СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA
SOUDNÍ DVŮR EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS DOMSTOL
GERICHTSHOF DER EUROPÄISCHEN UNION
EUROOPA LIIDU KOHUS
ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
COURT OF JUSTICE OF THE EUROPEAN UNION
COUR DE JUSTICE DE L'UNION EUROPÉENNE
CÚIRT BHREITHIÚNAIS AN AONTAIS EORPAIGH
SUD EUROPSKE UNIJE
CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA

EIROPAS SAVIENĪBAS TIESA
EUROPOS SĄJUNGOS TEISINGUMO TEISMAS
AZ EURÓPAI UNIÓ BÍRÓSÁGA
IL-QORTI TAL-ĠUSTIZZJA TAL-UNJONI EWROPEA
HOF VAN JUSTITIE VAN DE EUROPESE UNIE
TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ
TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA
CURTEA DE JUSTIȚIE A UNIUNII EUROPENE
SÚDNY DVOR EURÓPSKEJ ÚNIE
SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

CVRIA
LUXEMBOURG

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 9 March 2023 [1]

Case C-680/21

UL,
SA Royal Antwerp Football Club
v
Union royale belge des sociétés de football association ASBL,
joined parties:
Union des associations européennes de football (UEFA)

(Request for a preliminary ruling from the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking), Belgium))

(Reference for a preliminary ruling – Article 45 TFEU – Freedom of movement for workers – Article 165 TFEU – Sport – Regulations of UEFA and the associated national football federations – Home-grown players)

[1] Original language: English.

I. Introduction

1. The present reference for a preliminary ruling, which concerns the interpretation of Articles 45 and 101 TFEU, is made in proceedings involving, on the one hand, UL, a football player, and Royal Antwerp Football Club ('Royal Antwerp') and, on the other hand, the Union royale belge des sociétés de football association ASBL (Royal Belgian Football Association; 'URBSFA') and the Union des associations européennes de football (Union of European Football Associations; 'UEFA') for the annulment of an arbitration award which dismissed an action for nullity and compensation brought by UL and Royal Antwerp against a set of rules issued by the URBSFA, UEFA and the other national football associations which are members of the latter.

2. As requested by the Court, this Opinion is limited to the free movement of workers aspect of the case, under Article 45 TFEU. The rules in question relate to what are known as 'home-grown players' ('HGPs'), that is to say players trained by a club or in the national football association to which this club belongs. In essence, the question is whether the mandatory inclusion of a given number of HGPs on a relevant list amounts to an unjustified restriction of the free movement of workers under Article 45 TFEU.

3. I shall argue in this Opinion that the contested provisions are (only) precluded by Article 45 TFEU to the extent that they apply to players who do not emanate from the specific club in question. Nobody wants boring football, [2] which is why some restrictions to this fundamental provision can, in my view, be accepted.

II. Facts, procedure and questions referred

A. The parties to the dispute

4. UL is a football player, born in 1986, who holds the nationality of a third country as well as Belgian nationality. He has been professionally active in Belgium for many years. He played for Royal Antwerp, a professional football club based in Belgium, for several years and is now playing for another professional football club in Belgium.

5. UEFA is an association governed by Swiss law, which is based in Nyon (Switzerland). It was founded in 1954 with the purpose, inter alia, of dealing with all matters relating to football, supervising and controlling the development of football in all its forms and preparing and organising international football competitions and tournaments at European level. Its membership consists of 55

[2] Even though die-hard *aficionados* like Nick Hornby in his 1992 novel *Fever Pitch* may assert that 'complaining about boring football is a little like complaining about the sad ending of King Lear: it misses the point somehow', see Penguin Books edition, 2000, p. 127.

national football associations, whose members include professional football clubs. Its supreme body is the Congress, which brings together all its members. Its executive body is the Executive Committee, whose members are elected by the Congress, by European Leagues (EL), which is itself a Swiss-based association representing 37 national leagues from 30 different states, and by the Association européenne des clubs (European Clubs Association (ECA)), which is a body representing football clubs.

6. The URBSFA is a non-profit association under Belgian law recognised by the Fédération Internationale de football association (International Association Football Federation (FIFA)), by UEFA, of which it is a member, and by the Comité Olympique et Interfédéral Belge (Belgian Olympic and Interfederal Committee (COIB)). Its purpose is to ensure the sporting and administrative organisation of professional and amateur football in Belgium as well as its promotion.

B. The contested provisions

1. UEFA

7. On 2 February 2005, the UEFA Executive Committee adopted rules requiring professional football clubs taking part in UEFA's interclub competitions to enter a maximum number of 25 players on the squad size limit list, which in turn must include a minimum number of HGPs. Such players are defined by UEFA as players who, regardless of their nationality, have been trained by their club or by another club in the same national association for at least three years between the ages of 15 and 21. On 21 April 2005, the HGP rule was approved by UEFA's 52 member associations, including the URBSFA, at the Tallinn Congress. Since the 2008/2009 season, the UEFA regulation has required clubs registered for one of its competitions to include a minimum of 8 home-grown players in a list of maximum 25 players. Out of those eight players, at least four must have been trained by the club in question.

