Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 16 January 2025 [1]

Case C-600/23

Royal Football Club Seraing
v
Fédération Internationale de Football Association (FIFA),
Union Royale Belge des Sociétés de Football Association ASBL (URBSFA),
Union européenne des Sociétés de Football Association (UEFA),
joined party:
Doyen Sports Investment Ltd

(Request for a preliminary ruling from the Cour de cassation (Belgium))

(Reference for a preliminary ruling – Judicial remedies – Effective judicial protection – Article 47 of the Charter – FIFA Statutes – Court of Arbitration for Sport – The conformity of an arbitral award with EU law reviewed by a court of a third country – National rules according the status of *res judicata*)

I. Introduction

1. 'For good or bad, few passions are as widely and as profoundly shared around the globe as the passion for sport. Its symbolism is often awesome. It brings out the noblest human qualities (good sportsmanship, the quest for excellence, a sense of community), and the basest (chicanery and mob violence). It is also big international business. Its capacity to motivate vast populations is nothing less than fabulous, and so naturally exercises a powerful attraction on those who would use its magic for their own ends. The appetite for political influence and for money moves the heart inside the business suit with a force as primal as that of the dreams of glory that swell the distance runner's tunic. … And at the heart of the issue of control is that of ultimate authority to establish norms and to settle disputes.' [2]

2. These words hold true as much today as they did in 1993 when they were first published. At stake in this case is the question of control: more specifically, the relationship between Fédération Internationale de Football Association's (FIFA) system of dispute resolution before the Court of Arbitration for Sport (CAS) and the principle of effective judicial protection under EU law.

[1] Original language: English.

[2] Paulsson, J., 'Arbitration of international sports disputes', *Arbitration International*, Vol. 9(4), 1993, p. 359.

II. Facts in the main proceedings

A. The protagonists

3. The applicant, Royal Football Club Seraing, whose registered office is in Seraing, Belgium, is a non-profit association governed by Belgian law that runs the Seraing football club, which is affiliated with Union Royale Belge des Sociétés de Football Association ASBL (Royal Belgian Football Association; 'the URBSFA').

4. As explained by the referring court, during the 2013/14 season, the club was taken over by new management with 'the ambition of returning the club … to the Belgian or even the international elite'. It 'is still evolving for the time being in Amateur Division 1, thus on the cusp of professional football which it legitimately aspires to reach as soon as possible, which involves being able to strengthen its position in sporting and financial terms'.

5. As a third party to the proceedings in support of the applicant, Doyen Sports Investment Limited ('Doyen Sports') is a private company incorporated under Maltese law whose registered office is in Sliema, Malta. It focuses its commercial activity on providing financial assistance to football clubs in Europe. [3]

6. The first defendant, FIFA, is a non-profit association governed by Swiss law whose registered office is in Zurich (Switzerland). It is a grouping of national associations responsible for the organisation and control of football in their respective countries.

7. The second defendant, Union européenne des Sociétés de Football Association (UEFA), is a non-profit association governed by Swiss law whose registered office is in Nyon (Switzerland) and which brings together the national associations of the continent of Europe.

8. The third defendant, the URBSFA, whose registered office is in Brussels (Belgium), is a Belgian non-profit association that is a member of both UEFA and FIFA.

B. The FIFA rules at the source of the dispute

9. FIFA's 'Regulations on the Status and Transfer of Players' ('the STP Regulations') [4] lay down global and binding rules concerning the status of players and their eligibility to participate in organised football. Some of the provisions of those regulations are directly binding on national associations; others must be included by each association in its own regulations.

[3] According to its articles of association, its aims are, inter alia: (a) the purchase of football players, coaches and managers; (b) the representation of football players, coaches and managers; (c) the transfer of players, coaches and managers between different clubs; (d) the representation of clubs; (e) to profit from football clubs or to play an active role in their day-to-day management, provided that they comply with FIFA regulations and any other relevant national or international regulations; and (f) to grant loans to football clubs.

[4] Available at: https://digitalhub.fifa.com/m/69b5c4c7121b58d2/original/Regulations-on-the-Status-and-Transfer-of-Players-June-2024-edition.pdf.

10. On 26 September 2014, a FIFA press release announced that, 'in order to protect the integrity of the game and the players, the Executive Committee took the decision of general principle that third-party ownership of players' economic rights ("TPO") shall be banned with a transitional period'. [5]

11. By a circular dated 22 December 2014 addressed to its members, FIFA informed the national associations, and therefore the URBSFA, that, at its meetings on 18 and 19 December 2014, its Executive Committee had approved 'new provisions to be included in the [STP] Regulations concerning the third-party ownership of players' economic rights and third-party influence on clubs', with the clarification that they would enter into force on 1 January 2015 and that they must be included in the list of binding provisions at national level.

12. Under the new rules, (i) the conclusion of new agreements contrary to the prohibition of TPO has been totally prohibited since 1 May 2015; (ii) contracts were still permitted to be entered into and to come into force between 1 January and 30 April 2015, but they remained valid for only one year from their date of signature; (iii) contracts entered into and which came into force before 1 January 2015 remain in force until the date they are due to expire but may not be extended beyond that date.

13. A third party, within the meaning of those rules, is any 'party other than the player being transferred, the two clubs transferring the player from one to the other, or any previous club, with which the player has been registered'. [6]

C. Third-party contracts at issue

14. On 30 January 2015, the Royal Football Club Seraing entered into an agreement with Doyen Sports, the contractual term of which was set until 1 July 2018. That agreement made provision for the conclusion of future specific financing agreements for any player of the applicant chosen by mutual agreement between the two parties and governed the transfer of the economic rights of three named players. Doyen Sports became the owner of 30% of 'the financial value deriving from the federative rights' of those players, the Royal Football Club Seraing being prohibited from transferring its share in the economic rights of those players 'independently and autonomously' to a third party.

15. On 7 July 2015, Royal Football Club Seraing and Doyen Sports entered into a second agreement, which was similar to the agreement of 30 January 2015, to transfer 25% of the economic rights of a new named player.

[5] 'Footballers have three types of rights: federative; labour; and economic. … Federative rights pertain to a player's right and requirement to register with the governing association (e.g., United States Soccer Federation) of the country where his club resides. … The second type of right a footballer has is that of labour, which refers to an employment agreement. … The third and final right a football player has is his economic right. … While federative and labour rights are exclusive to clubs and players, players' economic rights are not, which has allowed third parties to contract with players for the assignment of their economic rights so that they may collect the transfer fees that clubs pay for the players.' Williams, B., 'The fate of third party ownership of professional footballers' rights: Is a complete prohibition necessary', *Texas Review of Entertainment & Sports Law*, Vol. 10, 2008, p. 79, at p. 83.

[6] The STP Regulations, 'Definitions', point 14.

D. The arbitral award

16. On 4 September 2015, the FIFA Disciplinary Committee found the Royal Football Club Seraing guilty of breach of the abovementioned FIFA rules for having entered into the two agreements, prohibited it from registering players for four registration periods (two years) and ordered it to pay a fine of 150 000 Swiss francs (CHF).

