewlj.2019.19; E. Kassoti & J. Odermatt, *The Principle of Autonomy and International Investment Arbitration: Reflections on Opinion 1/17*, 73 Questions Int’l L. 5 (2020); J. Lindeboom & R. A. Wessel, *Introduction: European Integration. Autonomy and Legal Theory*, 8(3) Eur. Papers: A J. on L. & Integration 1247, 1254 (2023).

¹⁹ See for other formulae J.-L. Chappelet, *The Autonomy of Sport and the EU*, in *Research Handbook on EU Sports Law and Policy* 157, 167–168 (J. Anderson, R. Parrish & B. García eds 2018).

²⁰ P. Ibáñez Colomo, *Competition Law and Sports Governance: Disentangling a Complex Relationship*, 45 World Competition 7, 8 (2022), doi: 10.2139/ssrn.4130043.

proportionate to the conduct of the sport, among others to set common standards of safety and quality.²¹ In addition, with regard to free movement law, the Court has ‘created’ a framework for limited interference with norms issued by SGBs, by consistently holding that sports norms are outside the scope of this branch of EU law on the condition that involve ‘question[s] of purely sporting interest ... ha[ving] nothing to do with economic activity’,²² though do not *ipso facto* remove from the remit of Union law the person engaging in the activity governed by that rule or the entity laying it down.²³ Indeed, also from the standpoint of the principle of jurisdictional autonomy of EU law, there should be no complication in connection with sports arbitration as long as sporting tribunals do not imperil the interpretative monopoly of the CJEU as regards Union norms. In respect of this latter, the Court could exert a check on a case-by-case basis where disputes in front of CAS Panels come within the scope of EU law, as deemed acceptable in other areas of the *acquis*. However, various dicta in the recent decision *International Skating Union v. Commission*²⁴ (hereinafter, *ISU*) appear to point in the direction of a problematic interaction between sports arbitration and the jurisdictional autonomy of EU law *in abstracto*. In particular, the ruling might alert that EU law does not tolerate anymore the current structure of international sports arbitration.

2 THE CASE

On 21 December 2023, the Grand Chamber of the Luxembourg Court handed down a ‘trilogy’ of judgments that concerned the compliance of certain sporting rules with both free movement (Articles 45 and 56) and competition (Articles 101 and 102) provisions of the Treaty on the Functioning of the European Union (TFEU).²⁵ Although all three decisions involved the resolution of similar points of law, the main eccentric feature of *ISU* is that the Decision of the European Commission (Commission) that the skating governing body sought to annul concluded that ‘[ISU] Appeals Arbitration rules *reinforce* the restriction of [the

²¹ Weatherill, *supra* n. 10, at 11–15. For the Court’s orthodox vision of conditional autonomy, Case C-415/93, *Bosman*, 15 Dec. 1995, ECLI:EU:C:1995:463, para. 81; Case C-22/18, *TopFit and Biffi*, 13 Jun. 2019, ECLI:EU:C:2019:497, para. 52. For the views of the Commission as to sporting rules compliance with EU law, Commission, Staff Working Document – The EU and Sport: Background and Context – Accompanying document to the White Paper on Sport, 11 Jul. 2007, SEC/2007/0935 final, Annex I, para. 2.4 and Annex II, para. 1. But see Case C-415/93, *Bosman*, para. 136.

²² See the case law cited in Case C-124/21 P, *International Skating Union v. Commission*, 21 Dec. 2023, ECLI:EU:C:2023:1012, para. 92.

²³ Case C-519/04 P, *Meca-Medina and Majcen*, 18 Jul. 2006, ECLI:EU:C:2006:492, para. 27. For a synopsis of the cases in this field prior to the Dec. 2023 trilogy, Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* 249–253 (2022).

²⁴ Case C-124/21 P, *International Skating Union v. Commission*, *supra* n. 22.

²⁵ Cases C-333/21, *European Superleague Company (ESL)*, 21 Dec. 2023, ECLI:EU:C:2023:1011 and C-680/21, *Royal Antwerp FC*, 21 Dec. 2023, ECLI:EU:C:2023:1010.

Athletes'] commercial freedom and the foreclosure of ISU's potential competitors [resulting from the Eligibility rules]' (*italics added*).²⁶ The significance of this finding, on which the following sections are centred, lies in the fact that for the first time arbitration rules set forth by a SGB undergo the scrutiny of Article 101 TFEU, for whose understanding it is useful to reconstruct the reasoning of the bodies called to adjudge on that question of law.

2.1 THE COMMISSION'S ASSESSMENT

First and foremost, the factual landscape in *ISU* will be outlined: two Dutch skaters lodged a complaint with the Commission alleging that certain provisions in the 2014 ISU Eligibility Rules, whereby athletes participating in competitions not authorized by the ISU could face a ban from ISU events, constituted a decision of an association of undertakings in breach of EU law in that those norms prevented them from taking part in a contest set up by Icederby, which promised better economic conditions.²⁷ Prominently, the provisions of the Eligibility Rules at hand were the object of an amendment in 2016,²⁸ whose main purpose was to eliminate the reference to the skating governing body's economic interests, that nevertheless did not erase the *de facto* obligation for athletes to take part in ISU-sanctioned or ISU-approved events.²⁹ In brief, the Commission sided with the athletes, and (on this question) the General Court (GC) rejected all the pleas put forward by the ISU, with the Court agreeing on the dismissal of the appeal against the GC's decision.

Reverting to the focus of this contribution, i.e., the ascertainment that the arbitration rules in Articles 25 and 26 of the ISU Constitution reinforce the restriction of competition that follows from the Eligibility Rules, the Commission, the GC, Advocate General (AG) Rantos, and the Court came to differing conclusions. Starting with the Commission's reasoning, the provisions that stipulate that the CAS is the sole body in front of which adverse decisions of the ISU Council as to the ineligibility of a competition may be appealed pose 'hurdles ... that protect potentially anti-competitive decisions of the ISU Council'³⁰ due to the following considerations. As to the contestation of CAS

²⁶ Commission Decision C(2017) 8230 final of 8 Dec. 2017 (Case AT.40208 – International Skating Union's Eligibility rules), recital 286.

²⁷ *Ibid.*, recital 22.

²⁸ *Ibid.*, recitals 49–55.

²⁹ H. Vedder, *On Thin Ice: The Court's Judgment in Case C-124/21 P, International Skating Union v. Commission*, 9 Eur. Papers J. L. & Integration 1, 89 (2024).

³⁰ C(2017) 8230 final, *supra* n. 26, recital 277.

awards, there is a lack of effectiveness of judicial protection based on, among others:

- The case law of the Swiss FSC, from which it flows that EU competition law does not form part of Swiss public policy within the meaning of Article 190(2)(e) PILA.³¹
- Being the FSC a court of a third state, it cannot refer questions to the CJEU should doubts in interpreting EU law arise.³²

Here is the first possible link with the principle of jurisdictional autonomy of EU law. Eligibility norms potentially run afoul of the *acquis*, given that the EU athletes' rights to engage in an economic activity depend on the decisions of an association of undertakings potentially restricting competition, and the verification of the compliance therewith is relinquished in favour of a court that is external to the system of judicial cooperation set up by the EU treaties. Furthermore, the situation is aggravated by certain additional factors.³³ In the wake of the statement of objections, the ISU advanced several arguments against those findings. While some pleas will be presented in the context of the scrutiny carried out by the GC, as they were resubmitted in the appeal, from the standpoint of the autonomy of EU law the most interesting one is that the parties to CAS awards may lodge an annulment action with the Swiss FSC should the Union competition rules be not taken into account as mandatory law in the arbitral decision. Unsurprisingly, the Commission repeats its findings in relation to the unavailability of the preliminary reference procedure for both the CAS and the FSC as an element that does not grant the interpretation of EU law 'to the requisite substantive and procedural standards'.³⁴

2.2 THE GC AND AG RANTOS

Called to rule on the appeal against the Commission's decision brought by ISU, the GC tested the plea on the part concerning arbitration norms against the yardstick of the aggravating circumstances of a breach of competition law.³⁵ This choice was criticized as conflating these circumstances with 'reinforcements' of a restriction of competition by AG Rantos, who also cast doubts concerning the

³¹ SFC, *Tensacciai*, 8 Mar. 2006, 4P.278/2005, para. 3.1 is cited.