2. URBSFA

8. The relevant rules of the URBSFA federal regulations provide for football clubs participating in the professional football divisions 1A and 1B to submit *lists* containing a maximum list of 25 players, which must include at least 8 trained by Belgian clubs (meaning players who have been affiliated to a Belgian club for at least three full seasons before their 23rd birthday). Furthermore, at least three of those eight players must have been affiliated to a Belgian club for at least three seasons before their 21st birthday. [3]

[3] This results from a combined reading of former Articles P335.11 and P1422 and current Articles B4.112 and B6.109 of the URBSFA federal regulation.

9. Moreover, as regards *match sheets*, clubs must resort to players on the abovementioned lists and must include at least six players who have been affiliated for at least three full seasons before their 23rd birthday, two of which before their 21st birthday. [4]

10. In both instances, if the minimum thresholds are not met, such players cannot be replaced by players who do not satisfy the relevant conditions.

C. The main proceedings

11. On 13 February 2020, UL brought an action before the Cour belge d'arbitrage pour le sport (Belgian Court of Arbitration for Sport, Belgium) seeking, inter alia, a declaration that the HGP rules put in place by UEFA and the URBSFA were unlawful on the ground that they infringed Article 45 TFEU [5] and related compensation for the damage caused to UL. Royal Antwerp subsequently voluntarily intervened in the proceedings, also seeking compensation for the damage caused by those rules. UEFA was not a party to the arbitration proceedings.

12. By an arbitration award made on 10 July 2020, the Belgian Court of Arbitration for Sport decided that those claims were inadmissible in so far as they related to the HGP rules put in place by UEFA and admissible but unfounded in so far as they related to those put in place by the URBSFA.

13. As regards the rules put in place by the URBSFA, the Belgian Court of Arbitration for Sport considered, in substance, that they did not infringe the free movement of workers guaranteed by Article 45 TFEU on the grounds that they were indistinctly applicable, that they did not give rise to any discrimination on the basis of nationality and that they were, in any event, justified by legitimate objectives and were not disproportionate to them. [6]

14. As a result, the Belgian Court of Arbitration for Sport dismissed the claims for compensation of UL and Royal Antwerp.

15. On 1 September 2020, UL and Royal Antwerp brought an action before the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking), Belgium) for the annulment of the arbitration award on the grounds that it was contrary to public policy, in accordance with Article 1717 of the Belgian Judicial Code.

4 This results from former Article P1422 and current Article B6.109 of the URBSFA federal regulation.

5 And Article 101 TFEU.

6 Moreover, the Belgian Court of Arbitration for Sport found there to be no breach of Article 101 TFEU.

16. In support of their claims, they argue, in substance, that the UEFA and URBSFA rules on HGPs infringe the freedom of movement for workers under Article 45 TFEU in that those rules restrict both the possibility for a professional football club such as Royal Antwerp to recruit players who do not meet the requirement of local or national roots which they set out, and to field them in a match, and the possibility for a player such as UL to be recruited and fielded by a club in respect of which he cannot rely on such roots.

17. On 9 November 2021, UEFA filed an application for voluntary intervention in the proceedings, which was declared admissible by a judgment delivered on 26 November 2021.

18. In its request for a preliminary ruling, the referring court notes, in the first place, that the arbitration award which it is asked to annul was based (i) on the partial inadmissibility of the claims of UL and Royal Antwerp and on the rejection of the remainder of those claims as unfounded and (ii) on the interpretation and application of two provisions of Union law, namely Articles 45 and 101 TFEU, the possible non-compliance with which could, where appropriate, constitute a breach of public policy within the meaning of Article 1717 of the Belgian Judicial Code, having regard to their nature and the relevant case-law of the Court.

19. In the second place, the referring court considers that, in order to be able to give judgment, it is necessary for it to obtain clarification from the Court as to the interpretation of Articles 45 and 101 TFEU. That court questions the restrictive impact of those rules on the free movement of workers and on competition, and whether they are justified, adequate, necessary and proportionate to the objectives they pursue. In this context, the court refers, inter alia, to a press release published by the European Commission and to a study carried out on behalf of that institution, from which it emerges (i) that those rules have or are likely to have restrictive effects on the free movement of workers and (ii) that the question whether those effects are proportionate to the very limited benefits derived from them, having regard to the less restrictive alternative measures which appear to be possible, is the subject of detailed examination, in particular within the framework of infringement proceedings brought by that institution. [7]

D. The questions referred

20. It is against this background that, by order of 15 October 2021, received at the Court on 11 November 2021, the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)) referred the following questions to the Court of Justice for a preliminary ruling:

[7] Moreover, the referring court wonders whether the rules on HGPs can be regarded as constituting an agreement between undertakings, a decision by an association of undertakings or a concerted practice within the meaning of Article 101(1) TFEU.

‘(1) Is Article 101 TFEU to be interpreted as precluding the plan relating to “HGPs” adopted on 2 February 2005 by UEFA’s Executive Committee, approved by UEFA’s 52 member associations at the Tallinn Congress on 21 April 2005 and implemented by means of regulations adopted both by UEFA and by its member federations?

