EXCLUSIVE DEALING IN SPORTS AFTER *ESL* AND *ISU*[*]

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ABSTRACT

Recent EU competition cases—including *European Super League* (*ESL*) in football and *International Skating Union* (*ISU*) in ice speed skating—raise important questions on the legality of exclusive dealing restrictions imposed by sports organisers on athletes and clubs. In this article, I summarise the emerging legal framework for assessing exclusive dealing in sports within the EU following *ESL* and *ISU*. I then discuss three key areas in the (economic) assessment of competitive effects in exclusive dealing in sports: market definition, theory and quantification of harm, and procompetitive justifications. I conclude with some reflections on the role of economic analysis after *ESL* and *ISU*.

JEL: K21, L21, L41, L42, L83

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I. INTRODUCTION

Sports and competition law is a hot topic. On 15 December 2022, Advocate General (AG) Rantos of the Court of Justice of the European Union (CJEU) delivered his long-awaited opinions in both *European Super League* (*ESL*)[1] and *International Skating Union* (*ISU*)[2]. In *ESL*, AG Rantos concluded that the exclusion by FIFA and UEFA of a new top European football league, while potentially harming competition,[3] was 'inherent in and proportionate to' the pursuit of a recognised 'European Sports Model' that involves open competition between participants and financial solidarity.[4] In *ISU*, AG Rantos concluded that the eligibility rules imposed by the International Skating Union (ISU) on professional ice speed skaters—which prohibited them from participating in unauthorised competing ice skating events—should have been assessed based on their 'effect' on competition, not their 'object'.[5] As in *ESL*, AG Rantos refers also in *ISU* to the specific characteristics of sports as potentially relevant when assessing any justification for these eligibility rules.[6]

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[1] Opinion of CJEU Advocate General Rantos, Case C-333/21 *European Super League Company SL v UEFA and FIFA*, delivered on 15 December 2022 ('ESL Opinion'). AG opinions are generally indicative of the final judgment by the CJEU, but are not binding. At the time of writing, the date of the final judgment by the CJEU is not yet known.

[2] Opinion of CJEU Advocate General Rantos, Case C-124/21 P *International Skating Union v European Commission*, delivered on 15 December 2022 ('ISU Opinion'). At the time of writing, the date of the final judgment by the CJEU is not yet known.

[3] ESL Opinion, paras 79–82. See also ESL Opinion, para. 11. For the conclusion of the opinion, see para. 187.

[4] ESL Opinion, paras 28, 30, and 123. AG Rantos opined that this European sports model (discussed in more detail later in this article) has been given a 'constitutional' recognition in Article 165 TFEU, which states that 'the Union shall contribute to the promotion of European sporting issues […] by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports'.

[5] ISU Opinion, para. 123.

[6] ISU Opinion, para. 38.

European competition cases in sports involving exclusive dealing restrictions (or, more specifically, exclusive supply restrictions[7]) are not new. In *Meca-Medina* (2006), the CJEU already concluded that the new anti-doping rules of the International Swimming Federation, while potentially foreclosing competition exerted by excluded players, were not in breach of EU competition law. This is because these rules were deemed to be necessary 'to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport'—and were proportionate despite potential harm to competition.[8] Since then, there have been several European competition law disputes involving some form of exclusive dealing restrictions in sports—including among others motorsport,[9] equestrian sports,[10] bridge,[11] sailing,[12] basketball,[13] swimming,[14] football,[15] and padel.[16] Some of these cases are currently still ongoing.[17,18]

Exclusionary cases in sports have raised some intriguing and fundamental questions about how competition law should apply to sports governance.[19] In particular: what are the possible legitimate objectives for sports organisers to restrict the individual freedom of its participants (i.e. athletes and clubs) to take part in competing

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[7] Exclusive dealing can involve a buyer committing to a seller not to make any purchases from another seller (i.e. exclusive purchasing); or a seller committing to a buyer not to sell to another buyer (i.e. exclusive supply). If one classifies athletes and clubs as providers of an input to sports organisers, the exclusive dealing restriction involves exclusive supply.

[8] Case C-519/04 *Meca-Medina* (2006) ECR I-6991, paras 42–56. That proportionality needs to be evaluated relative to potential harm to *competition* follows from para. 47 of the judgment, which reads: '[…] the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable if they are breached are *capable of producing adverse effects on competition* because they could, if penalties were ultimately to prove unjustified, *result in an athlete's unwarranted exclusion* from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in' [emphases added]. While recognising the potential anticompetitive effects of the restrictions, the CJEU in this case simply concluded that disproportionality was not pleaded by the appellants (para. 55).

[9] Case C-49/07 *MOTOE v ELPA* (2008) ECR I-4863 (on the Greek state granting the Greek Automobile and Touring Association (ELPA) exclusive rights to organise motorcycle racing events).

[10] Verdonck, C., Baeyens, H., Methens, N., and Silvestre, Q. (2020), 'Sports and competition law: an overview of EU and national case law', *Concurrences e-Competitions Special Issue Sports*, 16 July, section 3.2.2-3. The cases discussed were on the International Equestrian Federation (FEI) restricting members from participating in an unauthorised event organised by Global Champions Tour (GCL), on GCL imposing a discriminatory system of participant selection in its show jumping series, and on the Italian Equestrian Sports Federation (FISE) restricting members from participating in unauthorised events.

[11] Footnote 10, section 3.3.1 (on the World Bridge Federation (WBF) and the Deutscher Bridge Verband (DBV) punishing two bridge players that had been found cheating).

[12] MLex (2018), 'World Sailing confirms receipt of EU antitrust request for information', 1 November (on World Sailing mandating the exclusive use of equipment for windsurfing and one-person dinghy for an Olympic event).

[13] MLex (2020), 'Basketball leagues turn to EU antitrust watchdog over top European club championships', 30 September (on the International Basketball Federation (FIBA) restricting members from participating in unauthorised events, including by the Union of European Leagues of Basketball (ULEB); and on ULEB

[14] StateOfSwimming (2022), 'European antitrust lawyers at the bready as Dutch swim bosses tell athletes 'choose country or ISL', in a move that may force FINA to rewrite rules', 15 May (on the Royal Dutch Swimming Federation (KNZB) threatening members from exclusion when participating in the International Swimming League (ISL)).

[15] Footnote 10, sections 3.3.2 and 3.3.4 (on the Italian Football Federation (FIGC) adopting rules restricting access to the market of professional services offered by specific professions that support teams; and on UEFA, FIFA, and the Belgian Football Association banning third party ownership of players); MLex (2021), 'UEFA's 'homegrown talent' rules sent to EU judges to test antitrust compliance', 18 October (on UEFA requiring European football teams to have a minimum amount of home-grown players); MLex (2022), 'UEFA targeted in new Luxembourg court action over competition, transfer rules', 21 July (on UEFA and Luxembourg Football Federation (FLF) restricting clubs from setting up a cross-border league).

[16] MLex (2022), 'Boom in padel racket sport triggers EU antitrust complaint over rival tour', 23 February and MLex (2022), 'World Padel Tour interim measures request rejected by Spanish court, rival competition says', 21 November (on World Padel Tour (WPT) restricting members from participating in events by the International Padel Federation (FIP)).

[17] For older EU and UK cases involving exclusive dealing restrictions in sports, see in particular Case 36/74 *Walrave and Koch v Union Cycliste Internationale* (1974) ECR 1405 (on a requirement that 'pacemakers' and 'stayers' in a cycling race had to be of the same nationality); *Greig v Insole* (1978) 1 WLR 302 (on restricting members of the International Cricket Council (ICC) and the Test and County Cricket Board (TCCB) from participating in unauthorised events); Case C-415/93 *Bosman* (1995) ECR I-5040 (on a Belgian football club refusing to let a player leave on a free transfer after his contract with the club expired); and *Hendry and Others v WPBSA* (2001), EWCA Civ 1127 (on the World Professional Billiards and Snooker Association (WPBSA) restricting members from participating in a new, unauthorised event).

[18] An excellent chronology of EU case law around sports governance and antitrust is provided by Kornbeck, J. (2022), 'Introduction: The slow yet steady rise of EU sports antitrust law (1982–2022)', in: Kornbeck, J. (ed), *EU Antitrust Law and Sports Governance: The Next Frontier*, Routledge.

[19] Note that there are also other restrictions in sports that may have the same effect as exclusive dealing. This includes minimum number of events (quantity forcing), maximum number of external events, 'blackout periods' around event dates, and various loyalty schemes. For tractability, I refer exclusively to exclusive dealing in this article.

sports events? When is the restriction necessary and proportionate relative to the potential harm to competition between organisers? And what may be the procompetitive effects of such restrictions?

In this article, I aim to shed light on the above questions, with a focus on the role of economic analysis. For a legal take on these questions, see for example Kienapfel and Stein (2007), Van Rompuy (2015), and Colomo (2022).[20] Recent (legal) takes in light of *ESL* or *ISU* are also provided, for example, by Szyszczak (2018), Agafonova (2019), Kornbeck (2022), and (specific to the latest opinions of AG Rantos) Budzinsk (2023), Houben (2023), Mancini and Marazzi (2023), Monti (2023), and Weatherill (2023).[21] In contrast to these works, my work also delves into the economic analysis underlying exclusive dealing cases in sports. An interesting discussion on the distinction between horizontal restrictions imposed between sports participants and vertical restrictions imposed by sports organisations (or associations) is provided by Budzinski and Szymanski (2015).[22] Finally, to note, in this article I focus on exclusive dealing restrictions. A discussion on state aid and sports media rights (as other contemporary topics within sports and competition law) is provided, for example, in Kienapfel and Stein (2007), Niels, Jenkins, and Kavanagh (2020), and Verdonck et al. (2020).[23]

The remainder of this article is structured as follows. In Section II, I first summarise the *ESL* and *ISU* cases, as well as the developing legal framework for assessing exclusive dealing restrictions by sports organisers under EU competition law (pending the CJEU rulings). I then discuss three key areas in the (economic) assessment of competitive effects in exclusive dealing in sports. In Section III, I discuss market definition, and how indirect network effects in sports may necessitate a market definition that takes into account the multisided nature of sports organisers. In Section IV, I discuss how economics can be used to assess the harmful effects from exclusive dealing. This includes providing a theory of harm that explains why participants would even accept harmful restrictions, identifying and assessing relevant factors driving harm within the economic context of the case, and providing supportive economic evidence. Finally, in Section V, I discuss how economics can be used to assess potential procompetitive justifications of exclusive dealing restrictions in sports. Section VI concludes.

II. EU LEGAL FRAMEWORK FOR EXCLUSIVE DEALING IN SPORTS

In this section, I first summarise in Sections II.A and II.B the recent and ongoing *ESL* and *ISU* cases. I then conclude in Section II.C with the emerging legal framework in the EU, pending the CJEU rulings.

A. *European Super League*

The International Association of Football Federations (FIFA) and the Union of European Football Associations (UEFA) are the global and European football governing bodies, respectively.[24] FIFA and UEFA are composed of national federations, with professional football clubs as indirect members. Both federations perform a dual function of (monopoly) sports regulator, and commercial organiser of international professional competitions—and as such face a potential conflict of interest.

Following announcements of the creation of the European Super League (ESL), a new and (semi-)exclusive breakaway league set up by several top European football clubs, FIFA and UEFA issued a joint statement on 21 January 2021 setting out their refusal to recognise the new competition, and threatened to exclude participating

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[20] Kienapfel, P. and Stein, A. (2007), 'The application of Article 81 and 82 EC in the sports sector', *Competition Policy Newsletter*, Number 3; Van Rompuy, B. (2015), 'The role of EU competition law in tackling abuse of regulatory power by sports associations', *Maastricht Journal of European and Comparative Law*, **22**(2), pp. 179–208; Colomo, P.I. (2022), 'Competition law and sports governance: disentangling a complex relationship', *World Competition*, **45**(3).

