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ARTICLE

Down with the politics, up with the law! Reinforcing EU law's supervision of sport autonomy in Europe

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Abstract
The rulings of the CJEU in *Superleague*, *Royal Antwerp* and *ISU* endorse some of the characteristics of the European Model of Sport without explicitly referring to it. The Court recognises across the three judgments the specific nature of sport, the cultural importance of sport in Europe, the primacy of sporting merit and equal opportunities in sport competitions, and the relevance of redistribution to maintain amateur and commercial sport intertwined. The CJEU also acknowledges the legitimacy of sport governing bodies as regulators of their sport, but severely limits their autonomy to do so. The judgments are extremely critical of sport governance structures in two main areas: policy-making processes, and accountability mechanisms. The latter is severely criticised with demands for sport federations to produce thorough and convincing evidence that could demonstrate the benefits of their anticompetitive rules and regulations, so they can be granted and exemption under EU law. Furthermore, the Court criticises forced arbitration through the Court of Arbitration for Sport. The judgments assert the primacy of EU law over politics in European sport regulation, whilst also reinforcing the supervised nature of sport autonomy in the European Union. The judgments can also be interpreted as a warning to the Commission, European Parliament, and Council of the EU on the limits of Article 165 TFEU in the development of a European sport policy.

Keywords Governance · Regulation · Autonomy · Accountability · Supervised autonomy

1 Introduction

The Court of Justice of the European Union (CJEU) judgments in the *Superleague*,[1] *International Skating Union (ISU)*,[2] and *Royal Antwerp*[3] cases might have set new boundaries in the application of EU law to sport in areas such as the definition of restrictions by object in the activities of sport organisations, or even the nature of Article 165 of the Treaty on the Functioning of the European Union (TFEU). Many of these are covered in the contributions to this special issue, but will also take quite some time to unravel, not least because in both *Superleague* and *Royal Antwerp* there are still important decisions to be taken by the referring courts in Spain and Belgium. Whereas there are particularities to each judgment, there is a common and important element binding these cases together: They all involve a stakeholder within the governance of sport challenging the rules and regulations of sport governing bodies. In that respect, neither the cases nor the rulings represent a very innovative dynamic.[4]

The judgments, whilst deciding on legal matters of access to the market and fundamental freedoms, come with important consequences for the distribution of power and legitimacy in sport. At the centre of the debate is the dual role of international sport governing bodies (ISGBs) both as

[1] Judgment of 21 December 2023, *European Superleague Company SL* v. *Fédération Internationale de Football Association (FIFA)*, *Union of European Football Associations (UEFA)*, C- 333/21, ECLI:EU:C:2023:1011.

[2] Judgment of 21 December 2023, *International Skating Union* v. *Commission*, C-124/21, ECLI:EU:C:2023:1012.

[3] Judgment of 21 December 2023, *SA Royal Antwerp Football Club* v. *Union royale belge des sociétés de football association ASBL (URBSFA)*, C-680/21, ECLI:EU:C:2023:1010.

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[4] García 2007a, b, 2009a, b; García and Meier 2012.

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regulators of their sport and commercial operators, and the extent to which it is legally (or politically) desirable to allow governing bodies to preserve that dual role.

These judgments delineate a triangle of sport regulation and governance in which we find ISGBs on one side, stakeholders (clubs and athletes in these cases) on the other, and the CJEU closing that challenging relationship in the third side of the triangle. As Arnout Geeraert pointed out,[5] EU institutions offer different mechanisms to stakeholders in their attempt to control the governing bodies, with recourse to the CJEU being one of the strongest because of the binding nature of EU law. The interventions of the Court in sport-related cases have the potential to modify the *status quo* in the complex structures of sports governance along two dimensions: (1) the power and legitimacy relationships amongst stakeholders, and (2) the role of EU institutions and their impact on the governance of sport. This short commentary aims to analyse the consequences of the three CJEU rulings in these two important dimensions and envisage a way forward for European sport policy and governance.

