# The assessment of arbitration agreements in competition law

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*In recent years, arbitration agreements have come under the repeated scrutiny of competition law enforcers. By analyzing a recent judgment of the CJEU, the Article finds that arbitration agreements are generally still regarded as harmless to competition in EU law. The Article subsequently discusses the exceptional cases in which arbitration agreements have been found to violate competition law. These cases include arbitration agreements which serve to cover-up other infringements of competition law as well as arbitration agreements by which a dominant undertaking imposes an unfair dispute resolution mechanism on a structurally disadvantaged party. The Article concludes that neither EU competition law nor other EU law require the place of arbitration to be located within the single market.*

## I. Introduction

Arbitration agreements remove legal disputes from the state's jurisdiction. If the disputes covered by these agreements affect the market participation of companies, this can lead to conflicts with competition law. In principle, competition law requires that each company must assess for itself whether market participation is legally possible and economically desirable in view of the individual risk-benefit function.[1] If companies find themselves disputing the limits of lawful market participation with each other, it is the task of state authorities, and chief among them the courts, to determine the scope of legal competition by interpreting the relevant statutes.[2] Under competition law, it makes no difference if competing companies co-ordinate their market behavior directly or if such a co-ordination is achieved indirectly by using a consensual dispute settlement mechanism.[3]

Against this backdrop, it is not surprising that arbitration agreements have lately come under repeated scrutiny by competition law enforcers.[4] Most of these cases originated from the sports sector. Therefore, these cases primarily concerned referrals to the Court of Arbitration for Sports (CAS), which is located in Lausanne (Switzerland). However, in terms of competition law, the sports sector is an economic sector like any other.[5] Although the economic particularities of each sector must be taken into account,[6] the sports cases are of general importance for determining the confines under which competition law allows for arbitration agreements.[7]

With a special focus on the recent case law in the sports sector,[8] this article provides an overview of the boundaries which competition law sets for arbitration agreements. To begin with, it must be stressed that arbitration agreements cause no competitive harm in principle (II). Then, the special circumstances will be examined under which arbitration agreements may violate competition law as an exception to this principle (III.). Contrary to some speculations in the literature, the recent CJEU case law does not reveal any tendencies towards the development of principles for a European arbitration law that would go beyond the mere application of competition law (IV.). The final section summarizes the article's results and discusses the practical effects of the CJEU's case law on arbitration (V.).

## II. No competitive harm in principle

At the outset, the CJEU rightly emphasizes that the agreement of private dispute resolution mechanisms does not generally restrict competition in the relevant markets.[9] This is because the mere relocation of the legal forum for eventual disputes cannot, in itself, affect the companies' market behavior. In most cases, it is only the resulting arbitral award that has the potential to restrict a company's market participation and thus to infringe competition law.

If, however, the contractual agreements or unilateral practices, which are covered by the arbitration agreement, themselves contain a breach of competition law, this can also adversely affect the arbitration agreement, effectively rendering it anti-competitive according to the recent CJEU case law. Taking into account the German enforcement activities throughout the last years, a breach of competition law by an arbitration agreement is possible under the following circumstances.

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1 Cf. for the principle of independent business judgement *Podszun,* Anwendbarkeit des Kartellrechts auf die Regulierung von Spielervermittlern durch Sportverbände, NZKart 2021, 138, 141 and *Emmerich,* case note on CJEU, judgment of 4.6.2009 – case C-8/08, JuS 2009, 1156, 1157.

2 CJEU, judgment of 7.2.2013 – case C-68/12, EuZW 2013, 438 para. 20: "Moreover, it is for the public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements. The […] situation is evidence enough of the fact that the application of statutory provisions may call for complex assessments which are not within the area of responsibility of those private undertakings or associations of undertakings."

3 Cf. for the comparable cases of so-called "hub-and-spoke" co-ordinations *Schuhmacher/Holzweber,* in: Grabitz/Hilf/Nettesheim, R.EU, 81st ed. January 2024, Art. 101 TFEU para. 847.

4 Cf. CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31; Federal Constitutional Court, decision of 3.6.2022 – 1 BvR 2103/16, NJW 2022, 2677; Federal Court of Justice, BGHZ 234, 288, SchiedsVZ 2023, 166; Higher Regional Court of Düsseldorf, judgment of 20.1.2022 – VI-6 W 1/22 (Kart), NZKart 2022, 221.