17. On 7 January 2016, the FIFA Appeal Committee dismissed the Royal Football Club Seraing's appeal against that decision.

18. On 9 March 2016, the Royal Football Club Seraing lodged an appeal against that decision of 7 January 2016 before CAS, in accordance with the FIFA Statutes'[7] rules on arbitration.

19. In an award dated 9 March 2017, CAS held that the applicable law was constituted by FIFA regulations and by Swiss law, including the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and by EU law, in particular, the provisions of the Treaties on freedom of movement and competition.[8]

20. CAS concluded that the new provisions of the STP Regulations were lawful. In relation to the disciplinary decision of FIFA, CAS reduced the prohibition on registering players to three periods and upheld the fine.

21. On 15 May 2017, the applicant filed an application for annulment of the award of 9 March 2017 before the Tribunal fédéral (Federal Supreme Court, Switzerland). That court dismissed that application by judgment of 20 February 2018.

E. Litigation leading to the main proceedings

22. On 3 April 2015, Doyen Sports brought proceedings against FIFA, UEFA and the URBSFA before the Tribunal de commerce francophone de Bruxelles (Brussels Commercial Court (French-speaking), Belgium), which the Royal Football Club Seraing joined on 8 July 2015.

23. The applicant requested, among other things, that that court declare that a total prohibition on the practices excluded by the new rules of the STP Regulations (TPO and 'third-party investment') is unlawful under EU law. More specifically, it claims that that prohibition is contrary to the free movement of capital, the right to the freedom to provide services, the right to the free movement of workers and competition law.

24. Furthermore, it sought, under Article 1382 of the former Code civil (Belgian Civil Code), the provisional sum of EUR 500 000 by way of compensation for the damage suffered as a result of the application of the new rules of the STP Regulations.

[7] The version of the FIFA Statutes applicable to the present case is from 2016 and is available here: https://www.icsspe.org/system/files/FIFA%20Statutes.pdf. The FIFA Statutes were amended in 2024 and that version is available here: https://digitalhub.fifa.com/m/16d1f7349fa19ade/original/FIFA-Statutes-2024.pdf.

[8] Those were considered mandatory provisions of foreign law within the meaning of Article 19 of the Loi fédérale du 18 décembre 1987 sur le droit international privé (Swiss Federal Law on Private International Law of 18 December 1987).

25. By judgment of 17 November 2016, the Tribunal de commerce francophone de Bruxelles (Brussels Commercial Court (French-speaking)) declined jurisdiction to hear the applicant's claims. On 19 December 2016, the Royal Football Club Seraing lodged an appeal against that decision before the Cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium). [9]

26. On appeal, the Royal Football Club Seraing sought to establish the liability of FIFA, UEFA and the URBSFA on the basis of national law. It claimed that the three defendants infringed EU law by preventing it from entering into 'third-party investment' or 'third-party ownership' agreements, that that infringement of EU law deprived it of a means of finance or development and that the disciplinary measures had had detrimental consequences.

27. The applicant requested that the Cour d'appel de Bruxelles (Court of Appeal, Brussels) declare that Articles 18bis and 18ter of the STP Regulations are unlawful inasmuch as they infringe EU law and the ECHR, which, in its view, gives rise to liability on the part of FIFA.

28. The CAS arbitral award and the judgment of the Tribunal fédéral (Federal Supreme Court) dismissing the action for annulment of that award by the applicant, referred to in points 19 to 21 above, were both issued while the appeal procedure was pending. This influenced the judgment of the Cour d'appel de Bruxelles (Court of Appeal, Brussels) as follows.

29. The Cour d'appel de Bruxelles (Court of Appeal, Brussels) held, on 12 December 2019, that it follows from national law that an arbitral award has the force of *res judicata* from the date on which it is delivered without the need for a prior exequatur procedure. It considered that the CAS award was final and acquired the force of *res judicata* following the dismissal of the action for annulment by the Tribunal fédéral (Federal Supreme Court) on 20 February 2018.

30. As explained in the order for reference, under Article 22(1) of the Loi portant le Code de droit international privé (Belgian Code of Private International Law), any foreign judgment which is enforceable in the State in which it was rendered is recognised *de jure* in Belgium without any need for a procedure. The Cour d'appel de Bruxelles (Court of Appeal, Brussels) thus attached the force of *res judicata* to the judgment of 20 February 2018 of the Tribunal fédéral (Federal Supreme Court), which thus prevented the applicant from being able to challenge before the Cour d'appel de Bruxelles (Court of Appeal, Brussels) the validity of the CAS award.

31. That award, among others, settles the question in dispute as to the compatibility of the new rules of the STP Regulations with EU law. The consequence is that the Cour d'appel de Bruxelles (Court of Appeal, Brussels) is prevented from deciding on the possible infringements of EU law, and therefore also from referring those questions to the Court of Justice.

32. The Cour d'appel de Bruxelles (Court of Appeal, Brussels) dismissed the grounds of appeal, alleging infringement of EU law and of the rights guaranteed by the ECHR, as inadmissible or unfounded. It also decided that the plea of illegality of the disciplinary measures inferred from the forced nature of the arbitration was unfounded, because the jurisdiction of CAS had not been challenged by any of the parties to the arbitration procedure.

[9] That appeal was therefore lodged after the applicant submitted an appeal before CAS, but before CAS issued the arbitral award.

33. By its judgment delivered on 12 December 2019, the Cour d'appel de Bruxelles (Court of Appeal, Brussels) therefore dismissed the appeal against the judgment of the Tribunal de commerce francophone de Bruxelles (Brussels Commercial Court (French-speaking)) of 17 November 2016 and held that the claims put forward by Royal Football Club Seraing were unfounded.

34. Royal Football Club Seraing appealed against that judgment before the referring court, the Cour de cassation (Court of Cassation, Belgium).

III. The questions referred for a preliminary ruling and the procedure before the Court

35. In those circumstances, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 19(1) [TEU], read in conjunction with Article 267 [TFEU] and Article 47 of the Charter of Fundamental Rights of the European Union [("the Charter")], preclude the application of provisions of national law such as Article 24 and Article 171[3](9) of the Code judiciaire (Belgian Judicial Code), laying down the principle of *res judicata*, to an arbitral award the conformity of which with EU law has been reviewed by a court of a State that is not a Member State of the European Union, which is not permitted to refer a question to the Court of Justice of the European Union for a preliminary ruling?

(2) Does Article 19(1) [TEU], read in conjunction with Article 267 [TFEU] and Article 47 of the [Charter], preclude the application of a rule of national law according probative value vis-à-vis third parties, subject to evidence to the contrary which it is for them to adduce, to an arbitral award the conformity of which with EU law has been reviewed by a court of a State that is not a Member State of the European Union, which is not permitted to refer a question to the Court of Justice of the European Union for a preliminary ruling?'

36. Written observations were submitted by Royal Football Club Seraing, Doyen Sports, FIFA, the URBSFA, UEFA, the Belgian, German, French and Lithuanian Governments and the European Commission.

37. A hearing was held on 1 October 2024 where Royal Football Club Seraing, Doyen Sports, FIFA, the URBSFA, UEFA, the Belgian, Greek, French, Lithuanian and Netherlands Governments and the Commission presented oral argument.

