**Case C-600/23**

**Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

2 October 2023

**Referring court:**

Cour de cassation (Belgium)

**Date of the decision to refer:**

8 September 2023

**Applicant, appellant and appellant in the appeal on a point of law:**

Royal Football Club Seraing

**Defendants, respondents and respondents in the appeal on a point of law:**

Fédération Internationale de Football Association (FIFA)

Union européenne des Sociétés de Football Association (UEFA)

Union Royale Belge des Sociétés de Football-Association (URBSFA) ASBL

**Other party:**

Doyen Sports Investment Limited (party served notice that it is a third party to the proceedings)



## I. Subject matter of the main proceedings

1 The case in the main proceedings concerns an action brought by Royal Football Club Seraing against the Fédération Internationale de Football Association (FIFA), the Union européenne des Sociétés de Football Association (UEFA) and the Union Royale Belge des Sociétés de Football-Association (Royal Belgian Football Association; 'the URBSFA') seeking, in essence, a declaration that FIFA's rules providing for a prohibition of the third-party ownership of players' economic rights (practices known as 'third-party ownership' or 'third-party investment') are unlawful under EU law. That action also seeks damages to

compensate for the harm allegedly suffered by Royal Football Club Seraing as a result of the application of that prohibition. At the same time, the FIFA Disciplinary Committee imposed on Royal Football Club Seraing disciplinary measures which were confirmed by an award of the Tribunal Arbitral du Sport (Court of Arbitration for Sport, Switzerland), which was upheld by the Tribunal fédérale (Federal Tribunal, Switzerland).

## II. Subject matter and legal basis of the request

2 The Cour de cassation de Belgique (Court of Cassation, Belgium) considers that, in order to be able to rule on the case in the main proceedings, it must refer to the Court of Justice of the European Union, pursuant to Article 267 TFEU, questions on the interpretation of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union in order to determine whether those provisions preclude an arbitral award from being given the force of *res judicata* and probative value vis-à-vis third parties, where the review of conformity with EU law has been carried out by a court of a State which is not a Member of the European Union.

## III. Questions referred for a preliminary ruling

1. Does Article 19(1) of the Treaty on European Union, read in conjunction with Article 267 of the Treaty on the Functioning of the European Union and Article 47 of the Charter of Fundamental Rights of the European Union, 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) of the Treaty on European Union, read in conjunction with Article 267 of the Treaty on the Functioning of the European Union and Article 47 of the Charter of Fundamental Rights of the European Union, 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?

## IV. Main provisions of national law relied on

3 The provisions of national law relied on are inter alia the following.

***A. Loi du 16 juillet 2004 portant le Code de droit international privé (Law of 16 July 2004 on the Code of Private International Law)***

– Article 22(1)

'A foreign judicial decision that is enforceable in the State in which it was delivered shall be declared enforceable in Belgium, in whole or in part, in accordance with the procedure referred to in Article 23.'

– Article 26:

'Probative value of foreign judicial decisions

§ 1. A foreign judicial decision shall be authentic in Belgium in respect of the findings made by the court if it satisfies the conditions necessary to establish its authenticity under the law of the State in which it was delivered. The findings of the foreign court shall be set aside in so far as they produce an effect which is manifestly incompatible with public policy.

§ 2. Evidence in rebuttal of the facts found by the foreign court may be adduced by any legal means.'

***B. Code judiciaire (Judicial Code)***

– Article 24:

'Every final decision shall, from the time of its delivery, have the force of *res judicata*.'

– Article 28:

'Every decision shall have the force of *res judicata* as soon as it is no longer open to objection or appeal, save as otherwise provided by law and without prejudice to the effects of extraordinary appeals.'

– Article 1713(9):

'An award shall have the same effect in relations between the parties as a decision of a court or tribunal.'

**V. Succinct presentation of the facts and the procedure in the main proceedings**

4 The first defendant, respondent and respondent in the appeal on a point of law ('defendant'), the Fédération Internationale de Football Association (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.

5 According to its statutes, it has regulatory powers which enable it to lay down rules which are binding both on its members and, directly or through the intermediary of those associations, on clubs in each country and on the players registered with those clubs.

6 The objective of those rules must be to promote integrity, ethics and fair play, and to prevent methods and practices such as corruption, doping or manipulating matches from jeopardising their integrity and that of competitions, official players and clubs, or from giving rise to abuse.

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 According to its statutes, its objectives are inter alia to promote football in Europe in a spirit of 'fair play', to monitor and control the development of every type of football in Europe, to organise and conduct international competitions by setting the criteria to be met in order to participate, to 'prevent all methods or practices which might jeopardise the regularity of matches or competitions or give rise to the abuse of football' and to 'seek to achieve its objectives by implementing any measures it deems appropriate, such as setting down rules, entering into agreements or conventions, taking decisions or adopting programmes' (Article 2 of its statutes).