5 Cf., among others, *Ackermann,* Grenzen der Sportverbandsautonomie nach der Wouters-Doktrin, WuW 2022, 122, 122 who rejects the idea of a special "sports antitrust law".

6 Cf. *Blaschczok,* Freiheit und Fairness, 2023, chapter 4.

7 Cf. *Bien,* Sports Arbitration and Competition Law, NZKart 2024, 398, 399; *Pauer/Blaschczok,* Das Konzept der Fairness im Rahmen von Art. 101 AEUV – zu den dogmatischen Neuerungen der EuGH-Sporttrilogie, NZKart 2024, 296, 297.

8 See the references in fn. 4.

9 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, para. 193: "That is why, while noting that *an individual may enter into an agreement that subjects, in clear and precise wording, all or part of any disputes relating to it to an arbitration body in place of the national court that would have had jurisdiction to rule on those disputes under the applicable national law, and that the requirements relating to the effectiveness of the arbitration proceedings may justify the judicial review of arbitral awards being limited* […], the Court has nevertheless pointed out that such judicial review must, in any event, be able to cover the question whether those awards comply with the fundamental provisions that are a matter of EU public policy, which include Articles 101 and 102 TFEU […]" (emphasis added here). See already judgment of 1.6.1999 – case C-126/97, *Eco Swiss ./. Benetton International,* EuZW 1999, 565 para. 35.

## III. Exceptional circumstances in which competitive harm may occur

### 1. Scope of application

A breach of European or German competition law can only occur if the relevant statutes are applicable to the dispute at hand. With regard to arbitration agreements, two different limitations of the competition laws' scope of application can be relevant: the international and the substantive scope of application.

#### a) International scope of application

European competition law (Art. 101, 102 TFEU) applies to arbitration agreements whose arbitral award is either implemented within the internal market (so-called implementation principle) or has a direct, foreseeable and substantial effect on the internal market (so-called qualified impact principle).[10] In practice, the European Commission regularly supports its cases by applying both these principles in parallel.[11] Nevertheless, each of these principles can also justify the applicability of European competition law alone.[12] Therefore, the sports arbitration of the CAS in Lausanne is subject to European competition law, for example, insofar as its arbitration proceedings substantially affect the European sports markets.[13] In contrast, the place of arbitration is generally considered irrelevant under EU competition law.[14]

Cases testing the limits of this principle can occur in German competition law. Under German law, the Higher Regional Court of Düsseldorf has granted an injunction to a US athlete, who was seeking admission to the Paralympic Games in Beijing (China), because the defendant (who was appointed to decide on the admission) was located in Bonn (Germany) and its decisions were subject to German law, pursuant to its statutes.[15] German competition law also applies to restrictions of competition that have a qualified effect in Germany, Section 185(2) of the Act against Restraints of Competition (ARC).[16]

The additional applicability of German competition law is mostly irrelevant in cases which only concern Art. 101 TFEU and Section 1 ARC, since these provisions are fully harmonized for cases with cross-border significance, cf. Art. 3(1), (2) of Regulation 1/2003. Therefore, differences between European and German competition law will mostly occur in cases concerning the abuse of a dominant position pursuant to Art. 102 TFEU and Sections 18 et seq. ARC. In this area of competition law, national statutes may be stricter (but not more lenient) than EU law, according to Art. 3(2) of Regulation 1/2003.

Applying these principles, an arbitration agreement between a US company and a Chinese company, for example, is generally exempt from the international scope of European and German competition law if neither party is active in the EU's internal market. Local competition law will apply, however, if the arbitral award is to be executed within the EU's internal market or if the execution of the arbitral award has a significant effect on the European and/or German markets.

#### b) Substantive scope of application

In substance, competition law only applies to "economic activities", relating back to the so-called "functional" concept of an undertaking.[17] Therefore, arbitration agreements covering non-economic disputes escape the scope of application of European competition law.[18] This can be particularly important for sports arbitration cases. Pursuant to the new CJEU case law, a sporting association's rules and regulations can be exempt from competition law altogether if they merely regulate the sport as such and thus lack in economic nature.[19] This represents a remarkable shift compared to the CJEU's previous approach in the *Meca Medina* case.[20] In that case, it was held that sporting associations' rules for professional sports do generally fall under the scope of competition law, but can be justified under an implied exemption from Arts. 101, 102 TFEU if they are found to be proportionate.

