Kluwer Competition Law Blog

EU Court of Justice Delineates the Scope of the Wouters Exception

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On 21 December 2023, the Court of Justice of the European Union (CJEU) delivered its highly anticipated judgment in the *European Super League Company* (ESL) case (C-333/21), alongside two other rulings dealing with the application of EU competition and free movement law to sports governance: *International Skating Union* (ISU) *v Commission* (C-141/21 P) and *SA Royal Antwerp Football Club* (Royal Antwerp) (C-680/21). While the ESL case has garnered most of the attention, it is important to read the trio of judgments together (see the previous post assessing the rulings from an antitrust perspective here). The Court – confronted with an increasing number of sports-related antitrust cases – made a clear concerted effort to outline the principles for the appraisal of restrictive sporting rules and practices, particularly those connected to the unusual gatekeeper power that most sports governing bodies possess. This is an assessment that is necessarily guided by sector-specific considerations and the unique role that EU competition law assumes in subjecting transnational private rule-making to rigorous scrutiny.

However, the three judgments do address several points of broader relevance for EU competition law. This blog focuses on one of these, namely the Court's endeavours to clarify and confine the scope of the enigmatic *Wouters* exception, which removes certain anti-competitive practices from the reach of antitrust rules, in those cases where they are necessary means for achieving a legitimate objective.

The primary *Wouters* case and subsequent debate

The Court of Justice established the exception in its 2002 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* judgment (C-309/99). The Court had to determine whether a regulation adopted by the Netherlands Bar prohibiting partnerships between members of the Bar and accountants for ethical reasons violated Article 101 TFEU (and Articles 49 and 56 TFEU). The Court acknowledged that the restriction constituted a decision by an association of undertakings and had the potential to distort competition. It noted, however, that Article 101(1) TFEU does not necessarily prohibit every restriction of the freedom of action of undertakings. To determine whether an agreement or decision constitutes a restriction of competition within the meaning of that provision, account must be taken of its economic and legal context. This, then, may lead to the finding that the consequential anti-competitive effects are inherent to a legitimate objective (the suitability subtest) and do not go beyond what is necessary to attain the pursuit of that objective

(the necessity or least-restrictive-means test). If so – and in the case at hand the Court considered that this test was satisfied – the restriction falls outside the scope of Article 101(1) TFEU.

The introduction of this exception was not a passing phenomenon (or "*accident de parcours*") as the Court reaffirmed its reasoning in subsequent case law dealing with the rules of professional conduct. A prime example is the *Meca-Medina* case (C-519/04), where the Court was asked whether the anti-doping regulations of the International Olympic Committee (IOC) infringed Article 101(1) TFEU. The Court, unlike the European Commission and the General Court, refused to give immunity to a category of "*purely sporting*" rules and instead allowed sports-specific justifications to offset a *prima facie* case of competitive harm based on the *Wouters* exception. Ever since, this free movement-style proportionality test has been the central focus of antitrust cases involving sporting rules and practices.

That said, the *Wouters* exception remains a distinctive feature within EU competition law because it invites an examination of public interest justifications at the Article 101(1) TFEU stage. Although it has frequently been likened to the ancillary restraints doctrine, that comparison has done little to resolve the ongoing debate about the precise scope and application of the exception. A recent topic of discussion is whether private "*regulatory*" initiatives aimed at achieving sustainability goals in a given sector can invoke it (see e.g. here and here). In its draft guidelines on sustainability agreements, the Netherlands Authority for Consumers and Markets did not rule out that possibility but found the doctrine "*still insufficiently clear*". Similarly, the European Commission's revised guidelines on horizontal cooperation make a passing mention of the exception (footnote 366) downplaying its significance while not entirely dismissing that sustainability agreements could escape the Article 101(1) TFEU prohibition by satisfying the requirements of the *Wouters* test. In short, the very limited case law (six Court of Justice rulings) left us with considerable uncertainty.

The *Wouters* exception: when and where?

The *ESL*, *ISU*, and *Royal Antwerp* judgments mark the first time the Court of Justice properly addresses the scope of application of the *Wouters* exception. The Court makes four important points in this context.