³² C(2017) 8230 final, *supra* n. 26, recital 271.

³³ *Ibid.*, recitals 272–275. Namely: the ease of enforcing CAS awards, whose review by a court of a Member State may exclusively lead to the non-recognition –not the annulment– thereof in that particular Member State; the CAS Code reduces the possibility of obtaining interim relief in state courts, and the fact that athletes do not actually agree to arbitrate disputes relating to eligibility.

³⁴ *Ibid.*, recital 283. See also Case C-284/16, *Achmea*, *supra* n. 14.

³⁵ Case T-93/18, *ISU*, paras 146–155.

juridical value of a finding of a breach of competition law *ad abundantiam*.³⁶ As for the merits, in the view of the GC, the arbitration rules at issue do not aggravate the harm caused by the eligibility provisions in light of, *inter alia*:

- The interests of specialization, procedural uniformity, and legal certainty that justify the exclusive competence of the CAS over disputes arising from sporting competitions involving athletes coming from different jurisdictions.³⁷
- The possibility to initiate proceedings for damages suffered by athletes for violations of EU competition law in front of national courts within the Union, which may refer questions on the interpretation of the EU treaties for a preliminary ruling to the CJEU, and
- The athletes' right to apply to the Commission or national competition authorities for the exercise of their power to find an infringement of Article 101 TFEU.³⁸

Lastly, and noticeably from the standpoint of the autonomy of EU law, the GC distinguished the case of arbitral tribunals that may be seized by an investor in accordance with an investment agreement concluded between EU Member States (intra-EU BITs) and the CAS. Specifically, the establishment of this latter, in contrast to the former, 'does not derive from a treaty by which Member States agreed to remove ... from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law'.³⁹

Losing on this point of law and following the appeal against the GC's ruling proposed by the ISU, the two Dutch athletes filed a cross-appeal with the CJEU requesting to set aside the part of the GC's decision that had quashed parts of Articles 2 and 4 of the Commission's decision.⁴⁰ In his Opinion, AG Rantos approved of the GC's holdings on the issue of the appeal rules as a reinforcement of a violation of competition law; in the sporting context, specialization is necessary, and it would be inconceivable to envisage a system in which each participant in an international competition could plead the illegality of a SGB's decision in front of his/her home state's courts.⁴¹ Essentially, the AG opined that CAS arbitration finds its justification in the interest against judicial fragmentation and the specific nature of sports.⁴² Furthermore, his Opinion expanded upon the

³⁶ Opinion of AG Rantos in Case C-124/21 P, *ISU*, 15 Dec. 2022, ECLI:EU:C:2022:988, paras 145–151.

³⁷ Case T-93/18 *ISU*, para. 156, reproducing almost *verbatim* *Mutu and Pechstein v. Switzerland*, applications no. 40575/10 and 67474/10, §98, 2 Oct. 2018 but omits to mention the FSC, cited by the ECtHR instead.

³⁸ *Ibid.*, paras 157–160, which concede that no annulment of CAS awards is possible.

³⁹ *Ibid.*, para. 162, citing Case C-284/16, *Achmea*, *supra* n. 14.

⁴⁰ For the content of those provisions, *see* s. 6.

⁴¹ Opinion of AG Rantos in Case C-124/21 P, *ISU*, *supra* n. 36, paras 157–159.

⁴² A. Duval, *The International Skating Union Ruling of the CJEU and the Future of CAS Arbitration in Transnational Sports Governance*, *The Int'l Sports L. J.* 1, 3 (2024).

distinctive elements in the comparison between CAS Panels and investment tribunals, adding further arguments to the formalism of the GC pointing to the nature of the instrument in which the offer to arbitrate appears. As to the parties to the arbitration agreement, the Member States of the EU are not involved in laying down the provisions in SGB regulations submitting disputes to the CAS and, hence, the respect of the principles of mutual trust and sincere cooperation among them are not jeopardized.⁴³ In this instance, the AG and the GC struggled to subsume CAS arbitration within the formula of a waiver of the right to bring proceedings before ordinary courts that ‘originate[s] in the freely expressed wishes of the parties’, such as in the case of contractual arbitration proceedings, that according to settled case-law do not offend against the principle of jurisdictional autonomy of EU law, subject to the conditions indicated in that jurisprudence.⁴⁴ In fact, AG Rantos envisaged the opposite scenario: should an ‘asymmetry of powers’ between athletes and SGBs have been found to subsist, he considered that as long as ‘the independence and impartiality of the CAS are not called into question’⁴⁵ and its exclusive jurisdiction can be justified by the legitimate interest of specialization, those arbitration proceedings cannot reinforce an infringement of competition law.⁴⁶ If this evaluation is taken into the context of the jurisprudence on the principle of jurisdictional autonomy of EU law, which has never mentioned exceptions based on legitimate values justifying the relinquishment of the jurisdiction over EU law in favour of an organ outside the judicial system of the EU and its independence and impartiality, it is unprecedented.⁴⁷

2.3 THE COURT OF JUSTICE

Subsequently, the Court of Justice started the analysis of the plea of the cross-appeal on the arbitration rules as a reinforcement of an infringement of competition law with the alleged ‘general and undifferentiated’ conclusion that the appeal jurisdiction of the CAS, exclusively insofar as it entails the supervisory role of the

⁴³ Opinion of AG Rantos in Case C-124/21 P, *ISU*, *supra* n. 36, para. 165, also referring to Case C-284/16, *Achmea*, *supra* n. 14, para. 58.

⁴⁴ Cases C-284/16, *Achmea*, paras 54–55 and C-638/19, *European Food*, 25 Jan. 2022, ECLI:EU:C:2022:50, para. 144.

⁴⁵ *Mutu and Pechstein*, nos. 40575/10 and 67474/10, §§150–159 justifies this assertion. However, see the joint opinion of judges Keller and Serghides in that case, paras 5–16 and A. Rigozzi, *Sports Arbitration and the European Convention of Human Rights – Pechstein and Beyond*, in *New Developments in International Commercial Arbitration* 88–107 (C. Müller, S. Besson & A. Rigozzi eds 2020).

⁴⁶ Opinion of AG Rantos in Case C-124/21 P, *supra* n. 36, para. 167.

⁴⁷ Save for considering the ‘requirements of efficient arbitration proceedings’ in Case C-284/16, *Achmea*, *supra* n. 14, para. 54 as an exception to Arts 19(1) TEU and 267 TFEU. Whereas, as it shall be *seen infra*, the *Achmea* test simply applies in a different fashion to proceedings originating from ‘freely expressed wishes of the parties concerned’; as a result, formally there is no exception to that principle.

Swiss FSC,⁴⁸ is grounded in values relating to the specific nature of sports. As regards the scope of EU competition law, the Court clarified that it applies *ratione materiae*, only to the extent the arbitration rules relate to controversies on the exercise of sport as an economic activity, and *ratione loci*, insofar as they are implemented on the territory in which the EU treaties apply.⁴⁹ Then, the CJEU considered the possibility envisaged by AG Rantos' subsidiary argument deeming CAS arbitration compatible with EU law seen above. Specifically, the Court began by recalling its *EcoSwiss* jurisprudence under which the efficiency of arbitral proceedings justifies a judicial review of the award limited to strict grounds for annulment exhaustively listed by national law. In particular, the jurisdictional scrutiny must ensure the observance of fundamental provisions of EU public policy, therein included Articles 101 and 102 TFEU, especially when the arbitral proceedings are 'in practice, imposed by a person governed by private law'.⁵⁰ On top of that, the obligation of effective judicial examination imposes that the court carrying it out fulfils 'all the requirements under article 267 TFEU'.⁵¹ In this regard, the Court appeared to stress the supervising role of the Swiss FSC, whereas the AG and the GC pointed out the rationale of unifying global sports law underlying the establishment of an institution like the CAS.