Under the new approach, the revived distinction between economic regulations and non-economic rules for the sport as such leads to some challenges. A convincing way to solve this problem is the hypothetical amateur sport test (HAS-Test). According to this test, the rules in question regulate the sport as such, and are therefore of a non-economic nature if they could be applied with equal plausibility in amateur sports.[21] If that is not the case, the regulations in question only concern the professional side of sports and are thus economic in nature. To this extent, they are also subject to competition law.

According to these principles, regulations to strengthen the competitive balance[22] (such as financial fair play, which is widespread in soccer) or the so-called home-grown player rule,[23] whose purpose exclusively results from the commercialization of the sport, are covered by competition law. In contrast, regulations on the exclusion of foreign players from national teams, for example, do not fall within the substantive scope of competition law, as they are equally necessary in non-commercial sports competitions.[24]

10 CJEU, judgment of 6.9.2017 – case C-413/14 P, *Intel ./. Commission,* NZKart 2017, 525 paras. 40 et seqq.; *Rehbinder,* in: Immenga/Mestmäcker, Wettbewerbsrecht, 6th ed. 2019, Vol. 1 Part 1 II. Section, A. International scope of application, paras. 6–12.

11 *Rehbinder,* in: Immenga/Mestmäcker (fn. 10), Art. 101 TFEU para. 11.

12 CJEU, judgment of 6.9.2017 – case C-413/14 P, *Intel ./. Commission,* NZKart 2017, 525 para. 46.

13 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, para. 189.

14 For example, a bid rigging cartel organized in Europe at the expense of a third country does not fall under EU competition law, nor do agreements on exports to third countries, provided that there are no repercussions for competition in the internal market, see *Mestmäcker/Schweitzer,* Europäisches Wettbewerbsrecht, 3rd ed. 2014, Section 7 paras. 95 et seqq.

15 Higher Regional Court of Düsseldorf, judgment of 20.1.2022 – VI-6 W 1/22 (Kart), NZKart 2022, 221. Cf. Section 13 of the IPC's Articles of Association.

16 *Rehbinder/von Kalben,* in: Immenga/Mestmäcker (fn. 10), Section 185 ARC para. 128.

17 See *Mestmäcker/Schweitzer* (fn. 14), Section 9 paras. 6 et seqq.

18 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, para. 190: "It is, consequently, only the implementation of such rules in the context of such disputes and in the territory of the European Union that is at issue in the present case and not the implementation of those rules in a territory other than the European Union, their implementation in *other types of disputes, such as disputes concerning merely the sport as such and therefore not falling under EU law,* or, a fortiori, the implementation of the arbitration rules in different areas." (emphasis only here).

19 CJEU, judgment of 21.12.2023 – case C-333/21, EuZW 2024, 122 para. 84; CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, para. 92.

20 CJEU, judgment of 18.7.2006 – case C-519/04 P, *David Meca-Medina and others ./. Commission,* EuZW 2006, 593 paras. 27, 28.

21 See *Ackermann,* WuW 2022, 122, 126.

22 See also *Pauer/Blaschczok,* NZKart 2024, 296, 300.

23 See CJEU, judgment of 21.12.2023 – case C-680/21, NZKart 2024, 27.

24 CJEU, judgment of 21.12.2023 – case C-333/21, EuZW 2024, 122 para. 84; CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, para. 92.

Strikingly, regulations on qualification criteria for sports competitions seem to be assessed differently in European and German competition law. In an *obiter dictum,* the CJEU categorized these rules as non-economic.[25] In stark contrast, the Higher Regional Court of Düsseldorf has subjected the qualification criteria for the Paralympic Games to a review under the national statute regarding the abuse of a dominant position, Section 19 ARC. The court also deemed the arbitration agreement covering these qualification criteria to be in breach of competition law, as the agreed dispute settlement mechanism fell short of minimum standards for procedural fairness (see III.2.b.).[26]

## 2. Prohibitions

If the arbitration agreement is subject to European (and/or German) competition law according to the principles stated above, a violation of competition law may particularly occur in the following two scenarios.

The first scenario concerns arbitration agreements which cover market behavior that is itself in breach of competition law. In this situation, the competitive harm of the arbitration agreement is supposed to result from a reinforcement of the primary restriction of competition. More precisely, the arbitration agreement is thought to shield the restriction of competition against the application of competition law in the state court system.