2 The European model of Sport: he who must not be named

One of the most noticeable features of the rulings is that the CJEU does not make a single mention across the three judgments to the so-called European Model of Sport (EMS), which was central to the reasoning of Advocate General Rantos in his *Superleague* and *ISU* opinions. The EMS was defined by the European Commission in 1998. It has been since a cornerstone for those arguing in favour of a specific application of EU law to sport.[6] The EMS was recently re-evaluated and defended by the Commission, the Parliament and the Council of the EU in political declarations,[7] but the Court seems to haverefused to engage in that political debate at first sight.

However, a careful reading of the judgments indicates a more nuanced approach of the Court to the EMS. Whereas the judges of the Grand Chamber refused to directly mention the concept, this reminds us of the efforts of Harry Potter characters referring to 'he who must not be named' or 'you-know-who' to avoid using the name 'Voldemort' despite clearly feeling his presence. Indeed, in the preliminary considerations the Court first recognise that 'sporting activity carries considerable social and educational importance, henceforth reflected in Article 165 TFEU, for the Union and for its citizens'.[8] It then goes on to explain that 'a sporting activity undeniably has specific characteristics which, whilst relating especially to amateur sport, may also be found in the pursuit of sport as an economic activity,'[9] in a paragraph that repeats with the exact same wording across the three judgments.

The Court is recognising here, explicitly, the so-called specificity of sport and perhaps, more importantly, it acknowledges that such specific nature can be found in both amateur and commercial sport. This goes straight to the heart of one of the key characteristics identified by the other institutions in the EMS, namely its 'grassroots approach', which links together professional and amateur sport. This is further reinforced by the Court in *Superleague* when discussing commercial rights' collective selling. Whilst seemingly providing guidance to the referring Spanish court for their assessment of collective selling arrangements, the Court introduces several considerations that could be overseen if one does not read with attention.

First, the Court states that it finds 'prima facie convincing'[10] the arguments of FIFA, UEFA, the Commission and a number of national governments that there is a need 'to ensure some form of "*solidarity redistribution*" within football, to the benefit not only of professional football clubs participating in those competitions, but also *those not participating*, amateur clubs, professional players, women's football, young players and other categories of stakeholders in football'.[11] Second, the Court recognises that 'there is *a trickle-down effect* from those [UEFA international club] competitions into smaller professional football clubs and amateur football clubs which, whilst *not participating* therein, invest at local level in the recruitment and training of young, talented players'.[12] Third, the Court acknowledges 'the solidarity role of football', for it 'serves to bolster its educational and social function within the European Union'.[13] Finally, whereas the Court warns that the benefits of solidarity 'must be proven to be real and concrete' it lists again a wide list of beneficiaries from solidarity, including professional and amateur clubs and 'other stakeholders in football'.[14]

The Court is, therefore, endorsing solidarity and redistribution in sport. The mention of non-participant and amateur clubs gives an even wider remit to the concept. The Court is not only justifying the grassroots approach of sport; it is

[5] Geeraert and Drieskens 2015; Geeraert 2016.

[6] García 2009b.

[7] Schinas 2021; European Parliament 2021; Council of the European Union 2021.

[8] *Superleague*, par. 102; *Royal Antwerp*, par. 70.

[9] *Superleague*, par. 103, *Royal Antwerp*, par. 71, *ISU*, par. 95.

[10] *Superleague*, par. 235.

[11] *Superleague*, par. 234.

[12] *Superleague*, par. 235.

[13] *Ibid.*

[14] *Superleague*, par. 236.

also strongly suggesting that there is a link between the professional and commercial top and the amateur and grassroots bottom of the sporting pyramid. Finally, the Court is acknowledging football's educational and social function. These is, in their very essence, are key features of the European Model of Sport defined by the European Commission and endorsed recently by both the Parliament and the Council of the EU.

Further to this, a reading across the judgments finds references to several legitimate objectives and characteristics of sport that might deserve protection and could be used to justify the anticompetitive object or effect of ISGBs' rules. These can all be considered as part of the specific nature of sport mentioned before and, therefore, possible characteristics of the EMS. The Court mentions for example several times the social and educational importance of sport[15] and the 'considerable' social and cultural importance of football in the European Union.[16] This can be certainly assimilated to the EMS's links to local, regional and national identities, thatwere also initially defined as being a core component of the EMS by the European Commission.

