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Restrictions by Object and the Public Interest Defence

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On 30 April 2024, AG Szpunar issued his Opinion in Case C-650/22, *FIFA v BZ*. This gives the Court an opportunity to revisit and apply the December 2023 trilogy of sports cases decided by the Grand Chamber, which I have discussed in the Revista de Derecho Comunitario Europeo and which have been nicely contextualized by Jan Zglinski.

I beg the reader's indulgence: I shall analyse this Opinion and related fragments of the Grand Chamber trilogy by telling a story of how a fictitious national judge might respond to this case law.

Ferguson v Galaxia Association of Snooker Players

Galaxia is a new Member State of the European Union. Snooker is the preeminent sport, regulated by the Galaxia Association of Snooker Players. Rule 4321 of the Association forbids members from playing tournaments in countries that do not allow women to play snooker. Infringement of this rule results in a one-year ban from playing snooker in the EU. Ferguson, Galaxia's most charismatic player, has received a lucrative offer to play snooker in Ruritania, a country which forbids the playing of any sport by women. He goes to the national court and seeks a declaratory judgment that Rule 4321 is contrary to the confederation's competition laws and the free movement of workers.

Justice Hercules hears the case. Reading the Grand Chamber trilogy and the very elegantly written Opinion of AG Szpunar, she is puzzled. More than that, she feels that she has been well and truly snookered. Here is why.

The Concept of a Restriction of Competition

Rule 4321 limits the free movement of workers. This is the easy bit. Competition law could also apply: the rule is a decision of an association of undertakings which affects trade because the penalty forbids playing across the EU. But does it restrict competition? Hercules thinks that if she were to follow the ECJ case law the answer is yes. But she would like to apply a coherent set of principles, not just follow the Court unquestioningly.

The key principle is this: conduct restricts competition when (if we are talking about sellers

limiting competition) it leads to a reduction in output and an increase in price, or (if we are talking about buyers limiting competition) it leads to a reduction in the factors of production purchased and a lower purchase price. A restriction of competition causes a deadweight loss and a loss in consumer surplus (if conduct is by sellers) or in supplier surplus (if conduct is by buyers). This is how Hercules sees the economic approach which lies at the heart of the modern case law.

This approach is not always free from doubt when welfare effects are ambiguous. Moreover, it is not clear whether the reason we condemn is the deadweight loss or whether it is the lost surplus. Hercules thinks the latter, for competition law is premised on considerations of distributive justice.

She thinks AG Szpunar applies this approach in *FIFA v BZ*. The case deals with rules that have the following practical consequences: (1) they make it more costly for Club B to recruit a player from Club S because if the player is in breach of contract with Club S then Club B becomes jointly and severally liable with the player for paying damages to Club S and moreover (and this is more significant) Club B cannot now recruit other players for two consecutive registration periods if it buys a player who is in breach of contract; (2) they forbid club S from releasing a transfer certificate which is necessary for club B to deploy the player they are buying.

Where is the harm to competition? As AG Szpunar nicely puts it, we have to ask if the rules 'send a chill down *each player's* spine' or if they put an extremely high price tag for club transfers, reducing their volume (para 53). In other words, scale matters: the question is if as a result of these rules, a very large number of players are likely to be unable to change clubs, allowing football clubs to pay less for players and/or the rules increase in the cost of transfers making football matches less appealing to spectators. However, she is not certain that the clauses in *BZ* have either of these systemic effects. Competition is only eliminated for those players whose contract is terminated without just cause (para 56). We need to know if this could be a large enough class of players such that there may be a significant impact on the market. Moreover, the AG's analysis is incomplete because the thing to be studied is also the effect of the penalty for the club who hires this kind of player: they are forbidden from recruiting more players for some time. This was left unexplained, but this element may be crucial because it serves to multiply the possible adverse effect of the transfer rules.

Hercules is happy to apply the AG's approach to the case before her even if she disagrees with his application to the facts, which anyway is a question for the national court. The question is whether denying certain economic opportunities serves to either harm player welfare or consumer welfare. However, she worries that this analytical framework is not the one expected after the Grand Chamber trilogy.

On the one hand, she welcomes AG Szpunar's recalling the Grand Chamber's remark that 'some private entities act in a manner close to that of a State, either by sheer dint of their economic power or because of the manner in which they enact "rules"' (para 33). On the other hand, Hercules thinks that this constellation may require a different test to that which we apply to agreements among undertakings. And indeed, the Grand Chamber appears to have done so in the December 2023 trilogy. Recall that in two of those cases (*ISU* and *Superleague*) the sports regulator was governing entry into the downstream market for organizing sporting events. The Court's focus is on whether the selection criteria allow 'the holding of sporting competitions based on equality of opportunity and merit' (ISU, para 132). The Court considers harm to the competitive process rather than its economic or distributional effects. Is this a suggestion that when testing rule-making under competition law we apply a less economics-based approach? Hercules hopes not, for otherwise, the

law would lose its integrity. Fortunately, AG Szpunar follows an economic approach to explore if there is harm to competition. But the Court might disagree and place emphasis on the denial of the player's economic opportunities as such.