[21] Szyszczak, E. (2018), 'Competition and sports: no longer *so* special?', *Journal of European Competition Law and Practice*, **9**(3), pp. 188–196; Agafonova, R. (2019), 'International Skating Union versus European Commission: is the European sports model under threat?', *The International Sports Law Journal*, **19**, pp. 87–101; Kornbeck, J. (ed.) (2022), *EU Antitrust Law and Sports Governance: The Next Frontier*, Routledge; Monti, G.Budzinski, O. (2023), '(Sports) economics upside down? A comment on the Advocate General Opinion in *European Superleague v UEFA/FIFA*', *Concurrences*, 01/2023; Houben, R. (2023), 'Let's play: "Master and Servant"', *Concurrences*, 01/2023; Mancini, V. and Marazzi, T. (2023), 'A new European football club competition: From the ESL launch to the Advocate General's Opinion and the possible geopolitical impact of the European Court of Justice ruling', *Concurrences*, 01/2023; Monti, G. (2023), 'Sports governance after the opinions of Advocate General Rantos in Superleague and International Skating Union', TILEC Discussion Paper, DP 2023-001; Weatherill, S. (2023), 'A judicial coronation of the European model of sport? The conclusions of Avocate General Rantos in the *Superleague* case', *Concurrences*, 01/2023.

[22] Budzinski, O. and Szymanski, S. (2015), 'Are restrictions of competition by sports associations horizontal or vertical in nature?', *Journal of Competition Law & Economics*, **11**(2), pp. 409–29.

[23] Kienapfel and Stein (2007), footnote 20; Niels, G., Jenkins, H., and Kavanagh, J. (2016), *Economics for Competition Lawyers*, 2nd edition, Oxford University Press; Verdonck, et al. (2020), footnote 10.

[24] ESL Opinion, paras 4–13.

clubs from FIFA and UEFA competitions.[25] In turn, ESL initiated proceedings against FIFA and UEFA in front of the Madrid Commercial Court No. 17, based on the allegation that the statutes of both federations and their threat of sanctions are anticompetitive, and incompatible with Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). On 27 May 2021, the Madrid Commercial Court asked the CJEU whether the FIFA and UEFA statutes, and their threat to adopt sanctions, are indeed incompatible with Articles 101 and/or 102 TFEU. It also noted the absence of 'objective, transparent and non-discriminatory criteria' for prior approval of third-party organisers or for sanctions, and the possible conflict of interests affecting FIFA and UEFA following from their dual function as regulator and sports organiser.[26]

On 15 December 2022, AG Rantos concluded in a (non-binding) opinion to the CJEU that the prior approval rules and disciplinary regime—which can be classified to exclusive dealing restrictions[27]—are compatible with EU competition law. Most relevantly, AG Rantos noted that the restrictions and threats imposed by FIFA and UEFA fall outside of the scope of Articles 101 and 102 TFEU following the 'ancillary restraints' doctrine as derived from the judgment in *Wouters*.[28] This doctrine states that restrictions are permissible irrespective of an assessment under Article 101 or 102 TFEU when they are 'inherent in the pursuit of legitimate objective and proportionate to those objectives'. More specifically, AG Rantos opined that the restrictions appear inherent in the pursuit of, and proportionate to, the legitimate sporting objectives of (i) ensuring open European competitions based on sporting merits, (ii) financial solidarity from the elite level to the lower levels of the sport, and (iii) a competitive balance between clubs.[29] He noted that these objectives are legitimate in the context of sports given the 'constitutional' recognition of the so-called 'European Sports Model' in Article 165 TFEU.[30] Moreover, AG Rantos also cited the economic objective of avoiding opportunistic freeriding behaviour by the participating European football clubs as legitimate under the ancillary restraints doctrine.[31]

The opinion of AG Rantos relied principally on an application of the ancillary restraints doctrine in the context of sports to conclude that Articles 101 and 102 TFEU do not apply. However, he also provided three elements in his opinion that may be relevant for those exclusive dealing cases in sports where the ancillary restraints doctrine does not preclude concluding on an Article 101 or 102 TFEU infringement. First, the restrictions under consideration in *ESL* would not have the *object* of restricting competition within the meaning of Article 101(1).[32] This is because, among other things, exclusivity clauses more generally do not harm competition by their very nature, and the ESL and its participating clubs could, at least 'from a (pure) legal perspective', still set up an alternative competition outside of the FIFA and UEFA 'ecosystem'. Moreover, the mere absence of clearly defined, transparent, non-discriminatory, and reviewable approval criteria cannot automatically entail a classification of a restriction of competition by object.[33] To conclude on an infringement under Article 101(1) TFEU, an assessment of restriction of competition by effect would therefore be required.[34]

Second, in the context of a potential Article 102 TFEU infringement, the mere fact that a sports federation performs both a regulatory function and a function of organising sporting competitions would not entail in itself

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[25] ESL Opinion, paras 14–19.

[26] The Madrid Commercial Court also asked about the legality of ownership rights (ESL Opinion, para. 19.4) and whether the statutes are contrary to the fundamental freedoms recognised in Art. 45, 49, 59, and/or 63 TFEU (ESL Opinion, para. 19.6).

[27] ESL Opinion, para. 64.

[28] Judgment of the Court of Justice of the European Union in Case C-309/99, *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV*, delivered on 19 February 2002. See ESL Opinion, paras 85–123 for its application in the context of Art. 101(1) TFEU, and paras 130–131 for a note on its transposition to Art. 102 TFEU.

[29] ESL Opinion, paras 93–123.

[30] ESL Opinion, paras 28–30. The European Sports Model is summarised by AG Rantos as a model 'based, first, on *a pyramid structure* with, at its base, amateur sport and, at its summit, professional sport. Secondly, its primary objectives include the promotion of *open competitions*, which are accessible to all by virtue of a transparent system in which promotion and relegation maintain a competitive balance and give priority to sporting merit, which is also a key feature of the model. That model is, lastly, based on a *financial solidarity* regime, which allows the revenue generated through events and activities at the elite level to be redistributed and reinvested at the lower levels of the sport' [emphasis in original] (ESL Opinion, para. 30)—while noting that 'the diversity of European sports structures [makes it] difficult to define in detail a single and unified model for the organisation sports in Europe' (ESL Opinion, para. 32).

[31] ESL Opinion, paras 106–108.

[32] ESL Opinion, paras 63–78.

[33] AG Rantos referred in this context to the Judgment of the Court of Justice of the European Union in Case C-1/12, *Ordem dos Técnicos Oficiais de Contas (OTOC)*, delivered on 28 February 2013, paras 88–89, where the absence of such criteria was used to inform a classification of restriction by effect. He also provided a list of four objectives that such criteria should satisfy in order to be deemed proportional (ESL Opinion, paras 112–113). However, these criteria are merely sufficient, and not always necessary, as such criteria 'can apply only in relation to independent competitions which themselves comply with the objectives recognised as legitimate that are pursued by a sports federation' (ESL Opinion, para. 118).

[34] AG Rantos provided a summary discussion on the requirements for an effects analysis under Art. 101(1) in this case (ESL Opinion, paras 79–82), but does not conduct such an analysis or reach a conclusion.

an infringement.[35] The main obligation of a sports organiser in a dominant position would be 'to ensure that third parties are not unduly denied access to the market to the point that competition on the market is thereby distorted', which may also be achieved through other means than structural separation. Moreover, AG Rantos opined that a mandated structural separation risks going against the European Sports Model and, in particular, its pyramid structure.

Third, the 'essential facilities' doctrine as derived from the judgment in *Bronner*[36]—under which the UEFA and FIFA 'ecosystem' may be seen as an essential facility, the owner of which may be forced to cooperate with its competitors in giving them access—would not apply, as a third-party organiser does not (strictly) need approval to organise a new football competition, nor the existing UEFA infrastructure.[37] Moreover, the restrictive effects would in any case appear inherent in and proportionate for achieving legitimate objectives.

In short, AG Rantos does not see the exclusive dealing restriction imposed by FIFA and UEFA on clubs—and the subsequent exclusion of ESL as a new competitive entrant—as incompatible with EU competition law. However, at the time of writing, the final judgment by the CJEU on the questions referred by the Madrid Commercial Court is still pending.

B. *International Skating Union*

The International Skating Union (ISU) is the recognised international sports federation in the field of speed and figure skating on ice.[38] It is composed of national skating associations, which in turn have clubs and skaters as their members. Similar to FIFA and UEFA, ISU performs a dual function of both the sports regulator and the commercial organiser of the main events.

Since 2014, the ISU effectively imposed exclusive dealing restriction on its participating speed skaters through a set of eligibility and authorisation rules. More specifically, in its 2014 General Regulations, the ISU included eligibility rules that prohibited participants from participating in events not authorised by the ISU, with a penalty of a lifetime ban in case of infringement.[39] The ISU noted in its 2014 General Regulations that this condition of eligibility is made 'for the adequate protection of the *economic* and other interests of the ISU' [emphasis added].[40] At least until October 2015, the ISU had a large degree of discretion in its decision whether to authorise or reject third-party events.[41]

In a complaint lodged on 23 June 2014 in front of the European Commission, Mark Tuitert and Niels Kerstholt, two Dutch professional speed skaters, argued that the ISU eligibility rules infringed EU competition law, as it prevented them from participating in an unauthorised international speed skating event to be organised by Icederby—an entrant sports organiser that offered participants more prize money and sponsorship opportunities.[42] On 8 December 2017, the Commission concluded that the eligibility and authorisation rules harmed competition between sports organisers by 'creat[ing] significant barriers to finding skaters for third parties wishing to start organising and commercially exploiting international speed skating events in competition with the ISU and its Members',[43] and that the rules were an infringement of Article 101 TFEU.

In its legal assessment, the Commission concluded, most relevantly, that (i) the rules had the *object* of restricting competition within the meaning of Article 101(1) TFEU (following an examination of the content of those rules, their objectives, and the economic and legal context); (ii) the eligibility and authorisation rules were not inherent in or proportionate to the pursuit of legitimate objectives and hence did not fall outside of the scope

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[35] ESL Opinion, paras 46, 48, and 134–136.

[36] Judgment of the Court of Justice of the European Union in Case C-7/97 *Oscar Bronner GmbH & Co. KG*, delivered on 26 November 1998.

[37] ESL Opinion, paras 137–144.

[38] European Commission Decision in Case AT.40208 *International Skating Union's Eligibility rules*, 8 December 2017 ('ISU EC Decision'), paras 7–12.

[39] ISU EC Decision, para. 49. Since its 2016 General Regulations, the ISU reduced its penalties, now to be determined in accordance with the seriousness of the infringement. See ISU EC Decision, para. 53.

[40] Since its 2016 General Regulations, the ISU no longer refers to 'the adequate protection of the economic […] interests' as a motivation, but instead to 'the adequate protection of the ethical values, jurisdiction objectives and other legitimate respective interests'. See ISU EC Decision, para. 53.

[41] On 20 October 2015, the ISU issued Communication No 1974 titled "Open International Competitions", which sets out the procedure and requirements necessary to obtain ISU authorisation as a third-party organisers, as well as the ability for third parties to ask for arbitration proceedings in front of the Court of Arbitration in Sport in case of a rejection. See ISU EC Decision, paras 77–80. The Communication also includes the provision that authorised organisers need to pay a 'solidarity contribution', the amount of which is determined by the ISU at its discretion and on a case-by-case basis. See ISU EC Decision, para. 248.

[42] ISU EC Decision, para. 22.

[43] ISU EC Decision, para. 4.

of Article 101(1) TFEU under the ancillary restraints doctrine; and (iii) the rules did not fulfil the cumulative conditions provided for in Article 101(3) TFEU that would declare Art 101(1) TFEU inapplicable. The Commission also concluded that the infringement had the *effect* of restricting competition within the meaning of Article 101(1) TFEU. However, it did not rely on its effect classification given its earlier conclusion of a restriction of competition by object.