(2) Are Articles 45 and 101 TFEU to be interpreted as precluding the application of the rules on the inclusion on the match sheet and the fielding of locally trained players, as formalised by Articles P335.11 and P.1422 of the URBSFA’s federal regulation and reproduced in Articles B4.1[12] of Title 4 and B6.109 of Title 6 of the new URBSFA regulation?’

21. Written observations were submitted by UL, Royal Antwerp, the URBSFA, UEFA, the Belgian, Greek, Polish, Portuguese, Romanian and Swedish Governments and by the European Commission. UL, Royal Antwerp, the URBSFA, UEFA, the Polish, Romanian, Swedish Governments and the Commission took part in the hearing, which was held on 15 November 2022.

III. Assessment

22. The referring court seeks guidance on the compatibility, with Union law, of the HGP rules of UEFA (question 1) and of the URBSFA (question 2). Curiously, unlike to question 2, question 1 does not refer to Article 45 TFEU.

23. It is for this Opinion to examine whether Article 45 TFEU is to be interpreted as precluding the application of rules such as those contained in the relevant URBSFA regulation, concerning the inclusion on the match sheet and the fielding of locally trained players. Given that the said URBSFA regulation is based in large parts on the UEFA rules, I shall also examine the latter in this Opinion.

24. By its questions, the referring court in essence seeks to ascertain whether Article 45 TFEU is to be interpreted as precluding the application of the rules on HGPs, as adopted by UEFA and the URBSFA.

A. Admissibility

25. The URBSFA submits that the two questions should be declared inadmissible on the ground that they are of no interest to the applicants in the main proceedings and are hypothetical in nature. Moreover, it claims that the dispute in the main proceedings has a purely domestic dimension in view of UL’s nationality, Royal Antwerp’s place of establishment and the territorial scope of the rules at issue, and the referring court is called upon only to give a decision *inter partes*.

26. UEFA considers that the questions referred for a preliminary ruling must be declared inadmissible on the ground that the referring court did not set out in

sufficient detail the factual and legal context in which it raised them, in particular the identity of the various national football associations which have introduced rules relating to HGPs and the actual content of those various rules. Furthermore, that court has not established that the dispute in the main proceedings is transnational in nature. Moreover, as the decision to make a reference for a preliminary ruling was adopted before UEFA was heard, the insufficiently precise and detailed presentation of the factual and legal background of the case had prevented UEFA from asserting its rights.

27. In a similar vein, the Romanian Government and the Commission agree with the URBSFA and UEFA that the question on the interpretation of Article 45 TFEU has been made in the absence of any foreign, as in external, element in the main proceedings but also of any indication from the referring court that that interpretation meets a need inherent in the resolution of those proceedings despite the purely domestic nature of the dispute.

28. While I understand the concerns described in the preceding points, [8] I consider the questions in the case at issue to be admissible.

29. The starting point for assessing an objection that a case is not admissible because of an alleged purely domestic situation is the Court's judgment in *Ullens de Schooten*, [9] where it has neatly summarised and classified the four situations in which cases arising from purely internal situations are nevertheless admissible for a preliminary ruling to be given. One of those situations is where it is not inconceivable that nationals established in other Member States had been or were interested in making use of the freedom in question for carrying on activities in the territory of the Member State that had enacted the national legislation in question and, consequently, that the legislation, applicable without distinction to nationals of that Member State and those of other Member States, was capable of producing effects which were not confined to that Member State. [10] In this respect, it is not inconceivable that footballers established in other Member States are deterred by the provisions in question from accessing the Belgian market.

30. Furthermore, it should be borne in mind that *in casu* the competence of the referring court is limited to the determination whether public policy has been breached by the arbitral award. By definition, in its assessment, the referring court must go beyond the specific facts of the present case, given that considerations of public policy necessarily transcend individual cases.

8 After all, both UL and Royal Antwerp are based in Belgium and there is, in this respect, no cross-border element.

9 Judgment of 15 November 2016 (C-268/15, EU:C:2016:874).

10 See judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 50).

31. Moreover, it should be noted that the subject matter of the present case at national level is not a dispute between UL and Royal Antwerp but the contested provisions of UEFA and the URBSFA. The application, pending before the referring court, to set aside an arbitral award does not amount to a hypothetical situation. That arbitral award is based on an interpretation and application of Article 45 TFEU [11] by the Belgian Court of Arbitration for Sport. The referring court states that it is obliged to review the validity of this interpretation and application with a view to determining whether or not the award is contrary to public policy. Article 45 TFEU has thus been applied by the Belgian Court of Arbitration for Sport in a way that raises doubts in the referring court's mind. Neither the Belgian Court of Arbitration for Sport nor, by extension, the referring court, is called upon to assess the specific situation of UL. Rather, UL, subsequently supported by Royal Antwerp, sought a declaration that the HGP rules put in place by UEFA and the URBSFA were unlawful on the ground that they infringe EU law. In considering whether or not to set aside the arbitral award finding no infringement of EU law, the referring court's task is to examine the contested provisions in their entirety and in general.

