Kluwer Competition Law Blog

International Skating Union, European Super League and Royal Antwerp: The beautiful game and skating before the CJEU

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On 21st December 2023, the Court of Justice of the European Union ("CJEU") achieved a "hattrick" with three important judgments on the interplay of sports and EU Law. In particular, the CJEU delivered three judgments on sports governing bodies' statutes compliance with EU Law, especially EU Competition Law. In its *ISU* (C-124/21 P), *ESL* (C-333/21), and *Royal Antwerp* (C-680/21) judgments, the CJEU made some key findings on the interrelationship between sports and EU law. Those judgments are expected to have a major impact on the regulatory landscape surrounding professional sports in the EU. In order to illustrate the judgments' impact, this article first outlines the judgments and the CJEU's main findings. Subsequently, this article ends with a few key takeaways.

The ISU judgment's background

The judgment's background is, in a nutshell, as follows: The International Skating Union ("ISU") is a private association and figure skating's as well as speed skating's governing body. The sport's national associations are members of the ISU. The ISU has set out a set of rules including, inter alia, so-called prior authorisation rules, arbitration rules and eligibility rules. The prior authorisation rules state that the organisation of an international skating competition is subject to prior authorisation by the ISU. Further, the prior authorisation rules set out a series of requirements (e.g. financial or ethical requirements) for an organiser to comply with. In case the ISU rejects an application for authorisation, the organiser may lodge an appeal before the Court of Arbitration for Sport ("CAS") in accordance with the arbitration rules. The ISU's eligibility rules determine the conditions in which athletes take part in skating competitions. These eligibility rules contain, inter alia, a rule from which followed that if an athlete competed in a competition not authorised by the ISU and/or national associations, the athlete would be exposed to a lifetime ban from any competition organised by the ISU. The athletes may appeal such a decision imposing a lifetime ban before the CAS.

Back in 2014, two professional speed skaters filed a complaint with the European Commission ("EC") arguing that the aforementioned rules violated EU Competition Law. In 2017, the EC adopted a decision stating that the ISU's rules had infringed Article 101 TFEU. In 2020, the

General Court ("GC") then handed down a judgment widely confirming the EC's findings on the prior authorisation rules and eligibility rules violating Article 101 (1) TFEU (T-93/18). The ISU appealed the GC's judgment before the CJEU and, inter alia, requested to set aside the judgment confirming the EC's findings. For reasons of simplicity, this article focuses on two central aspects of the ISU judgment's reasons: The concept of a restriction of competition "by object" under Article 101 (1) TFEU and the question whether arbitration rules reinforce a potential infringement of Article 101 (1) TFEU.

ISU: restriction of competition by object?

First things first: The CJEU clearly stated that the ISU's rules in question are subject to EU Competition Law. Rules on a sporting association's exercise of powers (i.e. prior approval rules for sporting competitions and rules seek to cover the participation of athletes in such events) constitute an economic activity in so far, as they concern professional and semi-professional sport (para 94). However, the specific characteristics of sports (like the specific characteristics of any sector) may be relevant when assessing whether a certain conduct infringes Article 101 TFEU, e.g. in examining whether a conduct restricts competition "*by object*" or "*by effect*" (para 96).

The CJEU then addresses the categorisation of conduct restricting competition "*by object*" and "*by effect*". Generally, the concept of conduct restricting competition by its object is an exception in relation to the concept of conduct restricting competition by its effect, resulting in the concept of "*by object*" restrictions being interpreted very strictly (para 101). Only certain types of conduct that reveal a sufficient degree of harm to competition, e.g. horizontal price fixing or capacity limitations, sufficiently harm competition to restrict competition "*by object*" per se (paras 102-103). However, in certain cases, certain types of conduct may also be considered as restricting competition "*by object*" even though they might not be per se as harmful to competition as price fixing (para 104). To assess whether a certain type of conduct harms competition in a given case, one needs to examine (1) the agreement's content, (2) its economic and legal context and (3) its objectives (paras 105-107).

The CJEU further emphasizes that the examination of the prior authorisation rules and eligibility rules must be carried out in the light of the case law established in *MOTOE* (C-49/07) and *Ordem dos Técnicos Oficiais de Contas* (C-1/12) (paras 125-130). In this regard, the CJEU stresses the concept of equality of opportunity and concerns about undistorted competition due to a conflict of interest. According to the CJEU, a conflict of interest arises when an undertaking exercising a given economic activity has the (de jure or de facto) power to determine which other undertakings are also authorised to engage in that activity and the conditions of their market access (para 125). The CJEU explicitly states that Article 106 TFEU influences the application of Article 102 TFEU in such conflict-of-interest-situations (para 127). As Articles 101 and 102 TFEU must be interpreted consistently, Article 106 TFEU indirectly influences Article 101 (1) TFEU, too. Therefore, the CJEU emphasizes that an undertaking's power to determine which other undertaking may access a market and the conditions of accessing a market may be regarded as restricting competition by its very object (para 128). It is important to point out that, unlike the precedents cited by the CJEU (e.g. *MOTOE* and *Ordem dos Técnicos Oficiais de Contas*), the ISU's regulatory power does not originate from the grant of exclusive rights by a Member State. However, the CJEU explicitly states that the cited case law also applies where an undertaking's regulatory power originates from autonomous behaviour, i.e. from acquiring a dominant position

on a market enabling the undertaking to prevent competitors from accessing that market or a related/neighbouring market (para 126). Although the CJEU does not draw an explicit parallel, this is quite reminiscent of the CJEU's established case law on the freedom of movement rights applying to rules other than actions of public authorities, e.g. sports governing bodies' rules (see *WALRAVE*, Case 36/74, paras 18-21; *DONA*, Case 13/76, para 17; *Bosman*, C-415/93, paras 83-87). In both instances, the CJEU stresses a concept originally only applying to the State's measures onto private organisations with state-like or quasi-regulatory powers.

