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THE ECJ'S HAT-TRICK OF SPORTS COMPETITION CASES

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SUMMARY

The European Union's Court of Justice ("**ECJ**") went into the 2023 winter break in style, publishing a hat-trick of judgments (hereafter referred to as *SuperLeague, ISU,* and *Royal Antwerp)* regarding the application of competition law to the governance of sport. These judgments are an *El Classico* of sorts for sports and competition law aficionados, with far reaching implications for *rule-makers* (such as FIFA, UEFA, the ISU, national sports associations and other sports governing bodies), *players*, *clubs*, *fans*, and *other sectors* more generally.

This article details the factual background of the judgments, before assessing in turn, key implications in terms of sports governance and competition law. The judgments (*ISU* and *SuperLeague* in particular) strongly affirm the application of competition law to the governance of sports, and may subsequently result in many sports governing bodies revisiting the content and application of their rules.

PRE-MATCH BUILD UP

**full disclosure, one of the authors may well be a Spurs fan.*

EUROPEAN SUPERLEAGUE (SUPERLEAGUE) C-333/21

The announcement that eleven of the most elite football teams across Europe (such as Tottenham Hotspur, Juventus, Real Madrid etc.), and also Arsenal, planned to create a breakaway competition (the "**ESL**") from the UEFA Champions League provoked substantial media attention from fans, clubs, Governments, and indeed FIFA and UEFA as the bodies recognised as governing football globally and within Europe, respectively.

In response to the announcement of the creation of the ESL, FIFA and UEFA issued a statement which: (i) set out their refusal to recognise the ESL, and (ii) affirmed that any club or player taking part in the ESL would be banned from competitions organised by FIFA and UEFA (e.g. the World Cup, European Championship, Champions League and domestic leagues). FIFA and UEFA's threatened sanction was made in light of the ESL (and associated clubs) failing to gain **authorisation from both FIFA and UEFA** for the organisation of matches outside of FIFA and UEFA's governance (the "**ESL prior approval rules**").

Following the reaction from FIFA and UEFA and public pressure, nine out of the twelve clubs withdrew from the ESL. The ESL in response to FIFA and UEFA brought an action before the Commercial Court in Madrid, alleging that the ESL prior approval rules and associated sanctions were in breach of Articles 101 and 102 TFEU.

The Madrid Court ordered a series of protective measures aimed at preventing FIFA and UEFA from disrupting the establishment of and the participation of clubs and players in the ESL, and subsequently made a request for a preliminary ruling regarding the compatibility of, in relation to Articles 101 and 102 TFEU: (i) the ESL prior approval rules and sanctions, (ii) FIFA and UEFA's statements enforcing the same, and (iii) FIFA and UEFA's original ownership of all media rights. The Court also made preliminary ruling request on whether the ESL prior approval rules and sanctions are compatible with freedom of movement rights under the TFEU[1].

INTERNATIONAL SKATING UNION (ISU) C-124/21 P

Though it has received less headlines, the judgment in *ISU* is equally as exciting as *SuperLeague.*

The ISU is the only international sports federation recognised by the International Olympic Committee in the field of figure skating and speed skating. Like FIFA and UEFA, the ISU is responsible not only for the regulation of figure and speed skating but also organising international skating events and exploiting the rights associated with those events.

Since 2015, the ISU had in force a rule that the organisation of international skating competitions must be subject to the prior authorisation by the ISU and conducted in accordance with its regulations (the "**ISU prior approval rules**"). If an athlete participated in a competition not authorised by the ISU and/or one of the national member associations, that athlete risked a lifetime ban from any competition organised by the ISU (the "**ISU eligibility rules**"). The rules of the ISU further confined appeal against the ISU's implementation of its prior approval rules before the Court of Arbitration for Sport ("**CAS**") in Switzerland.

Following an investigation, the European Commission ("**Commission**") found in 2017 that the ISU prior approval and eligibility rules had the object and effect of restricting competition under Article 101 TFEU, and that the arbitration rules reinforced this restriction of competition. The General Court,

on appeal, upheld the Commission's conclusions in respect of the prior approval and eligibility rules, but rejected the Commission's conclusions in respect of the arbitration rules. The ISU appealed this judgment to the ECJ.