32. Finally, concerning UEFA's contention that it was not heard before the adoption of the decision to refer the matter to the Court, suffice it to state that pursuant to the Court's case-law it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and their procedure. [12]

33. Consequently, I propose that the Court consider the questions of the referring court to be admissible.

B. Substance

34. Pursuant to Article 45 TFEU, freedom of movement for workers is to be secured within the Union.

35. Sporting activities forming part of economic life fall under the fundamental freedoms of the Treaty [13] which implies that professional footballers engaging in an economic activity are to be classified as 'workers' for the purposes of Article 45 TFEU. [14]

11 As well as Article 101 TFEU.

12 See, by way of example, judgment of 11 April 2000, *Deliège* (C-51/96 and C-191/97, EU:C:2000:199, paragraph 29).

13 See also Forsthoff, U., Eisendle, D., in Grabitz, E., Hilf, M., and Nettesheim, M. (eds), *Das Recht der Europäischen Union*, 76. EL., updated May 2022, C.H. Beck, Munich, Art. 49 AEUV, point 104.

14 This has been consistent case-law since the judgment of 14 July 1976, *Donà* (13/76, EU:C:1976:115, paragraph 13). See also judgment of 15 December 1995, *Bosman* (C-415/93,

36. Moreover, as regards those bound by Article 45 TFEU, it is well established that that provision applies to private entities such as UEFA and the URBSFA which regulate gainful employment in a collective manner. [15]

1. The contested provisions

37. At this stage, I deem it helpful to recap quickly the contested provisions.

38. Under the UEFA regulation, HGPs are defined as players who, regardless of their nationality, have been trained by their club or by another club in the same national association for at least three years between the ages of 15 and 21. Moreover, under the UEFA regulation, clubs registered for one of the UEFA competitions [16] are required to include a minimum of 8 home-grown players in a list of maximum 25 players. At least four of those players must have been trained by the club in question.

39. Under the URBSFA rules, the clubs registered for a competition within the jurisdiction of the URBSFA must include a minimum of 8 players having played for the club or another Belgian club for at least three seasons by the age of 23 (3 out of those 8 by the age of 21), in a *list* of a maximum of 25 players. Moreover, as regards *match sheets*, clubs must resort to players on this list and must include at least six players who have been affiliated for at least three full seasons before the age of 23, two of which before the age of 21.

40. In both instances (UEFA and the URBSFA), if minimum thresholds are not met, players cannot be replaced by other players who do not satisfy the relevant conditions.

2. Restriction

41. Next, I shall examine whether the contested provisions constitute a restriction to Article 45 TFEU.

EU:C:1995:463, paragraph 73). On a general note, according to consistent case-law of the Court, the concept of 'worker' has a specific independent meaning and must not be interpreted narrowly. Any person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. See judgment of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraph 19 and the case-law cited).

15 This has been consistent case-law since the judgment of 12 December 1974, *Walrave and Koch* (36/74, EU:C:1974:140, paragraph 17). See also judgments of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 82); of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 35); and of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143, paragraph 30).

16 That is to say the following four competitions: UEFA Champions League, Europa League, Conference League and Super Cup.

42. UL and Royal Antwerp as well as the Commission [17] are of the opinion that the contested provisions not only affect the free movement of workers in the Union but also constitute indirect discrimination based on nationality. By contrast, UEFA and the URBSFA contend that the contested provisions not only apply without distinction to all players, regardless of their nationality, but that they also do not constitute an obstacle to the free movement of players.

43. It is my contention that the contested provisions are likely to create indirect discrimination against nationals of other Member States. It is a fact of life that the younger a player is, the more likely it is that that player resides in his place of origin. [18] It is therefore necessarily players from other Member States who will be adversely affected by the contested provisions.

44. The contested provisions in effect amount to a requirement that can only be fulfilled by those who have been present in a certain location. In this respect the Court has consistently held that national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreigners. [19] In a similar vein, it constitutes consistent case-law of the Court that qualification requirements necessary for admission to certain occupations constitute an indirectly discriminatory restriction to the freedom of movement for workers. [20] The rules on HGPs are likely to restrict the possibilities for players who are Union citizens freely to leave a club in one Member State for a club in another Member State. Though neutral in wording, the contested provisions place local players at an advantage over players from other Member States. [21]

45. In any event, even if it were to be held that the contested provisions are not indirectly discriminatory, *quod non*, they certainly constitute a (simple) restriction to the free movement of football players. In this regard, I recall that the Court has held that rules prohibiting a basketball club from fielding players from other Member States in matches in the national championship, where the transfer has

17 Which, as described above, nevertheless considers the question inadmissible for an alleged lack of a cross-border element.

18 This is not to deny that there are players who move abroad at an extremely young age. However, this is only a small fraction of players and constitutes the exception, thereby proving the rule which is that the younger a player is, the more local he is likely to be.

19 See, by way of example and with respect to Article 45 TFEU, judgment of 7 May 1998, *Clean Car Autoservice* (C-350/96, EU:C:1998:205, paragraph 29 and the case-law cited). See also Zawidzka-Łojek, A., 'Ochrona interesu ogólnego na rynku wewnętrznym - dopuszczalne wyjątki i ograniczenia swobód. Model ochrony', in *System Prawa Unii Europejskiego, Volume 7, Prawo rynku wewnętrznego*, Warsaw, C.H. Beck, 2020, point 197.

20 See, by way of example, judgment of 15 October 1987, *Heylens and Others* (222/86, EU:C:1987:442, paragraphs 9 to 11).