The CJEU then follows a clear line regarding the assessment of the prior authorisation rules and eligibility rules. While sports governing bodies are in principle allowed to adopt, apply and ensure compliance with rules relating to the organisation of the sporting discipline concerned, this regulatory power enables them to prevent market access of potentially competing undertakings (paras 131, 144). According to the CJEU, there is a need for previously enacted and accessible transparent, clear and precise substantive criteria circumscribing that regulatory power (para 131). These criteria must ensure that the regulatory power is exercised without discrimination and that sanctions are objective and proportionate (para 133). The CJEU generally expects non-discriminatory rules to subject 3rd party competitions to similar requirements as apply to 1st party competitions (competitions by the decision-making entity, e.g. the ISU) (para 133). Such a "duty of equal treatment" between 3rd parties and 1st party subsidiaries is mainly known from the regulation network industries. In addition to such substantive criteria, the regulatory power must be subject to transparent and non-discriminatory procedural rules (para 135).

The ISU's prior authorisation rules and eligibility rules did not contain such substantive criteria and procedural rules that would have circumscribed and controlled the ISU's regulatory power, according to the CJEU (paras 136-149). The CJEU held that the prior authorisation rules and eligibility rules allow the ISU, inter alia, to exclude any (even equally efficient) competing undertaking from the market for organising skating competitions (para 146). At least, the rules restrict the creation and marketing of alternative and new competitions (para 146). The rules deprive athletes of the opportunity to participate in alternative or new competitions as well as spectators of the opportunity to attend or watch alternative or new competitions (para 146). Therefore, the rules conferring the ISU to authorise, control and set conditions of access to the relevant market and to determine both the degree and conditions of competition (para 145). Therefore, the prior authorisation rules and eligibility rules restrict competition by their object.

However, not every conduct restricting competition falls within the prohibition laid down in Article 101 (1) TFEU. Generally – and as we know from case-law like *Wouters* (C-309/99), *Meca-Medina* (C-519/04 P) and *Ordem dos Técnicos Oficiais de Contas* (C-1/12) – conduct may escape the prohibition laid down in Article 101 (1) TFEU in so far as it fulfils a three-pronged test (so-called Meca-Medina test). The three stages are as follows: the conduct must pursue a legitimate objective of public interest, the specific conduct must be genuinely necessary to pursue the objective, and the conduct's competition-restricting effects do not eliminate all competition (*Meca-Medina*, C-519/04 P, paras 42-48; *Ordem dos Técnicos Oficiais de Contas*, C-1/12, paras 93-100; *ISU*, C-124/21 P, para. 111). However, and this is one of the most striking aspects of the *ISU* judgment, the CJEU states that the Meca-Medina test for competitive restraints inherent in the pursuit of a legitimate objective only applies to "*by effect*" restrictions of competition. As the ISU's rules were regarded as "*by object*" restrictions of competition, the CJEU did not apply the three-pronged Meca-Medina test. In opposition to "*by effect*" restrictions of competition, "*by object*" restrictions may only be exempted under Article 101 (3) TFEU (para 114). However, Article 101

(3) TFEU was not the subject of the ISU's appeal.

ISU: reinforcing an infringement via arbitration rules?

In its 2017 decision, the EC found that the ISU's arbitration rules reinforced the prior authorisation rules' and eligibility rules' violation of Article 101 (1) TFEU. The EC stated that while the arbitration rules did not violate Article 101 (1) TFEU themselves, they made the other rules' infringement more harmful. In opposition to the EC, the GC stated that the ISU's arbitration rules did not compromise the full effectiveness of EU Competition Law (T-93/18, paras 154-164). The CJEU now mainly consented to the EC's findings (paras 187-204). According to case law like *Skanska* (C-724/17, para 24), Articles 101 and 102 TFEU directly create rights for individuals, which national courts must protect (para 192). The CJEU generally acknowledges that individuals, i.e. athletes, may enter into an agreement that subjects disputes to an arbitration body, i.e. the CAS, and that judicial review of arbitration awards may be limited due to reasons of effectiveness (para 193). However, the judicial review must be able to cover the question of compliance with fundamental provisions of EU public policy, including Articles 101 and 102 TFEU (paras 193, 198). Furthermore, the reviewing court has to satisfy the requirements set out in Article 267 TFEU so that it is at least entitled to refer to the CJEU concerning the interpretation of EU law. CAS awards therefore have to be subject to judicial review by a court that can refer to the CJEU when fundamental provisions of EU public policy are at stake. Where there is no sufficient judicial review of fundamental provisions of EU public policy, the arbitration mechanism compromises the effectiveness of the provisions in question, i.e. Articles 101 and 102 TFEU (para 194). The CJEU further states that the possibilities of stand-alone and/or follow-on private enforcement before EU courts and lodging a complaint with the EC or national authorities cannot compensate for the lack of effective judicial review (paras 200-203).

