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ISU v Commission: Arbitration as a Reinforcement of Infringements of EU Competition Law

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On 21 December 2023, the CJEU hit the newspaper headlines after handing down the judgments in Case C-333/21 European Super League Company, Case C-124/21 P International Skating Union v Commission, and Case C-680/21 Royal Antwerp Football Club (see an analysis of those cases from the antitrust perspective here). All three cases raised complex questions regarding the application of EU competition law to international sports federations and clubs. The present commentary focuses on a specific and unique aspect of the appeal in *ISU v Commission* regarding the settlement of disputes in the sports industry through arbitration before the Court of Arbitration for Sport (CAS) in Lausanne.

Background

The International Skating Union (ISU) operates a set of prior authorisation and eligibility rules. The former governs the procedure to grant advance authorisation to organise an international skating competition. The latter determines the conditions according to which athletes may take part in skating competitions. These conditions include the competition's prior authorisation by the ISU. ISU decisions applying the prior authorisation and eligibility rules can be challenged exclusively before the CAS.

CAS awards may be challenged before the Swiss Federal Tribunal through an action to annul the award. As far as the athletes are concerned, recourse to CAS arbitration is "*compulsory*" in the sense of ECtHR case law (see *Mutu and Pechstein v Switzerland*, applications Nos 40575/10 and 67474/10). Indeed, recourse to arbitration does not originate in the freely expressed wishes of the parties. Rather, athletes must consent to the exclusive jurisdiction of the CAS in order to qualify as professional skating athletes.

Two Dutch speed skaters submitted a complaint against the ISU to the European Commission alleging that the ISU's eligibility rules infringed EU competition law by threatening the speed skaters with lifelong bans from its competitions if they participated in competitions not authorised by the ISU. In its decision of December 2017 (**Decision**), the Commission found that the ISU's eligibility rules constituted a restriction of competition by object infringing Article 101(1) TFEU, that could not be justified. It also found that the compulsory and exclusive jurisdiction of the CAS to hear challenges against ISU eligibility decisions reinforced the infringement of competition law.

The ISU challenged the Decision before the General Court which dismissed the ISU's action insofar as it related to the prior authorisation and eligibility rules but upheld it with respect to CAS arbitration. In a nutshell, the General Court found that the CAS' exclusive and compulsory jurisdiction did not reinforce the infringement of Article 101(1) TFEU for four reasons. First, the Commission had not called into question the very possibility of recourse to arbitration, nor considered that the conclusion of an arbitration clause in itself restricted competition. Second, the Commission had not considered that CAS arbitration infringed the right to a fair hearing as such. Third, the conferral of exclusive and compulsory jurisdiction on the CAS to review ISU decisions could be justified by legitimate interests linked to the specific nature of the sport, the need for expedient dispute settlement and the international nature of disputes. Fourth, the General Court stressed that skating athletes and any potential competitors to the ISU were not deprived of remedies under EU law. Not only could they bring actions for damages before the national courts but also lodge complaints with the Commission and the national competition authorities for breach of EU competition law (paras 152-159 of the GC's judgment). Interestingly, in holding that the recourse to CAS arbitration is not such as to compromise the full effectiveness of EU competition law, the General Court distinguished the recourse to arbitration in this context from the right of investors to have recourse to arbitration against a Member State under a bilateral investment treaty that the Court of Justice had considered contrary to the principle of autonomy of EU law in **Case C-284/16 Achmea**.

The ISU appealed the General Court's judgment before the Court of Justice while the two Dutch athletes, who had intervened in the first instance, filed a cross-appeal challenging the General Court's finding that the CAS' exclusive and compulsory jurisdiction did not reinforce the infringement of Article 101(1) TFEU.

In his Opinion, Advocate General Rantos sided with the ISU considering that the General Court erred in law in upholding the Decision insofar as it found the prior authorisation and eligibility rules to constitute a restriction by object. However, he sided with the General Court on the issue of arbitration, highlighting the fact that CAS arbitration applies in relations between private parties and an international sports federation (and not a Member State) (para 159 of the Opinion).

In its judgment, the Court of Justice did not follow AG Rantos' Opinion. It dismissed the ISU's appeal and upheld the Commission's and General Court's finding that the prior authorisation and eligibility rules constituted a restriction of competition by object that could not be justified. It also upheld the athletes' cross-appeal against the General Court's finding that the CAS' exclusive and compulsory jurisdiction did not reinforce the infringement of Article 101(1) TFEU. On that basis, it set aside the General Court's judgment and dismissed the ISU's action of annulment to the extent that it had not been previously dismissed by the General Court.