21 See also, to that effect, Kliesch, J., *Der Status des Profifußballers im Europäischen Recht*, Nomos, Baden-Baden, 2017, p. 215 with respect to the UEFA rules.

taken place after a specified date, ‘constitute an obstacle to freedom of movement for workers’. [22]

46. I should mention in passing that for determining the restriction, the definition of HGPs chosen by UEFA and the URBFSA, according to which HGPs are not only players emanating from a given club, but also from the relevant national league, is immaterial. In both instances, 8 players cannot come from a club in another Member State, whereas 17 can. However, the distinction between club-players and players of the same league becomes relevant when it comes to determining the proportionality of the contested provisions.

3. Justification

47. A restriction on the freedom of movement for workers cannot be justified unless it, in the first place, serves one of the grounds of justification listed in Article 45(3) TFEU [23] or an overriding reason relating to the public interest [24] and, in the second place, observes the principle of proportionality, meaning that it is suitable for securing, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary in order to attain it. [25]

(a) On Article 165 TFEU

48. In view of the fact that various parties to the proceedings resort to Article 165 TFEU throughout their submissions and in a generous manner, a few comments on this provision are in order at this juncture of the legal analysis.

22 See judgment of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 49). The Court here explicitly refers to its judgment of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraphs 99 and 100). Moreover, in its judgment of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143, paragraph 35) the Court held that a French collective agreement requiring a ‘joueur espoir’ (a player between 16 and 22) at the end of his training period, on pain of being sued for damages, to sign a professional contract with the club which trained him was likely to discourage that player from exercising his right of free movement.

23 Public policy, public security or public health.

24 The Court has over the years employed different terminology to describe reasons of a non-economic nature as grounds of justification, which have been (and are being) developed by the case-law. See Martucci, F., *Droit du marché intérieur de l’Union européenne*, Presses Universitaires de France, Paris, 2021, point 261. For ease of reference, I shall refer to the term ‘overriding reason relating to the public interest’ in this Opinion.

25 See to that effect, in essence, judgments of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 104); of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143, paragraph 38); and of 10 October 2019, *Krah* (C-703/17, EU:C:2019:850, paragraph 55).

49. Article 165 TFEU, which has found its way into the Treaties with the Treaty of Lisbon, [26] deals with three distinct, yet interrelated issues: education, youth and sport. It is structured into four paragraphs. Paragraph 1 sets out the general aim and rationale of the provision which is that the Union is to contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function. Paragraph 2 then specifies what precisely Union action is aimed at – with which it is impossible to disagree: [27] developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest. Paragraph 3 stresses the importance of fostering cooperation with third countries and international organisations, in particular with the Council of Europe. [28] Finally and crucially, paragraph 4 allows the political institutions of the Union [29] 'in accordance with the ordinary legislative procedure' to 'adopt incentive measures, excluding any harmonisation' [30] and the Council (alone), on a proposal from the Commission, to adopt recommendations.

(1) Literal interpretation

50. The following is already directly apparent from the wording of Article 165 TFEU.

51. First, this provision is addressed to the Union and not to Member States or other public entities, let alone private ones. Secondly, the wording that is employed ('contribution', 'promotion', 'taking into account', 'development', 'cooperation') is typically found in soft law. Thirdly, Article 165 TFEU covers both professional and recreational sports, regardless of whether they are practised in clubs or individually. [31] Fourthly, even though the provision refers to the

26 On the genesis of this provision, see Opinion of Advocate General Rantos in *European Superleague Company* (C-333/21, EU:C:2022:993, point 29).

27 Out of the seven aims in this paragraph, six refer to education and only one to sports.

28 In so far as reference to the Council of Europe is made, this provision constitutes a specific emanation of the general obligation incumbent upon the EU under Article 220(1) TFEU to establish all appropriate forms of cooperation with the Council of Europe. See also my Opinion in *The English Bridge Union* (C-90/16, EU:C:2017:464, point 33).

29 For the purposes of this Opinion, I understand the EU political institutions to comprise the Commission, the Council and the Parliament.

30 Admittedly, it takes some time to get one's head around this provision which, in Orwellian-like fashion, allows the political institutions to resort to the ordinary legislative procedure in order to adopt … anything but legislation.

31 See also, to that effect, Odendahl, K., in Pechstein, M., Nowak, C., Häde, U., (eds), *Frankfurter Kommentar zu EUV, GRC und AEUV*, Band III, Mohr Siebeck, Tübingen, 2017, Art. 165 AEUV, point 9.

ordinary legislative procedure, Article 165(4) TFEU is *not* a legal basis for allowing the political institutions to adopt legally-binding acts within the meaning of Article 288 TFEU. [32] Article 165(4) TFEU is, therefore, nothing less than a 'false legal basis' and typical for a subject matter brought within the realm of EU policy without Member States in their capacity as masters of the Treaties being willing to concede any related legislative powers to the Union. Incidentally, the latter aspect is already mirrored in Article 2(5) and Article 6(e) TFEU: in the area of sport the Union's 'competence' is not a legislative one but limited to 'carry[ing] out actions to support, coordinate or supplement the actions of the Member States'. [33]

(2) Systemic and teleological interpretation

52. Regarding Article 165 TFEU within the structure of the FEU Treaty, it should be noted that being located in Part Three, Title XII of the FEU Treaty, [34] Article 165 TFEU features among all other areas of Union policy.