Restrictions by Object

Hercules feels that the Court of Justice would say that Rule 4321 is a restriction of competition by object. She thinks this is wrong because, as just shown above, the mere existence of a restrictive rule is insufficient to infer harm to competition. In the case before her, if the rule only serves to prevent players from travelling to some countries, but they are free to ply their trade across the vast majority of the other countries in the world, then there would be no restrictive effect.

Object restrictions, the Court always frustratingly repeats, are those which are 'by their very nature' harmful to competition. AG Szpunar explains that this means the restriction is 'in itself' (footnote 29) anticompetitive. Equally unhelpful. Hercules understands why a price-fixing cartel is anticompetitive by object: anyone 'with a rudimentary understanding of economics' (California Dental v FTC 526 US 756, 757) can work out that this conduct reduces output and increases price. But an agreement that prevents the transfer of an unspecified set of footballers cannot 'eliminate one of the essential parameters of the competition in which football clubs may engage' (para 54). In contrast, there are even websites where the die-hard football fan can observe who might move and every player's transfer market value. In other words, *FIFA v BZ* is one of those cases where the rules may have the capacity to cause harm to competition, but a closer look at its effects is warranted, not an object condemnation.

More generally: object restrictions are those where, with a cursory look at the legal and economic context it is clear that conduct harms competition. A rule that might affect the transfer market cannot be condemned unless we know that it affects a sizeable portion of that market. A ban on playing in some countries is not harmful unless this prevents players from playing anywhere but Galaxia. And even then, if Galaxia is where 90% of all snooker tournaments are held and these are organized by some 20 promoters competing fiercely for players, the rule might not have an anticompetitive effect.

Public Interest Justifications to Restrictions of Free Movement of Workers

Back to the free movement of workers rule: the rule is non-discriminatory as it applies to any snooker player, therefore, it is possible for the association to seek to justify that rule based on an overriding reason relating to the public interest. Hercules is in no doubt that Rule 4321 may be so justified: society must stand up for those who have been historically discriminated against, the rule is well-motivated and may be a way to exercise soft power to change Ruritania's policies. A one-year ban will deter most players.

However, AG Szpunar's Opinion suggests otherwise because there is a risk the rule fails the proportionality test. The test is that the rule must 'be suitable for securing, in a consistent and systematic manner, the attainment of the objectives pursued and must not go beyond what is necessary in order to attain them' (para 63). Applying this to *FIFA v BZ*, the Opinion offers the following guidelines. First, Club S's entitlement to compensation for breach of contract is deemed

proportionate provided it is compensatory and not punitive (para 67). This imports rules found in contract law (by which penalty clauses are frowned upon, see e.g. Art 9:509 PECL) into an analysis of competition law. Second, Club B's joint and several liability to Club S goes beyond what is necessary because it is wrong to presume that Club B has induced the breach of contract (para 68). Third, Forbidding Club S from issuing a transfer certificate is disproportionate because there is a risk that this is done when the breach of contract is merely alleged and not yet shown (para 69). The AG analysis borrows from contract law, which may not be adequate as we are not testing justice between the parties but assessing a wider public interest.

Moreover, Hercules wonders whether the context within which these rules were drafted matters in assessing their proportionality. FIFA redrafted its transfer rules after the Commission expressed concerns about their compatibility with EU Law and the current version is the result of bargains between FIFA and the main players' union, FIFpro. The joint agreement of both sides and the Commission's statement that the revised rules achieve an adequate balance between market freedoms and public interest considerations appear relevant indicators of the proportionality of the rules.

More generally, Hercules thinks that the fine-grained analysis of proportionality proposed by AG Szpunar may well be adequate in a case like *BZ* but cannot be a general approach. It would be, pardon the pun, disproportionate to always ask a court to test in such a manner the proportionality of every rule. If this were so we would have to scrap the road traffic code: punishing someone for running a red light would be disproportionate if this happened when there was no oncoming traffic. But this would turn the world into Naples, where road signs are mere suggestions! Sometimes, like with Rule 4321, we know the rule is appropriate without performing a granular proportionality assessment.