Eventually, the Court devoted the final paragraphs of the ruling to dismissing the remaining objections raised by the ISU and upheld by the GC. The possibility of suing the SGBs for damages caused by infringements of the *acquis* in the courts of the EU Member States 'cannot compensate' those jurisdictions, also following arbitration proceedings, lacking the power to grant provisional measures, enjoin the cessation of conduct or order the annulment of a measure of the international sporting federation in favour of professional athletes, 'whose career may be especially short, in particular where they practice ... sport at a high level'.⁵² Put otherwise, the prospect of receiving compensation several years –as to be expected in many national *fora*– after the end of a brief career is particularly unsatisfying for professional sportspeople.⁵³ Eventually, the Court held that the Commission was correct in assessing the Appeal Arbitration Rules of the ISU as reinforcing the breach of Article 101 TFEU ensuing from the Eligibility Rules; as a consequence,

⁴⁸ Case C-124/21 P, *ISU*, para. 191.

⁴⁹ *Ibid.*, paras 189–190.

⁵⁰ *Ibid.*, paras 193, 225.

⁵¹ *Ibid.*, para. 198 citing, inter alia, Case C-126/97, *Eco Swiss*, 1 Jun. 1999, ECLI:EU:C:1999:269, para. 40.

⁵² *Ibid.*, para. 201.

⁵³ P. Landolt, *CJEU's Decision in International Skating Union v. European Commission: Its Manageable Consequences for International Arbitration*, Kluwer Arb. Blog 3 (10 Apr. 2024), <https://arbitrationblog.kluwerarbitration.com/2024/04/10/cjeus-decision-in-international-skating-union-v-european-commission-its-manageable-consequences-for-international-arbitration/>. All websites were last accessed on 13 Mar. 2025, at 15.26 (CET).

the judgment of the GC was partially overturned, and the action of the ISU before the GC was dismissed for the remaining part.⁵⁴

3 THE DECISION IN THE CONTEXT OF THE AUTONOMY OF EU LAW

As observed in the scholarship, the Court refrained from conducting its assessment of the arbitration rules of the ISU Constitution with regard to its decision in *Achmea*; yet, it was also pointed out that the Court's assessment was 'imbued' with the spirit of the principle of jurisdictional autonomy of EU law as interpreted therein.⁵⁵ As a matter of fact, the Court of Justice stressed that the need for an effective review, operated by the judiciary of the Member States of the EU, of extra-judicial methods of settling disputes that remove controversies within the scope of EU law also applies to the vertical autonomy of the SGBs.⁵⁶ By contrast, the ruling in *ISU* cannot be said to constitute an *Achmea* moment for sports arbitration in front of the CAS, inasmuch as the Court did not declare it incompatible *tout court* with EU law,⁵⁷ and did not –directly– look at it through the lens of the autonomy of the EU legal order. In fact, the verification of its legality with EU rules was carried out according to competition norms and in connection with specific provisions issued by the ISU whose restrictive object was reinforced by arbitration norms. On the other hand, *ISU* made clear that EU competition law is generally applicable in the case of arbitration rules that govern controversies arising from the enforcement of provisions laid down by an international federation that concern sport as an economic activity.⁵⁸ In light of this (non-innovative)⁵⁹ finding of the applicability of EU law to the economic aspects of sport and other findings of *ISU*, what would be the outcome of the scrutiny of sports justice if evaluated in light of the case law of the principle of jurisdictional autonomy of EU law? In case of a conclusion of incompatibility, the finding of reinforcement of a restriction of

⁵⁴ In fact, the Court of Justice itself adjudged on the appeal proposed by the ISU on the part of the decision of the Commission that held arbitration rules as reinforcing a breach of competition law, essentially repeating its findings on the cross-appeal (Case C-124/21 P, *ISU*, *supra* n. 48, paras 221–231).

⁵⁵ P. Paschalidis, *ISU v. Commission: Arbitration as a Reinforcement of Infringements of EU Competition Law*, Kluwer Arb. Blog 4 (9 Jan. 2024), <https://competitionlawblog.kluwercompetitionlaw.com/2024/01/09/isu-v-commission-arbitration-as-a-reinforcement-of-infringements-of-eu-competition-law/>.

⁵⁶ Vedder, *supra* n. 29, at 102.

⁵⁷ S. Wuschka, *ISU v. Commission – the 'Achmea Moment' for Sports Arbitration and Beyond?*, Luther Law Firm (17 Jan. 2024), <https://www.luther-lawfirm.com/en/newsroom/press-releases/detail/isu-v-commission-the-achmea-moment-for-sports-arbitration-and-beyond>.

⁵⁸ Case C-124/21 P, *ISU*, *supra* n. 48, para. 94.

⁵⁹ G. Monti, *EU Competition Law After the Grand Chamber's December 2023 Sports Trilogy: European Superleague, International Skating Union and Royal Antwerp FC* 3–4 (31 Jan. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4686842.

competition could effectively turn into a trojan horse in which the ‘essential characteristics’ of the EU legal order could be hiding and ready to strike when the night comes in Troy, i.e., if the concerned actors of the Olympic movement do not self-reform to accommodate the CJEU’s demands for better sports governance in authorizing competitions organized by competing undertakings.⁶⁰

Prior to delving into the answer to the question of compliance with Articles 19 TEU and 267 TFEU, it is useful to distinguish between different offers to arbitrate before CAS panels. In this respect, Article R27(1) CAS Code provides for various instruments that can contain an agreement to arbitrate in front of the Panels under its aegis: contracts, regulations, or statutes of a sports-related body and ad hoc or ‘later’ arbitration agreements. As far as contracts and ad hoc or later agreements are concerned, the procedures in front of CAS panels arising therefrom mostly fit within the ‘freely expressed wishes of the parties’ formula. Specifically, in comparison to the regulation and statutes of the SGBs, which are drafted only by their organs over which athletes might only exert an indirect influence through elected representatives, contracts and ad hoc agreements are likelier to be the result of a genuine concurrence of wills between the athletes and the SGBs, for they imply a negotiation with the individual sportsperson. Hence, the agreements to arbitrate sporting disputes flowing from contracts and ad hoc or later agreements probably do not contravene the principle of jurisdictional autonomy of EU law,⁶¹ notwithstanding the possibility of national courts of the EU Member States not to grant enforcement and recognition should the awards rendered by CAS Panels breach EU competition law.⁶² As a result, the following sections will only deal with agreements to arbitrate resulting from the regulations and statutes of the SGBs.

4 DOES THE *ACHMEA* TEST APPLY TO SPORTS JUSTICE?

By way of introduction, it should be recalled that the Court of Justice in *Achmea* tested whether arbitral proceedings pursuant to an intra-EU BIT complied with the autonomy of EU law per a three-pronged test. As to the choice of conducting

⁶⁰ Namely, the substantive criteria for granting an authorization must be ‘transparent, clear and precise’ so as to prevent an arbitrary and discriminatory application, and ‘enable effective review’. Besides, they have to be accompanied by ‘transparent, non-discriminatory detailed procedural rules’ and proportionate sanctions (see the similarly framed Cases C-124/21 P, *ISU*, *supra* n. 48, paras 131–135 and C-333/21, *ESL*, paras 135–136, both citing Case C-1/12, *Ordem dos Técnicos Oficiais de Contas*, 28 Feb. 2013, ECLI:EU:C:2013:127). Further on these criteria, Monti, *supra* n. 59, at 13–16.

⁶¹ See Cases C-284/16, *supra* n. 44, for which see K. Von Papp, *EU Law and International Arbitration: Managing Distrust Through Dialogue* 119–121 (2021). The scenario in which they do not fall under that dictum could be subject to the burden of proof laid down in *Mutu and Pechstein*, nos. 40575/10 and 67474/10, §119.