First, the Court specifies that the *Wouters* exception applies specifically in cases involving "*rules adopted by an association such as a professional association or a sporting association*" that regulate the "*exercise of a professional activity*" with a view "*to pursuing certain ethical or principled objectives*" (C-333/21, para 183). This emphasis on rulemaking by professional bodies can be interpreted as limiting the broader application of the exception to, for instance, agreements setting sustainability standards. Their assessment also presents challenges in evaluating costs and benefits. Nevertheless, restricting the *Wouters* exception to private (but quasi-legislative) measures imposed on members of a profession appears justified as this peculiar context demands a more intuitive means-ends analysis to encompass the regulatory objectives at play.

Second, the Court affirms the applicability of the *Wouters* exception to Article 102 TFEU, extending its reach beyond the confines of Article 101 TFEU. Because the two antitrust provisions can come into play at the same time, as exemplified by the *ESL* and *Royal Antwerp* judgments, the Court emphasizes that they should be applied consistently, adhering to their respective conditions

of application (C-333/21, paras 119,186). In its 2007 White Paper on Sport, the European Commission had already taken the view that unilateral conduct may also benefit from the *Wouters* exception. More recently, the German competition authority applied the *Wouters* test when examining the advertising restrictions that the IOC imposes on Olympic athletes and their sponsors under Article 102 TFEU. The Court's support for this approach, coupled with its express recognition of the need for a consistent analytical framework, is a welcome development.

Third, the Court clarifies that the *Wouters* exception cannot be applied to conduct that is, by its very nature, harmful to the proper functioning of competition (C-333/21, para 186). This means that before considering the exception, it must first be established whether the conduct can be classified as a restriction by object Only when this is not the case, the *Wouters* exception can be invoked, possibly leading to the conclusion that the identified restriction of competition or abuse nevertheless escapes the prohibition laid down in Article 101(1) TFEU or Article 102 TFEU.

The Court could have just acknowledged it was both redefining the rationale of the exception and the circumstances under which it applies. Instead, it asserts that this limitation was already "*implicitly but necessarily apparent*" from the absence of any reference to the *Wouters* case law in its judgment in the *MOTOE* case (C-49/07). It is difficult to see how that conclusion was derived. In *API* (C-184/13 to C-178/13) and *CHEZ Elektra Bulgaria* (C-427/16 and C-428/16), the Court established that the exception could also extend to State measures that coerce or induce undertakings to engage in anti-competitive practices, potentially violating Article 101 TFEU read in conjunction with Article 4(3) TEU. It follows that the exception can also apply when Article 106(1) TFEU is read together with Article 102 TFEU, as was the case in *MOTOE*. However, even so, the Court never previously applied the *Wouters* exception to (State-imposed) unilateral conduct. Furthermore, in both judgments, the Court stated that the legislation at issue might fall outside the prohibition laid down in Article 101(1) TFEU if the *Wouters* conditions are satisfied, notwithstanding that it rendered mandatory a decision of an association of undertakings "*which has the object or effect of restricting competition*". Even comparisons with the ancillary restraints doctrine under Article 101(1) TFEU, which only applies in cases where the main transaction is not anti-competitive in nature, would not have implied this change in direction. In *Lupin* (T-680/14), for instance, the General Court reasoned that non-challenge and non-marketing clauses contained in a patent dispute settlement agreement could not be regarded as ancillary, because that agreement was aimed at market exclusion. It then added that for the same reason, the *Wouters* exception could not be invoked (paras 138-144). However, the Court of Justice has never linked the two doctrines. There are conceptual similarities, but also differences. In *MOTOE*, there were no restraints to appraise in the light of the effects of a main operation: the creation of the legal monopoly carried with it the risk of abuse. So, necessarily apparent? Not quite.

Fourth, the Court sheds some light on the overlap between the *Wouters* exception and the traditional justification framework laid down in Article 101(3) TFEU. It maintains that the two frameworks are not mutually exclusive. Still, in practice, an efficiency defence under Article 101(3) TFEU will not be successful if the conduct fails the *Wouters* test on the same grounds. The Court explicitly recognizes that the *Wouters* exception offers greater flexibility by stressing that the criteria for establishing an efficiency defence "*are more stringent*" (C-333/21, para 189). In addition to the need to demonstrate appreciable objective advantages ("*efficiency gains*") and the indispensability of the restrictions for achieving them, Article 101(3) TFEU requires proving that an equitable part of the benefits is passed on to consumers and that there is no elimination of competition for a substantial part of the products or services concerned. The case law further mandates – as part of the first condition – a weighing of the pro- and anti-competitive effects to

ensure that the efficiency gains offset the harm to competition.