ROYAL ANTWERP C-680/21

Under certain of UEFA's rules, professional football clubs taking part in international inter-club football competitions organised by UEFA must include on their match sheet a certain number of "home grown" players (that have been trained by their club or by another club in the same national association for at least three years between the ages of 15-21). The Belgian Football Association implemented similar (but not equivalent) rules in respect of domestic games (in totality the "**home grown rules**"). These rules effectively necessitate that each club must include on their match sheet a minimum number of players trained by the club itself, or in the territory of the national association to which that club is affiliated.

These rules were challenged by SA Royal Antwerp Football Club on the grounds of an infringement under Article 101 TFEU and/or the freedom of movement for workers under Article 45 TFEU. On appeal from the Belgian Sports Arbitration Court, the Brussels Court of First Instance made a request for a preliminary ruling from the ECJ for guidance on the application of Articles 45 and 101 TFEU to the home grown rule.

A GAME OF TWO HALVES – KEY TAKEAWAYS

SPORTS AS AN ECONOMIC ACTIVITY AND THE ROLE OF ARTICLE 165 TFEU

The ECJ in each of *SuperLeague*, *ISU* and *Royal Antwerp* re-affirmed that the practice of sport, insofar as it constitutes an **economic activity**, is subject to EU law. This includes the home grown rules and the various authorisation and eligibility rules in *SuperLeague* and *ISU*.

Whilst this conclusion was unsurprising, there was some uncertainty heading into *SuperLeague* in relation to the role of Article 165 TFEU.

Article 165 provides that the Union shall "*contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function*". Advocate General Rantos in his *SuperLeague* opinion considered that Article 165, as a "*standard in the interpretation and application*" of Articles 101 and 102 may be relevant for any objective justification of certain sporting rules that restrict competition. In that sense, Advocate General Rantos held open the idea that Article 165 TFEU could have scope in exempting sporting rules from the application of competition law.

The ECJ firmly put the lid on this idea, confirming within *SuperLeague* and *Royal Antwerp* that Article 165 TFEU must **not** be regarded "*as being a special rule exempting sport from all or some of*

the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application". The ECJ recognised that there are specific characteristics of sport, but that these factors should be taken into account when assessing whether the conduct in question should be considered as having the object, or effect, of the prevention, restriction or distortion of competition, rather than grounding an objective justification disapplying the competition rules.

VAR CHECK – THE LAWFULNESS OF THE AUTHORISATION, ELIGIBILITY, AND HOME GROWN RULES

The authorisation and eligibility rules – the creeping role of Article 106 TFEU

The judgments in *SuperLeague* and *ISU* are of extreme importance and novelty: they apply certain responsibilities subject to public (or quasi-public) undertakings through Article 106 case-law to *private* undertakings which, by their own means, occupy functionally equivalent roles.

Article 106 TFEU subjects *public* undertakings, and/or undertakings granted special or exclusive rights **by a Member State** of the Union, to the rules of the Treaties (particularly the rules on competition). Article 106 in effect applies *in tandem* with Articles 101 and 102 to these types of undertakings, and it usually prescribes stricter obligations by virtue of any anti-competitive behaviour made out by these undertakings being attributable to *state measures*.

The ECJ in *SuperLeague* and *ISU* extended the principles inherent in Article 106 to undertakings such as FIFA, UEFA, and the ISU, which whilst not being public undertakings, and lacking an exclusive or special right **granted** by a Member State, have *de jure or* ***de facto*** power to determine which undertakings are authorised to engage in their economic activities, and to determine the conditions under which that engagement may be exercised. The ECJ noted that an undertaking, such as the ISU or FIFA, being able to exercise this power gives rise to a "*conflict of interests"*, putting itself at an "*obvious advantage"* over its competitors and denying equality of opportunity between undertakings. To comply with competition rules, the powers to determine the conditions on which a competitor may access the market (such as the prior approval rules) must be placed within a framework of "*substantive criteria which are transparent, clear and precise"* which ensures these powers are exercised without discrimination, and that these must be placed within a framework of "*transparent, non-discriminatory detailed procedural rules"* which allow for sanctions (such as the eligibility rules) only to the extent that these are "*objective and proportionate*".