9 The third defendant, the Royal Belgian Football Association (URBSFA), whose registered office is in Brussels, Belgium, is a de facto Belgian association recognised as a public service body. It manages the first two divisions of professional football and amateur football in Belgium, together with other associations. Its full members include football clubs. It is the Belgian national association which is a member of the first two defendants. It is required to comply with and ensure that the Belgian clubs comply with the statutes, regulations and decisions of FIFA and UEFA, subject to general principles of law, public policy provisions and relevant national, regional and Community legislation. In addition, its statutes confer on it regulatory, executive, sporting, disciplinary and jurisdictional powers over Belgian clubs.

10 The party served notice that it is a third party to the proceedings, Doyen Sports Investment Limited, 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. According to its articles of association, its aims are inter alia (a) the purchase of football players, (b) coaches and managers; (c) the representation of football players, coaches and managers; (d) the transfer of players, coaches and managers between different clubs; (e) the representation of clubs; (f) profiting from football clubs or playing 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 (g) granting loans to football clubs.

11 The applicant, appellant and appellant in the appeal on a point of law ('the applicant'), Royal Football Club Seraing, whose registered office is in Seraing, Belgium, is a non-profit association governed by Belgian law which runs the Seraing football club, which is affiliated with the URBSFA. During the 2013-2014 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*'.

12 FIFA has adopted 'Regulations on the Status and Transfer of Players' ('the STP Regulations'), which 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 at national level and must be included without modification in the regulations of national associations. Others must be included by each association in its own regulations.

13 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*'.

14 By a circular dated 22 December 2014 addressed to its members, FIFA informed the national associations, and therefore the URBSFA, that, at its meeting 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.

15 The new Article 18bis of the STP Regulations ('Third-party influence on clubs') has provided, since 1 January 2015:

> '*1. No club shall enter into a contract which enables the counter club/counter clubs and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.*
>
> *2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article.*'

16 Article 18ter (‘*Third-party ownership of players’ economic rights*’) of the same regulation has provided, since 1 January 2015:

> ‘*1. No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.*
>
> *2. The interdiction as per paragraph 1 comes into force on 1 May 2015.*
>
> *3. Agreements covered by paragraph 1 which predate 1 May 2015 may continue to be in place until their contractual expiration. However, their duration may not be extended.*
>
> *4. The validity of any agreement covered by paragraph 1 signed between 1 January 2015 and 30 April 2015 may not have a contractual duration of more than one year beyond the effective date.*
>
> *5. By the end of April 2015, all existing agreements covered by paragraph 1 need to be recorded within the Transfer Matching System (TMS). All clubs that have signed such agreements are required to upload them in their entirety, including possible annexes or amendments, in TMS, specifying the details of the third party concerned, the full name of the player as well as the duration of the agreement.*
>
> *6. The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article’.*

17 Thus, under Article 18ter, (i) the conclusion of new agreements contrary to that provision is totally prohibited as from 1 May 2015; (ii) contracts may still be entered into and come into force between 1 January and 30 April 2015 but they remain 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 of their contractual expiry but may not be extended beyond that date.

18 A third party, within the meaning of those provisions, 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*’ (STP Regulations, Definitions, point 14).

19 On 30 January 2015, the applicant entered into an agreement with Doyen Sports, the contractual term of which was set at 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; under that agreement, Doyen Sports became the owner of 30% of ‘*the financial value*

*deriving from the federative rights*' of those players, the applicant being prohibited from transferring its share in the economic rights of those players '*independently and autonomously*' to a third party.

20 On 3 April 2015, Doyen Sports, inter alia, brought proceedings against the three defendants before the tribunal de commerce francophone de Bruxelles (Brussels Commercial Court (French-speaking), Belgium); on 8 July 2015, the applicant intervened voluntarily in the proceedings.

21 The applicant requested inter alia that the court declare that a total prohibition of the practices excluded by Articles 18bis and 18ter of the STP Regulations (known as third-party ownership or third-party investment) is unlawful under EU law and more specifically the right 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; to declare as null and void any regulation containing such a total prohibition; to order UEFA to amend its 'Club Licensing and Financial Fair Play Regulations' so as to make them compatible with the practice of third-party ownership or third-party investment, and to pay it, under Article 1832 of the former Code civil (Belgian Civil Code), in accordance with which any act of an individual causing damage to another obliges the one whose misconduct has caused it to make good the damage, the provisional sum of EUR 500 000 by way of compensation for the damage suffered as a result of the application of Articles 18bis and 18ter of the STP Regulations.

22 On 7 July 2015, the applicant and Doyen Sports entered into an agreement, which was similar to the agreement of 30 January 2015, to transfer 25% of the economic rights of a new named player.