The ESL judgment's background

In essence, the *ESL* judgment's facts are very similar to the *ISU* judgment's facts. Both, inter alia, concern prior approval rules for 3rd party competitions by sports' governing bodies and sanctions to enforce compliance with those rules. The European Super League ("ESL") is an international interclub football competition project by the ESL Company ("ESLC"). Several professional football clubs, e.g. FC Barcelona, Real Madrid C.F., AC Milan and Manchester City, established the ESLC. Following the launch of the ESL project, FIFA and UEFA were heavily opposed to it. The ESLC then brought an action before the Commercial Court in Madrid seeking protective measures against FIFA and UEFA. The Commercial Court in Madrid referred to the CJEU regarding the interpretation of Articles 101 and 102 TFEU in light of FIFA's and UEFA's statutes.

FIFA's statutes provide for, inter alia,

- UEFA to ensure that international leagues or other groups of clubs shall not be formed without FIFA's and UEFA's consent and approval (Article 22 FIFA Statutes),
- No international match or competition takes place without the prior permission of FIFA and UEFA (Article 71 FIFA Statutes),
- prohibition of sporting contacts (e.g. matches) between FIFA/UEFA-affiliated teams/players and

non-affiliated teams/players (Article 72 FIFA Statutes) and
- FIFA's and UEFA's authorisation for associations/leagues/clubs affiliated to a Member Association to take part in competitions on another FIFA member association's territory (Article 73 FIFA Statutes).

Further, FIFA's statutes concern the exploitation of various rights emanating from the organisation of professional football competitions. In this regard, FIFA's statutes provide for, inter alia,

- FIFA and its Member Associations own all the rights (including financial rights, audiovisual rights, reproduction and broadcasting rights, multimedia rights, marketing and promotional rights, incorporeal rights such as emblems) emanating from football competitions under their jurisdiction (Article 67 FIFA Statutes)
- FIFA's exclusive responsibility for authorising the distribution of images, sound and other data carriers of football matches, without any restriction of content, time, place and technical as well as legal aspects (Article 68 FIFA Statutes)

UEFA's statutes provide for, inter alia,

- UEFA's sole jurisdiction to organise or abolish international football competitions in Europe, in which Member Associations and/or their clubs participate (Article 49 UEFA Statutes),
- Prior approval for international matches, competitions or tournaments not organised by UEFA but played on UEFA's territory (Article 49 UEFA Statutes)
- UEFA's mandatory permission for forming combinations or alliances between UEFA Member Associations, leagues or clubs (Article 51 UEFA Statutes)
- A Member Association's mandatory permission for playing or organising matches outside a Member Association's territory (Article 51 UEFA Statutes)

ESL: application of EU Competition Law

The CJEU recognizes that sport serves several social and educational purposes and has specific characteristics in relation to other sectors (paras 102-103). These specific characteristics may potentially be taken into account when applying Article 101 TFEU (paras104-105). The CJEU uses a nearly similar wording as in ISU stating that "*specific characteristics may potentially be taken into account along with other elements and provided that they are relevant in the application of […] Article 101 TFEU [and Article 102 TFEU]"* (*ESL*, C-333/21, para 104; *ISU*, C-124/21 P, para 96). In both judgments, the CJEU further stated that "*such an assessment may involve taking into account, for example, the nature, organisation or functioning of the sport concerned and, more specifically, how professionalised it is, the manner in which it is practised, the manner of interaction between the various participating stakeholders and the role played by the structures and bodies responsible for it at all levels, with which the Union is to foster cooperation, in accordance with Article 165 (3) TFEU"* (*ESL*, C-333/21, para 105, *ISU*, C-124/21 P, para 96). Therefore, the FIFA's and UEFA's statutes were subject to EU Competition Law, i.e. Articles 101 and 102 TFEU. The CJEU applied Articles 101 and 102 TFEU on (1) the prior approval rules including sanctions and (2) on the exploitation of rights emanating from interclub football competitions by FIFA and UEFA.

ESL: prior approval rules and sanctions under Article 102 TFEU

Starting with Article 102 TFEU, the CJEU firstly generally illustrates the concept of abusing a dominant position and how to categorise conduct in a given case (paras 123-138). The CJEU mainly summarises past case law and emphasizes the effects-based approach and the concept of competition on the merits reminding us of, inter alia, what it recently stated in *Servizio Elettrico Nazionale* (C-377/20) (paras 124-127). Two aspects in the CJEU's framework for finding an abuse of a dominant position deserve more attention according to my view.