The Court explains that these requirements "*are all the more necessary when an undertaking in a dominant position, through its own conduct…places itself in a situation where it is able to deny potentially competing undertakings access to a given market"*.

The prior approval and eligibility rules did not satisfy this criteria. The ECJ concluded that these rules were therefore **restrictive by object** under Article 101 TFEU, and, in the case of *SuperLeague*

(including the announcements from FIFA/UEFA which acted to implement these rules), constituted an abuse of dominance under Article 102.

This conclusion by the ECJ is significant for sports governing bodies which have the effective role of authorising third party competitions whilst undertaking the economic activity of organising their own competitions. Any authorisation rules (in combination with the threat of sanctions) which are not subject to objective transparent and precise criteria with corresponding procedural rules are liable to be found as infringing Articles 101 and/or 102 TFEU, and therefore *void* (unless they are exempt under Article 101(3) or objectively justified).

In addition, the read-across of Article 106 case-law in relation to private undertakings potentially opens the door in respect of other obligations pursuant to Article 106 in combination with Articles 101 and 102. For example, if a private undertaking with powers **de facto** equivalent to a public undertaking is able to prevent competitive entry, it is feasible that a failure by such an undertaking to meet existing demand (as in *Höfner and Elser v Macrotron* in an Article 106 context) might plausibly be considered a breach of Article 102.

We emphasise lastly that a read-across of the judgments in *ISU* and *SuperLeague* is unlikely to be confined to sports governing bodies. These judgments are likely applicable and significant for any entity which, through its own conduct, has unfettered ability to authorise or reject any potential competitor from engaging in an economic activity.

The home grown rules – back to 4-4-2

The ECJ in *Royal Antwerp* was slightly less adventurous than in *SuperLeague* and *ISU*, outlining that it is for the referring court to reach a position as to whether the home grown rules are restrictive of competition by object or effect.

The ECJ restated factors relevant for finding a restriction of object (behaviour which reveals a *sufficient degree of harm* to competition to not require assessment of effects). The ECJ reiterated established case-law, that to find a restriction of object it is necessary to consider the content, objectives, and the legal and economic context of the restriction concerned (which, **in the case of sports** includes the specific characteristics of sport, in addition to general factors such as the functioning and structure of the market) to assess whether the restriction is sufficiently harmful to competition.

In relation to the legal and economic context of home grown rules, the ECJ noted that it is generally open for sports governing bodies to adopt rules governing the participation of athletes, provided no EU law rights or freedoms are limited. In relation to the characteristics of sport, the ECJ tendered a suggestion that it is legitimate for sports bodies to regulate the conditions in which football clubs can put together teams, and that a central characteristic of football is *sporting merit* such that teams have a certain equality of opportunity. In relation to the real conditions of the functioning of

the 'market' the ECJ noted that the rules governing sport may "*continue to refer, on certain points and to a certain extent, to a national requirement or criterion*".

The ECJ affirmed that it is for the referring court to assess the content of the home grown rules to conclude whether they present a sufficient degree of harm to competition in limiting the access of football clubs to 'resources' (players) essential for their success upstream on the player recruitment markets and downstream in relation to inter-club matches.[2]To that extent, the ECJ stressed the particular importance of the proportion of players the home grown rules cover, and that it is necessary for the referring court to take into consideration the characteristics of sport and the economic and legal context of the home grown rules as outlined above, to assess whether the home grown rules have the **objective** of restricting clubs' access to players, of partitioning or re-partitioning markets according to national borders, or of making interpenetration of national markets more difficult by establishing "*national preference*".