23 On 4 September 2015, the FIFA Disciplinary Committee found the applicant guilty of infringement of the abovementioned Articles 18bis and 18ter for having entered into those agreements; it prohibited it from registering players for four registration periods and ordered it to pay a fine of 150 000 Swiss francs.

24 On 7 January 2016, the FIFA Appeal Committee dismissed the applicant's appeal against that decision.

25 On 9 March 2016, the applicant lodged an appeal against that decision of 7 January 2016 before the Swiss Court of Arbitration for Sport, in accordance with an arbitration clause in FIFA's statutes.

26 By judgment of 17 November 2016, the Brussels Commercial Court (French-speaking) declined jurisdiction to hear the applicant's claims.

27 On 19 December 2016, the applicant lodged an appeal against that decision.

28 In an award dated 9 March 2017, the arbitration tribunal held that the applicable law was constituted by

– FIFA Regulations and Swiss law, including the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR');

– EU law, in particular the provisions of the Treaties on freedom of movement and competition, as mandatory provisions of foreign law within the meaning of Article 19 of the loi fédérale sur le droit international privé (Swiss Federal Law on Private International Law) of 18 December 1987.

29 It concluded that Articles 18bis and 18ter of the STP Regulations were lawful, reduced the prohibition on registering players to three periods and upheld the fine.

30 On 15 May 2017, the applicant filed an application for annulment of the award of 9 March 2017 before the Swiss Federal Tribunal. That court dismissed that application by judgment of 20 February 2018.

31 Before the Cour d'appel de Bruxelles (Brussels Court of Appeal, Belgium), the applicant sought to establish the liability of the three defendants on the basis of Article 1382 et seq. of the Civil Code. 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 financing or development and that the disciplinary measures had had detrimental consequences.

32 As it was unable to strengthen the core of the team by recruiting new players, the sporting progression of the team had been hindered. The club had also been prevented for three consecutive periods from registering new young people or from extending the registration of young people already at the club, which had resulted in the deregistration and forfeiture of about 10 teams, all of which resulted in a loss of income from the membership fees paid by new entrants and the admission fees received during the matches played at the club.

33 The applicant requested that the Court of Appeal 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.

34 It put forward 13 grounds of appeal:

(1) infringement of the right to the free movement of capital;

(2) infringement of the right to the freedom to provide services;

(3) infringement of the right to the free movement of workers;

(4) infringement of Article 102 TFEU;

(5) infringement of Article 101 TFEU;

(5) infringement of the right to property as guaranteed by the ECHR;

(7) unlawfulness of UEFA's 'Financial Fair Play' Regulations having regard to EU law (Articles 63, 101 and 102 TFEU);

(8) unlawfulness of the disciplinary measures in the light of the 'fundamental freedoms of the European Union';

(9) unlawfulness of the disciplinary measures in the light of the principle of proportionality;

(10) unlawfulness of the disciplinary measures in the light of the principle that penalties must be specific to the offender;

(11) the Court of Arbitration for Sport does not meet the requirements of independence and impartiality laid down in Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the ECHR;

(12) the imposition of such compulsory arbitration has increased the effectiveness of infringements of the fundamental freedoms of the European Union and, more broadly, has deprived those parties of the EU rights guaranteed to them;

(13) the lack of exequatur of the award of 9 March 2017 of the Court of Arbitration for Sport.

35 As the Court of Appeal noted, the applicant thus submits that Articles 18bis and 18ter of the STP Regulations infringe several provisions of the FEU Treaty and the ECHR. The first, second, third and fourth grounds of appeal concern the infringement of fundamental freedoms. The fourth and fifth grounds of appeal concern competition law. The sixth ground of appeal relates to the right to property as guaranteed by the ECHR. The eighth ground of appeal concerns the lawfulness of the disciplinary measures. The ninth to thirteenth grounds of appeal concern the lawfulness (i) of the disciplinary measures imposed on it by FIFA and (ii) of the award in the light of EU law.

36 As regards the freedoms guaranteed by the European Union, the applicant claimed inter alia that the prohibition at issue was liable to hinder the free movement of capital since, as in the present case, it prevents a Maltese third-party owner from investing in a Belgian club. That prohibition restricts the free movement of services since the deflationary effect it generates on 'player' costs (wages, transfers, etc.) leads to a reduction in the volume of services. It submits that the prohibition of third-party ownership will limit the opportunities available to certain European citizens (professional football players whose international

transfer would have been possible by a 'third-party ownership' contribution) to leave their Member State of origin in order to find employment at a club established in another Member State. It considers that those restrictions on the free movement of capital, services and workers cannot in any way be justified by an overriding reason in the public interest.

37 As regards competition law, it claims, with regard to Article 102 TFEU, that, since FIFA has given itself the exclusive power to regulate the transfer market (and then to extend its regulatory activity to third parties present on that market), it is indisputable that it holds a dominant position on that market. The abuse consists in the complete exclusion of all current and potential operators which are not clubs from the market concerned, in order to reserve that market for its ultimate members, the clubs.