The second scenario concerns arbitration agreements through which a dominant undertaking imposes an unfair dispute resolution mechanism on a structurally disadvantaged party. In this situation, competition law serves to protect the minimum requirements for a fair trial vis-à-vis a powerful counterpart.

The first scenario has recently been the subject of EU case law, while the second scenario is primarily known from German ARC enforcement. Nevertheless, both types of infringements can be reprimanded under both competition law regimes equally. In the seminal case of the International Skating Union (ISU), both competition violations had been alleged by the parties in parallel which has contributed to blurring the fundamental principles underlying this judgement.[27] However, for procedural reasons, the CJEU expressly refused to rule on whether the CAS is sufficiently independent to guarantee a fair trial.[28] Therefore, the ISU case serves as a pure example for the first scenario, i.e. the supposed reinforcement of a primary restriction of competition through an arbitration agreement.

### a) Reinforcement of a primary restriction of competition

The CJEU[29] and the Commission[30] concur in assuming that arbitration agreements may reinforce the harmful effects of other restrictions of competition by shielding them from the effective application of Arts. 101, 102 TFEU within the state court system.

In the ISU case, for example, the federation's athletes were prohibited from participating in competitions outside of the federation and were put under the threat of sanctions. This prohibition was applied in general terms and was not based on predetermined, transparent, non-discriminatory and proportionate criteria.[31] The CJEU rightly considered this blanket restriction of the athletes' market behavior to be in breach of competition law.[32] Moreover, due to an arbitration agreement in the ISU's statutes, the athletes could challenge the federation's prohibitions exclusively before the CAS.[33] The CJEU found that these arbitration rules were in breach of competition law as well.[34]

First of all, the CJEU emphasized that the restrictive nature of the arbitration agreement does not follow from the forum choice as such.[35] In the CJEU's view, the anti-competitive nature of the arbitration agreement only arises from the fact that neither the CAS nor the Swiss Federal Tribunal (which is the only court with jurisdiction to annul CAS awards[36]) take Arts. 101, 102 TFEU into account in their decisions and, in case of doubt, refer the matter to the CJEU for a binding interpretation of these provisions pursuant to Art. 267 TFEU.[37] The verdict of anti-competitive behavior is thus based on the assumption that the arbitration agreement shields anti-competitive behavior from the application of EU competition law by the state courts.[38]

On closer inspection, this reasoning is not entirely consistent. The effective enforcement of competition law could require that a company's market behavior is reviewed under Arts. 101, 102 TFEU in all civil proceedings, regardless of their forum. Following from this view, all arbitration agreements that circumvent a review under Arts. 101, 102 TFEU by locating the forum outside the EU's internal market would have to be considered as anti-competitive in nature. This would be the case regardless of how the market behavior covered by the arbitration agreement is to be assessed under competition law.[39] Alternatively, the possibilities for enforcement proceedings by competition authorities and private actions for damages based on competition law infringements could be considered sufficient to guarantee for an effective review of the companies' market behavior under competition law. According to this view, arbitration agreements could not be thought to cause any impairments to the effective enforcement of competition law at all, even if the contract or conduct at issue restricts competition in the relevant markets.[40] To demand that the arbitration tribunal's procedural scope of review includes EU compe-

25 CJEU, judgment of 21.12.2023 – case C-333/21, EuZW 2024, 122 para. 84; CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, para. 92.

26 Higher Regional Court of Düsseldorf, judgment of 20.1.2022 – VI-6 W 1/22 (Kart), NZKart 2022, 221 paras. 32–34, 47, 54.

27 See *Hülskötter,* Europäisches Recht auf Konfrontationskurs mit dem Sitz des CAS, SpuRt 2024, 78, 79 et seqq.

28 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 181, 182.

29 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 221, 228.

30 See already Commission, Decision of 2.12.1977, OJ 1978 L 20/18, paras. 18 et seq.

31 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 9–19, 131–145.

32 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 148, 149. Cf. also *Pauer/Blaschczok,* NZKart 2024, 296, 298.

33 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 12, 19, 223.

34 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 221, 228, 231.

35 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 191, 193.

36 Cf. *Bien,* NZKart 2024, 398, 400.

37 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 191, 198.

38 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 221, 228.