Interestingly, the Court contributes to more convergence between the tests by suggesting that the "*no elimination of competition*" condition similarly applies to the *Wouters* exception (even though a rule would not necessarily fail the proportionality test simply because it eliminates competition). When describing the *Wouters* test, the Court highlights the need to assess whether the inherent anti-competitive effects do not exceed what is necessary "*in particular by eliminating all competition*" (C-333/21, para 183). Furthermore, when addressing the proportionality requirement to satisfy the test of justification under Article 45 TFEU – which conceptually aligns with the *Wouters* test – the Court in *Royal Antwerp* draws upon its analysis of the third and fourth conditions of Article 101(3) TFEU (C-680/21, para 148).

Assuming that the public interest benefits can be translated into economic efficiencies (that is a topic for another day), the "*fair share for consumers*" condition under Article 101(3) TFEU stands as the most prominent difference between the two frameworks. The Court emphasizes in its *ESL* and *Royal Antwerp* judgments that this requires the defendants to demonstrate that the sporting rule at issue positively impacts each of the various categories of users, "*comprising, inter alia national football associations, professional or amateur clubs, professional or amateur players, young players, and more broadly, consumers, be they spectators or television viewers*". This is a far more demanding proposition than the more open-ended proportionality test under the *Wouters* exception.

Which legitimate objectives are legitimate?

One of the key debates surrounding the Wouters exception has always been the question of which types of justifications can be invoked to support its application. Some assert that this should be confined to objectives that have a foundation in public law (because then there is input legitimacy, see e.g. here) or those related to "national" interests. However, this view has always been challenged by sports-related cases, which have allowed for objectives that arguably fall outside these categories. Others have characterised legitimate objectives as those aimed at protecting a public good (see e.g. AG Mazák in C-439/09).

In its decision on the ISU Eligibility Rules, the European Commission introduced a limiting factor by stating that only non-economic objectives can be accepted as legitimate objectives. After all, the Wouters exception is a transplant from the free movement case law, where "economic" aims are precluded as justifications (para 220). It, therefore, refused to consider the protection of financial interests as a legitimate objective. And it accepted the prevention of free-riding only as an efficiency benefit. The Court of Justice, however, does not address this specific issue. It merely refers to "*legitimate objectives in the public interest*" and "*principles or ethical objectives"* and appears willing to consider the identified legitimate sporting interests (such as encouraging the recruitment and training of young professional football players) as relevant justifications regardless of the analytical framework. This is sensible. The sports sector exemplifies the blurry boundaries between economic/non-economic aims, making labels less useful. For instance, maximising commercial revenue can easily be reframed as preserving the sports ecosystem and, therefore, promoting grassroots development: whether we should accept it as a justification will depend on the presence of effective redistribution mechanisms (see C-333/21, paras 234-237).

Conclusion: more clarity can be just as confusing

The Court of Justice has finally attempted to clarify the scope of the Wouters exception through its judgments in *ESL*, *ISU*, and *Royal Antwerp*. While expanding the exception's application to Article 102 TFEU, the Court has mostly narrowed its scope, notably by excluding its applicability when anti-competitive effects can be presumed. This was a wholly unnecessary move: the finding that the conduct appears to restrict competition by object should simply have been a pertinent factor in the proportionality assessment (as it was in the Commission's ISU Eligibility Rules decision). In fact, this exclusion has two undesirable and perhaps far-reaching consequences. Firstly, the application of the Wouters exception presupposes that the conduct is capable of distorting competition. However, the Court now requires a definitive classification of the nature of the restriction of competition or the abuse, before we can consider whether there is a restriction of competition or abuse within the meaning of Articles 101(1) TFEU or 102 TFEU. This is not only counterintuitive but the uncertainty inherent in that classification exercise, as evidenced by the three judgments, risks pushing the analysis in any event towards an efficiency defence. Secondly, the narrower application of the Wouters exception diminishes its distinctive function as a more suitable means-ends test to give proper weight to public interest considerations. Now the nature of the restriction delimits which justification framework(s) will be available, obscuring their relationship. Has the Court (inadvertently) rendered the Wouters exception practically obsolete?

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* The author represented the complainants in the proceedings before the European Commission that resulted in its decision of 8 December 2017 in Case AT.40208 – International Skating Union, referred to in this blog. The opinions expressed in this blog are purely personal and do not necessarily correspond with those of the complainants.

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