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EDITORIAL

Sports and Competition Law: A Not-So-Special Relationship?

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On 21 December 2023, the European Union's (EU) Court of Justice handed down a trilogy of judgments on the application of EU antitrust rules to sports competitions, namely in *European Superleague (ESL)* (C-333/21),[1] *International Skating Union (ISU)* (C-124/21) and *Royal Antwerp* (C-680/21).[2] At the heart of all three cases is the extent to which competition law may interfere with the autonomy of sports' governing bodies. But there is a lot to unpack in the judgments. As Advocate General Szpunar posited in his opinion in *FIFA v BZ* (C-650/22), the rulings constitute "a considerable effort of synthesising and summarising prior case-law". The Court's Grand Chamber did not only attempt to streamline common questions relating to the special relationship between sports and competition law. It also took the chance to touch upon crucial aspects relating to the nature and scope of Arts. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

A quick look at the facts is essential to understand the substantive issues at stake. The *ESL* ruling was undoubtedly the most anticipated. The Superleague was a 20-team breakaway competition announced in April 2021, conceived by 12 major European football teams. It was to run beyond the clutches of the Fédération Internationale de Football Association (FIFA) and the Union of European Football Associations (UEFA). The news prompted an immediate backlash from football fans, associations, players, managers and even key political figures, including

[1] *See* IIC at https://doi.org/10.1007/s40319-024-01484-2.

[2] *See* IIC at https://doi.org/10.1007/s40319-024-01483-3.

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French President Emmanuel Macron and former UK Prime Minister Boris Johnson. Predictably, the ESL also drew the ire of both FIFA and UEFA, who announced the clubs involved and possibly their players would be banned from their competitions. Most clubs backtracked and said they would no longer be participating. The ESL filed proceedings against FIFA and UEFA in Spain, and the Commercial Court of Madrid asked the Court of Justice to delineate the conditions under which these governing bodies may lawfully require prior approval of sports competitions.

The *ISU* case – said to have been triggered by a social media post from skater Mark Tuitert – stemmed from an action for annulment of a 2017 European Commission decision (C/2017/8240). The decision considered ISU's rules in relation to the approval of skating events and the sanctions that imposed for taking part in competitions without permission. These were found to be restrictions of competition by object contrary to Art. 101(1) TFEU. Since there were no countervailing efficiencies, the arrangements could not be redeemed by Art. 101(3) TFEU. In *Royal Antwerp*, the issue was UEFA's "home-grown player" rule, by virtue of which each squad must have a minimum number of players trained by the club they play for, or by another in the same national association. The rule was unsuccessfully challenged before the Belgian Court of Arbitration by an unnamed player and by the Royal Antwerp Football Club. The parties then appealed to the Brussels Court of First Instance, which in turn referred the case to the Court of Justice for a preliminary ruling.

Reconciling sports competitions and antitrust presents a legal quagmire. Sports' governance bodies often bring together independent undertakings, and therefore the tournaments they organise might entail some degree of commercial collusion. Moreover, the control these organisations have over competitions gives them a virtually incontestable privileged market position. Of course, there may be strong (quality, safety) reasons for allowing this market model. The Court of Justice refers to the peculiarities of sports as an economic activity in all three cases. In *ESL* and *ISU*, it emphasises the need to consider the social and educational benefits of sports, in line with Art. 165 TFEU. The case law has long acknowledged that antitrust exceptions might be needed. Following the *Wouters* doctrine (C-309/99), in *Meca-Medina* (C-519/04) the Court ruled that EU competition rules could be inapplicable to restrictions in sports competitions provided that three conditions are met. First, there must be a legitimate objective. Second, the restrictive effects have to be inherent to that objective. Third, the proportionality principle ought to be respected, meaning that the restrictions cannot go beyond what is necessary to protect the aim in question.

At the same time, leaving the autonomy of these bodies entirely unchecked would be tantamount to handing them the chance of stifling competition on a silver platter. In the trilogy, the Court makes clear that there are boundaries to those powers. FIFA and UEFA have a dominant position in the organisation and commercial exploitation of European football competitions, and they hold the key that enables others to enter those markets. Therefore, their right of approval must be exercised in a transparent, objective, non-discriminatory and proportionate manner. This was not the case here, and consequently the Court found that FIFA and UEFA had breached both Arts. 101 and 102 TFEU. And while it would be up to the

national court to decide whether the Art. 101(3) exception would be applicable, the Court all but ruled out this possibility by stating that the procedures are likely to eliminate effective competition.

As for ISU's rules, they are held to be restrictive of competition by object, since they did not grant equal treatment. The conditions imposed on would-be competitors for accessing the market were not in line with those imposed on ISU competitions. The sport federation's regulatory powers ought to have been constrained by clear and precise criteria ensuring non-discrimination, as well as objective and proportionate sanctions. As drafted, the rules allowed ISU to arbitrarily exclude *any* rival, preclude athletes from participating in competing tournaments, and prevent spectators from enjoying alternative competitions without justification. Crucially, the Court of Justice clarifies that the *Wouters* escape route is not available for restrictions of competition by object. The only way these may dodge illegality is if they are found to comply with all the conditions of Art. 101(3) TFEU.

With regard to the home-grown player requirement scrutinised in *Royal Antwerp*, the Court acknowledges that it could potentially be restrictive of competition by object or effect. However, the facts suggest that the rule could pursue a legitimate aim, and there might be attainable efficiencies. It is less clear that it would meet the proportionality requirement. In the circumstances, it would be for the national court to assess whether competition has been restricted and, if that is the case, whether Art. 101(3) TFEU might apply. Interestingly, the Court provides a valuable categorisation of object restrictions. Hardcore cartels (price fixing, market sharing, output restrictions of customer allocation) are particularly detrimental to competition and therefore necessarily anticompetitive by object. However, there are other kinds of conduct that, while not as harmful as the previous restraints, might still earn the by object rubric. This will depend on the analysis of the three conditions famously stressed in *Cartes Bancaires* (C–67/13): the content of the agreement, its legal and economic context, and its objectives.

Dissecting the multifaceted significance of these cases will require extensive scholarship. Thankfully, at the time of writing – only four months after the rulings were handed down – many prominent voices had already taken to the task. Here, I would like to conclude by inviting further reflection on three important aspects. First, the limitations imposed on the autonomy of sports' governing bodies are entirely consistent with the economic nature of their activity. They have considerable freedom to lay down the rules of their competitions, the organisation of alternative tournaments, and the participation of their members in those alternatives. Yet, if they were able to impose restrictions without checks and balances, they could use their power to keep competitors at bay and perpetuate their privileged market position. This is at odds with the advantages of sports often invoked to justify restrictions. Second, the Court of Justice continues to wrestle with the demarcation of the notion of restriction of competition by object. It is torn between accepting the existence of categories of object restraints and insisting on the need to consider content, context and objectives. Third, the limitation of the *Wouters* exception, read in conjunction with the clarifications regarding object restrictions, has far-reaching implications. For instance, it will be difficult to use

Wouters to exclude the application of Art. 101 TFEU to sustainability agreements when they are between competitors and, as is frequently the case, lead to higher prices or reduced choice.

Eleanor Fox once said that antitrust provides equal opportunity to people without power. The judgments contribute towards restoring the balance in the relationship between the almighty governance bodies, the athletes and the spectators. From this perspective, the Court may have scored a remarkable hat-trick.