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# Competition and Sport

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I. **Prior approval and sanction regimes under EU competition law (*ESL and ISU judgments*)**

II. **Sports arbitration and competition law (*ISU judgment*)**

III. **Home-grown player rules under EU competition law (*Royal Antwerp judgment*)**

# SPORT GOVERNANCE STRUCTURES IN THE EU

- Key role played by sport federations / governing bodies

  - European Sports Model enshrined in the Treaties (Art. 165 TFEU)

  - Key characteristics (organizational/structural perspective)

    - pyramid structure
    - openness of competition
    - financial solidarity

- Appearance and rise of ‘alternative’ competition formats called into question the existing governance structure / operation model of sport federations and the European Sports Model

  - Emergence of ‘*closed*’ competitions and break-away leagues

  - From a legal standpoint, the challenges to the governance model of sports federations have often been built upon competition law

  - Focus of the objections has been (i) the dual role of regulator and economic stakeholder held by the sports federations, (ii) the monopolistic structure of certain markets for the organisation of sporting competitions and the marketing of the associated rights and (iii) the refusal by these federations to allow the organisation of independent competitions and thus market entry by new players

# PYRAMID STRUCTURE: THE EXAMPLE OF FOOTBALL

# SPORT UNDER THE SCRUTINY OF EU COMPETITION RULES

- Sport is subject to European competition law insofar as it constitutes an **economic activity**

  - Economic vs. non-economic activities - only certain specific rules which were adopted solely on non-economic grounds and which relate to questions of interest solely to sport per se must be regarded as being extraneous to any economic activity [judgments *Walrave and Koch*, 36/74, paragraph 8, *Bosman*, C-415/93, paragraphs 76 and 127, *Deliège*, C-51/96 and C-191/97, paragraphs 43, 44, 63, 64 and 69]

- **Specific characteristics** of sports recognised by the Court

  - 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 (*ISU judgment, para 95*)

  - Sport of football is of considerable social and cultural importance in the European Union (*ESL judgment, para 143*)

  - Example of sporting merit, which can be guaranteed only if all the participating teams face each other in homogeneous regulatory and technical conditions, thereby ensuring a certain level of equal opportunity (*ESL judgment, para 143*)

- Specific characteristics of sports **do not justify a sport exception**

- Specific characteristics of sports **may to be taken into account as part of the competition analysis**

# SPORT GOVERNING BODIES PRIOR APPROVAL AND SANCTION REGIMES UNDER EU COMPETITION LAW

JUDGEMENTS OF THE ECJ

C-333/21 | *European Super League(Grand Chamber)*

C-124/21 | *International Skating Union v. Commission (Grand Chamber)*

# SPORT GOVERNANCE STRUCTURES UNDER EU COMPETITION LAW

- Existing governance structure of sport federations is **not anticompetitive as such**
  - ❑ The mere fact that sport governing bodies are both regulators of the market and organisers of sporting competitions is not in itself anti-competitive
  - ❑ No need for a structural separation between these two activities to ensure compliance with competition law

- **Prior approval and sanction regimes are not *per se* anti-competitive**
  - ❑ ECJ did not question the legitimate objectives pursued by sport governing bodies - e.g. rules intended to guarantee the homogeneity and coordination of those competitions within an overall match calendar as well as, more broadly, to promote, in a suitable and effective manner, the holding of sporting competitions based on equal opportunities and merit (*ESL judgment, para 144)*
  - ❑ It is also legitimate to ensure compliance with those common rules through rules on prior approval of those competitions and the participation of clubs and players therein (*ESL judgment, para 144, 145)*
  - ❑ The same holds true for sanctions introduced as an adjunct to those rules, since such sanctions are legitimate, in terms of their principle, as a means of guaranteeing the effectiveness of those rules (*ESL judgment, para 146*)

# ELEMENTS OF CONTEXT TO BE TAKEN INTO ACCOUNT AS PART OF THE COMPETITION ASSESSMENT

- UEFA/FIFA and ISU have "gatekeeper" powers to determine access to the market by competing undertakings
  - where a sports governing body has a (de facto) quasi-regulatory function it is treated as a State actor
  - organisations with such powers are subject to the sort of obligations that apply to Member States pursuant to Art. 106 TFEU
  - such powers must be subject to restrictions, obligations and review so as not to give rise to an infringement of Articles 101 and/or 102 TFEU

- These powers will need to be placed within **a framework of substantive and procedural criteria which are transparent, objective and non-discriminatory**
  - Substantive rules: transparent, clear and precise substantive criteria circumscribing the regulatory power enabling sport governing bodies to regulate (and potentially) prevent market entry of potentially competing undertakings (*ESL judgments, para 175 and 178*)
  - These criteria must also ensure that the regulatory power is exercised without discrimination and that sanctions are objective and proportionate (*ISU judgment, paras 133 and 134*)
  - Powers in question must be subject to transparent and non-discriminatory detailed procedural rules, such as those relating to the applicable time limits for submitting a prior authorisation request and the adoption of a decision on that request, which are not likely to be to the detriment of potentially competing undertakings by preventing them from effectively accessing the market (*ISU judgment, para 135*)

# UEFA/FIFA'S PRIOR APPROVAL AND SANCTIONS RULES GIVE RISE TO AN ABUSE OF A DOMINANT POSITION

- **Dominance:** FIFA and UEFA hold a dominant position (if not a monopoly) in the market for the organisation and marketing of international football competitions and the exploitation of the various rights related to those competitions.