38 As regards Article 101 TFEU, it considers that Articles 18bis and 18ter, which may be regarded as the product of an agreement between the members of FIFA, with the participation of UEFA, give rise to restrictions of competition. Restrictions on the freedom to invest limit the freedom to finance clubs and strike at the heart of the competitive process: clubs are restricted in defining their recruitment policy. It is the consumers of the 'football' product who will suffer from receiving a lower quality product.

39 FIFA, which must prove that the total prohibition of the practice of third-party ownership or third-party investment is justified and proportionate to the attainment of its legitimate objectives, has not provided such proof.

40 As regards the lawfulness of the disciplinary measures, the applicant submits that any measure based on a rule that infringes the freedoms of the European Union itself infringes those freedoms.

41 FIFA contested all the grounds of appeal put forward by the applicant and submitted inter alia that the positive effect of the force of *res judicata* attaching to the award of 9 March 2017 of the Court of Arbitration for Sport precluded a challenge to the lawfulness of the prohibition of third-party ownership in those proceedings.

42 The Brussels Court of Appeal held, with regard to the first to sixth and the eighth grounds of appeal, that it follows from Article 1713(9) of the Judicial Code, and Articles 24 and 28 of that code, 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, subject to annulment by the national court. In the present case, the award is final and acquired the force of *res judicata* following the dismissal of the action for annulment by the Swiss Federal Tribunal on 20 February 2018. The award settles the question in dispute as to the compatibility of Articles 18bis and 18ter of the STP Regulations with EU law, raised using identical wording before the Court of Appeal in the civil liability action.

43 As regards the ninth to thirteenth grounds of appeal, the Court of Appeal held that the applicant was unsuccessful in challenging the validity of the disciplinary measures imposed by the Court of Arbitration for Sport and of the award. The jurisdiction of the Court of Arbitration for Sport has not been challenged by any of the parties. Consequently, the plea of illegality of the disciplinary measures inferred from the forced nature of the arbitration is unfounded. Next, according to the settled case-law of the Court of Justice, an arbitral tribunal is not a court or tribunal within the meaning of Article 267 TFEU and cannot therefore refer questions to it for a preliminary ruling.

44 It considered that the fact that it is impossible for an arbitral tribunal, whether Belgian or foreign, to refer a matter to the Court of Justice for a preliminary ruling, which has its origin in Article 267 TFEU as interpreted by the Court of Justice, does not in itself have the effect of invalidating the decisions of that tribunal in the light of Article 6(1) of the ECHR.

45 It recalled that, in a judgment of 20 February 2018 which contained a detailed statement of reasons, the Swiss Federal Tribunal had confirmed its previous case-law and held that the Court of Arbitration for Sport is a genuine independent and impartial arbitral tribunal and that it had no reason to go back on firmly established case-law.

46 Under Article 22(1) of the Belgian Code of Private International Law, any foreign judgment is recognised by operation of law in Belgium without any procedure. The effect of that recognition is that the force of *res judicata* in respect of the foreign decision is accepted in Belgium. The positive effect of the force of *res judicata* attaching to the judgment of 20 February 2018 of the Swiss Federal Tribunal prevents the applicant from being able to challenge before the Court of Appeal the independent and impartial nature of the Court of Arbitration for Sport and the validity of the award, in particular in the light of the principle of proportionality.

47 Lastly, exequatur concerns only the enforcement of the decision, that is to say forced execution. An arbitral award is not invalidated merely because it has not been the subject of an exequatur. Consequently, the plea of illegality of the disciplinary measures inferred from the lack of exequatur of the award is unfounded (thirteenth ground of appeal).

48 The disciplinary measures imposed by the Court of Arbitration for Sport pursuant to Articles 18bis and 18ter of the STP Regulations are imposed on the applicant and not on third parties, who remain free to play football. Those measures are therefore not unlawful in the light of the principle that penalties must be specific to the offender (tenth ground of appeal).

49 The Court of Appeal therefore concluded that the grounds of appeal alleging infringement of EU law and of the rights guaranteed by the ECHR were inadmissible or unfounded. The misconduct alleged against FIFA has therefore

not been established. Consequently, the applicant's claim for damages is unfounded.

50 By judgment delivered on 12 December 2019, the Brussels Court of Appeal therefore dismissed the appeal brought by the applicant against the judgment of 17 November 2016 and held that the claims put forward by the applicant were unfounded.