Key findings of the Court of Justice

Restriction by object

The judgment provides a very lucid and tidy restatement of the case law on Article 101(1) TFEU, regarding in particular the definition and proof of restrictions by object and the possibility of considering that certain specific conduct, that is justified by the pursuit of legitimate objectives in the public interest, does not come within the scope of the prohibition laid down in Article 101(1)

TFEU.

As noted by Professor Ibáñez Colomo, the judgment is noteworthy for treating organisations such as the ISU as undertakings holding powers akin to those referred to in Article 106 TFEU. Indeed, such organisations find themselves in a situation of conflict of interest as economic operators who perform a regulatory or quasi-regulatory function and, hence, have the power to deny their competitors entry to the relevant market or to favour their own activity. In these conditions, the ISU was found to be subject to strict obligations including in particular, the respect of the principle of equality of opportunity and the duty to adopt rules that are transparent, objective, non-discriminatory and subject to effective review by the courts.

Through a combined reading of Articles 101, 102 and 106 TFEU, the Court held that the holding of an unfettered power that does not comply with these strict obligations constitutes an abuse of dominance and may also be regarded as a restriction by object, or at the very least by effect.

Recourse to CAS arbitration – scope

As a preliminary matter, the Court of Justice clearly delineated the scope of its findings with respect to the CAS' exclusive and compulsory jurisdiction to hear challenges against ISU decisions. It limited its findings to ISU decisions that concern skating as an economic activity and which are, therefore, capable of affecting competition. In particular, the Court of Justice limited its findings to the submission of two types of disputes to CAS arbitration, namely disputes regarding (i) the organisation, and marketing of international speed skating competitions and (ii) the right to take part in such competitions as a professional athlete (para 189 of the judgment).

It follows that the submission of all other kinds of disputes to the exclusive and compulsory jurisdiction of the CAS does not reinforce the ISU's infringement of Article 101(1) TFEU.

Recourse to CAS arbitration – reinforcement of the infringement

The judgment is not a wholesale condemnation of CAS arbitration. Indeed, the Court of Justice clarified that the reinforcement of the infringement of EU competition law 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, in reality, subject to judicial control by the Swiss Federal Tribunal only. Thus, matters of EU public policy (such as EU competition law – see **Case C-126/97 Eco Swiss**) escape the review by the Member States' courts and, ultimately, the jurisdiction of the Court of Justice, despite the fact that such control is necessary to ensure the effective legal protection of individuals, especially in circumstances where recourse to arbitration does not originate in the freely expressed wishes of the parties but is imposed by the international sports association.

On this basis, the Court held that "[i]*n 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*" (para 194 of the judgment)

Precisely because the ISU is in a position of power akin to that of undertakings referred to in

Article 106 TFEU, its prior authorisation and eligibility rules must, *inter alia*, be subject to effective review by the Member States' courts which may confirm the CAS awards or refer preliminary questions to the Court of Justice pursuant to Article 267 TFEU. Review of CAS awards by the Swiss Federal Tribunal is not capable of satisfying that requirement, especially when taking into account that court's case law pursuant to which EU competition law does not form part of Swiss public policy.

In light of these considerations, the Court of Justice held that the General Court could not have found that recourse to CAS arbitration could be justified by legitimate interests linked to the specific nature of the sport.

Remedies other than review by Member States' courts are not enough

According to the Court of Justice, the General Court erred in finding that CAS arbitration did not reinforce the infringement of EU competition law because the athletes had other remedies at their disposal. The right of the athletes to seek damages or to file a complaint with the Commission or a national competition authority does not compensate for the lack of a remedy entitling them to bring action before a court seeking to have the conduct infringing competition law being brought to an end or, where appropriate, to have the disputed measure reviewed and annulled.

Outlook

The Court of Justice's judgment is very pragmatic. The ISU had arranged its affairs in a manner in which the courts of the EU Member States would not be seized of disputes regarding the exercise of skating as an economic activity because all such disputes would fall under the exclusive and compulsory jurisdiction of the CAS and the Swiss courts. In their cross-appeal, the athletes convincingly set out the practical reasons for which CAS awards would not be the subject of effective review in the EU (e.g., through exequatur proceedings), despite the fact that the ISU's rules and decisions would affect the EU market. If anything, it is surprising that the General Court and AG Rantos found that state of affairs imposed unilaterally by the ISU normal or desirable. The Court of Justice put an end to a *de facto* state of impunity vis-à-vis EU competition law that the ISU had created for itself by, systematically and without exception, requiring athletes to pursue their EU law-based rights before manifestly inappropriate fora, namely the CAS and the Swiss courts. The judgment is thus to be welcomed in this respect.

