Kluwer Competition Law Blog

Empowering Monopolists? The Super League Opinion of AG Rantos

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By now the issues surrounding the Super League need no further introduction. On the one hand, there are monopolists that potentially abuse their dominant position, whereas, on the other hand, there is a controversial collective of clubs, seeking to change or expand Europe's current football offering.

Consequently, the ECJ's ruling may shape Europe's sports sector for decades to come. Thus, AG Rantos' opinion was eagerly awaited, especially since the Court tends to follow the AG opinion. Whereas one may rightly conclude that AG Rantos' opinion fits neatly with existing case law, the factual underpinnings and the magnitude of this decision may go unnoticed.

The sports industry has undergone significant developments in recent years. Following the commencement of the virtualization of sports, with FIFA also in the mix, the lines between sports associations and Big Tech and Big Gaming become increasingly blurred. During a time when large undertakings become increasingly exploitative, we ought to ask ourselves whether one should empower monopolists or foster consumer welfare and competition.

This blog post seeks to provide some cause for thought on the opinion's arguments and is a follow-up of the preceding Super League post on this blog.

Background

Following speculation over the creation of a Super League in January 2021, FIFA and UEFA released a statement, declaring that they would not recognize the Super League. They threatened that any player or club involved in the League would be banned from participating in FIFA or affiliated tournaments. The European Super League Company (ESLC) is of the opinion that the actions by FIFA and UEFA violate European competition laws and therefore filed a lawsuit at the Juzgado de lo Mercantil nº 17 de Madrid. The court referred the present case to the ECJ, to determine whether certain provisions of the associations' rules and the subsequent behavior are in conformity with EU law.

AG Rantos' Opinion

As part of his opinion, AG Rantos proposed, inter alia, that:

- the FIFA and UEFA rules under which any new competition is subject to prior approval are compatible with EU competition law (para. 123, 144); and
- EU competition law does not prohibit FIFA, UEFA, their member associations or their national leagues from issuing threats of sanctions against clubs when those clubs participate in a project to set up a new competition (para. 146).

Whilst the conclusions drawn by AG Rantos are mostly in line with existing case law, certainly, not everyone in the legal literature will agree with the interpretation of Art. 165 TFEU. However, this blog post is intended to address the core issues. Since AG Rantos affirms the general conditions of a cartel violation under Art. 101 TFEU as well as of an abuse of dominance under Art. 102 TFEU, the core issues concern the examination of the actions' justification.

Legal standard

Concerted practices may be exempted from the application of Art. 101 TFEU, if said practices pursue a legitimate objective, are inherent to these objectives, as well as necessary and proportionate. Case law has emphasized that the specific nature of sports must be considered. The specific nature of sports is of particular relevance in assessing said legitimate objectives. These were specified, inter alia, by the Commission's communication on "Developing the European Dimension in Sport", as: "for example, […] the fairness of sporting competitions, the uncertainty of results, the protection of athletes' health, the promotion of the recruitment and training of young athletes, financial stability of sport clubs/teams or a uniform and consistent exercise of a given sport (the "rules of the game")."

Application

AG Rantos regarded the openness of competitions, the protection of health and safety of players and guaranteeing solidarity as well as redistribution of revenue as legitimate objectives in this case (para. 93).

This legally uncontroversial conclusion is followed by an assessment of whether the associations' actions are necessary and proportionate. These assessments are prone to (factual) criticism.

AG Rantos noted in para. 95, following Deliége (para. 67, 68), that it is the responsibility of sports associations „to lay down the rules appropriate to the organisation of a sporting discipline". This decision does by no means confer a monopoly on any particular association. Several sports, e.g., boxing or stand-up paddling, are governed by multiple associations. This approach is also endorsed by the Court of Arbitration for Sport, which stated that the governance of a sport by several associations is possible. Hence, case law and industry practice do not stipulate that one association must monopolize a sport. Accordingly, it is at least in theory legally possible for another association or company to join (the governance of) a sport. Whilst the so-called "one association per sport" principle may have its benefits in facilitating the often complex organization of a sport,

Courts, in defending said principle did not provide for much more than the prevention of complexity, as a legal justification for not departing from said principle, as is illustrated in the cases of U (K) 5327/08 and U 3431/12 by the OLG Munich.

Relatedly, the prior approval system is not necessary to ensure the coordination and compatibility of European football match and competition calendars (Rn. 96). A coordination would be sufficient and is by no means uncommon as illustrated by this year's World Cup preparation between FIFA and the European football associations. Concerning the risk that two matches could be played simultaneously, prior approval rules could be modified in this respect, unless of course the true incentive behind the prior approval system is the reduction of competition between broadcasting outlets, which would likely not be exempted from Art. 101 TFEU. Furthermore, this risk is not uncommon for European football. For instance, the second half of Real Madrid's match vs. FC Barcelona on the 16th of October 2022 overlapped with the Premier League match Liverpool FC vs. Manchester City. Thus, one may argue that the coordination element may not be a legitimate objective as the associations, at least in part, fail to meet said objective, especially so, if one considers the rumors that FIFA may change the occurrence of the World Cup to a three-year cycle, which would inevitably clash with the four-year cycle of UEFA's European Championship.