51 The applicant lodged an appeal on a point of law against that judgment.

## VI. The essential arguments of the parties in the main proceedings

52 The applicant puts forward three grounds of appeal before the Court of Cassation.

### *A. First ground of appeal*

53 By its first ground of appeal, alleging the forced nature of the arbitration, it claims that the following provisions were infringed:

– Article 19(1) TEU;

– Articles 18, 45, 56, 63, 101, 102, 267 and 344 TFEU;

– Articles 15, 16 and 47 of the Charter of Fundamental Rights of the European Union;

– Articles 1, 2(1), 4 and 5 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union;

– principle of effectiveness of EU law;

– principle of the primacy of EU law over national provisions, deriving in particular from Article 4 TEU and Article 288 TFEU;

– Articles 23 to 28 and 1713(9) of the Judicial Code;

– Articles 22 to 27 of the Law of 16 July 2004 on the Code of Private International Law;

– Articles 1383 and 1384 of the Civil Code;

– Article 149 of the Constitution.

54 By the first part. the applicant claims that it had argued before the Court of Appeal that the compulsory arbitration before the Court of Arbitration for Sport imposed

on it unilaterally increases the infringement of the fundamental freedoms of the European Union and more broadly deprives it of the European rights guaranteed to it.

55 In Case AT.40208, *International Skating Union's Eligibility Rules*, the European Commission decided, with regard to the arbitration clauses in favour of the Court of Arbitration for Sport imposed by the statutes of the International Skating Union, that '*(57) The Appeals Arbitration rules are contained in Article 25 of the ISU Constitution, and read as follows: … Decisions of the CAS shall be final and binding to the exclusion of jurisdiction of any civil court*'. *(58) …. The Appeals Arbitration rules reinforce the restrictions of competition …. The Commission takes the view that the Appeals Arbitration rules reinforce the restrictions of competition that are caused by the Eligibility rules. … In combination with the Eligibility rules, the Appeals Arbitration rules reinforce the restriction of their commercial freedom and the foreclosure of [the International Skating Union's] potential competitors*'.

56 The applicant also submitted that, in its judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158), the Court of Justice reaffirmed that the arbitration institution was subject to genuine judicial review, from the moment when fundamental provisions of EU law are at stake, and inferred from that, in essence, that a Member State is in breach of its obligation to ensure the full effectiveness of EU law and its autonomy when it consents to submit to certain types of arbitration. Even in the case of 'commercial arbitration', resulting from the freely expressed wishes of the parties, it is essential that there is judicial review with the possibility of referring questions for a preliminary ruling to ensure consistency with the public policy of the European Union. Just as much as (if not more than) arbitration imposed by two Member States under a bilateral treaty, the requirement in FIFA's statutes to have recourse to arbitration by the Court of Arbitration for Sport prevents the full effectiveness of EU law and undermines the autonomy of that law, in particular by preventing questions from being referred to the Court of Justice of the European Union for a preliminary ruling.

57 By no means, it submits, does the judgment under appeal respond to that ground of appeal that the compulsory arbitration before the Court of Arbitration for Sport, combined with the extremely marginal nature of the review of legality carried out by the Swiss Federal Tribunal, precludes the proper application of EU law. It is therefore not properly reasoned (Article 149 of the Constitution).

58 By the second part of the first ground of appeal, the applicant complains that the judgment under appeal refrains from examining whether the award by the Court of Arbitration for Sport of 9 March 2017, which it recognises as having the force of *res judicata*, complies with the fundamental provisions of EU law even though that award has not been the subject of a review of compliance with EU law.

59 By virtue of the principle enshrined in Article 344 TFEU, Member States – including Belgium – cannot allow a dispute concerning the application or

interpretation of the Treaties to be submitted to any method of settlement other than those provided for therein (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 31). Furthermore, EU law '*is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves …. In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law*' (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraphs 33 and 35).

60 In accordance with Article 19(1) TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraphs 36 and 37).

61 Although the rules implementing the principle of *res judicata* are a matter for the national legal order of the Member States, in accordance with the principle of the procedural autonomy of those States, '*those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness)*' (judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 24).

62 Where, as a result of the wishes of the parties concerned, their dispute is settled by a decision given by an arbitral tribunal which cannot be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU and which is therefore not entitled to make a reference to the Court of Justice for a preliminary ruling, the review carried out by the courts of a Member State may be limited in scope, that is only '*provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference … for a preliminary ruling*' (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraphs 54 and 55). That review of fundamental provisions of EU law, and in particular those of European public policy, is all the more essential where arbitration is 'forced' by the statutes of an association such as FIFA.