39 Arguing in this direction, for example, *Orth,* Verstoßen exklusive Sportschiedsklauseln mit Schiedsort Schweiz gegen europäisches Kartellrecht?, ZWeR 2018, 382, 390. *Bien,* NZKart 2024, 398, 402 rightly points out the excessive practical consequences of this view.

40 This has been argued in the previous annulled decision by the General Court, judgment of 16.12.2020 – case T-93/18, *International Skating Union ./. Commission,* NZKart 2021, 111 paras. 157–161.

tition law, but only in cases where a substantive breach of EU competition law has indeed occurred, comes close to circular thinking. In abstract form, this thinking boils down to the following legal principle: the waiver of action before a state court is only effective to the extent that the asserted claim does not exist. This, however, is only to be determined by the waived proceedings. Their admissibility cannot depend on their outcome.

In terms of competition policy, it remains equally unclear what purpose the theory of the reinforcement of a primary restriction of competition by an arbitration agreement could serve. The most likely justification for this theory is a consideration based on institutional economics. According to this view, the detection of anticompetitive behavior should be decentralized and effectively outsourced to individual disputes before the national courts, instead of taking place in the centralized enforcement procedures of the European Commission. In the end, this approach strengthens the private enforcement of competition law by giving the concerned parties access to the state courts already in the main proceedings. If that were not the case, the concerned parties would be relegated to secondary actions for damages. The CJEU's approach can be particularly helpful in sports litigation, in which retrospective awards of monetary damages may not offer adequate compensation for a long interruption of an athlete's career.[41] If this consideration of procedural economics is behind the ISU decision, the CJEU should have mentioned it directly instead of hiding it behind the invention of a category of "accessory" restrictions of competition by reinforcement.

It is also possible, however, that the ISU ruling was simply thought through from an ex-post perspective. From this perspective, the decision can be understood more intuitively. If it is already clear that a firm's behavior violates competition law, that firm is also barred from invoking an arbitration agreement covering the illegal behavior. Strictly speaking, this line of reasoning, however, also involves a *non sequitur.* In addition, under the national law applicable to actions for damages, even arbitration agreements relating to claims based on a breach of competition law itself can be valid.[42] This principle is called the "arbitrability of competition law actions". The described line of reasoning would be in conflict with this principle as well.

**b) Unfair arbitration procedure**

The second scenario in which arbitration agreements may violate competition law comprises dispute resolution mechanisms that fall short of minimum standards for a fair trial. In these situations, there is typically a structurally disadvantaged party which has no choice but to accept the arbitration agreement, if it wants to participate in a certain market segment.[43] Like in the previously discussed scenario, the arbitration agreement's anti-competitiveness does not follow from the forum-shifting as such, but only from substantial shortcomings regarding procedural fairness in the out-of-court settlement mechanism. This category of prohibitions is deeply rooted in ordoliberal conceptions of competition law, which is why it is not surprising that enforcement activities in this regard have primarily occupied the German courts. According to ordoliberalism, the fundamental rights must be protected against powerful entities of all kinds, be they state agencies or private companies.[44] The enforcement of fundamental (judicial) rights against dominant undertakings by means of competition law can be seen as a logical continuation of this understanding of the economic and social order.[45]

In contemporary legal history, this category of unfair arbitration agreements can be traced back to the efforts of the speed skater *Claudia Pechstein.* In a momentous[46] series of proceedings, Ms. Pechstein successfully rebuked the CAS for shortcomings regarding fair trial standards in anti-doping procedures. The competition senate of the Federal Court of Justice initially rejected Ms. Pechstein's claim. It deemed the arbitration agreement to be valid under Section 19 ARC, as the CAS statutes ensured that its proceedings were "still acceptable" in terms of a fair trial.[47] The Federal Constitutional Court then overturned the Federal Court of Justice's ruling as it had defectively weighed one of the essential elements of a fair trial, namely the principle that court hearings should be public.[48] In this judgement, the Federal Constitutional Court ruled that the Basic Law (i.e. the German constitution) demands that arbitration agreements falling short of complying with the minimum standards for a fair trial have to be found void under Section 19 ARC.