Following an appeal lodged by the ISU on 19 February 2018, the General Court of the EU on 16 December 2020 upheld the Commission decision in relation to the eligibility and authorisation rules—focussing in particular on its classification of a restriction by object under Article 101(1) TFEU.[44] However, following further appeal by the ISU in front of the CJEU, AG Rantos proposed in a (non-binding) opinion to the CJEU dated 15 December 2022 that the General Court's application of the concept of restriction of competition by object was too permissive, and that the General Court should instead examine whether the Commission has shown a restriction of competition by effect.[45] In particular, AG Rantos opined that the mere 'theoretical capability' of undermining competition based on the ISU's 'broad discretion' is not sufficient to establish an anticompetitive object, that the absence of transparent, non-discriminatory, and reviewable authorisation criteria does not necessarily mean a restriction of competition by object,[46] that the impact on competition of the severity of the penalties cannot be analysed 'in the abstract', and that the General Court conflated an examination of a restriction of competition by object with the ancillary restraints doctrine (e.g. by seemingly concluding, erroneously, that disproportionality informs the classification of restriction by object).

As the General Court did not examine the additional effect classification by the Commission (as it found such an examination superfluous), AG Rantos proposed for the case to be referred back to the General Court.[47] However, at the time of writing, the final judgment by the CJEU is still pending.

C. Emerging legal framework for exclusive dealing in sports

As already recognised in the *Meca-Medina* judgment, rules of sports organisers, including sports governing bodies, are not in principle exempt from EU competition law.[48] However, the specificity of sports does include important elements that determine how EU competition laws are applied to sports cases—as the ongoing *ESL* and *ISU* exclusive dealing cases show.

1. Ancillary restraints doctrine and by-object classification under Article 101(1) TFEU

The ancillary restraints doctrine—as derived from *Wouters*[49]—states that restrictions are permissible irrespective of an assessment under Article 101 or 102 TFEU when they are 'inherent in the pursuit of legitimate objective and proportionate to those objectives'. A key question in the context of *ESL* and *ISU* is whether the objectives sought can be classified as 'legitimate'.

In this context, AG Rantos referred principally to 'legitimate sporting objectives' that would follow from Article 165 TFEU, as the 'constitutional' recognition of the European Sports Model, and the series of initiatives that led up to the adoption of Article 165 TFEU in the Treaty of Lisbon in 2009.[50] These objectives include the

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[44] Judgment of the General Court in Case T-93/18 *International Skating Union v European Commission*, delivered on 16 December 2020. For a discussion of this judgment, see for example Cattaneo, A. (2021), '*International Skating Union v Commission:* Pre-authorisation rules and competition law', *Journal of European Competition Law and Practice*, **12**(4), pp. 318–320.

[45] ISU Opinion, paras 58–108. More specifically, AG Rantos opines, in response to argumentation put forward by the Commission and endorsed by the General Court, that it seems 'doubtful that the [mere] *theoretical capability* of undermining competition on the basis of the *broad discretion* which a sports federation may have, can be considered sufficient to establish an anticompetitive effect' [emphasis in original] (para. 72); that the impact on competition of the severity of the penalties cannot be analysed in the abstract (para. 84); that the fact that the measures may have been disproportionate to a legitimate objective does not in itself mean that they can be classified as a restriction by object (para. 96); and that a federation seeking to protect its economic interest is not in itself anticompetitive (para. 100).

[46] ISU Opinion, paras 77–81. See footnote 33 for the same conclusion in the context of *ESL*.

[47] ISU Opinion, paras 135–137.

[48] Footnote 8, paras 29–34.

[49] Footnote 28.

[50] ESL Opinion, para. 29–30. The series of initiatives cited by AG Rantos include the 1995 *Bosman* judgment by the CJEU (Judgment of the General Court in Case C-415/93 *Bosman*, delivered on 15 December 1995), the joint declaration on sport annexed to the1997 Treaty of Amsterdam (Declaration No 29 on Sport, 2 October 1997, 11997D/AFI/DCL/29), the 1999 Commission report on the specific nature of sports in the context of competition law (European Commission (1999), 'Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework – The Helsinki Report on Sport', COM(1999) 644 final, 10

openness of competitions, protecting the health and safety of players, guaranteeing solidarity and redistribution of revenue, and maintaining the integrity of competitions and the balance between participants.[51]

However, the list of potential legitimate objectives is not limited to purely sporting objectives. In particular, in relation to the intention of top European football clubs to set up a rival competition in the most lucrative segment of the market while still participating in the UEFA 'ecosystem', AG Rantos opined that '[UEFA] cannot be criticised for attempting to protect its own economic interest, in particular in relation to such an 'opportunistic project that would risk weakening it significantly'.[52] In other words, exclusive dealing restrictions with the procompetitive (or 'economic') objective to prevent opportunistic freeriding behaviour may similarly be classified as justified under the ancillary restraints doctrine.[53]

Note, moreover, that the legal analysis of ancillary restraints is in principle separate from the legal analysis of a restriction of competition by object (or effect) within the meaning of Article 101(1) TFEU. More specifically, AG Rantos opined that 'it is only after finding, in the first stage, that a measure is capable of restricting competition within the meaning of Article 101(1) TFEU—but without necessarily reaching an express finding of a restriction of competition by object or effect—that the Court will examine, in the second stage, whether the effects restrictive of competition are inherent in the pursuit of legitimate and proportionate objectives and therefore fall outside the scope of Article 101(1) TFEU'.[54] In other words, it is for the Commission and the Court to first conclude whether a measure restricts competition within the meaning of Article 101(1)—notwithstanding a possible efficiency justification under Article 101(3), to be proved by the party—and then to conclude whether the measure is nevertheless inherent in the pursuit of a legitimate objective and proportionate to them. This is in contrast to how the General Court dealt with the matter in *ISU*, which instead examined both issues combined.

Relatedly, even if a measure is found to be disproportionate in the context of an ancillary restraints analysis, this does not imply also a restriction of competition by object under Article 101(1) TFEU. As AG Rantos noted in his *ISU* opinion, 'while it is indeed likely that a measure classified as a 'restriction of competition by object' will be, by its nature, disproportionate to a legitimate objective pursued, the contrary is not necessarily true'.[55]

Note that the pursuit of legitimate economic objectives such as the prevention of opportunistic freeriding behaviour through exclusivity can still be relevant (at least indirectly) when invalidating a by-object classification. As AG Rantos concluded in the *ESL* opinion: '[exclusivity clauses] are not among the types of agreements or the forms of conduct that can be regarded, by their very nature and in the light of the experience gained, as being harmful to the proper functioning of normal competition without examining their effects'.[56] As discussed in more detail in Section V.A, it is the objective of preventing freeriding behaviour that provides a key economic rationale (i.e. theory of benefit) for why exclusive dealing is not by its very nature anticompetitive.[57]

2. Link between the ancillary restraints doctrine and Article 101(3) TFEU

There is a potential overlap between an analysis under Article 101(3) and the ancillary restraints doctrine in that both may involve (much more directly than a by-object analysis under Article 101(1) TFEU) an assessment of the procompetitive effects of a restraint of competition. In particular, in the context of exclusive dealing in sports, the objective of preventing freeriding behaviour and its underlying theory of benefit may play a role both under Article 101(3) and the ancillary restraints doctrine.

However, there are two differences. First, the standard of proof and intensity of analysis is higher under Article 101(3) than under the ancillary restraints doctrine. As stated by AG Rantos in his ISU opinion: 'application

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December), the Nice European Council declaration on the specific nature of sport (Nice European Council (2000), 'Conclusions of the Presidency, Annex IV: Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies', 7-9 December), and the 2007 Commission's White Paper on Sport (European Commission (2007), 'White Paper on Sport', COM(2007) 391 final, 11 July).

[51] ESL Opinion, para. 93.

[52] ESL Opinion, para. 108, with reference also to Colomo (2022), footnote 20, therein.

[53] The economics behind this is discussed in more detail in Section V.A.

[54] ISU Opinion, paras 40–41, 89–91.

[55] ISU Opinion, para. 96.

[56] ESL Opinion, paras 64–65 and 76.

[57] At the same time, this role of legitimate economic objectives in invalidating a by-object infringement may also be a potential source of confusion, as AG Rantos as opined in his ISU opinion: 'in the context of a finding of a restriction of competition by object, the analysis of the objectives seeks to establish (in support of other elements such as the content of an agreement and its legal and economic context) the anticompetitive and sufficiently harmful aim or character of an agreement. Legitimate objectives [such as the prevention of freeriding behaviour] are therefore *not taken into account at that stage of the analysis*, although they may be taken into account, where appropriate, for the purposes of obtaining an exemption under Article 101(3) TFEU' [emphasis added], see ISU Opinion, para. 93. However, this does not preclude any underlying theory of benefit to be taken into account in informing the objective of a restriction.

of the concept of 'ancillary restraints' does not require the balancing of procompetitive and anticompetitive effects, since that analysis can be carried out only within the specific framework of Article 101(3) TFEU'.[58] Second, under Article 101(3) the burden of proof lies with the parties, whereas under the ancillary restraints doctrine it falls on the Commission to assess the effects.

3. By-effect classification under Article 101(1) TFEU

In cases where the ancillary restraints doctrine does not preclude concluding on an Article 101 TFEU infringement, but a by-object classification is not possible (as is generally the case in exclusive dealing restrictions, given that they do not restrict competition 'by their very nature'[59]), a by-effect classification under Article 101(1) TFEU or a finding of abuse of dominance under Article 102 TFEU would be required.

To conclude on a restriction of competition by effect under Article 101(1) TFEU, the Commission needs to show that 'competition has in fact been prevented, restricted or distorted to an appreciable extent'.[60] In doing so, the Commission needs to take into account the context of the case (the economic and legal context, the nature of the products or services concerned, the real operating conditions, and the structure of the market), as well as the effect on both the existing and potential competition in the relevant market. Moreover, the Commission may take into account the plausible developments of the market absent the agreement (i.e. the likely counterfactual).

Although AG Rantos does not provide any conclusion on a possible effect-analysis in the context of *ESL* and *ISU*, he does point to several factors that may be relevant (though not individually conclusive) in concluding on a restrictive effect. In particular, AG Rantos opined that while elements related to the disproportionality of the eligibility rules (such as their discriminatory and non-transparent nature) cannot serve as a basis for finding a restriction by object, they may nevertheless be relevant to a finding of a restriction by effect 'if they are used unjustifiably to exclude third-party organisers of events'.[61] Relatedly, in the context of *ISU*, AG Rantos referred to the repressive nature and magnitude of the penalties applicable as particularly relevant factors in analysing the eligibility rules. This is because 'they are capable of producing adverse *effects* on competition' [emphasis added] by potentially dissuading athletes from participating in events not authorised by the ISU, and consequently deprive potential competitors of the participation of the athletes necessary to organise events.[62] Finally, again in the context of *ISU*, AG Rantos noted that factual elements of intentionality, while not necessary to establish the existence of a restriction of competition by object or effect, may be relevant to the analysis of the effects of the ISU.[63]

4. Abuse of dominance under Article 102 TFEU

Instead of assessing exclusive dealing restrictions under Article 101 TFEU, it may be possible to assess the conduct under Article 102 TFEU—i.e. the abuse of a dominant market position—given its exclusionary effects.

In the context of *ISU*, the Commission decided exclusively on an Article 101 infringement. The ISU did raise the argument that it does not hold a 'very strong' market position, as its market power 'is limited to the undertakings which voluntarily submit themselves to its jurisdiction'. Moreover, ISU suggested that it is relevant that the Commission did not conclude on dominance.[64] However, both arguments were refuted as irrelevant by the Commission in its decision (which was not contested in front of the General Court).

In the context of *ESL*, however, the Madrid Commercial Court explicitly took the view that FIFA and UEFA hold 'a monopoly or, at the very least, a dominant position' on the market for the organisation and marketing of international football competitions in Europe.[65] In his opinion, AG Rantos takes this market definition and

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[58] ISU Opinion, para. 42.