IV. Analysis

38. For better or worse (to continue in the spirit of the opening quote), [10] sport today is organised as an autonomous system in which sports organisations, sometimes very influential and wealthy, exercise regulatory powers. [11] That is certainly the case in football, with FIFA as its top regulatory organisation. To take part, clubs and athletes must follow the rules enacted by FIFA.

39. At the same time, sport is an economic activity. Therefore, the practice of sport is subject to the provisions of EU law applicable to that economic activity. [12] The Court has found sport to be subject to free movement rules, competition law and the general principles of EU law, among them specifically proportionality and non-discrimination. [13]

40. The FIFA Statutes require any dispute that might arise in relation to its sporting rules to be resolved through its own dispute resolution system, which designates CAS as the exclusive and mandatory appellate body.

41. However, when a FIFA rule, or a decision based on such a rule, potentially infringes the right of an individual based on EU law, the constitutional system of the European Union bestows on that individual the right to effective judicial protection, expressed today in Article 47 of the Charter.

42. Under Article 19(1) TEU, whose interpretation the referring court requested, the Member States are under an obligation to ensure that subjects of EU law genuinely enjoy this fundamental right. [14] That means that the Member States must ensure that an individual who claims that his or her EU-based right is infringed has access [15] to an independent court previously established by law, [16] and with the power to make a reference to the Court under Article 267 TFEU. [17]

[10] See also, in that respect, Maduro, M.P. and Weiler, J.H.H., '"Integrity", "independence" and the internal reform of FIFA: A view from the trenches', in Geeraert, A. and van Ekeren, F. (eds), *Good Governance in Sport – Critical Reflections*, Routledge, 2022, pp. 129 to 136.

[11] In a recent case, Advocate General Szpunar stated that '… it is often difficult to deny that some private entities act in a manner close to that of a State, either by sheer dint of their economic power or because of the manner in which they enact "rules" …'. Opinion of Advocate General Szpunar in *FIFA* (C-650/22, EU:C:2024:375, point 33). This led him to conclude that FIFA is indeed subject to the rules on free movement. In another illustration of its State-like role and regulatory power, in 2017 FIFA published its own Human Rights Policy. For an assessment of its mixed success, see Mercado Jaén, P.J., Bistaraki, A. and Schubert, M., 'Between rhetoric and reality: Effects of FIFA's human rights policy on its organisational structures and procedures', *International Journal of Sport Policy and Politics*, Vol. 16(3), 2024, p. 499.

[12] The Court considered this to be the case as long ago as the judgment of 12 December 1974, *Walrave and Koch* (36/74, EU:C:1974:140, paragraph 4). See judgments of 4 October 2024, *FIFA* (C-650/22, EU:C:2024:824, paragraph 75), and of 21 December 2023, *European Superleague Company* (C-333/21, EU:C:2023:1011, paragraph 83).

[13] Judgment of 21 December 2023, *European Superleague Company* (C-333/21, EU:C:2023:1011, paragraphs 85 to 88).

[14] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 34). See also, judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraph 39 and the case-law cited).

[15] As the Court has held ever since the judgment of 15 May 1986, *Johnston* (222/84, EU:C:1986:206, paragraphs 18 and 19).

[16] On the requirement that a court or a tribunal must be independent, see judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraphs 57 and 58, 71 to 77); on the requirement that a court be previously established by law, see judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798, paragraphs 126 to 130).

[17] Judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraph 51), where the Court relied on Article 47 of the Charter to justify the existence of the duty of the last-instance courts to state reasons why they have decided not to refer. This demonstrates that the Court sees the preliminary reference procedure in the function of the realisation of the principle of effective judicial protection. See also, judgment of 23 November 2021, *IS (Illegality of the order for reference)* (C-564/19, EU:C:2021:949, paragraph 76), where the Court considered that 'limitations on the exercise by national courts of the jurisdiction conferred on them by Article 267 TFEU would have the effect of restricting the effective judicial protection of the rights which individuals derive from EU law'.

43. The judicial protection of EU-based rights that is allegedly breached by FIFA's rules, and confirmed by the CAS award as valid, must therefore be ensured by a court that satisfies the definition of a 'court or tribunal' under Article 267 TFEU.

44. CAS, or the Swiss Federal Tribunal which has jurisdiction to review its awards, are not such courts. Thus, their assessment of the compatibility of FIFA's rules with EU-based rights does not satisfy the requirement of effective judicial protection in EU law.

45. This brings us to the present case. It arises from the dispute before a 'court or tribunal' in the sense of Article 267 TFEU.

46. Before the Belgian courts, the parties claimed that FIFA's prohibition of TPO prevented them from enjoying the rights granted to them by EU law. They therefore requested a declaration of incompatibility of those FIFA rules with EU law, which CAS had in the meantime confirmed as valid, and asked for compensation of the damage thereby caused.

47. So far, so good. One might conclude from the above that the parties did have access to a court with the power to refer. However, the principle of effective judicial protection might nevertheless be breached because the competent courts were prevented from providing an effective remedy due to a rule of domestic (Belgian) law, according to which the CAS awards, confirmed by the Swiss Federal Tribunal, enjoy the force of *res judicata*. That rule, it is explained, prevents them from reviewing, in the case at hand, the compatibility of FIFA's rules with EU law.

48. Is such a rule precluded by the principle of effective judicial protection?

49. The answer seems to me to be a straightforward yes.

50. However, the written observations and discussions at the hearing raised a more general question: does EU law require a specific remedy that is sufficient to provide effective judicial protection where arbitral awards in sport are concerned? I will therefore briefly turn to that debate as well.

51. The structure of my analysis is as follows. I will first explain the organisation of FIFA's dispute resolution mechanism (Section A). I will then provide my opinion on how the two questions referred should be answered (Sections B and C), with emphasis on the first question.

A. CAS under the FIFA Statutes

52. In 1981, the then President of the International Olympic Committee (IOC), Juan Antonio Samaranch, put forward the idea of a sport-specific jurisdiction. CAS became operational in 1984 after the IOC ratified its statutes. IOC President Samaranch allegedly hoped that CAS would become the 'supreme court of world sport'.[18] The CAS website, which presents this history, states that 'the jurisdiction of the CAS should in no way be imposed on athletes or federations, but remain freely available to the parties'.[19]

[18] McLaren, R.H., 'Twenty-five years of the Court of Arbitration for Sport: A look in the rear-view mirror', *Marquette Sports Law Review*, Vol. 20, 2010, p. 305, at p. 306.

[19] Available here: https://www.tas-cas.org/en/general-information/history-of-the-cas.html.

53. At first, most sports organisations, including FIFA, did not resort to the use of CAS.[20] However, much has changed since 1984.

54. EU law scholars tell the story of CAS's significant transformation after the Court's 1995 *Bosman* judgment.[21] The number of CAS arbitral awards after 1995 skyrocketed. Therefore, despite initial reluctance, FIFA included an arbitration clause in its Statutes, designating CAS as the competent forum for such disputes. Initially, CAS's jurisdiction for disputes in the field of football was optional.[22]

55. Today, however, the jurisdiction of CAS in football, as provided for by the FIFA Statutes, is exclusive and mandatory.