OFFSIDE! THE ANCILLARY RESTRAINTS DOCTRINE DOES NOT APPLY TO "OBJECT" RESTRICTIONS

One of the most intriguing aspects of the judgments relates to the assessment of the *ancillary restraints* doctrine. The ancillary restraints doctrine acts to *exclude* from the application of Article 101(1) agreements which are justified by the pursuit of a legitimate objective and which are necessary and proportionate towards that objective. This doctrine can apply to particular restrictions which are necessary and proportionate towards a pro-competitive commercial agreement (*Pronuptia, Remia*), or restrictive measures necessary and proportionate towards *legitimate objectives in the public interest* (such as in *Wouters*).

By way of example, in *Meca-Medina*, the Court observed that while anti-doping rules adopted by the International Olympic Committee may have restricted athletes' freedom of action and had the inherent effect of restricting potential competition as between them, those rules fell outside of the scope of Article 101(1) as they were aimed at safeguarding the objectivity of the conduct of competitive sport, ensured equal opportunities for athletes and upheld the ethical values at the heart of sport, including merit.

It was anticipated that the concept of ancillary restraints would play a big role in the judgments of *ISU* and *SuperLeague*. However, the ECJ gives the concept very short shrift, outlining that the *Wouters* and *Meca-Medina* line of case-law does **not** apply in relation to object infringements of Article 101, therefore only Article 101(3) can exempt object restrictions from Article 101. The ECJ outlined that the ancillary restraints doctrine applies only to restrictions of Article 101 *by effect*.

This conclusion is perhaps unsurprising in relation to restrictions ancillary to pro-competitive commercial agreements (which, in light of a pro-competitive objective, in some way presupposes that an object restriction isn't applicable). However this conclusion is slightly surprising in relation to case-law such as *Wouters* and *Meca-Medina* which did not obviously exclude the possibility of

an object restriction being exempted from Article 101 when pursuing a legitimate public policy objective.

ARTICLE 101(3) AND OBJECTIVE JUSTIFICATION IN SPORTS CASES

The ECJ in *SuperLeague* and *Royal Antwerp* outlined that the individual exemption in Article 101(3) *may* apply to the ESL prior authorisation rules and the home grown rules. Article 101(3) can exempt a restriction under Article 101(1) where (broadly) the restriction: i) contributes to improving the production or distribution of goods (or services) or promoting technical or economic progress, ii) while allowing consumers a fair share of the resulting benefit, and which does not iii) impose restrictions not indispensable to the attainment of these objectives, and iv) allow the possibility of eliminating competition in respect of a substantial part of the products in question.

Whilst the Commission's positioning on the nature of the benefits which can be claimed under 101(3) is mainly confined to *economic* benefits, there has been debate on whether social benefits may also be included. For example, the Commission in prior years occasionally interpreted the "benefits" generated under 101(3) widely, e.g. in relation to the stabilisation of employment (*Metro SB-Großmärkte*), and the Commission defines the concept of *sustainability agreements* in its Horizontal Guidelines to include social activities such as labour and human rights development, whilst holding that exemptions under 101(3) are available for such agreements.[3]

To that end, the ECJ in *SuperLeague* stressed, no matter how "*laudable*" the principles and values of football are, in particular the "*open, meritocratic nature*" of the competitions concerned and the form of "*solidarity redistribution*" generated by them, any pursuit of these objectives must translate into ***"genuine, quantifiable efficiency gains"***. Similarly in *Royal Antwerp* the ECJ stressed that the benefits of the home grown rules must be assessed in relation to "***whether those rules are of an economic, statistical or other nature***".

It is clear therefore, that insofar as sporting rules may be exempted by Article 101(3) in respect of any 101(1) findings, the benefits of such rules must be genuine quantifiable efficiency gains, and cannot rely on the social benefits of organised sport. The ECJ applied the same considerations in respect of the efficiency gains limb of the "*objective justification*" exemption under Article 102 (finding that in *SuperLeague* the 'objective necessity' limb was not available).

MEDIA RIGHTS – EXCLUSIVE EXPLOITATION

In *SuperLeague* the ECJ also considered the compatibility of FIFA and UEFA's rules which granted these bodies complete control over the supply of rights related to interclub competitions (such as the power to authorise the broadcast of matches and events involving those interclub competitions) against Articles 101 and 102 TFEU.