[59] ESL Opinion, paras 65 and 76.

[60] For the principles outlining an effects-based analysis under Art. 101(1) TFEU, see for example ISU EC Decision, section 8.4.1. See also ISU Opinion, para. 61.

[61] ISU Opinion, para. 98, where AG Rantos made reference specifically to *Meca-Medina* (footnote 8, para. 47) and *OTOC* (footnote 33, para. 70–100). For the reference specifically to the discriminatory and non-transparent nature of the criteria, see ESL Opinion, para. 73 and ISU Opinion, para. 78.

[62] ISU Opinion, para. 83.

[63] ISU Opinion, paras 119–122. In the context of ISU, the factual elements of intentionality put forward by the Commission (and which the General Court did not examine) constitute a list of incidents or examples that would demonstrate the ISU's intention to refuse to grant competitors entry, see ISU Opinion, para. 121 and reference therein.

[64] In this case, the Commission indeed did not conclude on whether ISU has a position of dominance, see ISU EC Decision, para. 131. A discussion on other judgments involving market definition is provided in Section III.A as well as ISU EC Decision, para. 87 and the footnote cited therein.

[65] ISU Opinion, para. 18.

dominance classification on board.[66] He also noted that Article 102 TFEU imposes on FIFA and UEFA '[an] obligation to ensure, when examining requests for the authorisation of a new competition, that third parties are not *unduly* denied access to the market' [emphasis in original], and that 'accordingly, the analysis developed regarding the application of the case-law on 'ancillary restraints' […] can be transposed when examining the measures at issue in the present case in light of Article 102 TFEU'. As such, perhaps the most relevant lesson from the *ESL* opinion in relation to sports cases considered under Article 102 TFEU is that the ancillary restraints doctrine applies equally as in sports cases considered under Article 101 TFEU.

Lastly, and perhaps secondarily, AG Rantos opined that the mere fact that a sports federation acts as both the regulator and organiser of sporting competitions, while generating a conflict of interest, does not in itself entail an infringement of Article 102 TFEU;[67] nor that the essential facilities doctrine derived from the judgment in *Bronner* applies in this case.[68]

D. The role of economics in exclusive dealing cases in sports

In both ESL and ISU, AG Rantos assigned a central role to the concept of legitimate sporting objectives. These sporting objectives are legitimised based on political grounds—in particular the reference to Article 165 TFEU and the declarations on sport.[69] However, there are three key areas in the legal assessment of exclusive dealing in sports where economics still plays an important role: market definition (including the classification of a sports organiser as dominant), the theory and quantification of harm (i.e. an effects-based analysis), and the identification of procompetitive justifications and, by extension, legitimate economic objective. These are discussed in more detail in the remainder of this article.

III. MARKET DEFINITION IN SPORTS

The Commission, as well as other competition authorities, relies on market definition as a tool to systematically identify the immediate competitive constraints that firms face when offering or purchasing products or services, and to structure and facilitate a competitive assessment.[70] More specifically, in the context of Article 101 TFEU, the Commission uses market definition to inform a possible by-effects classification.[71] And in the context of Article 102 TFEU, the Commission uses market definition to assess the existence and degree of a dominant position—where a stronger dominant position is recognised to increase the likelihood that conduct protecting that position leads to anticompetitive foreclosure.[72] In defining a relevant market, the Commission considers in particular the degree of demand and supply substitution along a product and geographic dimension.[73]

As I develop more below, a key consideration in market definition in sports relates to demand substitution along the product dimension. In such cases, the Commission uses the hypothetical monopolist principle, which identifies the relevant market as the smallest market for which a hypothetical monopolist would find it profitable to implement a small but significant and non-transitory increase in price (SSNIP).[74] In evidencing this, the Commission can rely on qualitative evidence (product characteristics, intended use, customer and industry views), but also on quantitative evidence (price correlation, elasticities, diversion ratios, and 'critical loss analysis').[75]

In this section, I first discuss the EU case law and decisional practice related to market definition in sports cases, and the resulting vertical market framework (Section III.A), after which I discuss some of the key economic considerations in market definition in sports cases (Section III.B). I conclude with a focus on the possible classification of sports organisers as multisided platforms and its relevance for market definition (Section III.C).

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[66] ISU Opinion, para. 129–132.
[67] ESL Opinion, paras 133–136. See also the further discussion on this in Section II.A.
[68] ESL Opinion, paras 137–144.
[69] See footnotes 4 and 50.
[70] European Commission (2022), '[Draft] Commission Notice on the definition of the relevant market for the purposes of Union competition law', draft revision, 8 November ('EC Draft Revised Market Definition Notice'), paras 5–6.
[71] EC Draft Revised Market Definition Notice, para. 8.
[72] EC Draft Revised Market Definition Notice, para. 8; European Commission (2009), 'Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article [101] of the EC Treaty to abusive exclusionary conduct by dominant undertakings', 2009/C 45/02, para. 20, '[I]n general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure'; see also Niels, Jenkins, and Kavanagh, (2016), footnote 23, section 4.2.2.
[73] EC Draft Revised Market Definition Notice, paras 19–25.
[74] EC Draft Revised Market Definition Notice, para. 31.
[75] EC Draft Revised Market Definition Notice, paras 49–59. A critical loss analysis translates the hypothetical monopolist principle into a formula that consists of two variables: the expected volume loss following a SSNIP and the percentage profit margin of the product or service sold. See for example Niels, Jenkins, and Kavanagh, (2016), footnote 23, section 2.5.

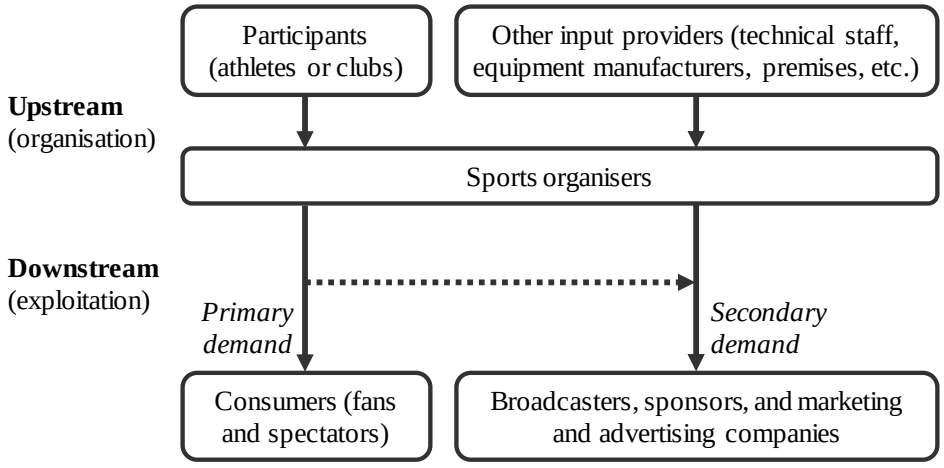
A. EU case law on market definition in sports

In its *ISU* decision, the Commission concluded on a relevant market defined as 'the organisation and commercial exploitation of international speed skating events'.[76] It comes to this conclusion based on the consideration of (i) a downstream market involving the commercial exploitation of the events and (ii) an upstream purchasing market involving the acquisition of necessary inputs for the organisation of the events, including the services of athlete.[77] In other words, the Commission adopted a vertical market structure framework. On the downstream market, the Commission concluded that the ISU services a primary demand from consumers as well as a secondary demand (i.e. derived demand) from broadcasters, sponsors, and marketing or advertising companies. It also concluded that the two levels of this vertical market are to be considered jointly, as they are performed jointly, with revenue generated through the commercial exploitation of events (i.e. downstream) covering the cost of allocating resources for the organisation of the event (i.e. upstream).

In line with case law and decision practice, the Commission concluded on a relevant market limited to a single sports discipline.[78] In further support of this, the Commission concluded that, while broadcasters, sponsors, and marketing and advertising companies could substitute to other suppliers than organisers of speed skating events, it is unlikely that a significant number of consumers would switch to another sport in case of a SSNIP. Similarly, on the upstream side, the Commission concluded that athletes can only switch to different sports disciplines in exceptional circumstances, and one therefore cannot define a broader upstream market for the purchase of athlete services. Finally, on possible supply substitution, the Commission concluded that organisers and promotors of other sports events will not switch to the organisation and commercial exploitation of speed skating events in the short term in the event of a SSNIP, given the expertise and costs required. Comparably, in the *ESL* case, the Madrid Commercial Court defined the relevant market as 'the organisation and the commercial exploitation of international competitions between football clubs at European level', which AG Rantos took on board in his opinion.[79] Going back further to previous European cases, comparable market definition can be found.[80]

Abstracting from the different cases, Figure 1 provides a flow diagram of the relevant market for the organisation and commercial exploitation of sports events more generally, based on the case law and decision practice discussed above. Although this vertical market structure framework is helpful in structuring market definition in sports cases, grounded in case law, it still leaves open some relevant questions in specific cases that may merit further (economic) consideration. This is discussed in more detail in the remainder of this section.[81]

Figure 1. Vertical market structure for the organisation and commercial exploitation of sports events



Note: Flow diagram for a vertical market for the organisation and commercial exploitation of sports events.
Source: Author reconstruction of EU case law and decisional practice.

[76] ISU EC Decision, para. 112.
[77] ISU EC Decision, paras 88–92 and 98.
[78] ISU EC Decision, para. 87, see in particular also the cases cited in the footnote therein.
[79] ESL Opinion, paras 18 and 129.
[80] See in particular Judgment of the General Court in Case C-49/07, *MOTOE v ELPA*, delivered on 1 July 2008, para. 33, as well as ISU EC Decision, paras 85 and 87, and footnotes therein.
[81] The vertical structure is also recognised in earlier academic work—see Budzinski and Szymanski (2015), footnote 22.

B. Key economic considerations in market definition in sports

As outline above, a key consideration in market definition in sports relates to the degree of demand substitution along the product dimension. In particular, it may need to be shown whether consumers indeed do not switch to other sports organisers in the events of a SSNIP. In the case of a single major sports organiser in a sport—as with FIFA, UEFA, and ISU—the question essentially becomes whether there is a material degree of *inter*-sport competition for consumers.

In many sports, viewers may be loyal to watching that one particular sport.[82] However, this conclusion can be different in specific cases—for instance when a sport is much more nascent and consumers are not yet tied to watching that one particular sport. The qualitative and quantitative (economic) evidence cited in the introduction of this section can then be used to support or refute the hypothesis that consumers do not switch between different sports in case of a SSNIP.

Similarly, a separate analysis may be required to conclude whether broadcasters, sponsors, and marketing and advertising companies would switch to an alternative sport in the event of a SSNIP. This, again, can be case-specific. For example, when a sports organiser faces mostly general (sports) brands and broadcasters as customers, these may be willing to readily substitute to other sports in case of a SSNIP, leading to a wider relevant market with respect to these customers. However, this may be different when a sports organiser faces mostly sports-specific brands and broadcasters as customers.[83]

Finally, from the perspective of the upstream purchasing market, there can be varying degrees of inter-sport competition for the services provided by participants and other input providers. In the case of *ISU* and *ESL*, it is recognised that the participants (speed skaters and football clubs respectively) cannot readily substitute to other sports.[84] However, the same may not be true in other sports where athletic skills are much more transferable. With respect to other input providers, such as equipment manufacturers and sports premises, these may be able to equally offer their services to sports organisers in other sports—reducing in turn the buyer market power enjoyed by a single sports organiser in a specific sport and potentially leading to a larger market with respect to these input providers. Again, the qualitative and quantitative (economic) evidence cited in the introduction of this section can be used to support or refute the hypothesis that various providers of input do not switch between different sports in case of a SSNIP.