63 Articles 23 to 28 of the Judicial Code and Articles 22 to 29 of the Code of Private International Law cannot prevent the points decided, in other proceedings, by an arbitral tribunal on an interpretation of the public policy rules of EU law relating in particular to the free movement of workers (Article 45 TFEU and Article 15 of the Charter), the freedom to provide services (Article 56 TFEU and Article 16 of the Charter), the free movement of capital (Article 63 TFEU) and competition law (Articles 101 and 102 TFEU) from being called into question before the courts of

a Member State. An application of the principle of *res judicata* prohibiting the Belgian courts from ascertaining whether or not the arbitral award of the Court of Arbitration for Sport, as reviewed by the Swiss Federal Tribunal, infringes fundamental provisions of EU law and, in order to do so, from referring questions to the Court of Justice for a preliminary ruling if necessary, would, in the matter referred to above, create obstacles to the effective application of the rules of EU law which cannot be justified by the principle of legal certainty and must therefore be considered to be contrary to the principle of effectiveness of EU law (judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraphs 30 and 31).

64 Moreover, it follows from Article 1, Article 2(1) and Articles 4 and 5 of Directive 2014/104/EU that EU law ensures that the right of anyone who has suffered harm caused by an infringement of competition law (thus of Articles 101 and 102 TFEU) to claim and obtain full compensation for that harm can be effectively exercised and that, in accordance with the principle of effectiveness, national substantive and procedural rules must be applied in such a way that they do not render practically impossible or excessively difficult the exercise of that right.

65 Similarly, under Article 47 of the Charter, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before an independent and impartial tribunal previously established by law.

66 It follows that, in holding that the grounds of appeal alleging infringement by FIFA of EU law and of the rights guaranteed by the ECHR are inadmissible or unfounded, without examining whether the award complies with the fundamental provisions of EU law which the applicant maintains have been infringed and in respect of which it may claim compensation for the damage resulting from that infringement, the judgment under appeal infringes all of the provisions referred to in the ground of appeal, with the exception of Article 149 of the Constitution (obligation to state reasons).

***B. Second ground of appeal***

67 By its second ground of appeal, alleging that the judgment under appeal incorrectly rejected the applicant's claim for damages against UEFA, the applicant alleges infringement of the following provisions:

– Article 149 of the Constitution;

– Articles 101 and 102 TFEU;

– Articles 1(1), 2, 3, 4, 5 and 11(1) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of

the competition law provisions of the Member States and of the European Union;

– Articles 1382, 1383 and 1384 of the Civil Code.

68 By the first part, the applicant submitted that UEFA had actively campaigned for a prohibition of third-party ownership or third-party investment agreements. By application of the theory of equivalence of conditions, UEFA must therefore be regarded as having itself, at least indirectly, contributed to the various instances of harm suffered by the applicant and, consequently, must be held liable to pay compensation to the applicant. In the light of Article 11(1) of Directive 2014/104, as it is thus one of the 'undertakings which have infringed competition law through joint behaviour', UEFA must be held jointly and severally liable for the harm caused by those infringements and accordingly it is bound to pay compensation for that harm in full.

69 By the second part, the applicant submitted that the judgment under appeal had found that FIFA '*is a non-profit association governed by Swiss private law which is a grouping of national associations responsible for the organisation and control of football in their respective territories*' and that UEFA '*is a non-profit association which brings together the national associations of the continent of Europe*'. In conclusion, the applicant submitted that UEFA is a confederation of associations which is itself a member of FIFA. UEFA has disputed that claim.

70 Articles 101 and 102 TFEU produce direct legal effects in relations between individuals and directly create rights for individuals which national courts must protect (judgments of the Court of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 24, and of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 20). The full effectiveness of those provisions and, in particular, the practical effect of the prohibitions laid down therein would be put at risk if it were not open to any individual to claim damages for loss caused to him or her by conduct liable to restrict or distort competition (judgment of the Court of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 2[5]). That right to full compensation is borne out by Articles 1, 2, 3 and 4 of Directive 2014/104/EU.

71 For the purposes of applying Article 101 TFEU, the applicant claimed that every decision of an association of associations of undertakings is binding on its members, who are obliged to comply with it and ensure that it is complied with, with the result that they, like the association of associations of undertakings within which the decision is taken, are co-authors of that decision (judgment of the General Court of 26 January 2005, *Piau* v *Commission*, T-193/02, EU:T:2005:22, paragraph 75). It is not necessary that the members of the association should have actually participated in the infringement, but only that the association must, by virtue of its internal rules, have been able to bind its members (judgment of the Court of 16 November 2000, *Finnboard* v *Commission*, C-298/98 P, EU:C:2000:634).

72 For the purposes of applying Article 102 TFEU, the applicant submitted that the rules laid down by FIFA prohibiting '*third-party ownership*' or '*third-party investment*' agreements may also be regarded as constituting a collective abuse of a dominant position, within the meaning of Article 102 TFEU, in which both FIFA and UEFA, to the extent of its statutory involvement within FIFA, participate, since the national federations or federations which bring clubs together present themselves as a collective entity vis-à-vis economic operators and consumers.

73 Under Article 102 TFEU and Article 11(1) of Directive 2014/104, participation in a collective abuse of a dominant position, thus 'joint behaviour', may result from a 'passive contribution' and even from 'tacit approval of the behaviour', without there being any need for the undertaking to have its own power to take decisions, intervene or impose penalties as regards the implementation of the abuse of a dominant position.