First, the CJEU states that conduct may not only be categorised as an abuse where it has the (actual or potential) effect of restricting competition on the merits by excluding equally efficient competitors from the market, but also where it has the (actual or potential) effect or even the object of impeding only potentially competing undertakings at an earlier stage, therefore preventing the growth of competition (para 131). In this regard, the CJEU highlights the concept of "*equality of opportunity*" between undertakings (para 133). Hence, the CJEU states that EU competition law not only protects equally efficient competitors but undertakings that may (or may not) grow into viable competitors in the future if there were equal competitive conditions. This passage may be of particular relevance not only for sports but also for the digital economy where undertakings marginalised by a platform's conduct in a given case might not be as efficient as the platform itself due to economies of scale and scope or network effects. The framework in para 131 of the *ESL* judgment is reminiscent of the EC's *Amazon Marketplace* commitment decision (AT.40462) and the GC's *Google Shopping* judgment (T-612/17), where the EC and the GC also stretched the concept of equality of opportunity (*Amazon Marketplace*, AT.40462, para 162; *Google Shopping*, T-612/17, para 180). Further, in *Amazon Marketplace* the EC preliminary found that Amazon Retail's structural data-advantage likely limited 3rd-party sellers ability to grow into viable competitors (*Amazon Marketplace*, AT.40462, para 197), which is quite reminiscent of the CJEU's findings in *ESL* on EU Competition Law protecting undertakings at an earlier stage, i.e. before being able to get equally efficient as the dominant undertaking.

Second, the CJEU explicitly states that Article 102 TFEU must be read in conjunction with Article 106 TFEU where a dominant undertaking has the power to determine which other undertakings may access a market or to determine the conditions in which they may access a market (paras 133-134). Again, the CJEU uses a nearly similar wording as it did in *ISU* to illustrate which situations give rise to concerns over a conflict of interest (*ESL*, C-333/21, para 133; *ISU*, C-124/21 P, para 125). Originally, Article 106 TFEU concerns, inter alia, undertakings, which are granted exclusive or special rights by a Member State. As in *ISU*, the CJEU again stretches this concept onto Articles 101 and 102 TFEU for undertakings that placed themselves in a similar position via their own autonomous conduct (*ESL*, C-333/21, para 137; *ISU*, C-124/21 P, para 126). This essentially means that any dominant undertaking that has the power to deny market access or determine the conditions under which access to a market is granted, must place its powers within a framework of transparent, clear, precise and non-discriminative substantive criteria and procedural rules which have been laid down in accessible form prior to their implementation (*ESL*, C-333/21, paras 135-136, 151; *ISU*, C-124/21 P, paras 133-135). This aspect may as well be relevant beyond sports, especially for digital platforms that determine the conditions of access to markets (i.e. end users) for their business users.

Back to FIFA and UEFA, the CJEU confirms they hold a dominant position regarding the organisation and marketing of international football competitions (para 139), as both, FIFA and UEFA, have the regulatory and control powers to authorise the setting up and organisation of

competing football competitions by a 3rd party (para 140). The CJEU states that it is irrelevant whether FIFA and UEFA hold a legal monopoly because at the current juncture, it would be impossible to set up viably a competition outside their ecosystem (para 149). Hence, FIFA and UEFA have the power to control the participation of teams and players in a potential 3rd party football competition (para 140). No framework of sufficient substantive or procedural rules circumscribes those powers according to the referring Madrid Commercial Court (para 141). Even if there were good reasons for sports' governing bodies like FIFA and UEFA to place teams and players under homogeneous regulatory and technical conditions, there needs to be a framework of substantive criteria and procedural rules to limit a dominant undertaking's discretionary power (paras 143-148). Rules and sanctions that are not placed within a sufficient framework must be held to infringe Article 102 TFEU (paras 147-148, 152). The standard for sufficient substantial criteria and procedural rules equals the standard for finding a "*by object*" restriction of competition known from the CJEU's *ISU* judgment. However, it is important to stress that the CJEU made it up to the referring court, i.e. the Madrid Commercial Court, to determine whether FIFA's and UEFA's statutes constitute an abuse of a dominant position in the light of the abovementioned (para 150). Admittedly, it is very likely that the Madrid Commercial Court categorizes the rules at issue in the main proceeding as an abuse, as it already stated that the FIFA's and UEFA's rules were not placed within a sufficient framework (para 141).

According to settled case law, a dominant undertaking may show that conduct that comes within the scope of Article 102 TFEU is justified and therefore finally escapes the prohibition laid down in Article 102 TFEU (see e.g. *Servizio Elettrico Nazionale*, C-377/20, para 46). Generally, there are two ways to justify a conduct. An undertaking may show that (1) the conduct is objectively necessary or (2) the so-called efficiency defence, i.e. where the conduct's anti-competitive effects are at least outbalanced by its positive effects (*Post Danmark*, C-209/10, para 41; *British Airways*, C-95/04 P para 69). Regarding the former, the CJEU states that conduct aiming at eliminating any and all competition from 3rd party undertakings cannot be justified by an objective necessity and does not escape the prohibition laid down in Article 102 TFEU (para 203). This is quite reminiscent to the CJEU rejecting the Meca-Medina test for "*by object*" restrictions of competition under Article 101 (1) TFEU. However, such conduct may be justified by the latter, i.e. the efficiency defence (paras 204-209). The CJEU emphasizes that the four conditions for an efficiency defence ((1) the existence of efficiency gains, (2) efficiency gains counteracting the harmful effects, (3) conduct is necessary for achieving the efficiency gains and (4) no elimination of effective competition) apply both in the context of Article 102 TFEU as well as in the context of Article 101 (3) TFEU (paras 204-208). Conduct needs to meet these conditions cumulatively. Especially the fourth condition (the conduct must not eliminate effective competition) can be difficult to meet as effective competition is already at risk due to the undertaking's dominant position as such. However, it is ultimately up to the referring court, i.e. the Madrid Commercial Court, to rule on whether the conduct meets the conditions of the efficiency defence in the present case (para 206).