⁶² Wuschka, *supra* n. 57 and, by analogy between competition and state aid law, Case C-333/19, *Romatsa* (order), 21 Sep. 2022, ECLI:EU:C:2022:749. +Eco Swiss, para.38

the appraisal of CAS arbitration under the *Achmea* test, this latter has the merit of providing a clear framework against which to assess extra-judicial methods of dispute settlement and whose validity has been consistently confirmed in the successive case law of the CJEU on investment arbitration.⁶³ Being cognizant of this subject-matter limitation, this section also examines if any of the findings of that jurisprudence find application in the case of CAS arbitration. Regarding its content instead, the test verifies (1) if an arbitral tribunal applies and/or interprets the *acquis*. (2) Providing that the preceding step produces a positive finding, whether the same tribunal classifies as a court or tribunal of a Member State of the EU. (3) On the condition that the prior step leads to a negative outcome, whether the arbitral award issued at the end of those proceedings is subject to the full review of a court of a Member State of the EU.⁶⁴ Should the third prong of the test conduct to a negative answer, the principle of jurisdictional autonomy of EU law is breached; whereas, as laid down in section 2.2, a preliminary issue is whether sports arbitration falls within the commercial arbitration exception to *Achmea*, which deems compatible with Articles 19 TEU and 267 TFEU a review of the awards that is ‘limited in scope’ and for which it ought to be verified whether the Member States of the EU ‘agree to remove from the jurisdiction of their own courts ... disputes [within the scope of EU law]’.⁶⁵

Turning now to the disputes between athletes/clubs and the SGBs at the world or regional level, it is necessary to consider the findings of the GC, AG Rantos, on the one part, and the Court of Justice, on the other, in *ISU* and contextualize them into the case law of the jurisdictional autonomy of EU law. As seen *supra* at section 2.2, AG Rantos built upon the holding of the GC and maintained that:

- (1) ‘the establishment of the CAS does not derive from a treaty by which Member States agreed to remove from the jurisdiction of their own courts disputes which may concern the application or interpretation of competition law’.
- (2) Hence, the principles of mutual trust and sincere cooperation among the EU Member States are not infringed.⁶⁶

⁶³ Opinion 1/17, *supra* n. 15, paras 126–127 (distinguishing with *Achmea*); Cases C-741/19, *République de Moldavie*, *supra* n. 11, paras 47–66 (applying the test), C-638/19, *European Food*, *supra* n. 44, paras 141–144 (applying the test without the first step); Opinion 1/20, 16 Jun. 2022, ECLI:EU:C:2022:485, para. 47 (confirming the findings of *République de Moldavie*).

⁶⁴ Case C-284/16, *Achmea*, *supra* n. 14, paras 39, 43 and 50. C. Contartese & M. Andenas, *EU Autonomy and Investor-State Dispute Settlement under Inter se Agreements Between EU Member States: Achmea*, 56(1) *Com. Mkt. L. Rev.* 163 (2019), doi: 10.54648/COLA2019007.

⁶⁵ Case C-638/19, *European Food*, *supra* n. 44, para. 139.

⁶⁶ *Supra* n. 43. On the (limited) role of the sources of international law in sports law, Boillet, Weerts, Ziegler, *supra* n. 5, at 4–5.

Admittedly, the reconstruction of the law in the second prong operated here by the AG is remarkable, since the reflections on the case law on the principle of jurisdictional autonomy have underlined that the respect of the principle of mutual trust is of central importance.⁶⁷ In detail, compliance with the principle of mutual trust entails a more lenient scrutiny of a dispute settlement mechanism when complied with, as extra-EU relations may be guided by reciprocity.⁶⁸ That could hypothetically be the case where a competition is organized in non-EU countries, such as the Dubai Icederby. The Member States of the EU, were they involved in the arbitration agreement, could legitimately not trust the judicial system of the EAU, which has territorial jurisdiction, and, in order to better protect the EU athletes' interests, submit disputes relating to that event to a neutral CAS Panels. That being said, the speculative nature of this example explains why the Court did not consider the second point in AG Rantos' argument even if it did not question the validity of the first point.

Only incidentally implying that some controversies before the CAS may have more than one 'intra-EU element',⁶⁹ the Court of Justice ruled against the ISU and held that CAS proceedings are *de facto* mandated by a person constituted under private law in fields covered by EU law.⁷⁰ Therefore, the premise in the first prong of the AG's reasoning is reformulated as follows: while it is true that the Member States play no role in the removal of the disputes relating to EU competition law from the judicial system of the EU, there is nonetheless a subject who subtracts these controversies. By referring to the private nature of the SGBs, the Court likely struck out the application of Article 344 TFEU, which was at issue in *Adhinea* jointly with Article 267 TFEU, in that does not extend to controversies between private parties.⁷¹ Furthermore, the mere circumstance that the CAS stands outside the EU judicial system does not *per se* adversely affect the autonomous nature of the EU legal order.⁷² Yet, what seems to be called into question with the relinquishment to the CAS of disputes between SGBs and clubs/athletes over the participation of the latter in sporting competitions is the 'preservation of the particular nature of the law established by the [EU] Treaties, ensured by the preliminary ruling procedure'.⁷³ In actual fact,

⁶⁷ Opinion of AG Szpunar in Case C-741/19, *République de Moldavie*, 3 Mar. 2021, ECLI:EU:C:2021:164, para. 87.

⁶⁸ B. Böhme, *The Future of the Energy Charter Treaty after Moldova v. Komstroy*, 59(3) Com. Mkt. L. Rev. 865, 866 (2022), doi: 10.54648/COLA2022054 referring to Opinion 1/17, *supra* n. 15, paras 117 and 122. For some critical aspects of Opinion 1/17, see Eckes, *supra* n. 18, at 18–19.

⁶⁹ Most SGBs have their seat outside the territory of the EU (Arts 52 TEU and 355 TFEU), but the competitions may take place there with EU athletes participating. See Case C-124/21 P, *supra* n. 48 on the scope of application of EU competition law.

⁷⁰ Case C-124/21 P, *supra* n. 48.

⁷¹ Opinion of AG Kokott in Case C-109/20, *PL Holdings*, 22 Apr. 2022 EU:C:2021:321, para. 58 citing Opinion 1/09, *supra* n. 12, para. 63.

⁷² Opinion 1/17, *supra* n. 15, para. 115.

⁷³ Opinion 1/09, *supra* n. 12, para. 85; Case C-109/20, *PL Holdings*, 26 Oct. 2021, EU:C:2021:875 para. 46. See also Angelos Dimopoulos, *EU Foreign Investment Law* 329–330 (2011).

despite the absence of any international agreement⁷⁴; on the one hand, the SGBs are subject to specific obligations under EU law when laying down rules on prior approval of sporting competitions when having a competing economic interest⁷⁵ and, on the other, the review of their acts, together with the protection of athletes' rights under EU law, are assigned to an arbitral tribunal. In connection with the review of the measures of the SGBs pertaining to economic activity, the awards of CAS Panels may only be appealed in front of a court of a third country, thus 'depriv[ing] th[e] courts and tribunals [under Article 267 TFEU] of the power to request preliminary rulings from the Court in that field'.⁷⁶

Nevertheless, as said above, it should be recalled that all the cited case law on the principle of jurisdictional autonomy of EU law flowing from Articles 19(1) TEU and 267 TFEU concerned the legality of concluded or envisaged international agreements. But in *ISU* there are several indicia of its applicability to CAS arbitration. As for arbitral procedures already identified in the case law of the CJEU, there are those (1) based on the 'freely expressed wishes of the parties'. For these proceedings, limited review, for instance, confined to the inarbitrability of the dispute according to the law of the seat of arbitration and other strict grounds,⁷⁷ abides by the principle of jurisdictional autonomy. Returning to arbitral procedures considered by the CJEU, it also found (2) arbitral proceedings originating in an agreement between or among Member States of the Union. In that regard, the Court might point to the existence of a third kind of arbitral proceedings for the purpose of verifying the respect of the ultimate authority to determine the meaning of EU law held by the Luxembourg Court: those unilaterally 'imposed by a person governed by private law', whose final award must undergo effective review by the 'ordinary' courts of the EU legal order in order not to infringe competition law. Most notably, the creation of this new category may seem paradoxical because the parties' consent is the main defining characteristic of arbitration as a dispute settlement mechanism.⁷⁸ Nonetheless, this category of 'forced proceedings' may be

⁷⁴ Unless considering the New York Convention of 1958 [UNTS, vol. 330 (at 3)] and other treaties in the field of international arbitration; nevertheless, their existence bore no weight in the finding of Case C-741/19, *République de Moldavie*, *supra* n. 11, para. 59 and the case law cited therein.