In short, market definition in the context of sports may require a careful consideration of each group of input providers and customers, and their ability to substitute to other sports organisers. Note, however, that the above approach to market definition (i.e. adopting a vertical market structure and considering substitution by the different customers and input providers in isolation) may be incomplete, in that it ignores potentially relevant indirect network effects between the different sides—particularly between participants, consumers, and advertisers. In light of this, I discuss in the next subsection an alternative framework of multisided platforms that may be used to instead.

C. Sports organisers as multisided platforms

Sports organisers create value by providing a platform for participants (athletes or clubs), consumers (fans and spectators), and advertisers, and managing the different positive direct and indirect network effects between them.[85] This may have implications for an appropriate market definition in the context of sports that are ignored when adopting a vertical market structure framework.

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[82] ISU EC Decision, para. 89: 'With regard to demand substitutability, fans of a given sports discipline are generally unlikely to substitute it with any other product for cultural, geographic and emotional reasons'.

[83] ISU EC Decision, para. 90: 'Regarding the secondary demand represented by broadcasters, sponsors and other marketing/advertising companies, the appeal of a sports event depends on a variety of factors (the attractiveness of the event to viewers, brand exposure opportunities, the image of the sports event in question). For those companies speed skating events could be substituted with other products'.

[84] ISU EC Decision, para. 92: '[Speed skaters] can only switch to different sports disciplines in exceptional circumstances. As in any other top level sport, speed skaters are highly skilled and to acquire and develop their skills as professional athletes, they have to specialise and maintain intensive training in their discipline from a very young age'.

[85] For a recent discussion of sports organisers as multisided platforms, see Budzinski (2023), footnote 21. An early work that also casts sports business as a multisided market is Budzinski, O. and Satzer, J. (2011), 'Sports business and multisided markets: Towards a new analytical framework?', IME Working Paper, No. 109, University of South Denmark, Department of Environmental and Business Economics (IME), Esbjerg. For more on the concept of platforms and direct and indirect network effects, see in particular Belleflamme, P. and Peitz, M. (2021), *The Economics of Platforms: Concepts and Strategies*, Cambridge University Press, Chapter 1, and Oxera (2020), 'Two-sided market definition: some common misunderstandings', *Agenda*, 30 September. In his *ESL* opinion, AG Rantos refers instead to the UEFA and FIFA 'ecosystem' (ESL Opinion, paras 74, 107, 139–141, and 157). However, he uses this term colloquially, and not with specific

1. Input complementarity, direct network effects, and indirect network effects

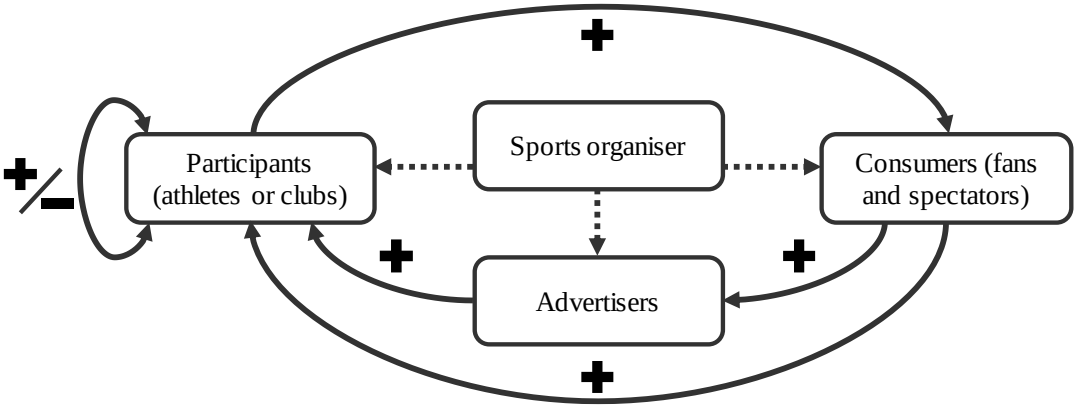
Unlike in conventional markets, participants providing their services to sports organisers are not clearly substitutable. Instead, it would be more appropriate to view participants as providing complementary inputs to a bundled product, as it is the joint display of competing participants that makes a sports event attractive to consumers and, by extension, advertisers.[86] Moreover, the presence of more top participants in an event may make it more attractive for other top participants to take part by increasing the personal prestige from winning—creating a positive direct network effect.

At the same time, too many participants in any one event may also create congestion around limited facilities and reduce the value that any one participant may be able to derive from its participants (e.g. in terms of sponsorship exposure or expected prize money). In addition to the positive direct network effect discussed above, there is therefore also a negative direct network effect from congestion. Sports organisers manage this negative direct network effect by imposing eligibility criteria—e.g. based on sporting merit, as in the European 'open' system; or based on a franchised system with entrance fees, as in the North American 'closed' system.[87]

The complementarity of the input provided by participants can also be framed as a positive indirect network effect running from participants to consumers: the more (top) participants that participate in any one sports event, the more attractive it becomes for consumers to watch this event. Similarly, the more consumers watch an event, the more attractive this event may become for participants—creating also a positive indirect network effect running from consumers to participants. In particular, if more consumers watch a sports event, this directly increases the prestige from winning that particular event to participants. However, and perhaps more relevantly, there is also a positive indirect network effect running from consumers to participants via advertisers: if more consumers watch a sports event, this will attract more interest from sponsors and advertisers, which in turn makes it more attractive to participants to be active in that event as an opportunity to acquire sponsorship and advertisement income.[88]

As a summary, Figure 2 provides a schematic overview of the different network effects. Although this is not an exhaustive coverage of all possible direct and indirect network effects in the context of any sports competition, these are the ones that may be presumed to be the most relevant.

Figure 2. Multisided market structure for the organisation and commercial exploitation of sports events



Note: Flow diagram for a market for the organisation and commercial exploitation of sports events, with organisers as multisided platforms.

reference to network effects, which is the defining feature of platforms as understood in economics. On academic work discussing sports as an 'ecosystem', see Buser, M., Woratschek, H., Dickson, G., and Schönberner, J. (2022), 'Towards a Sport Ecosystem Logic', *Journal of Sport Management* (ahead of print).

[86] Colomo (2022), footnote 20, refers to this interdependence of participants in sports as a relation of 'co-opetition', see also footnote 22 therein, and likens the cooperation of participants through a commonly controlled sports organisation to a joint venture.

[87] See also ESL Opinion, para. 33, and Colomo (2022), footnote 20.

[88] The presence of advertisers on a platform may, in principle, also generate a negative indirect network effect that runs from these advertisers to consumers—as an increase in advertisement efforts (especially in the form of interruptive commercials) can decrease the value to consumers of being active on that platform. While this negative indirect network effect is generally strong in the context of, for example, social media platforms, it may not be particularly strong in the context of sports events, where advertisement is generally less disruptive to consumers.

2. Participants as customers instead of input providers

Note that the fact that there are positive indirect network effects running from consumers and advertisers to participants also means that it may not be appropriate to frame participants exclusively as input providers (i.e. suppliers). Instead, it may be more appropriate to frame participants as *customers* of the 'exposure' services provided by sports organisers.

The fact that some in this customer group may pay a negative price for this service (given participation compensation and prize money) does not, in itself, invalidate the classification of participants as customers: as is well known, platforms may end up charging zero, or even a negative price, on one side of the platform in order to optimise the value creation through the management of the different network effects.[89] In that sense, the price charged to each side is nothing more than a value on a continuous number line running from minus infinity to plus infinity. Moreover, in many cases, participants may actually end up paying a positive price for participating on a platform—for example in the form of travel, accommodation, and equipment expenses, or when a registration fee is required.

In practice, however, the classification of participants as either upstream input providers or as 'downstream' customers may not be particularly relevant—provided that the competition authority involved is concerned not just with the implications of conduct on downstream customers, but also on upstream sellers (e.g. in the context of labour markets).[90]

3. Implications for market definition

There are three key ways in which the presence of strong network effects can have a relevant implication on market definition. First, the existence of direct and indirect network effects creates potential barriers to substitution that increase the market power of a hypothetical monopolist, and hence leads to a narrower market definition.[91] In the context of sports, for example, the fact that many or most top participants participate in an established competition may make it particularly difficult for an entrant competition to make itself sufficiently attractive to participants as a potential substitute, by the fact that it does not enjoy the same positive direct network effects as the established competition. Similarly, an entrant competition may find it particularly difficult to solve the 'chicken-and-egg' problem of simultaneously attracting (i) enough consumers and advertisers to make the platform attractive to participants and (ii) enough participants to make the platform attractive to consumers and advertisers.[92]

Second, in the case of a multisided platform, the Commission may decide to either define a relevant product market for the products offered by the platform as a whole, in a way that encompasses all user groups, or separate relevant product markets for each side of the platform.[93] Note, however, that in the context of sports, it is more appropriate to define relevant product markets for each side of the platform. This is because there are likely to be significant differences in the substitution possibilities on the different sides of the platforms—with participants perhaps unable to substitute to other sports organisers (in case of a single organiser for their sport), whereas consumers and particularly advertisers perhaps do have other options available and may be 'multi-homing'. A 'single market' approach risks ignoring these differences.[94]

Third, the presence of indirect network effects may complicate an assessment of demand substitution. The main reason for this is that in the presence of strong indirect network effects, platforms may end up charging zero or even negative (monetary) prices on one side of the market, while monetising its value creating on another side.[95] For example, consumers may not be charged at all for being active on the platform (e.g. viewing a sport), with monetising of the platform instead occurring on the advertiser-side. Applying the hypothetical monopolist

[89] Belleflamme and Peitz (2021), footnote 85, chapter 5.

[90] When it comes to market definition, the Commission adopts a similar approach in the case of downstream markets as in upstream purchasing markets. See EC Draft Revised Market Definition Notice, para. 6.

[91] EC Draft Revised Market Definition Notice, para. 57.

[92] For more on the chicken-and-egg problem for platforms, see Belleflamme and Peitz (2021), footnote 85, section 4.2.

[93] EC Draft Revised Market Definition Notice, para. 95.

[94] Moreover, sports organisers, unlike some other platforms, do not facilitate a specific transaction between different sides that can be identified. However, it is disputed from an economics perspective whether this distinction between 'transaction' and 'non-transaction' platforms is relevant, as this ignores that (i) even in a transaction platform different sides may face different competitive constraints and (ii) different (platform) suppliers may adopt different business models in supplying an overlapping customer group, with some providing a transaction product and others a non-transaction or mixed product). See Oxera (2020), footnote 85.

[95] EC Draft Revised Market Definition Notice, paras 96–98.

principle and the 'SSNIP test' in isolation on the consumer side will then not work. In such cases, non-price elements may be particularly relevant—as recognised by the Commission.[96]

IV. HARMS FROM EXCLUSIVE DEALING IN SPORTS

The basic underlying argument for why exclusive dealing (or, more specifically, exclusive supply) in sports would be harmful is straightforward: by depriving competing sports organisers from a necessary input, market entry will be deterred, which in turn reduces (i) customer choice and (ii) the pressure on an established sports organiser to reduce prices, increase output, improve quality, and innovate. This harm to competition and customers relates to the consumer-side (i.e. fans and spectators), but also broadcasters, sponsors, and marketing and advertising companies, as well as participants and other input providers.[97]

The anticompetitive potential of exclusive supply is recognised by the Commission, which states in its Vertical Guidelines that '[w]here a buyer is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer may easily have significant anti-competitive effects'.[98] However, given that exclusive dealing restrictions are unlikely to be anticompetitive 'by their very nature'—as identified in Section II—it may be necessary to assess in more detail the exact harms from an exclusive dealing restriction in an one case.[99] Moreover, any theory of harm needs to resolve the puzzle of why participants would subject themselves voluntarily to the restrictions, if these were to be anticompetitive and hence harmful to these participants.[100]

In this section, I start with a discussion of the Chicago School benchmark of inferring the procompetitive nature of exclusive dealing, from the fact that the input providers accept this restriction freely and voluntarily (Section IV.A). I then provide three theories of harm that outline conditions under which the Chicago School benchmark does not hold (Sections IV.B–D), and relate them to the context of sports. I conclude with a discussion of the qualitative and quantitative economic evidence that can be used to support a finding of harm (Section IV.E).