53. From this, we can infer the following elements.

54. First, Article 165 TFEU is not a provision having general application within the meaning of Part One, Title II of the FEU Treaty. [35] Secondly, UEFA and the URBSFA as private bodies, in so far as they regulate gainful employment in a collective manner, neither pursue nor implement a Union policy. Such an activity is for the Union legislature (and those transposing, applying and implementing secondary law). Instead, UEFA and the URBSFA seek to rely on a public policy objective in order to justify a restriction of a fundamental freedom. Regarding the case at issue, they are functionally comparable not to an EU institution which acts [36] on the basis of Article 165 TFEU, but to a Member State seeking to justify a restriction of a fundamental freedom. Put differently, the case at issue is one of *negative* integration where an entity intends to restrict a fundamental freedom in order to promote another policy which it deems to be of higher importance. This other policy happens to fall within the area of sport. Thirdly, it is not for UEFA or the URBSFA to implement Union action under

32 That is to say: regulations, directives and decisions.

33 See Article 2(5) and Article 6(e) TFEU. Article 2(5) goes on to specify that such actions do not supersede Member States' competence in these areas.

34 That is to say, it is tucked between the European Social Fund and Culture.

35 Such privilege is reserved for issues evidently considered more important by the masters of the Treaties, such as – to state just a few examples – non-discrimination (Articles 8 and 10 TFEU), the environment (Article 11 TFEU), consumer protection (Article 12 TFEU) or data protection (Article 16 TFEU).

36 I carefully employ the term 'act' for want of a better one, given that, as has been established above, Article 165 TFEU does not allow the EU institutions to legislate in the proper sense of the term.

Article 165 TFEU. They are private bodies exercising economic functions, in addition to regulatory ones. Fourthly, the political institutions of the European Union are of course free to proclaim [37] – in their wisdom – a European Sports Model on the basis of Article 165 TFEU or elsewhere. This does not mean, however, that functions incumbent on the EU institutions are outsourced in one way or another to UEFA or the URBSFA. Fifthly, UEFA and the URBSFA cannot obtain a blank cheque for the purposes of restrictions on the fundamental freedom of Article 45 TFEU by reference to Article 165 TFEU. Restrictions of this fundamental freedom by entities such as UEFA and the URBSFA must be appraised like all other restrictions, according to standard principles.

(3) Bearing on the case at issue

55. All of the above is not to say that the legal value of Article 165 TFEU is so limited [38] that it has absolutely no bearing on the case at issue. Indeed, this provision is helpful in two respects: first, to identify a ground of justification for a restriction of Article 45 TFEU, known as an overriding reason in the public interest, and secondly, as an indication of what is acceptable in and throughout the Union when it comes to carrying out the proportionality test. [39] This is, moreover, exactly what the Court has done in the past. [40]

(b) Identifying an overriding reason relating to the public interest

56. UEFA and the URBSFA essentially put forward two distinct overriding reasons relating to the public interest: encouraging the training and recruitment of young players and improving the competitive balance between teams in UEFA

37 I should like to note in passing that the political institutions have obviously chosen not to harmonise or regulate internal market-related matters of sports by resorting to Article 114 TFEU.

38 Furthermore, the Court has held that Article 165 TFEU, interpreted jointly with the Treaty rules on citizenship, Articles 18 and 21 TFEU, precluded certain rules of a national sports association restricting freedom of movement. See judgment of 13 June 2019, *TopFit and Biffi* (C-22/18, EU:C:2019:497).

39 In this respect I can fully subscribe to the Opinion of Advocate General Rantos in *European Superleague Company* (C-333/21, EU:C:2022:993, point 42), where it is stated that ‘whilst the specific characteristics of sport cannot be relied on to exclude sporting activities from the scope of the EU and FEU Treaties, the references to that specific nature and to the social and educational function of sport, which appear in Article 165 TFEU, may be relevant for the purposes, inter alia, of analysing, in the field of sport, any objective justification for restrictions on competition or on the fundamental freedoms’.

40 See judgment of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143, paragraph 39). See also, in the context of the freedom of establishment under Article 49 TFEU, judgment of 7 September 2022, *Cilevičs and Others* (C-391/20, EU:C:2022:638, paragraph 59), where the Court merely loosely refers to Article 165 TFEU before looking at the restrictive character of a national measure, which clearly fell within the realm of the matters covered by Article 165 TFEU.

club competitions and national competitions. Another overriding reasons relating to the public interests referred to is the protection of young players, in so far as their social and family environment should be maintained and a break in their normal education should be avoided.