ESL: prior approval rules and sanctions under Article 101 (1) TFEU

Next, the CJEU engages with the interpretation of Article 101 (1) TFEU, specifically whether the FIFA's and UEFA's rules constitute a restriction of competition "*by object*" or "*by effect*".

First, the CJEU generally recalls the concepts of a restriction of competition "*by object*" in relation to the concept of a restriction of competition "*by effect*" as it already did in *ISU* (paras 155-170). Again, the CJEU uses a nearly similar wording as it did in *ISU* (see *ISU*, C-124/21 P, paras 98-110). Regarding the categorization of the statutes, the CJEU explicitly stated that "*although the specific nature of international football competitions […] credence the idea that it is legitimate […] to have rules on prior approval […], those contextual elements nevertheless are not capable of legitimising the absence of substantive criteria and detailed procedural rules suitable for ensuring that those rules are transparent, objective, precise and non-discriminatory"* (para 175). Therefore, the rules reveal a sufficient degree of harm to competition and thus constitute a "*by object*" restriction of competition (para 178). In this regard, the CJEU's judgment differs from AG Rantos' opinion. AG Rantos concluded that the FIFA's and UEFA's rules on measures against projects like the ESL did not have the object of restricting competition (AG Rantos, *ESL*, C-333/21, paras 63-78). Moreover, the rules on sanctions on teams and players prima facie reinforce the anti-competitive object according to the CJEU. Sanctioning teams and players participating in 3rd party competitions may prevent a competing interclub football competition from calling on market resources, i.e. teams and players (para 177). In essence, the CJEU follows a clear and consistent line in its *ESL* and *ISU* judgments on categorizing "*by object*" and "*by effect*" restrictions of competition under Article 101 (1) TFEU. Further, the CJEU aligns the interpretation of Articles 101 and 102 TFEU. Just as the absence of a framework of sufficient substantive criteria and procedural rules infringes Article 102 TFEU (if there is a dominant undertaking), it infringes Article 101 (1) TFEU (if it constitutes an agreement or decision of an undertaking or association of undertakings). Again, the CJEU holds that the three-pronged so-called Meca-Medina-test is not applicable to "*by object*" restrictions of competition (paras 183-186). As the CJEU already stated in *ISU*, "*by object*" restrictions may only be exempted under Article 101 (3) TFEU.

The exemption under Article 101 (3) TFEU generally requires the same four conditions to be met as the efficiency defence under Article 102 TFEU (see para 190 on the four conditions). The CJEU generally outlines the conditions for a justification under Article 101 (3) TFEU and made it up to the referring court to examine whether the conduct is justified (para 195). However, there are two aspects regarding the second condition and the fourth condition of Article 101 (3) TFEU which are worth having a closer look at.

Regarding the second condition, the CJEU underlines that the conduct constitutes a "*by object*" restriction of competition and affects various different categories of users and consumers, e.g. football clubs, players, spectators or television viewers (paras 194-195). Therefore, the conduct's efficiencies must have a favourable impact on each of them to be exempted under Article 101 (3) TFEU (para 194). Given the various different categories of users and consumers, this can prove to be extremely difficult for the undertaking. Regarding the fourth condition, the CJEU once again stresses that FIFA's and UEFA's statutes lack a framework for sufficient substantial criteria and procedural rules. The CJEU explicitly states that "*the Court finds […] that such a situation is liable to enable entities having adopted those rules to prevent any and all competition on the market for the organisation and marketing of interclub football competitions on European Union territory"* (para 199). It is therefore quite unlikely that the Madrid Commercial Court will come to conclude that the fourth condition is met in the present case according to my view.

ESL: exploitation of rights under Articles 101 and 102 TFEU

The CJEU not only assesses the prior authorisation rules and sanctions but also the exploitation of rights by FIFA and UEFA. In this regard, the CJEU examines whether Articles 101 and 102 TFEU preclude the commercial exploitation of rights (e.g. financial, audiovisual or broadcasting rights) emanating from professional interclub football organised by FIFA and UEFA (paras 210-241). The CJEU applies Articles 101 and 102 TFEU simultaneously.