A. Chicago School benchmark

In the 1970s, scholars commonly associated with the Chicago School claimed that exclusive dealing can be presumed to be procompetitive, on the ground that, absent procompetitive effects, exclusive dealing would require too high of a compensation to the party accepting the exclusivity for this to be a profitable strategy of a dominant firm.[101] More specifically, the premise of the Chicago School presumption—in the context of exclusive supply—is that entry by a more efficient downstream entrant benefits a seller more than it hurts an incumbent buyer. From this premise, it follows that any gains to the incumbent buyer are insufficient to convince the seller to accept exclusivity. If exclusive dealing nevertheless occurs, then—according to the Chicago School presumption—this has to be for procompetitive reasons.

It is straightforward to formalise this logic in a simple sequential game setting with a single upstream seller U and two downstream buyers in a perfectly competitive market, with one incumbent buyer I and one entrant buyer E. Suppose that downstream demand is $D(p) = 1 - p$ and firms compete only on price—such that prices go down to marginal cost in case of entry. Suppose also that I is less efficient than E, with firms having a respective marginal cost of $c_I > c_E = 0$, and no other marginal or fixed cost. Suppose finally that the sequential gameplay is as follows: first, I offers U an amount $x > 0$ in return for exclusivity; second, U decides whether to accept or

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[96] Footnote 90, para. 98.

[97] See also ISU EC Decision, paras 203–205, as well as Fumagalli, C., Motta, M., and Calcagno, C. (2018), *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance*, Cambridge University Press, chapter 3 (although that focusses exclusively on exclusive purchasing, as opposed to exclusive supply).

[98] European Commission (2022), 'Guidelines on vertical restraints', Communication from the Commission, 2022/C 248/01, para. 323.

[99] Within a legal context, this need occurs in particular when determine proportionality under the ancillary restraints doctrine, or when undertaking an effects analysis under Art. 101(1) or Art. 101(3) TFEU.

[100] In the context of *ESL*, see for example ESL Opinion, para. 84: 'The disciplinary power enjoyed by a sports federation can be exercised only within 'the limits of its jurisdiction', which—in turn—depends on its recognition by the clubs and players affiliated to it that, initially, gave their *voluntary* agreement to be subject to its rules and, therefore, to its control' [emphasis added]. In the context of *ISU*, see for example ISU EC Decision, para. 131: 'The ISU argues that it does not hold a "very strong" market power due to its regulatory functions and that its market power is limited to the undertakings which *voluntarily* submit themselves to its jurisdiction' [emphasis added].

[101] Posner, R.A. (1976), *Antitrust Law: An Economic Perspective*, University of Chicago Press and Bork, R. (1978), *The Antitrust Paradox: A Policy at War with Itself*, New York: Basic Books. See also Fumagalli, Motta, and Calcagno (2018), footnote 97—specifically p. 240

reject the offer for exclusivity; third, E decides whether to enter (only possible in absence of exclusivity); fourth, U sets upstream wholesale price $w > 0$; fifth, downstream firms compete on price and demand and profits realise.

Table 1 below shows the profits for the incumbent buyer and the upstream seller respectively in the case of no exclusivity and in the case of exclusivity. This readily shows that the gain to the incumbent, i.e. $(1 - c_I)^2/16$, is smaller than the loss to the seller, i.e. $(1 - c_I)^2/8$—irrespective of the efficiency difference with the entrant.[102] In other words, the incumbent is never able to profitably convince the seller to accept exclusive dealing. The Chicago School logic then extends to the inference that if exclusive dealing is nevertheless accepted, this has to be for efficiency reasons.

Table 1. Effect from exclusive dealing on profits under Chicago School benchmark

	Incumbent buyer	Upstream seller
Profit absent exclusivity	0	$(1 - c_I)^2/4$
Profit under exclusivity	$(1 - c_I)^2/16$	$(1 - c_I)^2/8$
Change	$(1 - c_I)^2/16$	$-(1 - c_I)^2/8$

Note: Change in profits in case of exclusive dealing when a single upstream seller sells to two downstream buyers that are in perfect competition (Chicago School benchmark); market demand $D(p) = 1 - p$ and marginal costs $c_I > c_E = 0$ for the incumbent and entrant buyer.

However, this approach to undermining a possible theory of harm in exclusive dealing relies on a set of assumptions that may not—or may even be unlikely to—hold in the context of a dominant sports organiser. In the remainder of this subsection, I provide three potential theories of harm that provide conditions under which the Chicago School benchmark does not hold, and relate them to the context of sports.

B. Imperfect competition theory of harm

A critical assumption behind the above Chicago School benchmark is that competition absent exclusivity is perfect. If, however, there is imperfect competition also absent exclusivity, the profits to the upstream seller absent exclusivity are reduced. In turn, it may become possible for the incumbent buyer to use its gains from exclusivity to convince the upstream seller to accept exclusivity. More specifically, the above benchmark no longer holds if (i) competition absent exclusivity is sufficiently imperfect and (ii) the entrant is not too much more efficient.

This result can be formalised by taking a standard two-firm Shubik-Levitan demand $D_i(p_i, \bar{p}) = 0.5[1 - p_i + d(\bar{p} - p_i)]$ for any downstream firm $i \in \{I, E\}$, where p_i is the price of firm i, $\bar{p}$ the average of the two downstream prices, and $d \geq 0$ a parameter capturing the degree of competition, with $d \to \infty$ for perfect competition and $d = 0$ for monopoly pricing power for each of the two firms (i.e. no overlap).[103] Instead of d, one can also take for the degree of competition $\gamma = d/(1 + d)$, which is bounded between 0 (monopoly) and 1 (perfect competition).

Taking this specification of downstream demand, while keeping the rest of the sequential game set-up equivalent, it is possible to simulate the net gain from exclusion to seller and incumbent buyer—i.e. the gain to the incumbent minus the loss to the seller.[104] This is plotted in Figure 3, which plots it as a function of the degree of competition (captured with parameter γ) and for different levels of marginal cost c_I. This readily shows that the net gain from exclusion is positive if (i) competition is sufficiently weak and (ii) the marginal cost differential is not too large.

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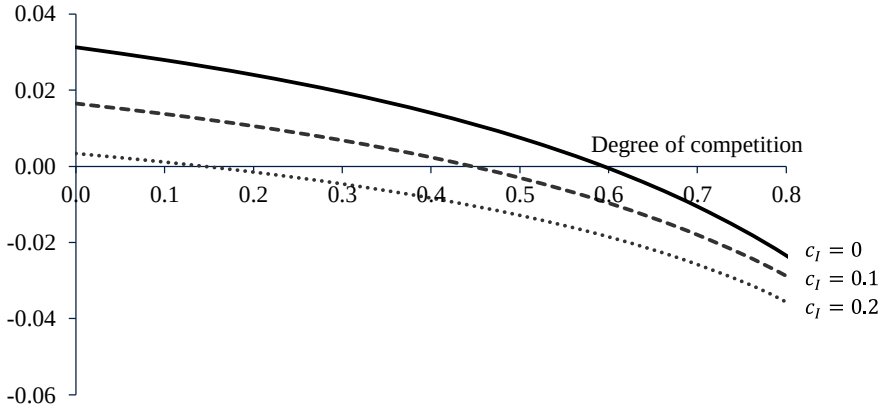
[102] These results follow when sequentially optimising $\pi_I(p, w) = D(p) \cdot (p - c_I - w)$ with respect to p (for incumbent buyer) and $\pi_U(w) = D(p^*(w)) \cdot w$ with respect to w (for the seller), where $p^*(w)$ is the optimal price set by the buyer as a function of w. Perfect competition in the absence of exclusivity implies that $p = c_I + w$ (under the assumption that $c_I + w \leq p^*(w)$.

[103] For a discussion of this demand function, see Choné, P. and Linnemer, L. (2020), 'Linear demand systems for differentiated goods: Overview and user's guide', *International Journal of Industrial Organization*, **73**, 102663. This demand function has two properties that are desirable in this context: when all firms set the same price, total demand in the market is unaffected by the degree of competition between the two firms; and in the case of monopoly (i.e. $d = 0$), firms face an equal share of an unchanged total market demand.

[104] This is done by deriving best-response price of firm E as $p_E(p_I, w) = [1 + (1 + 0.5d)w + 0.5dp_I]/[2 + d]$ and equilibrium downstream price of firm I as $p_I = \big[[1 + (1 + 0.5d)w][2 + 1.5d] + 2(1 + 0.5d)^2 c_I\big]/[4(1 + 0.5d)^2 - (0.5d)^2]$ and then simulating demand and profits for any level of w to identify the profit-maximising w for the seller, and the associated profits for the seller and incumbent buyer in the absence of exclusivity. The profits under exclusivity remain unchanged.

Figure 3. Net gain from exclusion to seller and incumbent buyer under imperfect competition



Note: Combined net gain from exclusion to seller and incumbent buyer as a function of (i) the degree of competition $\gamma = d/(1+d)$ and (ii) marginal cost of the incumbent; assuming a sequential game where a single seller first sets a wholesale price w, after which downstream incumbent I and entrant E compete on price with Shubik-Levitan demand $D_i = 0.5[1 - p_i + d(\bar{p} - p_i)]$ with $i \in \{I, E\}$ and $\bar{p}$ as average market price, marginal costs $c_I > c_E = 0$, and no other costs.

C. Coordination failure theory of harm

Note that the imperfect competition theory of harm developed above does not explain why participants would ever object to exclusive dealing restrictions. Indeed, in the case where downstream competition is sufficiently imperfect and the efficiency differential not too large, the upstream seller is set to benefit from accepting the exclusivity restriction in return for a sufficiently high competition. To explain why participants would instead ever object to exclusive dealing restrictions—despite accepting them 'voluntarily'—one needs to revert to another theory of harm.

One alternative theory is that of a coordination failure theory of harm. The intuition behind this theory is that if entry requires enough participants to not accept exclusive dealing, then a (small) payment for exclusivity may already lead to a bad equilibrium in which all participants are unilaterally better off accepting the exclusive dealing. To see why this is an equilibrium, suppose that each participant is compensated with a small amount $x > 0$ in return for exclusivity, and that currently all participants are signed up to this deal. When entry requires a sufficient number of participants to not accept exclusive dealing, then any one participation is never better off rescinding the compensation x, however small. Absent coordination between participants, they are then stuck in a bad equilibrium where everyone accepts exclusivity in return for only a small compensation—making them all worse off.

To formalise this intuition, suppose for simplicity that there are two participants P_1 and P_2, one incumbent event organiser I and one entrant E. Suppose also, for simplicity, that each participant receives a payoff of 10 when participating in any one event (i.e. 20 when participating in both), but that each organiser requires both participants to be viable. Suppose finally that I may offer each participant a compensation of $x \geq 0$ for committing to exclusivity. Supposing simultaneous move and non-discriminatory offers, the below payoff matrix (Table 2) can be used to identify all possible equilibrium (i.e. outcomes where each participant chooses a best response to the other). Note that this game has two equilibria whenever $0 < x < 10$ (i.e. the compensation for exclusivity is positive, but not too high): either both participants choose exclusivity, or both participants choose non-exclusivity.