57. It should be noted in this connection that the Court appears to assume that when entities such as UEFA and the URBSFA who are bound by Article 45 TFEU seek to rely on grounds justifying a restriction, neither the scope nor the content of such grounds of justification is in any way affected by the public or private nature of the contested provisions. [41]

58. I can agree with this statement and I understand the general interest in maintaining a uniform regime regarding Article 45 TFEU regardless of whether restrictions emanate from public or private bodies. Nevertheless, it is important to bear in mind that – contrary to a Member State as a public entity – private entities such as UEFA or the URBSFA, in line with their respective purposes, pursue objectives which are economic in nature. [42] Such objectives may at times be in conflict with public objectives. Moreover, UEFA and the URBSFA exercise both regulatory and economic functions. Since these functions are not separated, conflicts of interest are bound to arise. Put differently, UEFA and the URBSFA would be behaving irrationally if they attempted to further public objectives which ran directly counter to their commercial interests.

59. When Member States seek to justify restrictions of a fundamental freedom, there is a presumption that they intend to further a public interest other than that of the internal market. This is not the case for a private entity and ought to be kept in mind in the analysis that follows. It is for this reason that I prefer the terms employed by the Court in its judgment in *Angonese*, where it speaks of an 'aim legitimately pursued', [43] without specifying that such an aim must necessarily be in the *public* interest. This is also why it is all the more important to scrutinise the *public* interest element in the overriding reasons put forward by UEFA and the URBSFA.

60. In regard to professional sport, the Court has already had the opportunity to hold that, in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the

41 See judgment of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 86).

42 See also Weatherill, S., *European Sports Law*, T.M.C. Asser, The Hague, 2007, p. 60, who notes that while there is a 'logical neatness' in the Court's approach, 'it is not clear how the notions contained within [Article 45(3) TFEU] can be adequately re-shaped to suit the private sector' and who points to the risk that allowing private parties to invoke public grounds of justification 'may cause their overstretching'.

43 See judgment of 6 June 2000, (C-281/98, EU:C:2000:296, paragraph 42). See also, to that effect, Müller-Graff, P.-Chr., 'Die horizontale Direktwirkung der Grundfreiheiten', *Europarecht*, 2014, pp. 3 to 29, at p. 12.

recruitment and training of young players must be accepted as legitimate. [44] The same goes for the aim of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results. [45]

(c) Proportionality

61. Next, the contested provisions must respect the principle of proportionality, meaning that they must be suitable for securing, in a consistent and systematic manner, the attainment of the objectives pursued and they must not go beyond what is necessary in order to attain them. It will be for the referring court to assess the proportionality of the contested provisions. In this connection, the burden of proof as to the proportionality of the HGP rules lies with UEFA and the URBSFA.

62. Based on the information the Court has been provided with and the submissions of the various parties, I consider the Court to be sufficiently informed to guide the referring court on the proportionality test.

63. It will be demonstrated that some restrictions are justified.

64. On a general note, as has been pointed out in legal literature, 'Sporting rules have an economic effect. But without some fundamental rules there would be no sport'. [46] The specific markets of competitive sport rely on the existence of competitors. No restrictions could potentially lead to a situation where one club, capable of buying all players, would be in a position where de facto it can no longer be beaten by other clubs. It would be a pity if, say, *Wisła Kraków* were in a position to dominate the entire Polish league. The 'beautiful game' would lose some of its attraction.

(1) Suitability

65. The contested provisions must be suitable to satisfy the purported overriding reasons relating to the public interest, that is to say the HGP rules must be suitable for encouraging the training and recruitment of young players and improving the competitive balance between teams in UEFA club competitions and national competitions.

44 See judgments of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 106), and of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143, paragraph 39).

45 See judgment of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 106). The Court has also recognised the regularity of sporting competitions as a valid objective; see judgments of 11 April 2000, *Deliège* (C-51/96 and C-191/97, EU:C:2000:199, paragraph 64), and of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 53). The present case, however, is not about such regularity of a competition but rather about the conditions to be fulfilled by a club in order to participate in a competition.

46 See Weatherill, S., op. cit., p. 336.

(i) Training and recruiting young players

66. The contested provisions are, by definition, suitable to attain the objective of training and recruiting young players, as is, moreover, also recognised by Royal Antwerp. [47]

67. Nevertheless, I have certain doubts regarding the general coherence of the contested provisions, as regards the definition of an HGP. If, as is the case in both the UEFA and URBSFA rules, an HGP is not only a player trained by the club itself, but also one trained by another club in the national league, I wonder whether the contested provisions are in reality conducive to achieving the objective of clubs training young players. I note, in this connection, that according to UEFA rules, at least half (that is to say, four) of the HGPs must have been trained by the club in question. This mitigates matters, but does not tackle the problem at the root, which is the very definition of what constitutes an HGP.

68. Those doubts obviously increase if the national league in question is a major one, which is why, in my view, the UEFA rules appear to raise more questions than those of the URBSFA, which is, in comparison, one of the smaller leagues. If a club in a major national league can 'buy' up to half of HGPs, the objective of encouraging that club to train young players would be frustrated.

69. As a result, while I consider the requirement to include, on a list, a predefined number of HGPs justified, I do not see the rationale – from a training perspective – in extending the definition of an HGP to players outside of a given club, but inside the relevant national league. [48]

(ii) Improving the competitive balance of teams

70. The same considerations apply to the objective of improving the competitive balance of teams. If all clubs are obliged, through the contested provisions, to train, then overall the competitive balance of teams is likely to increase. Again, this aim is frustrated to the extent that clubs can resort to HGPs from other clubs in the same league.