Articles 67 and 68 of the FIFA Statutes allow FIFA to determine the conditions of exploitation and use of rights (para 220). They also reserve an exclusive power to FIFA and UEFA to authorise the broadcast of matches and events (para 220). The CJEU states that these rules enable FIFA and UEFA to control the supply of rights related to their interclub competitions in its entirety (para 222). The various controlled rights constitute the principal source of income of revenue derived by interclub competitions (para 223). Hence, these rights are a parameter of competition, which the FIFA's statutes remove from control of the football clubs that participate in the FIFA's and UEFA's interclub competitions (para 226). The CJEU concludes that the FIFA's statutes confer FIFA and UEFA a monopoly consisting in total control over supply, and enable them to charge excessive prices as they only face limited negotiating power of, e.g. broadcasters (para 229). Further, FIFA and UEFA enjoy a strong image and reputation by obliging all actual or potential buyers of rights to purchase from them (para 229). This incentivises actual or potential buyers to standardise their market conduct and their offerings, leading to a narrowing of choice and less innovation to the detriment of consumers and television viewers (para 229). Therefore, the exclusive exploitation of rights emanating from FIFA's and UEFA's interclub competitions is regarded to restrict competition by its object (Article 101 (1) TFEU) and constitutes an abuse of a dominant position (Article 102 TFEU) (para 230).

However, the exclusive exploitation of rights may be exempted under Article 101 (3) TFEU or justified under Article 102 TFEU. The CJEU stresses that it is ultimately to the referring court to determine whether the exclusive exploitation of rights is exempted or justified. In this regard, the CJEU emphasizes a few aspects, especially regarding the first, second and fourth conditions.

The CJEU stresses that there may be significant efficiency gains by allowing actual or potential buyers, e.g. broadcasters, to negotiate with two exclusive vendors, i.e. FIFA and UEFA (para 232). More specifically, efficiencies may arise due to reduced transaction costs and uncertainties actual or potential buyers face in opposite to negotiating on a case-by-case basis with different vendors (para 232). Further, actual or potential buyers might benefit from FIFA's and UEFA's brand reputation and cover the entirety of an interclub competition (para 232). Regarding the second condition, users and consumers might gain a fair share of these efficiencies due to improvements in production as well as in the distribution of the rights and the so-called "solidarity redistribution" of the profits derived from the centralised sale of the various rights (para 234). According to the CJEU, it appears "*prima facie to be convincing*" that the centralised sale of these various rights ultimately benefits supporters, consumers and EU citizens, especially those involved in amateur football (para 234). Lastly, regarding the fourth condition, the CJEU notes that the rules "only" eliminate competition on the supply side, but not on the demand side (para 239). The buyers (e.g. broadcasters) might face a strong negotiating power of FIFA and UEFA due to the centralised sale of rights. However, they can access a more attractive product in terms of content and image and face a fierce competition given the large range of programmes and broadcasts (para 239). In essence, it seems to me that the CJEU is less concerned about the exclusive exploitation of rights than it is about the prior approval rules and sanctions. While all rules were regarded as restricting competition under Article 101 (1) TFEU and the abuse of a dominant position under Article 102 TFEU, the CJEU seems to be more open about exempting or justifying the exclusive exploitation

of rights, of course, given that the conditions are met. However, it is quite surprising that the CJEU explicitly emphasizes significant efficiency gains under Article 101 (3) TFEU, yet still categorizes the exploitation of rights as a "*by object*" restriction of competition under Article 101 (1) TFEU. This is surprising, because according to the CJEU in *Super Bock* (C-211/22), the existence of pro-competitive effects may give reasonable doubt to whether an agreement caused sufficient harm to competition to be categorized as a "*by object*" restriction (Super Bock, C-211/22, para. 36).

ESL: freedom to provide services

Lastly, the CJEU examines whether the freedom to provide services (Article 56 TFEU) precludes FIFA's and UEFA's statutes. First, the CJEU emphasizes that the statutes not only tend to impede the organisation and marketing of interclub football competitions in the European Union for 3rd parties, but prevent them outright from doing so (para 248-249). Therefore, the statutes constitute an obstacle to the freedom to provide services enshrined in Article 56 TFEU (para 250). Second, the CJEU stresses that those measures may, in principle, be justified. Ensuring that interclub football competitions will be organised in observance of rules, principles and values of openness, merit and solidarity constitutes a legitimate object in terms of its very principle (para 253). However, those objectives are not justified if the statutes lack objective and non-discriminatory substantial criteria and procedural rules that circumscribe the governing bodies' power (para 254-255). Therefore, the rules at issue in the main proceeding do not appear to be justified according to the CJEU (para 256). By focusing on the lack of sufficient substantive criteria and procedural rules, the CJEU aligns the interpretation of the EU Competition rules (Articles 101 and 102 TFEU) and the freedom to provide services (Article 56 TFEU).

The Royal Antwerp judgment's background

Since the 2008/2009 season, UEFA regulation requires professional football clubs taking part in UEFA's interclub competitions to enter a maximum number of 25 players on the squad size, which in turn must include a minimum number of 8 so-called "home-grown players" (HGP). HGPs are players who have been trained by their club or by another club in the same national association for a minimum of three years between the age of 15 and 21. Out of 8 HGPs, a minimum number of 4 must have been trained by the club in question.

Total squad size	25 players		
	8 HGPs		
Of which	4 trained by the club in question	4 others	17 others

The Belgian football governing body's (Royal Belgian Football Association – "URBSFA") regulation requires professional football clubs in the Belgian football division 1A and 1B to submit lists containing a maximum of 25 players of which a minimum of 8 players must have been trained by Belgian clubs (meaning to be affiliated to a Belgian club for at least three full seasons before

their 23rd birthday). Furthermore, at least three of those 8 players must have been affiliated to a Belgian club for at least three seasons before their 21st birthday.