To see why this is the case, note that if P_2 chooses exclusivity, P_1 is always better off also choosing exclusivity, as $10 + x > 10$ (and vice versa); and if P_2 chooses non-exclusivity, P_1 is always better off also choosing non-exclusivity (i.e. enabling entry), as $20 > 10 + x$ (and vice versa). In other words, there are two mutual best-responses: both choosing exclusive and both choosing non-exclusive. This reveals a potential for coordination failure whenever the incumbent offers small but positive compensation: if at least one participant is exclusive, the participants will need to coordinate in order to move to the mutually optimal equilibrium of both choosing non-exclusivity.[105]

[105]Note that it may not be necessary to pay x to all participants. The same coordination game, with its multiple equilibria, arises when only one participant is offered the compensation. This means that, while the ability to make discriminatory offers is not a necessary condition for the coordination failure theory of harm to arise, it does help the sports organiser in making exclusion less costly.

Table 2. Payoff matrix formalisation of a coordination failure theory of harm

		P_2	
		Exclusive	Non-exclusive
P_1	Exclusive	$10 + x^*$; $10 + x^*$	$10 + x$; 10
	Non-exclusive	10 ; $10 + x$	20^* ; 20^*

Note: Payoff matrix when participants P_1 and P_2 have to choose simultaneously whether to accept an exclusivity commitment or not, where the first payoff is that of P_1 and the second of P_2. Stars indicate best-response for $0 < x < 10$.

D. Divide-and-conquer theory of harm

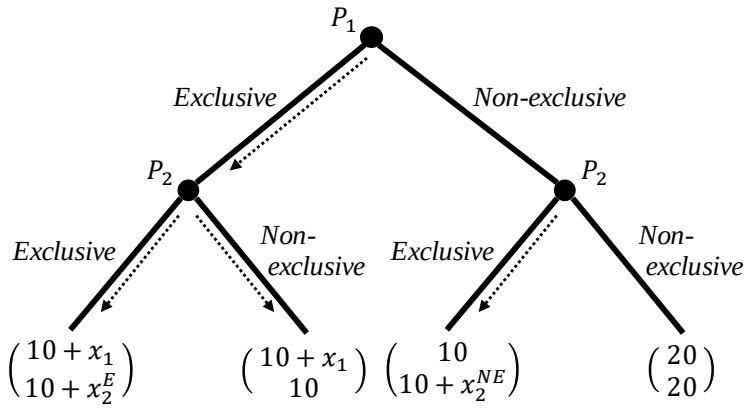
The coordination failure theory of harm may explain why participants end up accepting an exclusive dealing restriction freely and voluntarily, even though this is not in their collective interest. However, the bad equilibrium under the coordination failure theory of harm is not unique: the problem would be solved if all participants could somehow coordinate on the good equilibrium where none of them accepts exclusivity. In that case, the pivotal participant required for the entrant to enter will be incentives not to accept the small compensation x, but will instead reject and enable entry.

However, it is straightforward to show that the bad equilibrium may also be unique when the sports organiser is able to offer discriminatory terms to the participants—i.e. offer a different compensation x for exclusivity. This is particularly the case when offers are made sequentially.

The intuition behind this theory of harm is the idea of divide-and-conquer: suppose that other participants are prospected to receive a high compensation in return for exclusivity; then this pushes participants to already accept exclusivity now even for a low compensation. Once they have accepted it, however, the sports organiser no longer has the need to actually offer the high compensation to the other participants—as entry is already foreclosed.

To formalise this intuition, take the same set-up as above, but now suppose that I first offers $x_1 \geq 0$ to P_1 in exchange for exclusivity. If P_1 accepts exclusivity, I offers $x_2^E \geq 0$ to P_2. If P_1 does not accept exclusivity, I offers $x_2^{NE} \geq 0$ to P_2. This sequential game is captured in the game tree in Figure 4. Note that in this case, I already prevents entry by offering P_1 only a small but positive compensation x_1 and P_2 nothing for x_2^E—provided that it has an incentive to set an (off-equilibrium) value for x_2^{NE} that is sufficiently large. This follows readily from backwards induction: if $x_2^{NE} > 10$, P_2 will choose exclusivity if P_1 does not; anticipating this, P_1 is always better off choosing exclusivity, as $10 + x_1 > 10$ for any value $x_1 > 0$. The choice whether P_2 is subsequently also exclusive is then irrelevant (as entry requires both to be non-exclusive), and I may simply set $x_2^E = 0$.

Figure 4. Game tree formalisation of a divide-and-conquer theory of harm



Note: Game tree formalisation of a divide-and-conquer strategy in case of sequential discriminatory exclusivity offers, where incumbent sports organiser I offers x_1^E to first participant P_1 for exclusivity, and x_2^E or x_2^{NE} to second participant P_2 depending respectively on whether P_1 chose exclusivity. The first payoff at the end of each branch is that of P_1 and the second that of P_2. Arrows indicate best-response behaviour when $x_1 > 0$, $x_2^E = 0$, and $x_2^{NE} > 10$.

Note that while this exclusionary outcome is the only sub-game perfect equilibrium, and this outcome is disadvantageous to both participants (as they could have received 20 if they both remained non-exclusive), it does require the following assumptions: (i) I is sufficiently better off and P_2 not too much worse off in case of non-

entry, such that I is willing and able to offer a sufficiently large x_2^{NE} in the hypothetical case that P_1 does not accept exclusivity (which, interestingly, depends in turn on the same conditions as the imperfect competition theory of harm); (ii) I can offer discriminatory offers to the participants; (iii) participants are unable to write binding contracts on their behaviour before their sequential decision-making.

E. Supportive economic evidence

The basic narrative on why exclusive dealing in sports would be harmful is straightforward: it deprives competing organisers of a necessary input, reducing both customer choice and the pressure on the incumbent to compete. However, this basic narrative does not yet resolve the puzzle of why participants would ever voluntarily accept exclusive dealing if it is not in their advantage (i.e. the Chicago School benchmark). Moreover, exclusive dealing is not 'by its very nature' harmful. This necessitates the need for a theory of harm. In showing harm in any one particular case, it may therefore be necessary to find evidence supportive of any one theory of harm—as discussed above.

There is a range of factors that are relevant for identifying the likelihood of harm, and which can be assessed qualitatively as well as quantitatively. In particular, this includes the degree of incumbent market power (both upstream and downstream); the limits to participant coordination on the decision to accept exclusive dealing (as, in particular, the coordination failure and divide-and-conquer theories of harm assume limits to this coordination); the share of participants needed for entry to be viable; and any other circumstantial barriers to entry that already exist in addition to the exclusive dealing restriction (including network effects).

Finally, there is a range of quantitative metrics that may be used to support the claim that key parameters of competition have been adversely affected by the exclusive dealing. This relates to price and output, but also choice to the different customer groups, innovation (e.g. the introduction of innovative new sports formats), the spread of the sport (e.g. geographically), and customer satisfaction.[106] In assessing these metrics, standard comparator damages estimation tools may be deployed. This includes cross-sectional comparison (different sports), time-series comparison (over time within the same sport), and difference-in-difference comparison (combining both cross-sectional and time-series estimation, thereby correcting for any common changes to the different sports compared).[107] However, in the context of sports, it may be challenging to find good comparators: there are many fundamental differences between sports that make it difficult to isolate the effect of exclusive dealing specifically, and there may be a lack of strong temporal variation. One alternative in those cases could be to instead consider a profitability analysis of sports organisers, as a direct measure of market power (or the recoupment of past investments).[108] This, however, only speaks to the question of the degree of market power of a sports organiser (and its ability to recoup investment costs), and not necessarily to the harmful effect of exclusive dealing per se.

V. PROCOMPETITIVE EFFECTS FROM EXCLUSIVE DEALING IN SPORTS

In addition to assessing the harm from an exclusive dealing restriction in sports, it may equally be helpful or even necessary to assess its procompetitive effects (or 'theory of benefit'). In particular, under the ancillary restraints doctrine, economic objectives may equally be used to justify the restriction. Moreover, procompetitive rationales may be used to invalidate a possible by-object classification under Article 101(1) TFEU in as far as they inform the conclusion that the restriction is not 'by its very nature' anticompetitive—as is the case with exclusive dealing.[109] Finally, under Article 101(3) a balancing of pro- and anticompetitive effects would need to be conducted.

In this final section, I outline the main theory of benefit of exclusive dealing specific to sports, which is on preventing freeriding behaviour and hold-up (Section V.A). I then discuss a second potential theory of benefit relating to ensuring a minimum viable scale under network effects (Section V.B).

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[106] In its *ISU* decision, the Commission points specifically to output, choice, and innovation as being harmed—although it does not support this quantitatively. See ISU EC Decision, paras 203–205. In the context of *ESL*, an interesting economic analysis is performed by García, A., Jubete Blanco, D., Padilla, J., and Riera, A. (2023), 'Effects of the Super League on the revenues of European football clubs', *Concurrences*, 01/2023, who try to identify the projected income to different football clubs both with and without ESL joining in parallel to UEFA and FIFA.

[107] Oxera (2009), 'Quantifying antitrust damages: towards non-binding guidance for courts', study prepared for the European Commission, December; European Commission (2013), 'Practical guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU', Commission staff working document, C(2013) 3440, 11 June.

[108] Oxera (2009), footnote 107, sections 3.6–7.

[109] Footnote 56. Potentially, procompetitive rationales may even be used to help construct the appropriate counterfactual in the case of an effects analysis under Art. 101(1) TFEU—see ISU EC Decision, para. 191.

A. Preventing freeriding behaviour and hold-up

Absent exclusivity, a potential prospect of future opportunistic behaviour by participants may undermine the incentives of a sports organiser to invest in the development of a nascent sport or its participants—at the expense of both the sports organiser and the participants themselves. This is an example of what is known as the hold-up problem.

More specifically, participants may face the ex post incentive and ability to switch to another, more lucrative sports organiser once they or their sport has grown to prominence. This alternative organiser may be able to offer better terms to the participants than the original organiser, as—unlike the original organiser—it did not have to pay the ex ante investment costs necessary for the cultivation of the sport or participants. During the recoupment phase, and after having sunk the ex ante investment, the original sports organiser can then be 'held-up' by the participants to offer better terms, at risk of the participants switching to a competing tour. Importantly, it is an inability of participants to commit ex ante not to switch to another sports organiser that then undermines the incentives of the original sports organiser to invest in the development of a nascent sport.

To illustrate more formally the competitive harm from hold-up in absence of exclusivity, we can take the following sequential game. Suppose that first, an incumbent sports organiser I needs to decide whether to invest an amount $x \geq 0$ in the development of a nascent sport or sports event. If I does not invest in the sport, both I and participants P simply receive a payoff of zero. Second, if I invests in the sport, P needs to decide whether to remain exclusive to this sports organiser. If P remains exclusive, both I and P receive a payoff of 10 such that the net payoff is $10 - x$ for I (i.e. payoff minus the ex ante investment) and 10 for P. Third, if P is not exclusive, another organiser can enter the market, without the need to pay investment x. Suppose such entry doubles the payoff to P (higher output, stronger bargaining position) but halves the payoff to I (lower output, weaker bargaining position). The net payoff then becomes $5 - x$ for I and 20 for P if I decides to continue; and $-x$ and 10 respectively if I decides to stop. This sequential game is captured in the game tree in Figure 5 below.

Taking this set-up, whenever investment cost x is sufficiently large but not too large (in this case whenever $5 < x < 10$), it readily follows that in an absence of an ex ante exclusivity guarantee by P, the only sub-game perfect equilibrium results in I not investing in the development of the sport or sports event, and both I and P receiving a payoff of zero. This is even though both I and P would be better off if I would invest and P would remain exclusive.

To see why this is the only sub-game perfect equilibrium, backwards induction can be applied (indicated with the arrows in the figure): it can be inferred that in the third stage, I would continue to operate even if P is non-exclusive, as $5 - x > -x$; anticipating this, it can be inferred that in the second stage, P would be non-exclusive, as $20 > 10$; finally, anticipating this, it can be inferred that in the first stage, I would not invest, as $0 > 5 - x$ (given the condition that $x > 5$).