Similarly, the Court recognises legitimate objectives such as ensuring the preponderance of equal opportunities and sporting merit in competitions, guaranteeing the coordination of competitions 'within an overall match calendar', and securing that there are 'homogeneous regulatory and technical conditions' for all those participating in sport competitions to ensure 'certain level of equal opportunity'.[17] In so doing, the Court is directly pointing towards the so-called 'principle of promotion and relegation', and the homogeneity of sport organisational structures which are, again, identified as some of the key elements of the EMS as defined by its proponents.

Thus, whilst not mentioning the EMS, the Court makes an effort to effectively acknowledge some of the most important characteristics attributed to the EMS in the political declarations of other EU institutions. Importantly, the Court makes all these mentions with reference to its settled case law. This is not a trivial detail, and it should not be dismissed as irrelevant. The Court refuses to make a normative case either in favour or against the EMS, unlike AG Rantos in his opinion. Perhaps because it felt that could be too much of a political involvement in the discussion about the application of EU law to sport. However, the Grand Chamber judges provide a useful list of sport characteristics and legitimate objectives that are recognised and already enshrined in EU jurisprudence. It even recognises that these could apply to both amateur and commercial sport.

This is probably as far as the Court can go to facilitate the work of ISGBs within the structures of the EMS. It might not be enough for the most ardent proponents of the EMS, who could argue that this is still a case-by-case and piecemeal approach that does not provide legal certainty. They would probably prefer a more courageous Court that, like Harry Potter, dares to pronounce the name of the EMS. On the other hand, this would be a bit unfair with a Court that has been sympathetic to sport, but has preferred to choose the certainty of the law over the instability of politics. The Court has meticulously provided the certainty of settled case-law in specific areas, so the ISGBs are secure they can work in pursuit of those key legitimate objectives, as long as they do so through proportionate, transparent and non-discriminatory policies.

3 Governance and the autonomy of sport: towards increased supervision and accountability

We have analysed some of the values and features of the EMS covered in the judgments. However, we have not referred to what is, arguably, the most important element in the definition of European sport governance: The role of federations as monopolistic governing bodies of their sport at the top of a pyramidal governance structure under the principle of one federation per sport,[18] and their relations with stakeholders. This deserves separate analysis for two reasons. First, this is the cornerstone in the governance of European sport. Second, it is fair to say that ISGBs have received a bigger warning by the Court in this area.

First, it is necessary to be extremely clear at the outset. The judgments do not put into question the regulatory role of ISGBs. We can even say that the Grand Chamber judges endorse it. They find it logical that governing bodies adopt certain rules to ensure homogeneity, openness, and sporting merit in competitions. The Court is far more critical, though, of the way in which UEFA and ISU use their powers to restrict economic competition. It is clear across the three rulings that the Court is not impressed with ISGBs governance. The judges seem unimpressed with the federations' argumentation of their choices when formulating rules and regulations; they also criticise the lack of accountability, transparency, and proportionality of the means chosen to implement those rules. All these, in turn, mean that the ISGBs do not comply with EU internal market law.

Historically, ISGBs have faced challenges in achieving accountability and conducting effective decision reviews. Despite efforts to reform governance, a satisfactory

[15] *Superleague*, par. 102; *Royal Antwerp*, par. 70.

[16] *Superleague*, par. 143; *Royal Antwerp*, par. 105.

[17] *Superleague*, par. 143–144.

[18] European Commission 1998; Weatherill 2005; García 2009b; Council of the European Union 2021.

resolution to this issue has yet to be achieved. Pielke pointed out the difficulties of bringing FIFA (and other ISGBs by extension) to account. He basically argued that despite several possible theoretical avenues to ensure ISGBs accountability, most of them were either difficult to implement or impractical. He suggested that legal oversight could be one of the most powerful tools to ensure accountability, but this comes with obvious problems of jurisdiction, enforceability, and slow resolution.[19] Yet, the actions of the CJEU demonstrate the possibilities of legal oversight over ISGBs. EU law, due to its transnational nature, is one of the very few legal tools that can 'hurt' ISGBs.[20]

The Court in *Superleague* states that UEFA's competition authorisation rules will only be legal if they include '[a] framework for those various powers providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate'.[21] It then adds that such rules could only benefit from an exception under Article 101 (3) TFEU or justified under Article 102 TFEU 'if it is demonstrated, *through convincing arguments and evidence*, that all of the conditions required for those purposes are satisfied'.[22] Similarly, in *Royal Antwerp* the Court repeats the message that convincing arguments and evidence must be produced to justify that the home grown players rules are justified by the pursuit of a legitimate objective and that all the conditions under Article 101 (3) TFEU are met.