56. Article 57(1) of the FIFA Statutes recognises the jurisdiction of CAS to resolve disputes between FIFA, its member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents.

57. An appeal, which does not have suspensive effect, may be brought before CAS against final decisions issued by FIFA's bodies and against decisions passed by confederations, member associations or leagues.[23] They must be lodged before CAS within 21 days of notification of the appealed decision and may only be made after all other internal channels have been exhausted.[24]

58. Finally, Article 59 of the FIFA Statutes provides:

'1. The confederations, member associations and leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated players and officials comply with the decisions passed by CAS. The same obligation shall apply to intermediaries and licensed match agents.

2. Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.

3. The associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the association or disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the association or confederation or to CAS.

[20] Nafziger, J.A.R., 'International sports law: A replay of characteristics and trends', *American Journal of International Law*, Vol. 86, 1992, p. 489, at p. 508.

[21] Judgment of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463). See, in that respect, Duval, A., 'The Court of Arbitration for Sport and EU law: Chronicle of an encounter', *Maastricht Journal of European and Comparative Law*, Vol. 22(2) 2015, p. 224, at p. 226.

[22] The European Court of Human Rights (ECtHR) explained in *Mutu and Pechstein* that FIFA's rules from 2001 did not preclude players' access to ordinary courts, and therefore did not amount to compulsory arbitration. ECtHR, 4 February 2019, *Mutu and Pechstein v. Switzerland*, CE:ECHR:2018:1002JUD004057510, § 116.

[23] See Article 58(1) of the FIFA Statutes. The same provision, in its third subparagraph, excludes, however, the jurisdiction of CAS in appeals relating to (a) violations of the laws of the game; (b) suspensions of up to four matches or up to three months (with the exception of doping decisions); and (c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an association or confederation may be made.

[24] Article 58(1) and (2) of the FIFA Statutes.

> The associations shall also ensure that this stipulation is implemented in the association, if necessary by imposing a binding obligation on its members. The associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration, and not to ordinary courts of law.'

59. Therefore, as is also the case for the International Skating Union's (ISU) arbitral system,[25] bringing a football dispute under FIFA's rules before CAS is mandatory and its jurisdiction is exclusive. Indeed, invoking that exclusive jurisdiction, FIFA opposed the jurisdiction of the first-instance court in the main proceedings.[26]

60. The only ordinary court allowed to review the arbitral award decided by CAS is the Swiss Federal Tribunal. The grounds for review of arbitral awards by that court are, however, limited.[27] In *Semenya v. Switzerland*, the ECtHR found the review of a CAS award performed by the Swiss Federal Tribunal so limited that it was not capable of ensuring fundamental rights protection.[28]

B. The first question

61. In its first question, the referring court asks, in essence, whether the principle of effective judicial protection precludes a national law that grants an arbitral award the force of *res judicata*, where the review of conformity with EU law has been carried out by a court of a third country.[29]

62. This is not the first time the Court has been asked to provide an interpretation of the relationship between arbitration and EU law and the extent of judicial review of arbitral awards. For that reason, the participants in the procedure before the Court all attempted to find the answers for the present case from one line or another of the Court's case-law concerning arbitration. Thus, on the one hand, they discussed the case-law of *Nordsee*[30] and *Eco Swiss*,[31] and, on the other, the judgment in *Achmea*.[32]

63. After analysing the extent to which those two lines of jurisprudence may or may not be relevant for FIFA's arbitration system (Subsections 1 and 2), I will propose that the Court develop a specific interpretation suitable for mandatory arbitration, such as that carried out by CAS in the FIFA dispute resolution system. That solution was, to my mind, already suggested in the *International Skating Union*[33] (Subsection 3).

[25] See judgment of 21 December 2023, *International Skating Union v Commission* (C-124/21 P, EU:C:2023:1012, paragraph 223).

[26] FIFA did the same in the main proceedings from which the reference to the Court resulted in the judgment of 4 October 2024, *FIFA* (C-650/22, EU:C:2024:824, paragraph 32).

[27] These grounds are provided in Article 190 of the Loi fédérale sur le droit international privé (Swiss Federal Act on Private International Law), accessible at https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en. That court can set aside an arbitral award when it is contrary to public policy, as understood in Swiss law.

[28] ECtHR, 11 July 2023, *Semenya v. Switzerland*, CE:ECHR:2023:0711JUD001093421, §§ 234 to 240.

[29] In their written observations and at the hearing, the Belgian Government argued that the referring court wrongly presented national law and that the law in question actually allows for a review of an arbitral award where judicial review has been carried out by a court of a third country. I do not consider that the question posed hinges upon the proper interpretation of Belgian law, but rather that of EU law. It is then for the national court, once it receives an answer from the Court of Justice, to apply it to the case before it and to interpret the relevant national law accordingly.

[30] Judgment of 23 March 1982, *Nordsee* (102/81, EU:C:1982:107).

[31] Judgment of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269).

[32] Judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158).

[33] Judgment of 21 December 2023, *International Skating Union* v *Commission* (C-124/21 P, EU:C:2023:1012).

1. The applicability of the Nordsee/Eco Swiss *case-law*

64. FIFA, UEFA and the Belgian, French and Lithuanian Governments all claimed, in one way or another,[34] that CAS awards confirming the validity of FIFA rules may be controlled by national courts in respect of EU public policy, in line with the Court's judgment in *Eco Swiss*.

65. To recall, that line of case-law started with *Nordsee*, in which the Court considered that an arbitral tribunal deciding in commercial arbitration, voluntarily entered into by the parties, is not a 'court or tribunal' in the sense of Article 267 TFEU.[35]

66. Even in the event that such an arbitral tribunal might be required to apply EU law without the possibility to submit a preliminary reference, the Court found no issue because its arbitral awards may be reviewed in various procedures before Member State courts under national law.[36] In particular, arbitral awards are not enforceable in and of themselves, but must first obtain an exequatur from an 'ordinary' court. In such a procedure, those national courts would then have the possibility, or an obligation, to refer the question of interpretation of EU law to the Court.

67. The dispute in *EcoSwiss* arose from one such enforcement procedure of an arbitral award before the national court. In the judgment in *Eco Swiss*, the Court accepted that the limited scope of judicial review may be in the interest of efficient arbitration proceedings.[37] Thus, a national rule limiting judicial review to issues of public policy was considered acceptable from the perspective of EU law. In the same case, the Court stated that EU public policy included today's Articles 101 and 102 TFEU.[38]

68. What is and what is not EU public policy has not yet been explained in a general way.[39] Rather, the Court has answered this question on a case-by-case basis.[40] However, an interpretation of that concept is not necessary in the present case. What is important is that, in relation to commercial arbitration, the Court has accepted that the scope of judicial review of arbitral awards may be limited.[41]

69. To what extent is the foregoing line of case-law applicable to CAS arbitration under the FIFA Statutes?

[34] The French Government argued at the hearing that the CAS arbitration simply pertains to commercial arbitration in the sense of *Eco Swiss*. While the football organisations were not as explicit, they all argued that CAS arbitral awards should be subject to the limitations set out in that judgment.