If, however, P would somehow commit ex ante to being exclusive in the second stage, this hold-up problem is solved: I would invest, as $10 - x > 0$ (given the condition that $x < 10$), and P would receive 10, making both parties better off. In other words, the anticipation of P facing an ex post incentive to freeride on the investment by I (i.e. for I to be 'held-up' by P) in the second stage takes away the ex ante incentive for I to invest in the first place. A mutually beneficial solution would then be for P to commit ex ante to remain exclusive.

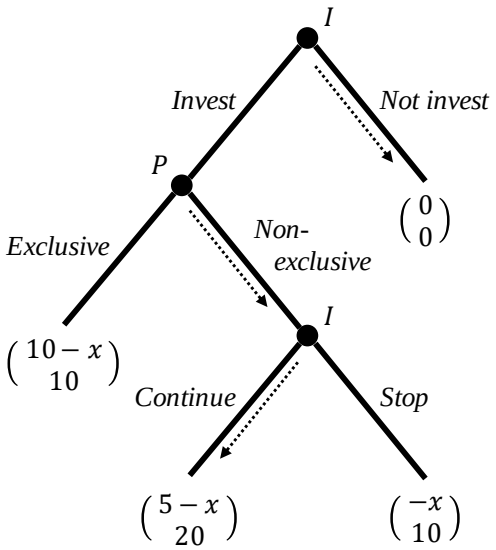
In the presence of such a commitment problem, exclusive dealing restrictions can help to protect the original sports organiser from being 'held-up' during the recoupment stage of its investment, and to ensure it has the ex ante incentive to invest. For a hold-up problem to occur (and hence for a vertical restraint to be potentially justified), three conditions—as cited by the Commission—must hold: (1) the ex ante investments made must be specific to this relationship, (2) they cannot be recouped in the short run, and (3) they are asymmetric (in that one party has to make more ex ante investments than the other).[110]

Note, finally, that in the context of sports, another important condition for a hold-up problem to occur is whether a sufficient number of participants can be made to switch from one sports organiser to another. In the context of network effects, this is anything but clear: as the previous subsection explained, competing sports organisers likely need to acquire a sufficient scale of participation from athletes or clubs in order to make their rival platform competitive. In other words, any new 'breakaway' sports organiser will need to convince a sufficient number of participants that it provides a superior platform to be commercially viable.[111]

[110]For more on the economics behind freeriding and hold-up, see European Commission (2010), 'Guidelines on Vertical Restraints', Commission Notice, C(2010) 2365, para. 107.

[111]At the same time, a switch to a new platform may also prove the point that a platform can be viable even without such restrictions (unless the new platform imposes similar exclusive dealing restrictions).

Figure 5. Game tree formalisation of a hold-up problem



Note: Game three of an investment game leading to a commitment problem, where incumbent sports organiser *I* first decides whether to invest x in a nascent sport, participants *P* then decide whether to remain exclusive, and—if *P* is not exclusive—*I* decides whether to continue. The first payoff at the end of each branch is that of *I* and the second that of *P*. Arrows indicate best-response behaviour when $5 < x < 10$.

B. Ensuring minimum viable scale under network effects

Because of the positive indirect network effects between participants on one side, and viewers (and, by extension, broadcasters, sponsors, and marketing and advertising companies) on the other side, sports organisers need to solve the chicken-and-egg problem to make a (nascent) sport, or sports event, viable: they need a critical mass of participants to make the event sufficiently attractive to viewers (and, by extension, broadcasters and sponsors), but they also need a critical mass of viewers and sponsorship interest to make the event sufficiently attractive to the participants.[112]

To solve this chicken-and-egg problem, it may be necessary to restrict participants' ability to multi-home (i.e. to participate in competing sports organisers' platforms). This is the case for instance when (i) more viewers tune in to a sports platform when the participating athletes or clubs can only be seen exclusively on that platform (i.e. there is no dilution of viewer attention), and (ii) the incremental increase in viewer interest initially accelerates once more top athletes or clubs start to participate, but eventually fades out. By ensuring that enough top participants are exclusively on the same platform, the platform may then potentially be able to ensure that a viable equilibrium even exists, and that the critical mass required to solve the chicken-and-egg problem is not too large.[113]

To formalise the intuition that banning participant multi-homing (i.e. imposing exclusivity) in sports may help platform viability, suppose that there are two sides: participants and viewers. Take $P \in [0,1]$ as the share of participants active on the platform and $V \in [0,1]$ as the share of viewers active on the platform. Suppose further that the best responses of each side (i.e. the share of each side participating as a fraction of the share of the other side participating) have the following properties: (i) V increases in P with a positive slope that initially increases (acceleration), but eventually decreases (saturation); (ii) the marginal benefit to V of additional P in exclusive participants is higher than in non-exclusive participants; and (iii) P increases in V, where it is assumed for simplicity that the share of participants is equal to the share of viewers—i.e. the best-response function of participants is $BRF_P = V$.[114]

To formalise the first assumption, we may suppose a logistic function[115] to capture the best-response function of V, i.e. $BRF_V = \bar{V}/\left[1 + e^{-k(P-P_0)}\right]$ where $\bar{V} \in [0,1]$ is the supremum of the logistic function (i.e. the higher horizontal asymptote, or saturation level when P goes to infinity), k the growth rate, and P_0 the midpoint. To get reasonable numerical values, we set $\bar{V} = 1$, $k = 10$ and $P_0 = 0.5$. To also incorporate the second assumption, we

[112]Footnote 92.

[113]For more on modelling demand in case of network goods, see Belleflamme and Peitz (2021), footnote 85, section 3.1 and references therein.

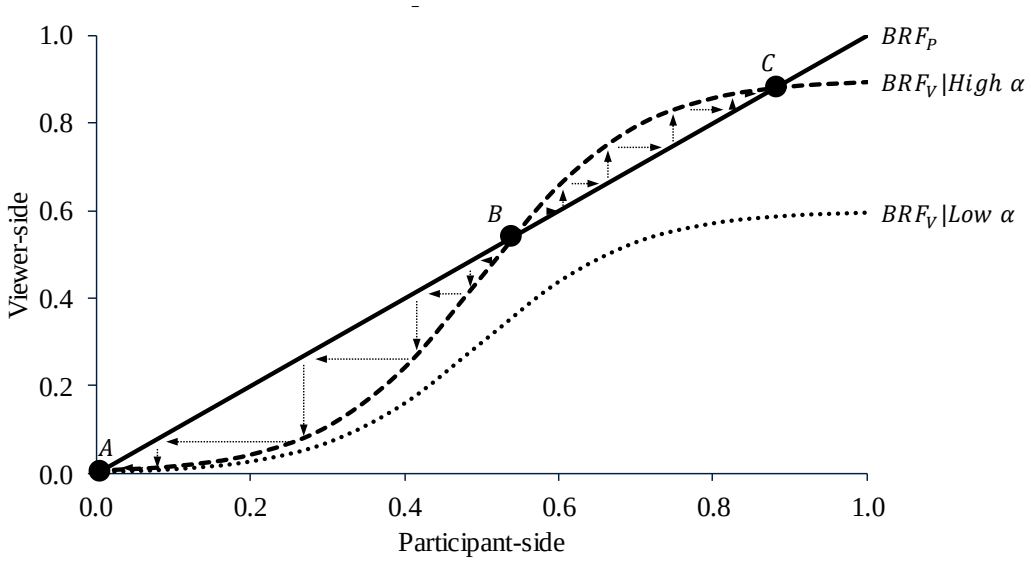
[114]For tractability, this formalisation the direct network effects between participants out of consideration.

[115]A logistic function, commonly used in economics, has an S-shape and is bounded between two horizontal asymptotes.

assume that a share $\alpha \in [0,1]$ of the participants is exclusive (E) and comes with the high supremum $\bar{V}_E = 1$, whereas a share $1-\alpha$ is non-exclusive (NE) and comes with a lower supremum $\bar{V}_{NE} = 0.5$. The best-response function now becomes $BRF_V = \alpha BRF_{V_E} + (1-\alpha)BRF_{V_{NE}} = 0.5(1+\alpha)/\left[1+e^{-10(P-0.5)}\right]$.

Figure 6 plots BRF_P and BRF_V, where BRF_V is plotted both for a high value of α (0.9) and a low value (0.6). This plot already reveals the following results: (i) when α is sufficiently high, there are three equilibria: low (A), middle (B), and high (C), and when α is too low, only low equilibrium A exists; (ii) if middle equilibrium B exists, this is 'critical mass' above which the market tips: any share of participants below this equilibrium will instigate best-response dynamics that push the market to low equilibrium A, whereas any share above will instead instigate dynamics that push the market to high equilibrium C; and (iii) if middle equilibrium B exists, it decreases if α increases. These results show that a ban on multihoming (i.e. imposing $\alpha = 1$) may help platform viability by potentially ensuring that a high equilibrium even exists and pushing down the critical mass necessary for the market to tip to the high equilibrium.

Figure 6. Equilibrium participation rates on a two-sided platform



Note: Share of participation of each side, with a plot of the best-response functions for participants (BRF_P) and for viewers (BRF_V, in the case of high and exclusivity share α respectively). Arrows indicate best-response dynamics, revealing equilibrium B as an unstable equilibrium (tipping point).

VI. CONCLUDING REMARKS

Generally, exclusive dealing in sports is illegal in the EU if both of the following conditions hold. First, the restrictions are not inherent in the pursuit of a legitimate (sporting or non-sporting) objective nor proportionate to these objectives. Second, there is an appreciable (net) negative effect on competition from these restrictions.

The ongoing *ESL* and *ISU* cases provide further guidance on each of these conditions. In particular, on legitimate objectives, it becomes clear that this may in fact relate to a range of sporting objectives politically legitimised in Article 165 TFEU and the series of initiatives that led up to its adoption (including declarations on sports by the European Council). However, non-sporting economic objectives may also be legitimate—in particular when it relates to the economic objective of preventing opportunistic freeriding behaviour.

On the condition of an appreciable negative effect on competition, it becomes clear after *ESL* and *ISU* that the alternative of a by-object classification is unlikely to withstand judicial review in exclusive dealing cases in sports. This is because exclusive dealing (in general, but also in sports specifically) is not 'by its very nature' harmful to competition. That said, there do exist robust theories of harm (as discussed in Section IV) that explain how exclusive dealing risks harming competition—despite the fact that participants have accepted these restrictions freely and voluntarily. It becomes a case-based assessment whether any one of these theories applies. Moreover, concluding on an appreciable (net) negative effect on competition—for example in the context of Article 101(1) or Article 101(3)—will require a case-based assessment of, in particular, the relevant markets (taking into account the potentially strong network effects between, and within, different customer groups), market power and dominance, and the specific theories of harm and benefit—and their necessary conditions.

As a final thought—based on the above assessment of *ESL* and *ISU*, and the economics underlying the assessment of market definition, harms, and procompetitive effects—I see that the *ESL* and *ISU* cases are revealing two interesting developments. On the one hand, the need to assess case-based effects points towards *more scope for more economics* in exclusive dealing cases in sports. In particular, the recognition that such restrictions are not by their very nature harmful requires an investigation of robust theories of harm. These theories exist, but in the abstract, and would need to be assessed within the context of the case. Moreover, there is a need to assess the elements of market definition, market power, and the conditions underlying the likelihood of harm or benefit.

On the other hand, however, the legitimacy of non-economic sporting objectives points towards *more scope for less economics* in exclusive dealing cases in sports. The different sporting objectives references by AG Rantos in his opinion (e.g. open competitions with admission based on sporting merit, a pyramid sporting structure, and financial solidarity) are legitimised based on political grounds, with reference to Article 165 TFEU and its underlying political declarations. Although economic objectives may also be legitimate (e.g. relating to preventing freeriding behaviour), it is not just economic objectives that are legitimate in EU sports cases—nor are they even the most important. This raises the question, in turn, of whether there may be other non-economic objectives, unrelated to sports, that could similarly be classified as legitimate—e.g. sustainability. If so, then *ESL* and *ISU* may have repercussions even beyond the realm of sports.