In short, the Court is here expecting high standards in both the decision-making process, and the accountability and review mechanisms within ISGBs. This is even more important when taken together with the CJEU's view of sport's forced arbitration through the Court of Arbitration for Sport (CAS) in *ISU*. The Court does not express a view about CAS itself; it focuses its attention on the Swiss Federal tribunal (which has jurisdiction to review CAS awards on appeal) and its unwillingness to review CAS awards on the basis of EU competition law and inability to send preliminary references to the CJEU.

The CJEU is of the opinion that, due to the inaction of the Swiss Federal Tribunal, the system does not provide stakeholders with effective redress in issues of EU public policy. In other words, the Court considers that the main review and accountability mechanism built into international sport governance is (partially) flawed in cases of EU public policy (not in others, though, as the Court does not enter in that realm).

In his seminal work on accountability, Bovens explains that decision-makers need to provide a mechanism whereby decision-takers are allowed to ask questions and pass judgment on proposed decisions or policies.[23] Bovens argues that true accountability can only be achieved when there are effective review mechanisms of the decision-makers' actions. In most ISGBs there are two main bodies for that purpose: the congress (mostly in terms of strategy and policy), and the ethics and disciplinary bodies (mostly in terms of conduct). However, they have either limited remit, limited powers, or limited independence from the organisation. The congress in most ISGBs also lacks sufficient stakeholder representation, and it is often indebted to the president or the executive committee. If the only other structure that is supposed to ensure a greater level of legal review and accountability is, according to the CJEU, not totally fit for purpose, it is not difficult to conclude that ISGBs do indeed have a problem of accountability. Although the criticism of the Court in *ISU* only relates to cases involving EU public policy (which are a minority in CAS workload), it adds to similar criticisms by the European Court of Human Rights in relation to athletes' human rights.

Governance and accountability issues frequently arise from the extensive self-regulation allowed to ISGBs within the framework of sport autonomy. The so-called autonomy of sport is indirectly recognised by the Court in these judgements as it refers again to the rules and regulations of purely sporting interest that are not subject to EU law. However, the CJEU is clearly limiting the extent of that autonomy along two dimensions. First, through the recognition of the diversity of stakeholders that ISGBs need to consider when designing their rules and policies. Second, in the call for robust review of ISGBs rules under EU law. It can also be argued that the Court's decision to limit the use of the Wouters/Meca-Medina test when reviewing ISGBs anticompetitive behaviour is further strengthening the supervision of EU law over sport autonomy, as federations now have to respond to the more stringent cumulative criteria under Article 101(3) TFEU to justify their actions. In short, the collective message conveyed by the three rulings underscores a necessity for governing bodies to undergo more rigorous scrutiny. Now these entities bear the responsibility of demonstrating that their rules and regulations not only claim to pursue legitimate objectives but also substantively deliver them while adhering to principles of proportionality, transparency, and non-discrimination.

[19] Pielke 2013.

[20] García and Meier 2016.

[21] *Superleague*, operative part of the judgment par. 1.

[22] *Superleague*, operative part of the judgment par. 3.

[23] Bovens 2007.

4 Conclusion

The CJEU judgments in *Superleague*, *ISU*, and *Royal Antwerp* mostly recognise and accept ISGBs' role as sport regulators but impose substantial limits on their autonomy by requiring enhanced stakeholder consideration, increased levels of proportionality and transparency, and more effective accountability mechanisms. The Court, with these rulings, is reiterating the supervised nature of sport autonomy under EU law.