[35] Judgment of 23 March 1982, *Nordsee* (102/81, EU:C:1982:107, paragraph 13). For literature critical of that finding, see Duval, A., (footnote 21 above), footnote 31. The Court also found that some arbitral tribunals do meet that standard, where they had been established by law, whose decisions were binding on the parties and whose jurisdiction did not depend on their agreement. See, for example, judgments of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* (109/88, EU:C:1989:383, paragraphs 7 to 9); and of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraphs 22 to 35); order of 13 February 2014, *Merck Canada* (C-555/13, EU:C:2014:92, paragraphs 16 to 18).

[36] The Court thus explained that 'the ordinary courts may be called upon to examine [questions of EU law] either in the context of their collaboration with arbitration tribunals … in the course of a review of an arbitration award …in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation'. Judgment of 23 March 1982, *Nordsee* (102/81, EU:C:1982:107, paragraph 14).

[37] Judgment of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 35).

[38] Judgment of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 36).

[39] For an overview of the case-law on public policy in EU law, see Opinion of Advocate General Szpunar in *Real Madrid Club de Fútbol* (C-633/22, EU:C:2024:127, points 71 to 103). For an early critique of the obligation of national courts to review EU public policy, the content of which is unclear, see Prechal, S. and Shelkoplyas, N., 'National procedures, public policy and EC law. From Van Schijndel to Eco Swiss and beyond', *European Review of Private Law*, Vol. 12(5), 2004, p. 589, at pp. 606 to 608.

[40] In its judgment of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraphs 35 and 38), the Court confirmed that the obligation to review *ex officio* unfair terms in consumer contracts pertains to public policy.

[41] See also, in that respect, Opinion of Advocate General Kokott in *PL Holdings* (C-109/20, EU:C:2021:321, points 43 to 46).

70. To my mind, there are two main reasons distinguishing it from commercial arbitration.

71. The first lies in the voluntary nature of commercial arbitration as opposed to the mandatory nature of FIFA's arbitration rules.

72. An essential feature of commercial arbitration, which was at issue in the *EcoSwiss* line of case-law, is the free acceptance of the arbitration clause by both parties.[42] By voluntarily choosing such arbitration, the parties intend to exclude the involvement of ordinary courts and possibly the application of some rules of a legal system. The Court took into consideration this nature and purpose of arbitration in commercial matters and therefore concluded that judicial review of awards resulting therefrom may be limited to public policy issues. The need to review the conformity of an award with public policy exists because those rules may be of such a public interest that their application cannot be excluded by the will of the parties.

73. To the contrary, as the Netherlands Government argued at the hearing, FIFA's rules are mandatory and the free will of the parties to submit a dispute to CAS is not obvious.[43]

74. In *Mutu and Pechstein*, the ECtHR discussed precisely this question when it analysed the differences between commercial arbitration and ISU's mandatory arbitration rules.[44] Sport actors cannot choose to submit their disputes, in which they challenge FIFA's rules or decisions, to any other adjudicatory system but to FIFA's internal disciplinary procedures and subsequently to CAS. A failure to accept CAS's mandatory jurisdiction prevents players from playing[45] and clubs from competing.

75. Thus, for players and clubs, CAS's jurisdiction is mandatory and not chosen of their own free will.[46] It therefore does not reflect their own choice to exclude access to a court and to prevent the applicability of certain legal rules to the dispute between them. This, to my mind, has consequences for the scope of judicial review that national courts should be able to perform in relation to EU law (see Section IV.B.3(b) below).

76. The second difference between commercial arbitration and the dispute resolution system under the FIFA Statutes is the self-sufficiency of the latter system in terms of enforcement.

[42] Judgment of 23 March 1982, *Nordsee* (102/81, EU:C:1982:107, paragraph 11). See also judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraph 55), where the Court distinguished arbitration envisaged by bilateral investment treaties from commercial arbitration on the basis that the latter originates in the freely expressed wishes of the parties. See also, judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraph 27 and the case-law cited), where the Court found that in contractual arbitration, 'the parties are under no obligation, in law or in fact, to refer their disputes to arbitration'.

[43] See also, the vivid explanation given by Paulsson: 'Typically the exclusive jurisdiction of sporting authorities is set down in the by-laws of federations which grant licences to compete in the course of a season or admission to participate in specific events. The federation in question has generally existed for decades if not generations, and has, without any outside influence, developed a more or less complex and entirely inbred procedure for resolving disputes. The accused participant, on the other hand, often faces the proceedings much as a tourist would experience a hurricane in Fiji: a frightening and isolated event in his life, and for which he is utterly unprepared.' Paulsson, J., (footnote 2 above), 361.

[44] ECtHR, 4 February 2019, *Mutu and Pechstein v. Switzerland*, CE:ECHR:2018:1002JUD004057510, §§ 103 to 108.

[45] Judgment of 21 December 2023, *International Skating Union* v *Commission* (C-124/21 P, EU:C:2023:1012, paragraph 223). ECtHR, 4 February 2019, *Mutu and Pechstein v. Switzerland*, CE:ECHR:2018:1002JUD004057510, § 113.

[46] In fact, the ECtHR found that in comparison to ISU's rules, FIFA's rules from 2001 did not preclude players' access to ordinary courts, and therefore did not amount to compulsory arbitration. The situation is certainly different in today's Article 59(2) of the FIFA Statutes, aligning it with ISU's rules. ECtHR, 4 February 2019, *Mutu and Pechstein v. Switzerland*, CE:ECHR:2018:1002JUD004057510, § 116.

77. If one of the parties to commercial arbitration refuses to implement an arbitral award, the other party will have to turn to ordinary courts to enforce it. As the Court explained in *Nordsee* (see points 65 and 66 of the present Opinion), when enforcement is required within the European Union, a Member State court will have the opportunity to review the conformity of the arbitral award with EU law and submit, if necessary, a preliminary reference to the Court.

78. In contrast, if a party refuses to implement a CAS award because it considers it to be in breach of EU law, it cannot simply refuse to comply with such an award, nor does FIFA need to initiate an enforcement procedure before the national court. FIFA can enforce the award on its own. Indeed, in the present case, it was able to enforce the penalties and the prohibition on the registration of players without recourse to a court. [47]

79. In such a self-enforcing system, it is unlikely that the question of compatibility of the arbitral award with EU law will reach a 'court or tribunal' in the sense of Article 267 TFEU in enforcement proceedings.

80. It is therefore possible that judicial remedies that were considered sufficient to guarantee effective judicial protection and uniformity of EU law in the context of commercial arbitration are not sufficient for the system of the self-sufficient mandatory arbitration at issue in the present case (see, further, points 111 to 114 below).

81. For those two reasons, I consider that the rules developed for commercial arbitration in the *Nordsee* and *EcoSwiss* line of case-law are not fitting for FIFA's system of mandatory arbitration by CAS.