Total squad size	25 players	
Of which	8 affiliated to Belgian club 3 seasons before 23rd birthday	17 others
	3 affiliated to Belgian club 3 seasons before 21st birthday	5 others

Additionally, URBSFA regulation requires Belgian professional football clubs to actually line-up players from these lists. Clubs must list at least 6 players affiliated with a Belgian club before their 23rd birthday, 2 of which before their 21st birthday in the match sheets.

An officially unidentified professional football player, which media reported to be the Israeli International Lior Refaelov, brought an action before the Belgian Court of Arbitration for Sport seeking a declaration that UEFA and URBSFA regulations were unlawful, joined by the football club Royal Antwerp. The Belgian Court of Arbitration found that the claims were partly inadmissible and partly unfounded. Following the Court of Arbitration's dismissal, the professional football player and Royal Antwerp FC brought an action before the Brussels Court of First Instance arguing that the regulation violated both the freedom of movement of workers under Article 45 TFEU and EU competition law under Article 101 TFEU. The Brussels Court of First Instance then referred to the CJEU for a preliminary ruling, inter alia, on the interpretation of Articles 45 and 101 TFEU.

Royal Antwerp: HGP rules under Article 101 TFEU

Like it did already in its *ISU* and *ESL* judgments, the CJEU first stresses that the rules in question are subject to EU Law (paras 52-62). Again, the CJEU points out that there are specific characteristics of sports as an economic sector (para 70-71). However, these characteristics can only be relevant in the application of EU Law's provision and do not justify any per se exemption for sports (para 72). The wording here is similar to the wording in *ISU* and *ESL*.

Next, the CJEU deals with categorizing "*by object*" and "*by effect*" restrictions of competition under Article 101 (1) TFEU (paras 85-100). In this regard, the Royal Antwerp judgment reinforces what we already learnt from *ISU* and *ESL* judgments. As regards the UEFA and URBSFA rules on HGP, the CJEU makes it ultimately up to the referring court to determine whether they reveal a sufficient degree of harm to competition to be considered as "*by object*" restrictions (para 108). However, there are a few things worth mentioning here. According to the CJEU, the rules on HGP limit, by their very nature, the possibility for clubs to line up players that do not meet the HGP rules' requirements (para 101). Hence, the 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 rules limit the football clubs' access to players as a "resource" essential to their success (para 109). According to the CJEU, the proportion of players

concerned by the HGP rules is particularly relevant here (para 109). However, the specific characteristics of football may suggest that it is legitimate for governing bodies like UEFA and URBSFA to regulate the competitive conditions in interclub football competitions, e.g. the way in how teams are put together (para 104). As regards the economic and legal context of the HGP rules, the referring court will have to take into account these specific characteristics of football to assess whether the rules have as their object the restriction of competition (para 110).

Then, the CJEU again underlines its findings in its *ISU* and *ESL* judgments, stressing that "*by object*" restrictions may only be exempted under Article 101 (3) TFEU (paras 113-117). As regards the interpretation of Article 101 (3) TFEU, the CJEU starts by recalling the four cumulative conditions a conduct must fulfil for an exemption (paras 118-127). The CJEU ultimately leaves it up to the referring court to determine whether the rules on HGPs satisfy Article 101 (3) TFEU's four conditions (para 128). However, the CJEU points a few things out for the referring court's assessment. 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). Furthermore, the referring court has to assess whether those efficiencies have a genuinely favourable effect on not only players but also on all clubs, spectators and TV viewers or whether they benefit only certain categories of clubs (para 130). Moreover, the 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). Lastly, the CJEU points out that the proportion of HGP included in the match sheet determines whether the HGP rules eliminate all competition between football clubs in the recruitment of players for their team (para 132).

Royal Antwerp: freedom of movement for workers

The CJEU states that the HGP rules are prima facie likely to place at a disadvantage football players who wish to play football in the territory of a Member State (Belgium) other than their Member State of origin (para 137). As the HGP rules define "homegrown" as players who were trained at a Belgian club, they are of an expressly national character and give rise to indirect discrimination at the expense of non-HGPs (paras 137-139). Nevertheless, the HGP rules might, in principle, be justified (paras 141-150). The HGP rules are justified provided that they pursue a legitimate object and observe the principle of proportionality. Encouraging the recruitment and training of young professional football players constitutes a legitimate object (para 144). However, the HGP rules must be suitable for ensuring the attainment of encouraging the recruitment and training of young players (paras 145-146). In this regard, it should be noted that the CJEU has doubts about the suitability. The CJEU questions whether the HGP rules constitute real and significant incentives for recruitment and training of young players for at least some of the football clubs (i.e. those with significant financial resources) as they might just buy HGPs, which have been trained by another Belgian club (para 147). This was also highlighted in AG Szpunar's opinion (AG Szpunar, C-680/21, paras 66-70). However, it is ultimately up to the referring court to determine whether the HGP rules are justified under Article 101 (3) TFEU (para 143).

Key Takeaways

So, what are the three judgments in *ISU* (C-124/21 P), *ESL* (C-333/21) and *Royal Antwerp*

(C-680/21) key takeaways? Seven aspects can be taken from the judgments, according to my view.