Regarding the legitimate objective of solidarity (para. 98 f, 105.), it ought to be noted that the Super League envisaged solidarity payments. The ESLC intended to provide solidarity payments to non-competing clubs that, according to unconfirmed reports, would have been more than three times higher than the current payments. This could possibly increase the attractiveness of smaller clubs for more talented players, which may have an impact on the competitive balance, furthering the legitimate objectives of openness of competition and an (improved) redistribution of revenue.

Furthermore, AG Rantos assumes that the Super League could gain a level of popularity that UEFA's and national competitions could be harmed (para. 102). This assumption may be flawed as competitions like the FIFA Club World Cup and the International Champions Cup have failed to match the success of UEFA's and national competitions, rendering the Super League's success at least questionable whilst denying consumers the possibility of competition in markets such as football broadcasting rights, as well as the access to additional football content, entrenching the already substantial FIFA and UEFA licensing revenues.

In addition, FIFA plans to increase the number of participants for the FIFA Club World Cup from seven to 32 teams in 2025, in order to increase the competition's popularity. Hence, one ought to question the "dual membership" argument, when in fact, additional competitions are already in preparation and approved, just as insofar that they stay under the umbrella of the existing monopolists.

One may follow AG Rantos' conclusion that "sporting merit" may be problematic given the Super Leagues intended 15 fixed slots. Consequently, many European countries would not have been represented (para. 104). In this regard, the ECJ will have to examine whether this restriction is sufficient to assume that the association's actions are justified.

In this context, clarity is required regarding the remaining Super League slots that are subject to a qualifying mechanism. Moreover, it should be noted that UEFA is seeking to introduce changes for the Champions League from 2024 onward. This would see the creation of two additional spots for the two best performing countries during the previous season in European competitions. This may be somewhat comparable to the (over-)representation of Spanish, Italian and English clubs in the

Super League. Thus, both the existing and the alternative model tweak the concept of sporting merit, yet only one is subject to critique.

Most of the above changes will see clubs or players playing more games, increasing the workload for players, as would be the case with the addition of the Super League. This increased workload may lead to the increase of team rosters which, due to the additional investments by new partners, may result in further opportunities and grassroot development for upcoming talents, ultimately furthering competition between clubs to invest in talent development.

Moreover, foreign investments are a material factor in European football. The recent example of Newcastle United illustrates the impact of investments on football leagues. Following bottom/mid-table finishes and one relegation in recent years, the foreign investment led the club to be placed third during the current season. The Premier League provides for several such examples, where investments turned average clubs into title contenders. The only differing factor for the investments proposed by the ESLC seems to be that instead of FIFA and UEFA, only clubs would receive a share of solidarity payments and media rights, again raising the question of whether the European sports model or FIFA and UEFA's financial comfort are being protected.

Granting sports associations more power in a time where media rights increase in value due to the additional exploitation opportunities provided by virtual events, metaverse competitions, as well as gaming licensing deals and the growing eSports sector, may prove fatal in the long term. It is already rare for athletes and clubs to legally challenge sports associations. In this context it ought to be noted that the ECJ clarified in Biffi that the specific nature of sports can also be interpreted to the disadvantage of an association to protect sports and its athletes (para. 33 f., 67).

Similarly as Doctorow and Giblin have demonstrated in the context of creative industries, clubs and players are locked into the governance of monopolistic sports associations. However, instead of challenging the monopolists and introducing choice, antitrust law may potentially be used to prevent the emergence of choice and competition. Whereas AG Rantos rightly acknowledges that the Super League is not barred from being founded, pointing only towards the prevention of dual membership and free riding (para. 106), antitrust law is used to create virtually insurmountable barriers to entry for a competing league. This is insofar questionable as several of the factors considered as harming European football by the Super League, are being implemented by FIFA and UEFA alike.

Concluding remarks

Whereas AG Rantos' legal opinion consolidates his desire to protect European sports, the ultimate question for the ECJ to consider will be whether it seeks to protect European sports or European sports associations, a notion that may not be as interconnected as the opinion outlines it to be.

At the same time, it should not be forgotten that projects such as the Super League can themselves violate antitrust law, depending on the structure. This may be a question for another day (and potentially another case). The objective of this blog post is to illustrate that the factual underpinnings of the Super League case are not as one-sided as they are often portrayed and that a different perspective exists. Ultimately, it is the unenviable task of the ECJ and the Juzgado de lo Mercantil nº 17 de Madrid to strike a balance that protects the European sports model and not the financial monopolization of European sports.

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