- **Abuse**: FIFA / UEFA's powers are **not placed within a framework of substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective and non-discriminatory**

  - in the absence of substantive criteria and detailed procedural rules ensuring that the sanctions introduced as an adjunct to those rules are transparent, objective, precise, non-discriminatory and proportionate, such sanctions must, by their very nature, be held to infringe Article 102 TFEU inasmuch as they are discretionary in nature (*ESL judgment, para 148*)

  - Indeed, such a situation makes it impossible to verify, in a transparent and objective manner, whether their implementation on a case-by-case basis is justified and proportionate in view of the specific characteristics of the international interclub competition project concerned (*ESL judgment, para 148*)

  - in that regard, it is irrelevant that FIFA and UEFA do not enjoy a legal monopoly and that competing undertakings may, in theory, set up new competitions which would not be subject to the rules adopted and applied by those two associations (*ESL judgment, para 148*)

  - the dominant position held by FIFA and UEFA on the market for the organisation and marketing of international interclub football competitions is such that, in practice, at the current juncture it is impossible to set up viably a competition outside their ecosystem, given the control they exercise, directly or through their member national football associations, over clubs, players and other types of competitions, such as those organised at national level (*ESL judgment, para 149*)

- **No objective justification**

# UEFA/FIFA'S AND ISU PRIOR APPROVAL AND SANCTIONS RULES ARE RESTRICTIVE OF COMPETITITION BY OBJECT

- Similar reasoning applied by the ECJ in the context of the analysis of FIFA/UEFA and ISU rules under Art. 101(1) TFEU

  - despite distinct scopes and objectives pursued, art. 101 and 102 TFEU must be interpreted consistently (ISU judgment, para 128)

  - Examination of prior approval and eligibility rules must be carried out in the light of the case-law established in *MOTOE and OTOC* (*ISU judgment, paras 125-130*)

  - Concerns in relation to undistorted competition due to existing conflict of interest raises vs. equality of opportunity (*ISU judgment, para 125*)

  - Prior approval and sanction rules set by sport governing bodies with regulatory functions must respect the principles of transparency, objectivity, non-discrimination and proportionality (*ISU judgment, paras 131-133*) and must be subject to effective review (*ISU judgment, para 134*)

- **Classification of FIFA/UEFA and ISU rules as restrictions by object**

  - *"where there is no framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate, such as those referred to in paragraph 151 of the present judgment, rules on prior approval, participation and sanctions such as those at issue in the main proceedings reveal, by their very nature, a sufficient degree of harm to competition and thus have as their object the prevention thereof. They accordingly come within the scope of the prohibition laid down in Article 101(1) TFEU, without its being necessary to examine their actual or potential effects"(ESL judgment, para 178*)

  - *"the General Court did not commit any error of law or of legal characterisation of the facts in finding that the Commission had correctly classified the prior authorisation and eligibility rules as having as their object the restriction of competition, within the meaning of Article 101(1) TFEU […] Those rules are thus able to be used to allow or exclude from that market any competing undertaking, even an equally efficient undertaking, or at least restrict the creation and marketing of alternative or new competitions in terms of their format or content. In so doing, they also completely deprive athletes of the opportunity to participate in those competitions, even where they could be of interest to them, for example on account of an innovative format, while observing all the principles, values and rules underpinning the sporting discipline concerned. Ultimately, they are such as to completely deprive spectators and viewers of any opportunity to attend those competitions or to watch a broadcast thereof"* (*ISU judgment, paras 146-148*)

# THE (IN)APPLICABILITY OF THE WOUTERS / MECA MEDINA DOCTRINE

- Application of the ancillary restraints theory to rules adopted and implemented by sport governing bodies

- The scope of application of the *Wouters* / *Meca Medina* doctrine

  - Case-law applies to rules adopted by (professional or) sporting associations which pursue certain ethical or principled objectives and, more broadly, to regulate the exercise of a professional activity if the association concerned demonstrates that the aforementioned conditions are satisfied [ISU, para 111 citing judgments *Wouters and Others*, C-309/99, paragraph 97, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, paras 42 to 48).