(iii) Conclusion

71. In conclusion, the contested provisions are not coherent and therefore not suitable for achieving the objectives of training young players and of improving the competitive balance of teams to the extent that HGPs who must appear on a list can include players not emanating from the club in question.

47 See paragraph 38 of the observations of Royal Antwerp.

48 To the extent that it is considered that clubs should have a necessary leeway in resorting not only to their own players but also to those from the same league, I would submit that such leeway would be better afforded by reducing the number of HGPs and at the same time limiting the definition to home- (as in club-) grown players.

72. This means that the provisions of the URBSFA are not suitable in their entirety, whereas those of the UEFA are only partially suitable.

(2) Necessity

73. Next, the contested provisions must not go beyond what is necessary in order to attain the objective of training and recruiting young players.

(i) On the discretion of UEFA and the URBSFA

74. UEFA, notably, contends that there is settled case-law, pursuant to which 'professional regulators' enjoy a 'considerable discretion' when choosing a specific solution to a given problem.

75. In this connection, I note that reference is made to only one (seminal) judgment of the Court [49] where the national court had to assess the measures taken by the Bar of the Netherlands. [50] I find it difficult to deduce a general principle from the particularities of this case, according to which private entities bound by Article 45 TFEU would have a greater discretion than that of Member States in comparable situations.

76. Rather, I would argue that standard case-law applies when it comes to the general assessment of those intending to justify restrictions to Article 45 TFEU. Here, it should be noted that, of course, those bound by Article 45 TFEU do have some latitude when it comes to assessing whether the pursuit of certain concerns is necessary and by what means this should be done. In this respect, the Court does allow for wider and narrower degrees of discretion, based not on the authorship (Member State or 'professional regulator'), but on the subject matter of the objective pursued by the ground of justification. The Court has thus allowed for rather wide discretion in 'sensitive matter[s]' such as the posting of workers [51] or matters of a 'peculiar nature' such as lotteries. [52] Moreover, the classical situation in which the Court affords some latitude is in the area of public health. [53]

49 See paragraphs 50 and 80 of UEFA's written observations, where reference is made to the judgment of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98, paragraph 110).

50 Similarly, in judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, EU:C:2013:127, paragraph 96), the Court, referring to its judgment of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98) examined whether the restrictive measures of an order of chartered accountants could 'reasonably' be regarded as necessary to guarantee the quality of services.

51 See judgment of 17 December 1981, *Webb* (279/80, EU:C:1981:314, paragraph 18) as regards the freedom to provide services.

52 See judgment of 24 March 1994, *Schindler* (C-275/92, EU:C:1994:119, paragraph 59 et seq.) as regards the freedom to provide services.

53 See, by way of example, judgment of 16 December 2010, *Josemans* (C-137/09, EU:C:2010:774, paragraph 63 et seq.) as regards the free movement of goods and the freedom to provide services.

It is fair to assert that the discretion increases to the extent that the subject matter pursued transcends classical economic policy. [54]

77. That is not, however, the case here. The training and recruitment of young players has a strong economic component, as does the objective of improving the competitive balance of teams. As pointed out by Royal Antwerp in its observations, players, including young ones, have a market value which acts, on all sides, as leverage for them and clubs alike when it comes to possible transfers.

78. Consequently, I see no reason to depart from standard case-law and to afford UEFA and the URBSFA a wider discretion than would be the norm for a Member State to justify a restriction of Article 45 TFEU.

(ii) Less restrictive measures

79. Alternative measures invoked, notably by UL and Royal Antwerp, are direct compensation for the training of young players or income redistribution.

80. As also underlined by the Commission, it is not established that such measures would be less restrictive and constitute less of an obstacle to free movement under Article 45 TFEU. Indeed, depending on their specific design, some of these measures, such as a salary cap, would even appear to be more restrictive of the ability of clubs to recruit players, while compensation schemes for training-related investments would directly affect equal opportunities and would require substantial administrative measures, costs and monitoring.

81. Moreover, there is no indication that such measures would be *equally effective* for achieving the same objective, which is the training of young players. In particular, financially strong clubs could ‘get away’ with not training young players and buying them from other clubs, which would frustrate both the intended objective of training young players as well as the overall objective of improving the competitive balance between teams. [55]

(iii) Conclusion

82. In conclusion, the contested provisions, to the extent that they are suitable, appear to be necessary for achieving the objectives of training young players and of improving the competitive balance of teams.

54 See also, to that effect, Forsthoff, U., Eisendle, D., op. cit., point 397.

55 See also, to that effect, Kliesch, J., *Der Status des Profifußballers im Europäischen Recht*, Nomos, Baden-Baden, 2017, p. 232.

IV. Conclusion

83. In the light of the foregoing, I propose that the Court answer the questions referred by the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking), Belgium) as follows:

Article 45 TFEU must be interpreted as precluding the application of rules on home-grown players, as adopted by the Union of European Football Associations (UEFA) and the Union royale belge des sociétés de football association (URBSFA), pursuant to which, in order to participate in the relevant competitions, clubs must enter, on a list, a minimum number of 8 home-grown players out of a maximum number of 25 players to the extent that such home-grown players can emanate from another club in the relevant national football association.