2. The applicability of the Achmea *case-law*

82. The Royal Football Club Seraing and Doyen Sports invoked *Achmea* in arguing that arbitral awards issued by CAS need to be subject to genuine judicial review by a national court, which must be able to refer questions of interpretation of EU law to the Court of Justice.

83. In its written observations, the Commission also relied on *Achmea* to argue that national courts must be able to control, among other things, the arbitrability of a dispute.

84. To recall, in *Achmea*, the Court denied the possibility to submit to arbitration disputes involving Member States on the basis of bilateral investment treaties (BITs). By such agreements, Member States agreed to exclude the jurisdiction of their own courts in investor–State disputes, even though such disputes may concern the application or interpretation of EU law. In the words of the Court, the Member States thus excluded possible infringements of EU law entirely 'from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law'. [48]

[47] FIFA confirmed at the hearing that its powers are based on Article 21 of the FIFA Disciplinary Code, available here: https://digitalhub.fifa.com/m/59dca8ae619101cf/original/FIFA-Disciplinary-Code-2023.pdf.

[48] Judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraph 55).

85. I understand the underlying rationale of *Achmea* to lie primarily in the principle of mutual trust.[49] Accepting the exclusion of certain disputes from the jurisdiction of Member State courts not only fails to ensure effective judicial protection, it also sends the wrong message: that those courts might not be sufficiently independent and impartial to decide disputes brought by investors against Member States.

86. The application of EU law largely depends on mutual trust in Member States' courts. For that reason, and in order to ensure the uniform interpretation of EU law through the preliminary reference procedure,[50] arbitration clauses in BITs between Member States were found to be contrary to EU law.

87. That understanding of *Achmea* is corroborated by the fact that, unlike in commercial arbitration, in *Achmea*, the Court did not address the question of whether subsequent review by national courts of arbitral awards under BITs could remedy the lack of effective judicial protection.[51] It simply considered general arrangements excluding the jurisdiction of national courts to be unacceptable. Thus, the Royal Football Club Seraing and Doyen Sports' arguments about the necessity of genuine judicial review of an arbitral award (see point 82 of the present Opinion) cannot be based on *Achmea*.

88. Likewise, in *PL Holdings* the Court found that the invalidity of an arbitral award issued under a BIT cannot be remedied by redefining the arbitration process as ad hoc voluntary arbitration, or simply because the Member State did not challenge the validity of the arbitral clause under a BIT in a concrete arbitration procedure.[52]

89. The Belgian rules applicable to the dispute at hand, coupled with CAS's mandatory jurisdiction under the FIFA Statutes, result in excluding, in a similar way, national courts from ensuring effective judicial protection of rights guaranteed by EU law to individuals. Yet, I do not think that it is enough to compare FIFA's arbitration system with the sort of arbitral jurisdiction at issue in *Achmea*. In addition, I do not find the same rationale based on mutual trust to be applicable to the present case.

90. There are three reasons for this distinction. First, the present case does not question the principled compliance of FIFA's arbitral system with EU law.[53] The majority of participants in the present proceedings in fact agree that arbitration in sport is useful. Similarly, the European Parliament issued a resolution in 2012 on the European Dimension in Sport, where it recognised 'the legitimacy of sports courts for resolving disputes in sport, as long as they respect people's fundamental rights to a fair trial'.[54]

[49] Judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraph 34). See also, Centeno Huerta, S. and Kuplewatzky, N., 'On *Achmea*, the autonomy of Union law, mutual trust and what lies ahead', *European Papers*, Vol. 4(1), 2019, p. 61, at pp. 65 to 68.

[50] Judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraphs 36 and 37).

[51] Judgment of 6 March 2018, (C-284/16, EU:C:2018:158, paragraphs 20, 52 and 53).

[52] Judgment of 26 October 2021, *PL Holdings* (C-109/20, EU:C:2021:875, paragraph 54).

[53] That does not mean that there is no criticism of CAS in the literature. For example, some criticise it for its problematic record on human rights: 'Sport arbitration by CAS, as long as it carries the name "arbitration", is capable of using arbitration's flexibilities to manoeuvre around human rights claims.' Shahlaei, F., 'The collision between human rights and arbitration: The game of inconsistencies at the Court of Arbitration for Sport', *Arbitration International*, Vol. 40(2), 2024, p. 169, at p. 203. Some point to the dangers of CAS for judicial protection more broadly. In that respect, see Anderson, J., '"Taking sports out of the courts": Alternative dispute resolution and the international Court of Arbitration for Sport', *Journal of Legal Aspects of Sport*, Vol. 10, 2000, p. 123. Finally, CAS has also been criticised for its lack of proper engagement with EU law. See Duval, A., 'Towards a transnational *Solange*: The Court of Arbitration for Sport and EU law' in Hörnle, T., Möllers, C. and Wagner, G. (eds), *Gerichte und ihre Äquivalente*, Nomos, 2020, p. 33.

[54] European Parliament resolution of 2 February 2012 on the European dimension in sport (2011/2087(INI)) (OJ 2013 C 239E, p. 46). This statement led Duval to argue for a *Solange*-like approach by national courts when they review CAS's arbitral awards. Duval, A., (footnote 53 above), p. 42.

91. An issue of possible non-arbitrability, as raised by the Commission, does not therefore arise.

92. Second, the mandatory and exclusive jurisdiction of CAS, at issue in the present case, does not result from an international agreement concluded by or between the Member States, nor from their exercise of public power. Rather, it results from the Statutes of FIFA, a private organisation. Those statutes in no way bind or limit the Member States when it comes to ensuring effective judicial protection through their judicial systems. Thus, Member States have not agreed to any exclusion of their courts' jurisdiction.

93. Third, *Achmea* speaks to the Member States and requests that they remove the harmful consequences that arbitration clauses under BITs cause for the principle of mutual trust in their judiciaries.[55] This can be achieved in various ways. Member States may reinterpret those agreements,[56] withdraw from them,[57] or not give any effect to arbitral awards based on them.[58] However, even if the Court were to consider FIFA's rules on CAS's jurisdiction to be in principle incompatible with EU law (which is not the question raised by the present case), the only way for Member States to give effect to such a finding would be for their courts not to recognise such arbitral awards. Any change to the arbitration system in football would inevitably depend on the willingness of FIFA.

94. Therefore, apart from repeating the importance of the effective judicial protection and uniformity of EU law, *Achmea* does not seem to add value to the *EcoSwiss* line of case-law for the questions raised by the present case. In that respect, FIFA was right to point out at the hearing that the Court made no mention of *Achmea* in its judgment in *International Skating Union*, when it analysed sports arbitration involving CAS.

3. Mandatory sports arbitration involving CAS and effective judicial protection

95. As I pointed out earlier (see Section IV.B.1), there are two important differences between commercial arbitration and sports arbitration involving CAS: first, its mandatory and second, its self-enforcing nature. I am of the view that those differences demand a specific assessment in light of the principle of effective judicial protection, in relation to both the question of access to courts and the scope of judicial review.