As Foster excellently pointed out a long time ago, there are three possible scenarios to regulate sport in Europe: sport self-regulation (total autonomy), direct legislation (no autonomy), or control through EU law (supervised autonomy).[24] The CJEU in these rulings reminds the limits of self-regulation, hence excluding total autonomy. But it goes even further, as it also strengthens the required level of accountability and oversight under supervised autonomy. The Court is also eager to remind that Member States chose not to exercise the legislative route when placing Article 165 TFEU as a supporting competence. In a petulant and slightly pedantic remark, the Court is of the opinion that the EU institutions have chosen not to develop a 'policy' on sport, but rather an 'action' on that field. [25] In doing so, the CJEU reminds political actors of the limits of soft-law and political declarations, whilst highlighting the centrality of the law in the regulation of sport as an economic activity in the EU. The Court seems to imply that, under the current circumstances, only direct legislation will make it change its approach to the application of EU law to sport. Until that happens, the primacy of EU law over politics is vindicated by the Court.

The consequences for sport governance can be profound. First, the judgments reinforce the idea that sport autonomy is conditional. Despite the claims of the IOC that autonomy is, in itself, a normative principle of good governance,[26] the rulings strengthen the emerging consensus that autonomy will only be *a result of good governance* standards.

Second, it can be argued that the rulings call for different policy-making processes by ISGBs, at least in matters of economic activity liable to be reviewed under EU law. When the Court demands effective review and the production of convincing evidence to demonstrate the efficiency and proportionality of policies, it is putting the onus on ISGBs. Thus, federations when designing rules and regulations that are likely to affect economic activity will have to demonstrate (1) that the rules are necessary, (2) they pursue a legitimate objective, (3) are proportionate, and (4) effectively deliver the benefits claimed. This is not necessarily difficult per se, but the policy-making dynamics will need to change in organisations that are traditionally averse to change. This is likely to be more complex when dealing with new problems, and it is better explained through a lense of political science and agenda-setting than through legal concepts. New policies introduced by ISGBs will need to rely first on a convincing definition and demonstration of the problem and objective that they are trying to achieve (i.e. issue/problem framing). Second, ISGBs will need to introduce their policies (i.e. solutions) with a pilot or initial stage in mind, to review their proportionality and effectiveness over a period. This would generate enough convincing evidence to demonstrate that ISGBs comply with EU law or, failing to do so, the federations will need to amend or cancel the policy/rules under scrutiny.

Whereas policy assessment and review are not unheard of in public policy-making, it is not that common in sport regulation. It will need a different frame of mind and change of both culture and processes in sport governing bodies. And this is easier said than done.

Finally, the question remains as to who will be entrusted to review the rules and regulations of ISGBs. In other words, who is going to be the supervisor of sport's supervised autonomy? The institutional framework where these processes are conducted (i.e. policy venues) is likely to condition the outcome. It is not the same if this is done in the CJEU, CAS or in the European Parliament.The CJEU has demonstrated that it is ready to do it, and that it will be demanding, especially when dealing with competition law and the four fundamental freedoms. The rulings also offer substantive guidance to national courts, which should be able to act also as a reviewer, although with some risk of disparity across the European Union. Similarly, the European Commission, which was vindicated by the Court in *ISU*, could see its Directorate-General for Competition (and national competition authorities) reinforced in the supervision of sport regulations. On the other hand, alternative Commission departments (such as the Directorate-General for Education, Youth, Sport and Culture), and notably the Parliament and the Council of the EU, who had taken a more political route in the debate, can see their momentum slightly halted.

Yet, French President Emmanuel Macron (and 25 other EU Member States – all but Spain-) seem to have reacted in the opposite direction: They have signed a declaration aiming to provide momentum for direct EU sport regulation, at least in relation to European competitions and their link to the national level. It is exactly this type of political declarations what the Court has largely ignored, and even subliminally criticised with their rulings. But should this become legislation, the Court will have no other option than to abide

[24] Foster 2000.

[25] *Superleague*, par. 99, *Royal Antwerp*, par. 67.

[26] IOC 2009.

by the legislator's decision and relax its supervisory role of sport autonomy. At present, though, this seems to be highly unlikely.

As for the governing bodies of sport, the message is clear: The better their internal governance and processes, the less need for supervision and, in turn, more autonomy for them.

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Declarations

Competing interests The authors declare no competing interests.

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