⁷⁵ Monti, *supra* n. 59, at 11 referring to Case C-124/21 P, *ISU*, *supra* n. 48, paras 131–135.

⁷⁶ Opinion 1/09, *supra* n. 12, para. 79.

⁷⁷ As noted by G. Saumier, *The Law Applicable to Post-Award Issues*, in *Cambridge Compendium of International Commercial and Investment Arbitration* 1603–1604 (S. Kröll, A. K. Bjorklund & F. Ferrari eds, Cambridge Univ. Press 2023), the grounds for setting aside an award are a matter for the *lex fori*. But the content of the law of the place of the arbitration may have been shaped by the adoption – also with amendments – of the UNCITRAL Model Law, Art. 34, as is the case for some Member States (e. g., Germany, Austria). Furthermore, the provisions on the reasons for the annulment of an award, at least as regards the refusal of recognition and enforcement of an award annulled in another jurisdiction, might be regulated by international treaties, such as the European Convention on International Commercial Arbitration (UNTS, vol. 484, at 349), Art. IX.

⁷⁸ M. L. Moses, *The Principles and Practice of International Commercial Arbitration* 2 (2017).

justified taking into account the peculiar position of athletes facing an arbitration clause in the Statute of a SGB.⁷⁹ As recognized by the European Court of Human Rights ('ECtHR'), albeit on a case-by-case basis, 'the only choice [could be] between accepting the arbitration clause ... or not accepting it and being obliged to refrain completely from earning a living from ... sport at that level'.⁸⁰ It ought to be noted that this and other paragraphs of *Mutu and Pechstein* were cited by the Court of Justice, whereas the GC and the AG stressed other parts of that same decision of the Strasbourg Court, thereby possibly constituting an example of 'selective' horizontal dialogue.⁸¹ On top of the reference to the alleged waiver of the guarantees of Article 6 ECHR, the CJEU probably considers the SGBs in a position akin to the undertakings referred to in Article 106 TFEU.⁸² Conversely, the Court seems to suggest the possibility of juxtaposing the standard of 'limited' review of awards delivered at the end of mutually agreed arbitration proceedings with CAS arbitration, as the systematic citation of a case concerning commercial arbitration (*Eco Swiss*) in paragraphs 192, 193, and 198 of *ISU* suggests. Still, the Court arguably takes issue with the fact that 'fundamental provisions of EU law [cannot] be the subject of a reference to the Court for a preliminary ruling'.⁸³ Without purporting to foresee the future, the next section will proceed assuming the applicability of the *Achmea* test, with its third prong limited to the verification of the respect of fundamental provisions of Union law, based on the impossibility of CAS arbitration to rely on the commercial arbitration exception to *Achmea*.

5 WOULD SPORTS JUSTICE SURVIVE THE *ACHMEA* TEST?

According to the first element of the *Achmea* test, it ought to be ascertained whether a dispute settlement body or organ applies EU law. As to CAS arbitration, pursuant to Article 58 of the CAS Code,⁸⁴ EU norms may be applied by a CAS

⁷⁹ Even though it cannot be excluded, as Wuschka, *supra* n. 57 and L. Fumagalli, *Arbitrato e rinvio pregiudiziale: Un altro rifiuto della Corte di giustizia. Una strada senza uscita?*, Riv. del Contenzioso Eur. 7 (2024) acknowledge, that the findings of *ISU* could be extended to commercial arbitration proceedings seated outside the EU involving questions of EU competition law. One case in which the findings of *ISU* could be juxtaposed to commercial arbitration would be the case of a contract that provides for such proceedings i.e., part of or constitutes an abuse under TFEU, Arts 101 or 102.

⁸⁰ *Mutu and Pechstein*, nos. 40575/10 and 67474/10, §113, mentioned partly in Case C-124/21 P, *ISU*, *supra* n. 48, para. 225, in the context of a possible waiver of the guarantees under ECHR, Art. 6(1). On this point, see Rigozzi, *supra* n. 45, at 83–85.

⁸¹ For the meaning of horizontal dialogue, L. Halleskov Storgaard, *Composing Europe's Fundamental Rights Area: A Case for Discursive Pluralism*, 17 Cambridge Y.B. Eur. Legal Stud. 210, 215 (2015), doi: 10.1017/cel.2015.8.

⁸² Paschalidis, *supra* n. 55, at 3.

⁸³ Hence, Case C-741/19, *République de Moldavie*, *supra* n. 11, para. 59 and the case law therein cited do not 'apply'.

⁸⁴ The analysis of the Ordinary Arbitration Procedure, for which see CAS Code, Art. R45, is omitted as *ISU* –arguably– mainly concerned the appeal of the *ISU*'s acts applying the Eligibility Rules.

Panel as rules of law chosen by the parties to the dispute,⁸⁵ or, in the absence of such a choice, as the law of the EU country in which a SGB is domiciled. Alternatively, a Panel may apply EU law if deemed appropriate or –as the ISU claimed in the administrative proceedings of the Commission– ‘taken into account’ as mandatory provisions of law.⁸⁶ As regards this latter formulation, a similarly-worded clause in *Achmea* led the Court to conclude that the arbitral tribunal at hand in that ruling ‘[might have been] called on to interpret or indeed to apply EU law’.⁸⁷

As for the second step of the *Achmea* test, by ascertaining whether the body that applies and/or interprets EU law may be considered as a court empowered to lodge requests for preliminary rulings with the CJEU, it is essentially aimed at assessing if it is possible to resolve *ex-ante* the risk of conflicting interpretations of EU law.⁸⁸ The CJEU in *Mytilinaios* briefly summarized its case law regarding arbitral tribunals qualifying as jurisdictions allowed to lodge references for a preliminary ruling:

arbitration tribunals ... whose jurisdiction is based on an agreement between the parties ... are not regarded as courts of a Member State [, whereas] arbitration tribunals whose jurisdiction is mandatory by law ... could be regarded as courts of a Member State if the other conditions set out in Article 267 TFEU are satisfied.⁸⁹

It ought to be noted that the Court prudently added ‘if the other conditions set out in Article 267 TFEU are satisfied’, among which the criterion of independence is considered in the overall assessment according to established case law.⁹⁰ In that connection, the Court of Justice has recently declared as inadmissible a request submitted by the Independent Arbitration Committee (IAC) of Austria, the body entitled to review anti-doping sanctions, because of the lack of external independence.⁹¹ Concerning the procedures before CAS Panels instead, there is

⁸⁵ Though in the context of an Ordinary Procedure, CAS 2023/O/9370, *PROFAA v. FIFA*, award of 24 Jul. 2023, paras 168–169.

⁸⁶ PILA, Art. 19 as interpreted in, inter alia, CAS 2016/A/4492, *Galatasaray v. UEFA*, award of 3 Oct. 2016, paras 41–45. Be that as it may be, see A. Duval, *Seamstress of Transnational Law: How the Court of Arbitration for Sport Weaves the Lex Sportiva*, in *Entangled Legalities Beyond the State* 268–274, especially at 274 (N. Krisch ed. 2022).

⁸⁷ Case C-284/16, *Achmea*, *supra* n. 14, paras 4, 40–42.

⁸⁸ Contartese & Andenas, *supra* n. 64, at 159.