96. That was, in my reading of that judgment, already stated by the Court in *International Skating Union*.[59] However, in that case, the Court was not concerned with the powers or obligations of national courts. It dealt only with the impact of the ISU's rules on the infringement of competition law. Still, in emphasising the mandatory and exclusive nature of CAS's jurisdiction as a reason why the ISU's infringement of competition law was greater,[60] the Court seems to have suggested that such arbitration requires a specific approach.

[55] On how that is going, see Biondi, A. and Sangiuolo, G., 'Three years after *Achmea*: What is said, what is unsaid, and what could follow', in Biondi, A. and Sangiuolo, G. (eds), *The EU and the Rule of Law in International Economic Relations – An Agenda for an Enhanced Dialogue*, Edward Elgar, 2021. For consequences before investor–State tribunals, see Centeno Huerta, S. and Kuplewatzky, N., (footnote 49 above), pp. 68 to 74.

[56] Judgment of 18 November 2003, *Budějovický Budvar* (C-216/01, EU:C:2003:618, paragraph 169).

[57] Judgment of 18 November 2003, *Budějovický Budvar* (C-216/01, EU:C:2003:618, paragraph 170). The EU did so in respect of the Energy Charter Treaty. See Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty (COM/2023/447 final), approved by the Council on 7 March 2024; Council Decision (EU) 2024/1638 of 30 May 2024 on the withdrawal of the Union from the Energy Charter Treaty ST 6509 2024 INIT (OJ L 2024, p. 1638).

[58] As was done in the order of 21 September 2022, *Romatsa and Others* (C-333/19, EU:C:2022:749, paragraph 43).

[59] Judgment of 21 December 2023, *International Skating Union* v *Commission* (C-124/21 P, EU:C:2023:1012).

[60] Judgment of 21 December 2023, *International Skating Union* v *Commission* (C-124/21 P, EU:C:2023:1012, paragraph 228).

97. At the hearing in the present case, the Netherlands Government also invited the Court to adopt a specific approach in relation to mandatory arbitration, such as for sports arbitration under the FIFA Statutes. One of the reasons why it made that invitation was the need to preserve the system of commercial arbitration as it stands.

98. I agree. If mandatory sports arbitration requires rules offering more generous access to justice and a broader scope of review in order to satisfy the requirements of effective judicial protection, it should be distinguished from voluntarily accepted commercial arbitration, where arbitral awards may be reviewed only exceptionally and for limited reasons.

99. Therefore, the *EcoSwiss* case-law should not be automatically transposed to the assessment of mandatory sports arbitration, such as that at issue. In what follows, I will deal with access to courts (a) and the scope of review (b) in this context.

(a) Access to courts

100. The self-enforcing nature of CAS awards in the FIFA system inevitably and significantly reduces the possibility for national courts to become seized of a case that concerns a CAS award.

101. In the case of commercial arbitration, the Court did not have to deal with the question of access to a court because it was assumed that access would, in any event, be secured at the enforcement stage.

102. The self-enforcing nature of FIFA's arbitration system, however, begs the question as to which judicial remedies Member States should provide in order to ensure effective judicial protection against a CAS award that potentially infringes rights guaranteed by EU law.

103. That question was discussed in the parties' written observations and at the hearing. For example, the Commission considered that some sort of direct challenge involving judicial review of a CAS award must exist. That would mean that an action should be available, resulting in the annulment of an award and a declaration of invalidity of FIFA's rules that are found to infringe EU law. Others, such as FIFA, were of the opinion that a direct action is not necessary. An indirect challenge, such as an action for damages, would suffice.

104. To my mind, the Court has already provided an answer to that dilemma in *International Skating Union*. First, it considered that, in situations where arbitration is imposed by sporting organisations on clubs and players, the requirement of judicial review by national courts 'is particularly necessary'.[61] Furthermore, it explained that the fact that a person is entitled to seek damages cannot compensate for the lack of a remedy whereby that person may seek, before a competent national court, to have that conduct brought to an end, or, where it constitutes a measure, the review and annulment of that measure.[62]

105. The principle of effective judicial protection therefore requires a direct judicial path to assess and, if necessary, to prevent the application of FIFA's rules that are contrary to EU law. An arbitral award proclaiming the conformity of FIFA's rules with EU law cannot stand in the way of a national court's power to review such conformity on its own, referring the question of interpretation of EU law to the Court if necessary.

[61] Judgment of 21 December 2023, *International Skating Union* v *Commission* (C-124/21 P, EU:C:2023:1012, paragraph 193).

[62] Judgment of 21 December 2023, *International Skating Union* v *Commission* (C-124/21 P, EU:C:2023:1012, paragraph 201).

106. Therefore, attaching the force of *res judicata* to an arbitral award in relation to its finding that EU law was not infringed is contrary to the principle of effective judicial protection.

107. A national rule such as the one at issue in the main proceedings, which attaches the force of *res judicata* to a CAS arbitral award, must, therefore, be set aside to give way to the possibility of a national court to exercise its power of judicial review of FIFA's rules against EU law. [63]

(b) Scope of review

108. Limited judicial review in commercial arbitration is not, in my view, sufficient in the context of FIFA's mandatory and exclusive arbitration system.

109. The *Eco Swiss* case-law tells us that the scope of judicial review may be limited to issues of public policy. Even if the precise meaning and scope of public policy of the European Union is not clearly settled, it does not seem to relate to all rules of EU law, but only to those rules of higher public importance.

110. Public policy control therefore does not necessarily concern every rule of EU law that bestows a right on an individual.

111. That is acceptable in commercial arbitration, as it may be considered that the parties voluntarily excluded the application of some rules of a legal system, but could not exclude those of public policy.

112. However, in mandatory arbitration, such as the CAS arbitration under the FIFA Statutes, the parties do not freely choose to exclude the application of some EU rules to their situation.

113. Therefore, the reasons that justify a limited scope of judicial review in commercial arbitration cannot readily be applied to mandatory arbitration.

114. A national court must, therefore, be able to conduct the review of FIFA rules against any and all rules of EU law, any CAS award notwithstanding.

115. It should be able to conduct such a review regardless of how a case arrives before it: be it directly as an enforcement action or indirectly, as incidental to a different action (as is the situation in the present case).

[63] FIFA, UEFA and the URBSFA argued that numerous judicial avenues were available to Royal Football Club Seraing and Doyen Sports in Belgium, as evidenced by other judicial proceedings that were initiated in parallel with the main proceedings in the present case (such as a number of actions before the Tribunal de première instance de Liège (Court of first instance, Liège, Belgium)). That argument in itself says nothing about the incompatibility of the rule on *res judicata* with the requirement for effective judicial protection in the procedure from which this reference resulted. Each procedure available under national law must in itself be effective. That means that it is not sufficient that a procedure may be initiated, but also that the court hearing the case has a real power to assess the claims submitted and decide on the requests of the parties.