From a doctrinal point of view, the judgment is remarkable in the sense that, while it makes several references to the *Eco Swiss* case law, it is, in fact, imbued with the spirit of the principle of autonomy as interpreted in *Achmea.* In that case, the Court drew a distinction between commercial and investment treaty arbitration. It held that the principle of autonomy of EU law precludes Member States from conferring, by international treaties, jurisdiction to hear an indefinite number of disputes subject to EU law to arbitral tribunals. At the same time, it safeguarded commercial arbitration and relied on *Eco Swiss* to explain that, unlike investment treaty arbitration, recourse to commercial arbitration is compatible with the EU's judicial architecture because it stems from the freely expressed wishes of the parties, meaning that two specific parties freely agree to submit disputes under a specific relationship to arbitration.

Unlike the General Court and AG Rantos, in *ISU v Commission*, the Court of Justice avoided any reference to *Achmea*. Yet, it is clear that it did not consider CAS arbitration to fall within the commercial arbitration exception recognized by *Achmea*, despite the fact that both the ISU and the athletes are private parties. Save for the fact that no State actor is involved in CAS arbitration, the analogy between investment treaty arbitration and *Achmea* could not have been any stronger. The ISU had exorbitant powers by comparison to the athletes to the point that, as held by the ECtHR, submission to CAS arbitration was not voluntary. Indeed, recourse to arbitration was not provided for in a specific agreement concluded with the athletes but was dictated in the ISU Statute, rules, codes, and communications that the athletes had to accept in order to become professional athletes. Such recourse thus governed all possible disputes that might arise between the ISU and the athletes, without exception, including disputes regarding the rights conferred on the athletes by EU law. Neither the CAS nor the Swiss Federal Tribunal are courts or tribunals of a Member State that can refer questions for preliminary rulings to the CJEU pursuant to Article 267 TFEU.

Given this analogy between CAS arbitration (as provided for by the ISU Statute and rules) and investment treaty arbitration, *ISU v Commission* should not be seen as further reducing the scope of the commercial arbitration exception created in *Achmea* but in fact as reinforcing it.

The more interesting question is perhaps whether the logic of *ISU v Commission* could be extended to commercial arbitration clauses included in contracts concluded between economic operators and Member States. Although such clauses can also cover disputes to which EU law rules of public policy apply, two reasons militate against such extension. First, recourse to arbitration in State contracts is not compulsory and systematic. Second, such an extension is certainly not possible insofar as the seat of the arbitration is placed in an EU Member State. Finally, although systematic and compulsory recourse to CAS arbitration does not *per se* constitute an infringement of Article 101(1) TFEU, it reinforces the infringement of Article 101(1) TFEU by the ISU's prior authorisation and eligibility rules insofar as it precludes an effective review of ISU's decisions with regard to EU competition law. As provided by the Decision that was entirely upheld by the Court of Justice, the ISU is required to provide for an objective, transparent and non-discriminatory procedure for the adoption and effective judicial review of decisions regarding the ineligibility of skaters and for the authorisation of speed skating events.

Some commentators (see e.g. Antoine Duval) consider that this aspect of *ISU v Commission* creates "*far-reaching implications*" for the CAS to the point that the CAS could be forced to relocate to the EU. Whilst it is true that the Decision and the judgment require the ISU to reconsider the review of its decisions, the claim that CAS would be forced to relocate to the EU appears, at least at first view, exaggerated. It is true that perhaps the easiest solution would be for the CAS to amend its rules so that CAS arbitrations may also be seated outside Switzerland. However, neither the Decision nor the judgment requires the CAS to take any corrective action. Nor are they concerned with the CAS and its conduct, or even with the principle of submitting disputes to the CAS. Rather, they are concerned with the manner in which the ISU has arranged for its decision to be reviewed. It is, therefore, unlikely that the CAS will have to relocate.

The ISU could comply with Article 101 TFEU simply by (following the example of other international sports associations) putting an end to the systematic and compulsory submission of all disputes to the CAS. Had recourse to CAS arbitration been voluntary, the outcome of the case on this point may have been different. As indicated by the Court of Justice, the ISU could maintain systematic and compulsory submission to CAS arbitration for all disputes regarding skating as a sport and not as an economic activity. By contrast, for disputes regarding the organisation and

marketing of skating competitions and eligibility to take part in such competition as a professional athlete, the ISU could offer its competitors and athletes the right to choose between CAS arbitration in Switzerland or another form of institutional arbitration seated in an arbitration-friendly jurisdiction in the EU.

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* The views expressed in the post are strictly personal and reflect the views of the author only.

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