First, the CJEU did not rule out the possibility for ISU, FIFA and UEFA to protect their competitions by any measures per se. Quite the opposite, the CJEU clearly stated which (substantial and procedural) conditions sports' governing bodies' statutes guaranteeing sports' competitions' homogeneity need to meet to comply with EU Law.

Second, the CJEU downplays the specific characteristics of sports and the so-called European Sports Model (see e.g. AG Rantos, C-333/21, paras. 30-33). The CJEU acknowledges that there are specific characteristics of sports, which are potentially relevant when applying provisions of EU Law. However, they are nothing more than specific characteristics of any economic sector.

Third, the CJEU examines the conduct in each proceeding in detail to assess whether it constitutes a restriction of competition "*by object*" or "*by effect*". Examining (1) a conduct's content, (2) its economic and legal context and (3) its objectives may be complex and time-consuming. However, it is still less complex than assessing its (actual or potential) effects.

Fourth, the three-pronged Meca-Medina test does not apply for restrictions of competition "*by object*". That is particularly relevant for other sports-related cases pending before the CJEU, such as the dispute over the most recently (voluntarily) suspended FIFA Football Agents Regulation ("FFAR") (C-209/23), whose provisions constitute "*by object*" restrictions of competition at least according to the Dortmund Regional Court. However, the Meca-Medina test was applied on the FFAR before the CAS. It remains to be seen how this will turn out in the light of the three recent judgments.

Fifth, the CJEU explicitly stated that Articles 101 and 102 TFEU have to be read in conjunction with Article 106 TFEU, where there are undertakings acting as a sort of "private regulators". Hence, the CJEU aims to limit sports federations‘ dual role as regulators and economic stakeholders. In a substantial way, this may be of particular relevance beyond sports, especially for digital platforms.

Sixth, the CJEU aligns the interpretation of Articles 101 and 102 TFEU, especially with regard to the substantial and procedural safeguards sports' governing bodies' statutes must contain to be compliant with EU Competition Law. Further, the CJEU aligns the conditions for justifying (Article 102 TFEU) and exempting (Article 101 (3) TFEU) conduct. Further, the CJEU somewhat aligns the interpretation of the EU Competition rules and the freedom of movement rights, inter alia, regarding the finding of an infringement (Articles 101 and 102 TFEU) and the justification of an obstacle to the freedom to provide services (Article 56 TFEU).

Seventh, the CJEU downplays the CAS jurisdiction whenever EU Competition Law is at stake, as it requires a court that fulfils the conditions of Article 267 TFEU (i.e. that is entitled to refer to the CJEU) to review arbitration awards.

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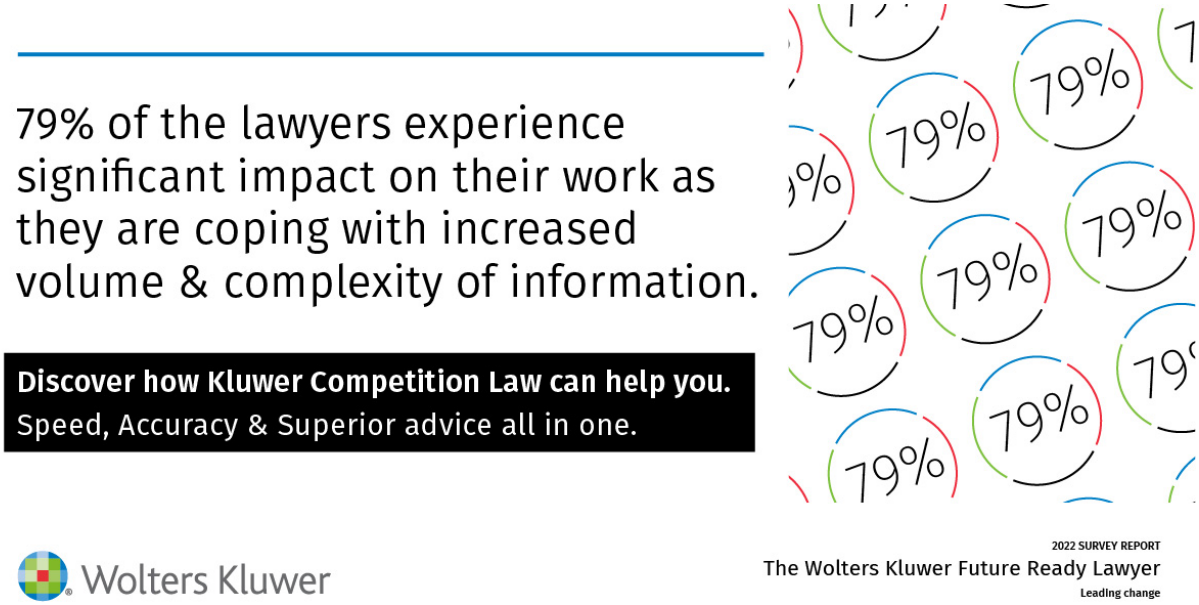

This entry was posted on Monday, January 8th, 2024 at 9:00 am and is filed under Arbitration, European Court of Justice, Exemptions, Restriction by object, Sport, Sports law
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