⁸⁹ Joined Cases C-701/21 P and C-739/21 P, *Mytilinaios*, 22 Feb. 2024, ECLI:EU:C:2024:146, paras 81–82 and 104–106. Further case law that classifies arbitral tribunals as courts and tribunals of the Member States within the meaning Art. 267 TFEU is listed in Fumagalli, *supra* n. 79, at 5, who also doubts the qualification of these bodies as arbitral tribunals *stricto sensu*, as their jurisdiction derives from the law rather than the consent of the parties.

⁹⁰ P. Craig & G. De Búrca, *EU Law: Text, Cases, and Materials* 498–499 (2020). More recent cases confirming that conclusion: Cases C-274/14, *Banco de Santander*, 21 Jan. 2020, ECLI:EU:C:2020:17, paras 51 and 56, C-132/20, *Getin Noble Bank*, 29 Mar. 2022, ECLI:EU:C:2022:235, para. 66, C-403/21, *Construct*, 26 Jan. 2023, ECLI:EU:C:2023:47, para. 39, and Case C-718/21, *Krajowa Rada Sądowictwa*, 21 Dec. 2023, ECLI:EU:C:2023:1015, para. 40.

⁹¹ Case C-115/22, *NADA*, 7 May 2024, ECLI:EU:C:2024:384, paras 48–53.

no need to analyse their position within that case law inasmuch as they manifestly lack the qualification of ‘courts or tribunals of a Member States’, since they are embedded in the Swiss legal system and, so, their awards are only reviewable by the Swiss FSC – a court of a third state that undeniably cannot refer questions for a preliminary ruling.⁹² A positive solution to the debate on the vexed question of the independence of the CAS could not, as a result, modify the impossibility of a ‘dialogue’ with the CJEU.⁹³

Therefore, if an organ of the sports judiciary does not satisfy the conditions of Article 267 TFEU to be qualified as part of the judicial order of a Member State of the EU, it is necessary to ascertain whether its decisions are subject to review by a court of the EU judicial system. That scrutiny must be capable of ensuring compliance at least with the fundamental provisions of EU public policy,⁹⁴ thus verifying the possibility of an *ex-post* solution to the risk of conflicting applications of Union norms.⁹⁵ Taking the example of the Austrian IAC, the applicable legislation empowers, inter alia, the World Anti-Doping Agency, the IOC, and the competent SGB to appeal the decision of the IAC in front of the CAS.⁹⁶ Considering also that ‘in order not to be covered by [Article 101(1) TFEU], the restrictions ... imposed by [anti-doping rules] must be limited to what is necessary to ensure the proper conduct of competitive sport’,⁹⁷ the Court in *ISU* stressed the insufficiency of the availability of the sole action to seek damages in front of the courts or tribunals of the EU Member States for the purpose of the effectiveness of EU law.⁹⁸ As a consequence, if the Court’s reasoning is extended to the verification of the third step of the *Achmea* test, the athletes’ right to apply with the domestic courts of the EU to have a measure set aside or bring a conduct to an end is essential for the protection of the monopoly of the definitive interpretation of Union law held by the Court of Justice. Such a stretching of the Court’s holding could be undue because of the explicit mentioning

⁹² This is what Case C-124/21 P, *ISU*, *supra* n. 48, paras 191, 198 and 225 seem to suggest. See also *supra* n. 34.

⁹³ See also *supra* n. 45. In the scholarship, on the democratization of the CAS as a basis for the ‘post-consensual’ foundation of its mandatory and exclusive jurisdiction, see Antoine Duval, *Not in My Name! Claudia Pechstein and the Post-Consensual Foundations of the Court of Arbitration for Sport*, Max Planck Inst. for Compar. Pub. L. & Int’l L. Res. Paper No. 2017–01, at 24–27 (20 Feb. 2017).

⁹⁴ As Matthias Schrader et al., *CJEU’s ‘ISU Decision’: A Nail in the Coffin of Antitrust-Related Arbitration in the EU?*, Kluwer Arb. Blog (9 Feb. 2024), <https://arbitrationblog.kluwerarbitration.com/2024/02/09/cjeu-isu-decision-a-nail-in-the-coffin-of-antitrust-related-arbitration-in-the-eu/> observes, the Court refrains from introducing a ‘full review’ standard, although ‘it is hard to imagine how state courts could conduct the required analyses ... without performing a full review of the merits’.

⁹⁵ Contartese & Andenas, *supra* n. 64, at 159.

⁹⁶ Anti-Doping-Federal Act of 2021, §23(4), which also allows direct appeal to the CAS in case of international competitions and athletes. See also the 2021 World Anti-Doping Code, https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf, Arts 13.2.1 and 13.2.2.

⁹⁷ Case C-519/04 P, *Meca-Medina and Majcen*, *supra* n. 23, para. 47. However, see SEC/2007/0935 final *supra* n. 21, para. 3.4.b).

⁹⁸ Case C-124/21 P, *ISU*, *supra* n. 48, paras 200–201.

of the ‘subjective’ necessity to protect the sportspersons’ brief career, rather than the ‘objective’ goal to safeguard the jurisdictional autonomy of EU law. On the other hand, the ‘subjective’ and ‘objective’ aims are inextricably interconnected, since ‘it is for the national courts and tribunals [of the EU Member States] and the [CJEU] ... to ensure effective judicial protection of the rights of individuals under [EU] law’.⁹⁹ As a consequence, –by way of illustration– legislation such as the Austrian one, allowing private bodies to submit disputes relating to the participation of athletes in competitions outside the EU judicial system, might hinder the principle of jurisdictional autonomy of EU law.¹⁰⁰ Nonetheless, if found to violate the principle of jurisdictional autonomy, it remains to be established how to avert, as underlined by AG Rantos, the danger of fragmentation that would result from the power of any domestic jurisdiction in the EU to annul a decision of national anti-doping tribunals.

6 HOW TO RECONCILE SPORTS JUSTICE WITH EU LAW IN THE WORST-CASE SCENARIO?

As observed by an author, the safest solution to get CAS arbitration in line with EU law would be to move its seat into the European Union,¹⁰¹ though another scholar doubts that it would be required by *ISU* itself.¹⁰² In this respect, a recent element of novelty is that on 21 June 2024 the Executive Committee of the Union of European Football Associations (UEFA) amended the Authorization Rules governing International Club Competitions of 2022.¹⁰³ For the purposes of this article, the main innovation is the introduction of Article 16(3), which entitles the party filing an appeal or a request for provisional measures to the CAS to ‘indicate in its first written submission ... whether [it] accepts Lausanne, Switzerland, as seat of the arbitration or if [it] shall be in Dublin, Ireland’.¹⁰⁴ In relation to this amendment, three aspects stand out. Firstly, the UEFA Congress of July 2024 did not modify the

⁹⁹ See Cases C-741/19, *République de Moldavie*, *supra* n. 11. Moreover, the effectiveness of EU judicial review would be severely weakened if the judiciary within the EU were only allowed (as is now) to award compensation after several years from the abusive conduct/act, *see supra* n. 54.

¹⁰⁰ Noteworthy, cf., Case C-115/22, *NADA*, *supra* n. 91, para. 56 and Case C-124/21 P, *ISU*, *supra* n. 48, para. 203, which suggest together that the respect of Arts 19 TEU and 267 TFEU may depend on the law applicable to the complaints submitted before an administrative authority entrusted to apply EU law.

¹⁰¹ Duval, *supra* n. 42, at 6–8.

¹⁰² Paschalidis, *supra* n. 55, at 5.

¹⁰³ UEFA Circular Letter 33/2024, 21 Jun. 2024, and enclosure, <https://www.uefa.com/news-media/documents/circular-letters>.