In 2022, the US snowboarder *Brenna Huckaby* also successfully appealed her non-admission to the Paralympic Games in Beijing before a competition senate of the Higher Regional Court of Düsseldorf.[49] Like in the previously discussed cases, disputes regarding the admission of athletes were covered by an arbitration agreement in the statutes of the International Paralympic Committee (IPC). The Düsseldorf competition tribunal considered this arbitration agreement to be abusive because the appointment of arbitrators was left to the sole and unfettered discretion of the respondent. This injunction case is also significant because the competition tribunal used Section 19 ARC to order the IPC to allow the plaintiff to compete in a specific class of the Paralympic Games. The legal consequences of unfair arbitration agreements are therefore not limited to a liability to implement fair proceedings in the future, but can extend to a decision by the competition tribunal in the arbitration case itself.

The relevant statutes of competition law relating to unfair dispute resolution mechanisms are Art. 102 TFEU and Section 19 ARC. To date, there is a lack of relevant CJEU case law on this category of cases. However, the application of Art. 102 TFEU is essentially guided by the same considerations that also inform the application of its national equivalent, Section 19 ARC.[50]

These provisions exclusively apply to dominant undertakings. Arbitration agreements between two companies, neither of which occupies a dominant position in the relevant markets, are therefore excluded. This raises the question of whether, below the threshold of market dominance, unfair arbitration agreements can also be void pursuant to Art. 101 TFEU and Section 1 ARC. In principle, claims of this sort will have to be rejected.[51]

41 Cf. *Bien,* NZKart 2024, 398, 401.
42 *Ollerdißen,* in: Wiedemann, Handbuch des Kartellrechts, 4th ed. 2020, Section 63 para. 7.
43 Cf. *Bien,* NZKart 2024, 398, 402; *Orth,* ZWeR 2018, 382, 387 et seqq.
44 *Blaschczok* (fn. 6), pp. 246 et seqq., 264, 270 et seqq.
45 *Blaschczok* (fn. 6), pp. 317 et seqq., 344 et seqq.
46 *Bunte,* case note on Federal Constitutional Court, decision of 3.6.2022 – 1 BvR 2103/16, NJW 2022, 2681, 2681.
47 Federal Court of Justice, judgment of 7.6.2016 – KZR 6/15, NJW 2016, 2266 paras. 46 et seqq.
48 Federal Constitutional Court, decision of 3.6.2022 – 1 BvR 2103/16, NJW 2022, 2677 paras. 34–49.
49 Higher Regional Court of Düsseldorf, judgment of 20.1.2022 – VI-6 W 1/22 (Kart), NZKart 2022, 221.
50 Federal Court of Justice, judgment of 7.6.2016 – KZR 6/15, NZKart 2016, 328, para. 66.
51 See also Higher Regional Court of Düsseldorf, decision of 6.5.2024 – W (Kart) 3/24, BeckRS 2024, 12291 paras. 24, 26.

An impairment of fundamental rights can only occur if one party is in a position of power over the other party that makes it impossible for the other party to switch to other business partners or to refuse to co-operate altogether.[52]

Below the threshold for market dominance, arbitration agreements which violate minimum standards for a fair trial may, however, be invalid pursuant to Section 307(1) of the Civil Code *(Bürgerliches Gesetzbuch).*[53] This applies to arbitration agreements in general terms and conditions (GTC), provided that they are subject to German law. According to the national case law, minimum procedural standards are not limited to GTC that contain arbitration agreements between a business and a consumer, but also extend to GTC that contain arbitration agreements between two businesses.

## IV. Setting the course for future principles of EU arbitration law?

Parts of the commentariat associate the CJEU's ruling in the ISU case with even broader notions of a developing EU arbitration law which supposedly derives from Art. 19 TEU and Arts. 267, 344 TFEU.[54] This is countered by the fact that the ISU judgement concerned an action for annulment (Art. 263 TFEU) brought by the ISU against an enforcement decision by the European Commission.[55] The CJEU therefore had no reason to rule on the interpretation of the aforementioned provisions, nor did it do so by way of an *obiter dictum*.[56] Contrary to this opinion in the literature, the ISU ruling contains unambiguous statements in favor of the reinforcement theory[57] which the Commission has been advocating for almost 50 years now:

> "In the present case, the Commission was correct in finding that the arbitration rules reinforced the infringement identified in Article 1 of the decision at issue, by making judicial review, in the light of EU competition law, of CAS awards [...] more difficult."[58]