74 It follows, according to the applicant, that the exclusion of any liability on the part of UEFA for the damage resulting from the application of the prohibition of '*third-party ownership*' or '*third-party investment*' is not legally justified.

### *C. Third ground of appeal*

75 By its third ground of appeal, the applicant complains that the judgment under appeal dismissed its action against the URBSFA by incorrectly holding that the probative force of *res judicata* attaching to the award of 9 March 2017 of the Court of Arbitration for Sport placed on it the burden of proving that Articles 18bis and 18ter of the STP Regulations are incompatible with EU law, evidence which it failed to adduce.

76 The applicant alleges infringement of the following provisions:

– Article 149 of the Constitution;

– Article 19(1) TEU;

– Articles 18, 45, 56, 63, 101, 102, 267 and 344 TFEU;

– Articles 15, 16 and 47 of the Charter;

– Articles 1(2)(1), 4 and 5 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union;

– principle of effectiveness of EU law;

– principle of the primacy of EU law over national provisions deriving in particular from Article 4 TEU and Article 288 TFEU;

– Articles 23 to 28, 870 and 1713(9) of the Judicial Code;

– Articles 1165, 1315, 1350(3), 1352, 1382 and 1383 of the Civil Code.

77 The applicant submits that, where a restriction on the free movement of capital, guaranteed by Article 63 TFEU, is established, which may result from a cartel, an agreement or a decision prohibited by Article 101 TFEU, it is for the party responsible for that restriction to establish that it is justified by legitimate objectives and proportionate to the attainment of those objectives.

78 Although an arbitral award which has the force of *res judicata* between the parties has probative value vis-à-vis third parties who were not parties to the case and may be relied on by them, the probative value resulting from those provisions cannot, however, undermine the effectiveness of provisions of EU law.

79 According to the applicant, it follows that those provisions cannot result in the burden being placed on the party adversely affected by a restriction on the free movement of capital resulting from a FIFA decision to establish that that restriction is not justified by legitimate objectives or proportionate to those objectives, on account of the probative value attached to a decision of the Court of Arbitration for Sport the annulment of which has been rejected by the Swiss Federal Tribunal, that is to say, a court which – unlike the Belgian courts – is not required to make a reference for a preliminary ruling under Article 267 TFEU.

80 Such an application of those provisions, which would attach probative value to the decision of the Court of Arbitration for Sport as to the compatibility of Articles 18bis and 18ter of the STP Regulations with the free movement of capital, the freedom to provide services and the free movement of workers and with Articles 101 and 102 TFEU, would have the consequence that, before the Belgian courts, which can – and must – refer questions on the interpretation of EU law to the Court of Justice, the burden of proving that the measure does not have a legitimate objective or that it is not proportionate to the objective attained lies with the person adversely affected by those restrictions. That would constitute a considerable obstacle to the effective application of the relevant EU rules and must therefore be regarded as contrary to the principle of effectiveness of EU law.

81 By refusing to refer questions to the Court of Justice for a preliminary ruling, the judgment under appeal infringes all of the provisions referred to in the ground of appeal.

82 The defendants put forward pleas of inadmissibility against all of those grounds of appeal.

## VII. Findings of the Court of Cassation and reasons for the request for a preliminary ruling

### *A. The first ground of appeal*

83 The Court of Cassation considers that, in the first part of the first ground of appeal, the plea of illegality of the disciplinary measures based on the forced nature of the arbitration is unfounded since the Court of Appeal responded to it by finding that the applicant had confirmed the jurisdiction of the Court of Arbitration for Sport after the dispute had arisen and that the jurisdiction of that court has not been challenged by any of the parties.

84 As regards the second part, the Court of Cassation holds that the plea of inadmissibility cannot be upheld. The judgment under appeal bases its decision to dismiss the applicant's claim against FIFA not on the ground that the applicant has not adduced evidence of its complaints based on EU law, but on the ground that the fact that the award of 9 March 2017 has the force of *res judicata* precludes the Court of Appeal from re-examining the question of the compatibility of Articles 18bis and 18ter of the STP Regulations with EU law.

85 According to Article 19(1) TEU, the Court of Justice of the European Union is to ensure that in the interpretation and application of the Treaties the law is observed; Member States are to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

86 In accordance with Article 47 of the Charter, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.

87 Directive 2014/104/EU provides:

– in Article 1(1), that that directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association; it sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm;

– in Article 2(1), that, for the purposes of that directive, 'infringement of competition law' means an infringement of Article 101 or 102 TFEU, or of national competition law;

– in Article 4, that, in accordance with the principle of effectiveness, Member States are to ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law

and that, in accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU are not to be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law.