116. A final question that cannot be ignored, and that was raised at the hearing, is the applicability of the New York Convention, [64] to which all the Member States are parties. [65] While the New York Convention does not bind the European Union, in line with the customary principle of good faith, the Court has previously also taken into account the international obligations of the Member States. [66]

117. All the parties at the hearing agreed that the New York Convention applies to CAS awards.

118. That is not self-evident. Rather, it is possible to conclude that mandatory arbitration does not meet the requirement of Article II(1) of the New York Convention. [67] Put simply, the parties did not 'undertake', which I understand to mean freely and consensually, to submit any or all of their disagreements to arbitration. [68]

119. That interpretation would allow national courts to interpret the New York Convention as not being applicable to mandatory arbitration of the same kind as FIFA sport arbitration. [69]

120. If, however, the New York Convention does apply, I am of the view that its provisions do not clash with the interpretation of effective judicial protection that I propose in respect of mandatory arbitration.

121. Article V(2)(b) of the New York Convention limits judicial review of arbitral awards to public policy issues. [70] That provision does not have an autonomous meaning in the convention, but is, rather, subject to the laws of its signatories. [71]

122. One way of approaching the possible applicability of the New York Convention is thus to interpret as part of public policy, for the purposes of that convention, the EU principle of effective judicial protection, which, in cases of mandatory arbitration, requires full judicial review. [72] That principle would therefore serve as a gateway to a full review of the arbitral award in respect of the applicable EU law.

[64] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

[65] The Commission argued at the hearing that the Court would be bound to interpret EU law in conformity with the New York Convention, so as to avoid obliging the Member States to act in breach of their international obligations, relying on the judgment of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312).

[66] Judgment of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 52). See also, judgment of 14 March 2024, *Commission* v *United Kingdom (Judgment of the Supreme Court)* (C-516/22, EU:C:2024:231, paragraph 126).

[67] 'Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.'

[68] See also, Born, G.B., *International Commercial Arbitration*, 3rd edition, Wolters Kluwer, 2020, p. 275, presenting comparative legislation and case-law (for example, from the United States, Canada, the United Kingdom, Japan, France and Germany) taking a similar approach to the interpretation of that article. For a similar argument that the convention only applies to voluntarily accepted arbitration, referring to Article I(2) of the New York Convention ('The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.'), see Wolff, R., *New York Convention: Article-by-Article Commentary*, Bloomsbury Collections, 2019, p. 37.

[69] A (re)interpretation of an international convention binding a Member State was seen as a possibility to conform to its obligations under Article 351 TFEU. See judgment of 18 November 2003, *Budějovický Budvar* (C-216/01, EU:C:2003:618, paragraph 169).

[70] Article V(2)(b) thereof states: 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: … (b) The recognition or enforcement of the award would be contrary to the public policy of that country.'

[71] It has been called an 'unruly horse' in the literature. Chatterjee, C. and Lefcovitch, A., 'Recognition and enforcement of arbitral awards: How effective is Article V of the New York Convention of 1958?', *International In-house Counsel Journal*, Vol. 9, 2016, p. 1, at p. 10.

[72] Similarly, Advocate General Tizzano proposed that the right to a fair hearing be defined as EU public policy. See Opinion of Advocate General Tizzano in *Mostaza Claro* (C-168/05, EU:C:2006:265, points 57 to 61).

4. Interim conclusion

123. Taking the preceding into account, I consider that the Court should expand on its judgment in *International Skating Union* and develop a separate approach to the judicial review of arbitral awards resulting from mandatory arbitration, such as the one before CAS on the basis of the FIFA Statutes.

124. In that respect, I am of the view that effective judicial protection demands that both access to national courts and their powers of review be expanded in relation to mandatory arbitration, beyond their current powers in relation to commercial arbitration.

125. Direct access to challenge FIFA's rules, despite a CAS award confirming their validity, should be available to subjects who claim that their rights guaranteed by EU law have been infringed. The scope of review should not be limited to public policy, but should include all relevant EU law provisions. It should be possible to exercise such review in all judicial proceedings, be they initiated as a direct challenge to FIFA's rules, in enforcement proceedings of a CAS arbitral award, or incidentally in a different type of procedure, such as the one initiated by an action for damages.

126. Based on such an approach to the FIFA system of mandatory arbitration by CAS, I propose that the Court answer the first question of the referring court as follows. Article 19(1) TEU, read in conjunction with Article 267 TFEU and Article 47 of the Charter, must be interpreted as precluding the application of national law such as Article 24 and Article 1713(9) of the Code judiciaire (Belgian Judicial Code), laying down the principle of *res judicata*, to an arbitral award the conformity of which with EU law has been reviewed by a court of a State that is not a Member State of the European Union, which is not permitted to refer a question to the Court of Justice for a preliminary ruling.

C. The second question

127. By its second question, the referring court asks, in essence, whether the principle of effective judicial protection, read in conjunction with Article 267 TFEU, precludes a rule of national law granting an arbitral award rebuttable probative value vis-à-vis third parties, where the review of conformity with EU law has been carried out by a court of a third country.

128. With the exception of the Royal Football Club Seraing and Doyen Sports, all the participants agree that the rules on the probative nature of arbitral awards do not significantly affect effective judicial protection.

129. The Royal Football Club Seraing and Doyen Sports argue that national rules according to which an arbitral award has prima facie probative value vis-à-vis third parties make it excessively difficult to exercise the right to effective judicial protection, chiefly by reversing the rules normally applicable to the burden of proof.

130. On the contrary, FIFA and UEFA, supported by the URBSFA, argue that the probative value rule is only a rebuttable presumption and there is, moreover, a remedy under domestic law enabling a national court to refuse to recognise or enforce an arbitral award in a manner that complies with the requirements of equivalence and effectiveness.

131. The Commission considers that the national rules in question are not an excessive impairment of the right to effective judicial protection in so far as they are only applicable to questions of fact determined by the arbitral award.

132. I agree with the Commission.

133. It is important that the national rule, as explained by the referring court, does not prevent the court in question from ensuring the full effect of EU law, nor its ability to submit a preliminary reference, if considered necessary.

134. A rebuttable presumption of probative value, does not, in my view, prevent national courts from discharging their obligations under Article 19(1) TEU, given that they remain able to ensure the full application of EU law, if necessary by submitting a preliminary reference to the Court of Justice.

135. In conclusion, I propose that the second question of the referring court be answered as follows. Article 19(1) TEU, read in conjunction with Article 267 TFEU and Article 47 of the Charter, does not preclude a rule of national law granting an arbitral award rebuttable probative value vis-à-vis third parties, where the review of conformity with EU law has been carried out by a court of a third country.

V. Conclusion

136. In light of the foregoing, I propose that the Court answer the questions referred for a preliminary ruling by the Cour de cassation (Court of Cassation, Belgium) as follows:

(1) Article 19(1) TEU, read in conjunction with Article 267 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union,

must be interpreted as precluding the application of national law such as Article 24 and Article 1713(9) of the Code judiciaire belge (Belgian Judicial Code), laying down the principle of *res judicata*, to an arbitral award the conformity of which with EU law has been reviewed by a court of a State that is not a Member State of the European Union, which is not permitted to refer a question to the Court of Justice for a preliminary ruling.

(2) Article 19(1) TEU, read in conjunction with Article 267 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union,

must be interpreted as not precluding a rule of national law granting an arbitral award rebuttable probative value vis-à-vis third parties, where the review of conformity with EU law has been carried out by a court of a third country.