Consistent with the usual structure of CJEU judgements, these statements are not located in the parts of the judgement where the CJEU repeals the previous decision of the General Court, but only in the concluding passages of the judgment by which the CJEU, pursuant to Art. 61(1) of the CJEU Statute, rules on the merits of the case and dismisses the ISU's action against the Commission's decision.[59]

Furthermore, neither Art. 19 TEU nor Art. 267, 344 TFEU are statutes of private law directed at undertakings which could render arbitration agreements between them ineffective.[60] Where the CJEU refers to the "principles underlying the judicial architecture of the European Union" and to the preliminary decision procedure under Art. 267 TFEU in its ISU judgment, this is always done in the context of the reinforcement theory under Art. 101 TFEU, according to which the transfer of the legal forum to the CAS in Lausanne supposedly impedes the effective application of EU law to restrictions of competition (see III.2.a. above). With these statements, the CJEU refutes the arguments of the General Court, which considered the arbitration agreement to be justified by legitimate objectives, although the General Court also found primary violations of Art. 101 TFEU.[61] If, on the other hand, there is no primary restriction of competition as a connecting factor, then, according to the CJEU, there are also no concerns regarding the legal validity of arbitration agreements, even if the forum is located in Switzerland.

These principles must, of course, be distinguished from the principles applicable to unfair arbitration agreements (see III.2.b. above), which were, however, not the subject of the ISU ruling.[62] The ISU case was exclusively reviewed under Art. 101 TFEU,[63] whereas arbitration agreements setting-up unfair arbitration procedures are exclusively reviewed under Art. 102 TFEU or Section 19 ARC (see III.2.b. above).

## V. Conclusion and outlook

In practical terms, the impact of competition law enforcement on the world of arbitration will likely remain marginal. The general view is that arbitration agreements are, in principle, not objectionable under competition law (see II. and III.2.a and b. above). A conflict with competition law may arise in two rather unusual scenarios. The first scenario concerns cases in which a primary restriction of competition exists which is supposedly reinforced by the arbitration agreement covering it (see III.2.a. above). The second scenario concerns cases in which a dominant undertaking imposes unfair dispute settlement procedures on a structurally disadvantaged party who has no other practical choice than to accept the agreement (see III.2.b. above). In all

52 *Blaschczok* (fn. 6), pp. 270 et seqq., 361.

53 Federal Court of Justice, judgment of 10.10.1991 – III ZR 141/90, NJW 1992, 575, 577; Regional Court of Frankfurt a.M., judgment of 7.10.2020 – 2-06 O 457/19, NJOZ 2021, 382 para. 18.

54 *Hülsk*ötter, SpuRt 2024, 78, 79 et seqq.

55 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 33–35.

56 Ultimately, this is conceded, see *Hülsk*ötter, SpuRt 2024, 78, 80 et seq.

57 See already Commission, Decision of 2.12.1977, OJ 1978 L 20/18, para. 18. In the ISU proceedings: Commission, Decision of 8.12.2017 – AT.40208, recitals 268–286.

58 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, para. 228.

59 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 214–231.

60 This, however, seems to follow from the view of *Hülsk*ötter, SpuRt 2024, 78, 81. The legal question at hand is to be distinguished from situations in which an arbitration tribunal is appointed for disputes between *member states*. The latter is prohibited under Art. 344 TFEU, cf. CJEU, judgment of 6.3.2018 – case C-284/16, *Slovak Republic ./. Achmea BV,* NJW 2018, 1663; judgment of 2.9.2021 – case C-741/19, *Republic of Moldova ./. Komstroy LLC,* NJW 2021, 3243 paras. 42 et seqq. See also *Wegener,* in: Calliess/Ruffert, EUV/AEUV, 6th ed. 2022, Art. 344 TFEU para. 7. Another distinct question is whether arbitral tribunals are entitled to make submissions pursuant to Art. 267 TFEU, cf. in this regard CJEU, judgment of 7.5.2024 – case C-115/22, *NADA*.

61 This is the final result of this part of the decision, see CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, para. 199: "Thus, the General Court erred in law by merely finding, in an undifferentiated and abstract manner, that the arbitration rules 'may be justified by legitimate interests linked to the specific nature of the sport', in so far as they confer on 'a specialised court' the power to review disputes relating to the prior authorisation and eligibility rules, without seeking to ensure that those arbitration rules complied with all the requirements referred to in the […] present judgment and thus allowed for an effective review of compliance with the EU competition rules, even though the Commission correctly relied on those requirements [...] in concluding that those rules reinforced the infringement identified in […] that decision."