¹⁰⁴ UEFA Authorization Rules governing International Club Competitions – Edition 2024, Art. 16(3). Further in that paragraph: ‘[i]n the latter case, UEFA is bound by the choice of Dublin, Ireland, as seat of the arbitration ... In case no seat is indicated in the first written submission to CAS, Article R28 of the CAS Code shall apply’ and the following paragraph ‘[t]he decision of CAS shall be final and binding to the exclusion of jurisdiction of any ordinary court ... This is without prejudice to the right of appeal of any party in accordance with the applicable law of the seat of the arbitration’.

reference to the CAS Code, that in Article R28 still sets Lausanne as the place of arbitration, contained in Article 63(2) of the UEFA Statutes.¹⁰⁵ This circumstance, combined with the fact that the possibility of choosing Dublin as a seat is provided for by an ‘ordinary’ regulation, appears to confirm that the right to have the arbitration proceedings seated in the territory of a Member State of the EU is limited to the decisions of the UEFA Executive Committee applying the authorization rules, as amended with no retroactive effect. Secondly, and in connection with this first point, this choice of UEFA does not consider that EU law, be it competition or free movement law, covers a wider array of rules that affect sport insofar as it constitutes an economic activity besides the eligibility norms for competitions organized by undertakings other than a SGB.¹⁰⁶ Lastly, UEFA is ‘the football governing body at European level’ recognized by FIFA at the worldwide level (Articles 3(1) and 3bis(1) of the UEFA Statutes). A recent case demonstrates that EU law may apply to and potentially bite rules and decisions implementing those norms issued by FIFA –not to mention universal or regional federations governing other sports– as well,¹⁰⁷ in respect of which there is no right to challenge before CAS Panels seated in the EU.

Reverting to *ISU*, considering that the CJEU’s findings do not extend to ‘disputes concerning merely the sport as such’,¹⁰⁸ the conclusion of CAS rules as reinforcing the breach of competition rules constituted by the ISU Eligibility Rules arguably means that once these are repealed,¹⁰⁹ arbitration before the CAS for disputes in non-economic fields is legitimate for EU law.¹¹⁰ In the case at hand, the fate of the ISU Appeal Arbitration rules is in the hands of the Commission: Article 1 of its decision, as a whole left unscathed by judicial review, exclusively refers to the Eligibility Rules and Article 2 to ‘bring to an end the infringement referred to in Article 1’. As a result, the Commission has discretion in evaluating whether the actions that the ISU undertakes in order to comply, envisaging explicitly the possibility that only the Eligibility Rules and the associated sanctions may be dropped,¹¹¹ satisfy or not its demands. In the latter case, ISU would face

¹⁰⁵ UEFA Circular Letter 28/2024, 3 Jun. 2024, and enclosures. Not to mention that the Authorization Rules cited above, Art. 16(1) still (ambiguously) recites that ‘[a]ny dispute related to these rules ... shall be finally resolved by arbitration before the CAS in accordance with the [...] CAS Code’.

¹⁰⁶ Confirmed in Case C-650/22, *FIFA v. BZ*, 4 Oct. 2024, ECLI:EU:C:2024:375, paras 75–81.

¹⁰⁷ *Ibid.*

¹⁰⁸ Case C-124/21 P, *ISU*, *supra* n. 48, para. 190.

¹⁰⁹ *Ibid.*, para. 189 seems to suggest that EU law will apply even if the Eligibility Rules are simply amended.

¹¹⁰ As noted by Stephen Weatherill, *Protecting the Conditional Autonomy of Governing Bodies in Sport from Review ‘from a Competition Standpoint’: How the Court Should Decide Its Pending Cases on the Transfer System, the Regulation of Agents and Club (Re-)Location*, EU Law Analysis (11 May 2024), <http://eulawanalysis.blogspot.com/2024/05/protecting-conditional-autonomy-of.html> any rule has an economic impact.

¹¹¹ C(2017) 8230 final, *supra* n. 26, recital 339. See also Landolt, *supra* n. 53, at 3.

the fine provided for by Article 4 of the decision. In any case, what if anti-competitive sporting rules are not repealed and athletes and/or clubs or organizations thereof institute proceedings in front of a domestic court of a Member State either to have an act of a SGB annulled or order the cessation of a conduct, essentially aimed at declaring that CAS arbitration over provisions on sanctions and/or eligibility of competitions violates the monopoly of the Court of Justice over the definitive interpretation of EU law?¹¹² As this article has demonstrated, a positive finding cannot be excluded altogether and, at that point, there would be the need to address the issue, *de iure condendo*, to guarantee the unity of the interpretation of the sporting rules *vis-à-vis* the danger of judicial fragmentation.¹¹³

Despite the recent steps undertaken by the European SGB of football seen above, the current leadership of the CAS dismissed the possibility of moving its seat.¹¹⁴ Hence, a basic concern is whether the CAS, still seated outside the EU when hearing disputes covered by EU law except for the (limited) cases falling within the scope of the new UEFA authorization rules, may be reconciled with the jurisdictional autonomy of EU law in case an incompatibility is found. One solution could be to adopt a Unified Patent Court (UPC)-like arrangement,¹¹⁵ which would entail, specifically to address the final authority of the Court of Justice in interpreting EU law, the following steps. Firstly, the conclusion of an international agreement among at least the EU Member States that expressly qualifies CAS Panels as ‘court[s] common to the Member States of the EU’¹¹⁶ when hearing an appeal against the decisions of the SGBs implemented in the territory of the EU, thereby (probably) empowering them to ‘dialogue’ with the CJEU.¹¹⁷ Secondly, the treaty thus concluded would have to provide that the jurisdiction of the Swiss FSC to hear appeals against CAS awards, always

¹¹² Landolt, *supra* n. 53, at 2 observes that such parallel jurisdiction would probably violate the New York Convention, Art. II(3); nonetheless, it could also be claimed that an agreement to arbitrate could be null and void under Art. 101(2) TFEU in light of *ISU*. Even if not null, the words of J. Klabbers, *Treaty Conflict and the European Union* 200 (2009) to describe the case law of the CJEU ought to be taken into account.

¹¹³ Duval, *supra* n. 42, at 6.

¹¹⁴ *Ibid.*, n. 50.

¹¹⁵ OJ2013/C 175/01 (hereinafter, UPCA).

¹¹⁶ Following the blueprint of UPCA, Art. 21 for which see N. Kuplewatzky, *Completing the Woodcut: On the Feasibility of an Intra-EU Investment Court*, in *Workshop on New Frontiers for EU Investment Policy* 162 (M. Bungenberg & A. Reinisch eds 2022) and Case C-337/95, *Parfums Christian Dior*, 4 Nov. 1997, ECLI:EU:C:1997:517, para. 21.

¹¹⁷ Also, for the distinguishing elements between the unified patent litigation system and the UPCA, J. Alberti, *When Judicial Dialogue Needs Strong Institutional Commitments: The Peculiar Case of the Creation of the Unified Patent Court*, Geneva Jean Monnet Working Paper 15, 12–14 (2016). Conversely, the part of the scholarship that questions the possibility of the UPC to lodge references for preliminary rulings in light of Case C-196/09, *Miles and Others*, 14 Jun. 2011, ECLI:EU:C:2011:388, paras 40–45 is indicated in M. Szpunar, *Is the Court of Justice Afraid of International Jurisdictions?*, 37 Polish Y.B. Int’l L. 125, 134, n. 56 (2017).

concerning measures implemented in the EU, be excluded.¹¹⁸ Furthermore, such awards rendered by CAS Panels should be attributable to the participating Member States of the EU for the purposes of proceedings under the EU treaties whose purpose is to obtain a declaration from the CJEU that the Member States offended against the *acquis*.¹¹⁹ Another notable aspect of *ISU* is that it could indicate that holding the Member States of the EU participating in the agreement liable to make good damage caused by the breaches of Union law in front of national courts¹²⁰ might not be sufficient to secure the effectiveness of EU law. In particular, monetary compensation after several years cannot make up for the lack of the power of national courts, inter alia, to annul measures of the SGBs, and order provisional measures in the peculiar context of the short-lived careers of professional sportspersons.¹²¹ In that regard, the agreement could envisage the concurrent jurisdiction of a domestic *forum*¹²² to order interim measures, which – if granted or not before the CAS has a say on the request – can be definitively ratified or rejected, with binding effects for national judiciaries, by the competent CAS panel to guarantee the unity in the interpretation of the *lex sportiva*.