  - Example of anti-doping rules - safeguarding fairness, integrity and objectivity in the conduct of competitive sport, ensure equal opportunities for athletes, protects health and uphold ethical values at the heart of sport (*Meca-Medina and Majcen* v *Commission*, C-519/04 P, paras 43 to 55)

- The *Wouters / Meca Medina* doctrine is **only applicable to restraints that do not restrict competition by object**

  - *Meca-Medina, Wouters & OTOC case-law* – does not apply to agreements / decisions which have as their object the restriction of competition [*ESL judgment*, 185; *ISU judgment, para 113*]

  - It is only if, following an examination of the conduct at issue in a given case, that conduct proves not to have as its object the prevention, restriction or distortion of competition that it must then be determined whether it may come within the scope of that case-law [*ISU judgment, para 114*]

- **Possible justification under Art. 101 (3) TFEU**

# SPORT ARBITRATION AS A REINFORCING ELEMENT OF EU COMPETITION LAW INFRIGEMENTS

JUDGEMENT OF THE ECJ

C-124/21 | *International Skating Union v. Commission (Grand Chamber)*

# SPORT ARBITRATION AND EU LAW

- Scope of ECJ's review limited to ISU decisions that concern skating as an economic activity and which are therefore capable of affecting competition, i.e. organisation and marketing of international speed skating competitions and right to take part in such competitions as a professional athlete (*ISU judgment, para 189*)

- Reinforcement of EU competition law violation does not stem from the submission of the disputes at issue to CAS arbitration but from the fact that, by virtue of the CAS' seat in Switzerland, its awards are **not subject to EU judicial control**

    - ❑ Articles 101 and 102 TFEU have direct effect and create rights for individuals which national courts must protect and which are matter of EU public policy (*ISU judgment, para 192 citing C-126/97, Eco Swiss judgment*) - they must therefore be recognized and applied by any arbitral tribunal and be subject to judicial review by a Member States' court (during for instance, enforcement of arbitral award)

    - ❑ Such a requirement is particularly necessary when such an arbitration mechanism does not originate in the freely expressed wishes of the parties but is imposed by a person governed by private law, such as an international sports association, on another, such as an athlete (*ISU judgment, para 193*)

    - ❑ In the absence of such judicial review, the use of an arbitration mechanism is such as to undermine the protection of rights that subjects of the law derive from the direct effect of EU law and the effective compliance with Articles 101 and 102 TFEU, which must be ensured – and would therefore be ensured in the absence of such a mechanism – by the national rules relating to remedies (ISU judgment, para 194)

- Review of CAS awards by the Swiss Federal Tribunal is not capable of satisfying that requirement

- Remedies other than the review by national courts are equally insufficient

    - ❑ Right to seek damages for harm caused by anti-competitive conduct cannot compensate for lack of remedy entitling that person to bring an action before national courts seeking the grant of protective measures or the review and annulment of the relevant measure (ISU judgment, para 201)

    - ❑ Possibility of lodging a complaint with the European Commission or national competition authorities cannot be relied on to justify the lack of effective judicial review (ISU judgment, para 203)

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# Home-grown player rules under EU competition law

C-680/21 | *Royal Antwerp (Grand Chamber)*

# HOME-GROWN PLAYER RULES UNDER ART. 101 TFEU

- HGP rules are **subject to competition law**
- **Specific characteristics of sports** (incl. legitimate objectives pursued by HGP rules) recognised by the ECJ
- These characteristics **may be taken into account as part of the competition assessment** but do not justify a per se exemption
- Categorisation of the HGP rules **as “by object” or “by effects” restrictions of competition**
  - HGP rules limit, by their very nature, the possibility for clubs to line up players that do not meet the HGP rules’ requirements (*para 101*)
  - HGP rules limit one of the essential parameters of interclub football competition, i.e. the recruitment and line-up of football players (*para 107*)
  - The referring court will have to take into account that the HGP rules limit the football clubs’ access to players as a “resource” essential to their success – in this respect the proportion of players concerned by the HGP rules is particularly relevant (*para 109*)
  - As regards the economic and legal context in which the rules at issue were adopted, the referring Court will have to taken into account the specific characteristics of football, and to assess whether the adoption of those rules had the objective of restricting the clubs' access to those resources, of partitioning or re-partitioning markets according to national borders or of making the interpenetration of national markets more difficult by establishing a form of 'national preference (*para  110*)

# HOME-GROWN PLAYER RULES UNDER ART. 101 TFEU

- Application of the *Wouters / Meca-Medina* doctrine

  - ECJ deferred to the referring court to decide whether these rules could not be exempted from the scope of Article 101 (1) TFEU

  - In their assessment, domestic court should be "*taking into account, the objectives put forward in particular by the sporting associations at issue in the main proceedings, which consist in ensuring the uniformity of the conditions in which the teams participating in interclub football competitions governed by those associations are formed and encouraging the training of young professional football players*" (*para 117*)

- Possible justification under Art. 101 (3) TFEU

  - ECJ deferred to the referring court to decide whether the conditions set out in Art. 101(3) TFEU have been met

  - Guidance provided by the Court indicating that some aspects of these rules could meet the criteria set in Art. 101 (3) TFEU

  - Possible efficiency gains might arise due to intensified competition because the HGP rules might encourage football clubs to recruit and train young players (*para 129*)

  - HGP may have a genuinely favourable effect on spectators and TV viewers whose interest in interclub competitions depends, among other factors, on the place of establishment of the clubs participating in those competitions and the presence in the teams fielded by those clubs of home-grown players (*para 130*)

  - Referring court will have to evaluate whether there are less restrictive measures like, e.g., a system of compensation for the costs borne by training clubs (*para 131*)