88 In its judgment of 23 March 1982, *Nordsee* (102/81, EU:C:1982:107), the Court of Justice recalls that Community law must be observed in its entirety throughout the territory of all the Member States, parties to a contract are not therefore free to create exceptions to it, and draws attention to the fact that, if questions of Community law are raised in an arbitration resorted to by agreement, the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of review of an arbitration award – which may be more or less extensive depending on the circumstances – and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by another method of recourse available under the relevant national legislation.

89 In its judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158), the Court of Justice states that, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law; that, in that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law, and that, in particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.

90 In its judgment of 7 April 2022, *Avio Lucos* (C-116/20, EU:C:2022:273), the Court of Justice held, first, that, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become final after all rights of appeal have been exhausted or after expiry of the time limits provided for in that regard can no longer be called into question. Therefore, EU law does not require a national court to disapply domestic rules of procedure conferring the authority of *res judicata* on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law. Second, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. Those rules must not, however, be less favourable than those governing similar domestic situations (the principle of equivalence) nor may they be framed in such a way as to make it in

practice impossible or excessively difficult to exercise the rights conferred by the EU legal order (the principle of effectiveness).

91 After having found that, '*under Article 1713(9) of the Judicial Code, "an award shall have the same effect in relations between the parties as a decision of a court"*' and that, '*under Articles 24 and 28 of the Judicial Code, every final decision, from the time of its delivery, is to have the force of* res judicata *... and every decision is to have the force of* res judicata *as soon as it is no longer open to objection or appeal, save as otherwise provided by law and without prejudice to the effects of extraordinary appeals*', the judgment under appeal states that '*it follows from those statutory provisions 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, subject to it being varied on appeal before other arbitrators or set aside by the national court*'.

92 It states that the arbitral award of 9 March 2017 is final and has acquired the force of *res judicata*, that it settles the question in dispute as to the compatibility of Articles 18bis and 18ter of the STP Regulations with EU law and that, consequently, the pleas alleging that those articles are unlawful in the light of provisions of the FEU Treaty and of the First Additional Protocol to the ECHR are inadmissible on the ground that the award has the force of *res judicata*.

93 That part of the ground of appeal criticises the judgment under appeal for refraining from examining whether the award by the Court of Arbitration for Sport of 9 March 2017, which it recognises as having the force of *res judicata*, complies with the fundamental provisions of EU law which the applicant alleges have been infringed by claiming that it has suffered damage as a result, even though that award was not subject to a review of conformity with that law which would have made it possible to refer a question to the Court of Justice of the European Union for a preliminary ruling.

94 Examination of that part of the ground of appeal requires the interpretation of Article 19(1) TEU and referring to the Court of Justice of the European Union the first question set out in the operative part of the judgment before a ruling can be given.

***B. The second ground of appeal***

95 The Court of Cassation considers that the first part of the second ground of appeal has no factual basis since the Court of Appeal answered it by finding that the fact that UEFA actively campaigned for the prohibition at issue is irrelevant from the point of view of civil liability, particularly since, in view of its ranking in 2015, the applicant's participation in matches organised by UEFA was purely hypothetical.

96 It considers that the examination of the second part of the second ground of appeal requires findings of fact exceeding its powers, and therefore that ground of appeal is inadmissible for a reason specific to the cassation proceedings.

### *C. The third ground of appeal*

97 The Court of Cassation finds this ground of appeal admissible, since it does not require it to determine the merits of the applicant's grounds of appeal to rebut the evidence of the arbitral award and the plea alleging infringement of Article 19(1) TEU is a matter of public policy and may be raised for the first time before the Court of Cassation. Infringement of that provision would be sufficient, if the plea were well founded, to quash the judgment.

98 The judgment under appeal dismisses the applicant's claim against the URBSFA on the grounds that '*a judgment is enforceable against third parties in the sense that its very existence within the legal order is binding on everyone*', that '*the enforceability of the judgment against third parties means that the probative value of what has been held on a disputed issue or point may be relied on against and by third parties, subject to evidence to the contrary*', that '*that rule applies to the arbitral award*' and that the applicant does not overturn the probative force of the award of the Court of Arbitration for Sport of 9 March 2017.

99 The ground of appeal criticises the judgment under appeal for imposing on the applicant the burden of rebutting the presumption drawn from that award that the restrictions resulting from Articles 18bis and 18ter of the STP Regulations are in line with the fundamental provisions of EU law which the applicant alleges have been infringed by claiming that it has suffered damage as a result, even though that award was not subject to a review of conformity with EU law which would have made it possible to refer a question to the Court of Justice for a preliminary ruling.

100 Examination of that part of the ground of appeal requires the interpretation of Article 19(1) TEU. It is therefore necessary, before a ruling can be given, to refer to the Court of Justice of the European Union the second question set out in the operative part of this judgment.