Now, it is likely that the SGBs would oppose such a scenario where the Member States unilaterally act to shield the autonomy of EU law.¹²³ In this respect, also to gain the trust of the international sport federations, both the courts of the Member States and the CJEU, in the scenarios of a UPC-like agreement and the shift of the CAS' seat to the EU, should adopt a standard of scrutiny of the SGBs' acts and conducts that strikes a balance between the need of effective protection and the deference towards the autonomy that the SGBs

¹¹⁸ Case C-124/21 P, *ISU*, *supra* n. 48, para. 191. Hence, one third country taking part in the agreement ought to be the Swiss Confederation, which should exclude the application of PILA, Arts 176(1) and 192 to the CAS when the Panels under aegis thereof hear disputes falling under the scope of EU law. Still, according to K. Lenaerts, I. Maselis & K. Gutman, *EU Procedural Law* 64 (OUP Oxford 2023), letting third countries join the agreement would deprive the 'converted' CAS of the quality of a court or tribunal common to the Member States. Another option to thread the needle could be therefore that the Swiss Confederation, in order to keep the CAS seated therein without EU law complications, could unilaterally carve out the application of the PILA to the cases in which a competition is organized in the EU or, if the competition is outside the EU, athletes of EU citizenship or clubs incorporated in the EU submit a complaint to the 'converted' CAS.

¹¹⁹ UPCA, Art. 23 referring to the actions in TFEU, Arts 258 to 260; Opinion 1/09, *supra* n. 12, para. 87.

¹²⁰ UPCA, Art. 22; Opinion 1/09, *supra* n. 12, para. 88; Kuplewatzky, *supra* n. 116, at 166.

¹²¹ Case C-124/21 P, *ISU*, *supra* n. 48, para. 201.

¹²² The agreement could well identify as the competent court the one in whose territory the competition is held or, if the event is outside the EU, the one of the athlete's nationality bringing proceedings before the CAS.

¹²³ It would not be the first time. In this regard, see the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169, 29 May 2020, at 1–41, and the Declaration on the Legal Consequences of the Judgment of the Court of Justice in *Komstroy and Common Understanding on the Non-applicability of Article 26 of the Energy Charter Treaty as a Basis for intra-EU Arbitration Proceedings*, 26 Jun. 2024, https://energy.ec.europa.eu/publications/declaration-legal-consequences-judgment-court-justice-komstroy-and-common-understanding-non_en.

enjoy.¹²⁴ Notably, this form of judicial restraint could replicate the framework set by the European Commission in its 2007 Accompanying Document to the White Paper on Sport.¹²⁵ Sticking to a ‘moderate’ standard of scrutiny essentially aims to assuage the dread that CAS arbitration seated in the EU or ‘forcibly’ made part of the judicial system of the Union would lose its transnational character¹²⁶ and, virtually, become tantamount to reducing sports law to a branch of EU law. In connection with the issue of this possible ‘Unionization’, the CJEU and the jurisdictions of the Member States shall also guarantee the equality of opportunities between athletes of EU citizenship and third-country nationals, which could nonetheless be at risk in the case of a treaty modelled on the UPCA exclusively concluded among the Member States of the EU, for it would create two different paths in CAS proceedings in a number of circumstances.¹²⁷

7 CONCLUSION

To conclude, this contribution has demonstrated that after *ISU v. Commission* a conflict between arbitration proceedings under the aegis of the CAS and the principle of jurisdictional autonomy of EU law enshrined in Articles 19(1) TEU and 267 TFEU, and developed through the case law,¹²⁸ cannot be excluded. Such a finding could be contemplated in the line of case law where the CJEU advances its project of European integration, that is to say, maintaining the integrity of the EU legal system.¹²⁹ An order whose basic tenet is that ‘national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties

¹²⁴ However, notwithstanding the *de iure* qualification of ‘effective’ review, *ISU* could be a hint at a standard of ‘full review of the merits’, as suggested by Schrader et al., *supra* n. 94.

¹²⁵ See with regard to competition law, SEC/2007/0935 final, *supra* n. 21, para. 3.4.

¹²⁶ Duval, *supra* n. 9.

¹²⁷ An example can show this danger. In the scenario of the conclusion of the agreement exclusively between the Member States of the EU, with the Swiss acquiescence seen *supra* at 118, let us suppose that a SGB issues a decision excluding two athletes, one having EU citizenship (a scenario reminiscent of *ISU*) and a third-country national, from a competition held outside the EU. The first athlete would bring proceedings in front of the CAS but could not apply for setting aside its award before the FSC, an option that would be available for the third-country national. On the other hand, this latter may not seek provisional measures before the courts of the Member States or have the CAS Panel submit requests for preliminary rulings.

¹²⁸ Karayiğit, *supra* n. 16.

¹²⁹ J. van de Beeten, *On Metaphor and Meaning: The Autonomy of the EU Legal Order Through the Lens of Project and System*, 8(3) Eur. Papers: A J. on L. & Integration 1441, 1459 (2023), doi: 10.2139/ssrn.4408114. Further on that page, ‘autonomy will only express a more substantive telos or ethos, if and when these align with the preservation of the systemic integrity of the EU legal order. In other words, when the ECJ must make a decision it chooses *system* over *project*’. In the scholarship, see *contra* Lenaerts et al., *supra* n. 18, at 87.

the law is observed'.¹³⁰ In addition, a ruling on the incompatibility between the autonomy of EU law and CAS arbitration would add further pressure to the SGBs and the CAS resulting from decisions of international and national judicial bodies¹³¹ and even the pleas for a better application of EU law by CAS panels would prove ineffective and –to a certain extent– counterproductive as an enhanced engagement with Union law would further reinforce the suggestion that the *acquis* is interpreted outside the judicial system of the EU. Nonetheless, the history of case law of the Court of Justice on the principle of jurisdictional autonomy admonishes to be cautious, as dispute settlement systems that appeared unlawful in light of earlier jurisprudence ended up being declared to be compatible with the Treaties¹³² or vice versa.¹³³ What is certain is that one common critique of the Court's case law on the exclusive interpretative authority of the CJEU over EU law is to act selfishly,¹³⁴ and what is to be hoped is that that selfishness may result in altruism for the better protection of athletes' rights under EU law. As regards the vertical autonomy of the SGBs and sports law, which is a fundamental right,¹³⁵ the Court of Justice, in contrast to AG Rantos, has signalled to be unsympathetic to it when the effective judicial review of measures and/or conducts potentially infringing EU competition law under its supervision cannot be performed.¹³⁶ Hence, the challenge will be retaining the desirable aspects of CAS arbitration (e.g., specialization of the body hearing sporting disputes, avoiding overlapping assertions of jurisdiction) while, at the same time, respecting the judicial architecture of the EU, if necessary resorting to the possible solutions surveyed in section 6 of this contribution. Only if those or other steps are undertaken will the CJEU be able to recognize that 'tu CASA es mi casa', as the CAS would be part of or supervised by the judicial system of the Union.

¹³⁰ Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 Feb. 2018, ECLI:EU:C:2018:117, para. 33.

¹³¹ See Wuschka, *supra* n. 57; one may also cite Case C-650/22 *FIFA v. BZ*.

¹³² Rapoport, *supra* n. 17, at 1744.

¹³³ Opinion of AG Wathelet in Case C-284/16 *Adhnea*, 19 Sep. 2017, ECLI:EU:C:2017:699, para. 43. Additionally, see the need for a case-by-case analysis underlined in Kassoti & Odermatt, *supra* n. 18, at 20.

¹³⁴ For an overview of the scholarly debate on the principle of jurisdictional autonomy, J. Odermatt, *The Court of Justice of the European Union and International Dispute Settlement: Conflict, Cooperation and Coexistence*, 24 Cambridge Y.B. Eur. Legal Stud. 88, 90–91 (2022).

¹³⁵ Opinion of AG Lenz in Case C-415/93 *Bosman*, ECLI:EU:C:1995:293, para. 216.

¹³⁶ Case C-124/21 P, *ISU*, *supra* n. 48, paras 196–197.