The Court considered that these media rights (which are a key source of revenue) are a parameter of competition between clubs, which FIFA and UEFA's rules removed from the control of those clubs,

thereby preventing any competition **between** these clubs in the marketing of media rights, but also affecting the functioning of competition across a range of **downstream media markets** to the detriment of consumers.

The ECJ concluded that, unless it could be proven that these rules were justified under Article 101(3) or objectively justified against Article 102, they must be regarded as an object infringement of Article 101 and an abuse of a dominant position under Article 102. To that end, comments from the ECJ in respect of potential efficiency gains for buyers of rights from two exclusive vendors (including UEFA and FIFA's brand power and ability to sell rights for a whole competition rather than on a per-match basis), and the apparent *'solidarity redistribution'* of revenue accrued from these rights to clubs, players, and ultimately television viewers, may be instructive in this regard.

THE IMPORTANCE OF JUDICIAL REVIEW

As noted above, the Commission found that the ISU arbitration rules reinforced the infringement of Article 101 identified (in relation to the ISU prior approval and ISU eligibility rules). While the ECJ recognised that requirements relating to the effectiveness of arbitration proceedings may justify the judicial review of arbitral awards being limited, this judicial review *must be able to cover the question of whether those awards comply with fundamental provisions of EU law* such as Article 101 and 102, as Articles 101 and 102 directly create rights for individuals which must be protected by national courts. It would not be sufficient for an affected party to bring damages proceedings before the Courts or for a complaint to be made to the Commission or national competition authority in substitution of this direct right. The Court concluded that CAS awards must be subject to judicial review by a court that can refer questions of EU law to the ECJ. This conclusion is significant beyond the remit of sports governance to any quasi-regulatory body with rules which affect competition within the EU, where rights of appeal are subject to an arbitral body unable to refer questions of EU law to the ECJ.

LOOKING TO NEXT SEASON

If 2023 was a bumper year for sports and competition law aficionados, 2024 will also not disappoint as sports bodies, clubs, players, and fans absorb the impact of these judgments.

Competition lawyers will be keenly watching the Brussels Court of First Instance in respect of its findings in relation to the legitimateness of the home grown rules. Furthermore, lawyers will be keeping an eye on the forthcoming ECJ decisions in the requests for preliminary rulings in respect of non-poaching agreements between Portuguese clubs, and in particular with respect to caps to agent fees established by the new FIFA Football Agent Regulations (FFAR), following a recent FA Rule K arbitral award in England that such caps (if implemented) would amount to object and effect infringements under Chapter I, and an abuse of a collectively dominant position under Chapter II of the Competition Act 1998. That FA Rule K decision has created significant interest within English football and had an impact on the scope of the FA Football Agent Regulations which came into

effect on 1 January 2024 without inclusion of the commission cap; the ECJ decision will generate similar interest from the football sector.

In relation to sports governance, and other sectors more widely, it would be wise for bodies which are able to authorise or reject any potential competitor regardless of a measure from a state to undertake a competitive assessment of their rules in line with requirements under Article 106 in tandem with Articles 101 and 102, in particular to the authorisation and eligibility of third party competitors.

In relation to *SuperLeague* especially it remains to be seen whether the Commercial Court in Madrid will consider that Article 101(3) and the objective justification defence for Article 102 apply. The oral hearing has been listed for March 2024. It is worth emphasising that, even should the restrictions assessed in *SuperLeague* fail to be exempted, it is still not the case that the ESL project will be ultimately allowed to proceed, as FIFA and UEFA may still reject the project on the basis of "*substantive criteria which are transparent, clear and precise".* The *SuperLeague* decision will certainly embolden those who still hope to rekindle the project, notably the European clubs who wish to break the Premier League's commercial dominance, but it will not be the last word on the matter.

FOOTNOTES

[1] Note this article does not assess the freedom of movement arguments in *ISU* and *Royal Antwerp.*

[2] Interestingly the ECJ did not assess the impact of the home grown rules on the labour market as a relevant market.

[3] Though the efficiencies given by the Commission in its assessment of 101(3) in such guidance is constrained to economic improvements in product quality and quantity.

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