Justifications and Competition Law

If the sporting rule is a restriction of competition by object, then no public interest justification is admissible. This proposition, which comes from the December 2023 trilogy, is what really snookers Hercules. Even if she can save the rule from the free movement prohibition, she must block it based on competition law, should it be restrictive by object. And she cannot comprehend why AG Szpunar, who noted this outcome, seems to think this result is unproblematic (para 35). As a matter of principle and justice, there are at least two ways to apply free movement and competition law that are consistent with a constructive interpretation.

First, given that both free movement and competition law are about creating an internal market, they should be interpreted in a similar way. Therefore, if there is a public interest that justifies interference with the internal market, then that public interest defence should be available for competition law restrictions too.

Second, and going in a different direction: given that the AG goes so far as to consider that the infringement of the freedom of movement of workers might be not just an economic freedom but a human right (paras 70-87), then it is bizarre that a human right may be traded off against a public interest while a mere economic freedom (competition law) cannot be so traded off, just because the conduct restricts competition by object. It follows that the many earlier cases giving precedence to economic considerations over human rights have been wrongly decided.

In choosing between these two interpretations, the second does not fit with the bulk of the case law and can be discarded. The first one, which limits the exercise of rights by reference to wider public interest considerations 'reflects the best constructive interpretation of the political structure and legal doctrine' of the EU (Dworkin, *Law's Empire* (1986) ch 7). After all, the EU prioritizes market creation. But then it is not clear why the same public interest justification cannot be applied to all competition law infringements.

The AG follows neither of these two interpretative lines. The only way to explain why he states that the two rules 'must be appraised independently on their merits' (para 34) is that he follows the recent cases issued by the ECJ.

In January 2024 the Court ruled on two requests for a preliminary ruling relating to the fixing of lawyers' fees. In Lithuanian Notaries the Court explained that the public interest justification cannot apply if the conduct 'is *so harmful to that competition* as to justify the view that its very 'object' is to prevent, restrict or distort it' (para 98, my emphasis). In Bulgarian Lawyers, the Court said (referring directly to *Superleague*) that object restrictions reveal '*a degree of harm* in relation to that competition that justifies a finding that it has as its very 'object' the prevention, restriction or distortion of competition' (para 32, my emphasis). But these passages confuse the gravity of an offence with object restrictions. The two are different: object restrictions are not by definition more harmful than effect ones, they are just more obviously restrictive. This mistake is the hook on which the Court in the trilogy and AG in *FIFA v BZ* are refusing to allow restrictions by object to be justified by public interest considerations. No principle and no policy supports this.

Summing Up

AG Szpunar finds that the December 2023 trilogy are 'arrêts de principe' by which the Grand Chamber has invested 'a considerable effort of synthesising and summarising prior case-law' (para 30). But just because the judges tried hard, it is quality, not effort, that should be recognised. For Hercules, the Court still errs in two ways.

First, restrictions by object are not by definition more serious than those by effect, they are just restrictions which are more obvious. As suggested earlier, the correct conceptualization is that object restrictions are those which, having regard to the legal and economic context, reveal a likely harm to competition with relative ease. Once the welfare effects are uncertain or ambiguous, an effects analysis is called for. It follows that an object finding by the Commission is always rebuttable by the undertakings calling into question the obvious nature of the harm. This is the object identity.

Second, when it comes to public interest justifications, the correct statement of the law is: any restriction of competition may be justified based on a public interest, whether it is a restriction by object or by effect. The more egregious the restriction the more likely it is that the justification will fail for lack of proportionality. Therefore, it is not likely that many object restrictions will be deemed proportionate. But as the case before Hercules shows, you never know when a blunt prohibition merits justification.

Hercules thinks there is a real risk that if the Court does not go back on its December 2023 trilogy then she will be forced to conclude in favour of Ferguson. Either she will be forced to rule that there is a restriction by object, as a result of which no public interest justification may be

considered; or she may manage to claim that an effects assessment is needed, but if such effects are proven, the rule risks being too blunt to pass the strict proportionality standard in the Opinion and the public interest justification may fail.

Her only escape might be to refer to Article 8 TFEU ('In all its activities, the Union shall aim to eliminate inequalities and to promote equality, between men and women'). Since the December 2023 rulings suggest that this is a 'cross-cutting provision having general application' (*Superleague*, para 100), then a constructive interpretation of the law requires that the competition rules are interpreted to ensure the principle of gender equality is maintained, and on this basis, she can hold that the restriction of competition (if any is shown) is anyway justified by the importance society places on gender equality.

Yes, the EU Treaties aim to sustain a market economy with free competition. But this market order is only acceptable if certain values are also upheld, like gender equality.

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Hercules is a niece of the homonymous judge whose exploits are recounted in Ronald Dworkin, *Law's Empire*.

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