62 CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, paras. 175, 180, 181.

63 See Art. 1 of the Commission's initial decision of 8.12.2017 – AT.40208, which was ultimately confirmed in full, as well as recitals 1, 135–267, 286–286, 302. See also the repealed judgment EGC, judgment of 16.12.2020 – case T-93/18, *International Skating Union ./. Commission,* NZKart 2021, 111 paras. 69 et seqq. and finally CJEU, judgment of 21.12.2023 – case C-124/21 P, *International Skating Union ./. Commission,* NZKart 2024, 31, para. 1.

other respects, however, arbitration agreements remain largely unaffected by European and/or German competition law, even in disputes that fall within its scope of application (see III.1. above).

Against this background, a relocation of the CAS's seat from Switzerland to the internal market may seem desirable from a protectionist perspective,[64] but is not required by law.[65] If the ISU had established fair[66] rules for the participation of its athletes in non-federation competitions in the first place, its arbitration agreement would not have been caught up in the maelstrom of European competition law (see III.2.a.).

From the perspective of the CAS and other arbitration tribunals, more worrying tendencies can be found in German law, as German courts have objected to CAS procedures for supposed shortcomings regarding fair trial standards, and have enforced these objections through national law on the abuse of a dominant position.[67] After all, the non-publicity of the proceedings is one of the key advantages of private arbitration tribunals. If one also considers the trend towards the establishment of so-called commercial courts within the framework of the German state jurisdiction,[68] this results in a judicial pincer movement, by which the state judiciary attempts to balance out the differences in attractiveness between itself and the private arbitration courts, which have dealt with an increasing share of very high-value disputes throughout the last decade. In the coming years, this twofold operation could lead to a shift in market shares from the private providers of legal forums to the state judiciary.[69]

While the agreement of an out-of-court dispute resolution mechanism usually does not cause any competitive harm, the resulting arbitral award can be highly relevant for competition law.[70] If companies dispute the rules and limits of market participation among each other, the arbitration award must precisely follow the statutory law on the matter, since only obviously illegal market activities are not protected as desired competition by EU law.[71] Therefore, restrictions in the arbitration award that go beyond the law of the land can turn out as prohibited hub-and-spoke co-ordinations. Pursuant to Art. 101 II TFEU, this may cause the invalidity of the arbitral award under EU law. In the end, competition law is also not covered by the prohibition of a *révision au fond* in arbitration law, but overrides this principle.[72]

64 *Hülskötter,* SpuRt 2024, 78, 84.

65 To safeguard the CAS jurisdiction in the event of material breaches of competition law, UEFA has now published revised "Licensing Regulations for International Club Competitions" (edition dated 21.6.2024) (available at: https://documents.uefa.com/v/u/SQXkA-jipcd_nsiERsgAvDQ, last accessed on 9.7.2024). Their Art. 16 para. 3 contains the following provisions: "The party filing the statement of appeal and/or a request for provisional measures, whichever is filed first with CAS, shall indicate in its first written submission to CAS whether the party accepts Lausanne, Switzerland, as seat of the arbitration or if the seat of the arbitration shall be in Dublin, Ireland, in derogation of Article R28 of the CAS Code. In the latter case, UEFA is bound by the choice of Dublin, Ireland, as seat of the arbitration and UEFA shall confirm its agreement to such seat in its first written reply to CAS. In case no seat is indicated in the first written submission to CAS, Article R28 of the CAS Code shall apply."

66 In other words, pre-defined, transparent, non-discriminatory and proportionate criteria. See in more detail *Pauer/Blaschczok,* NZKart 2024, 296, 297 et seqq.

67 See also *Bien,* NZKart 2024, 398, 402 et seq.

68 See the government website https://www.commercial-court.de (last accessed on 25.6.2024).

69 *Raeschke-Kessler,* SchiedsVZ 2023, 158, 164.

70 See, for example, Federal Court of Justice, BGHZ 234, 288 paras. 14 et seqq.

71 CJEU, judgment of 7.2.2013 – case C-68/12, EuZW 2013, 438 paras. 19 et seqq.

72 Federal Court of Justice, decision of 27.9.2022 – KZB 75/21, NZKart 2023, 30, head note.