Kluwer Competition Law Blog

Justifications for Anticompetitive Agreements: AG Emiliou's Sports Trilogy of 15 May 2025

Giorgio Monti (Tilburg University) · Tuesday, June 3rd, 2025

Introduction

Advocate General Emiliou delivered three interlocking Opinions concerning decisions of football governing bodies. Two of these cases were brought to challenge elements of the FIFA Football Agent Regulations (Case C-209/23, RCC Sports and Case C-428/23, Rogon). The third concerns a decision of the Portuguese Competition Authority which had found that a no-poach agreement by football clubs during the Covid pandemic restricted competition (Case C-133/24, Tondela). The Opinions are relevant not only for the sports sector but more generally for an understanding of basic principles of EU competition law. This blogpost focuses on the manner in which the Opinions frame the justifications available to undertakings and associations of undertakings whose conduct infringes competition law and internal market law.

Some fundamental premises should be stated at the outset (*RCC Sports*, paras 29-33). It is lawful, as a matter of EU Law, for a private association (like FIFA or a national football association) to set up rules governing its activities and those of economic actors affiliated to it. However, if these rules harm competition, then Article 101(1) TFEU applies; and if they have an adverse effect on the internal market, so do the free movement provisions (e.g. if the rules hamper the provision or receipt of services contrary to Article 56 TFEU). There is no automatic immunity for anticompetitive rules issued by sport governing bodies. However, on a case-by-case basis, associations may justify restrictive regulations. A brief remark on the way the theory of harm is articulated in these Opinions will be helpful first before discussing justifications.

Theories of Harm

In *RCC Sports* and *Rogon*, the rules (e.g. those limiting agent remuneration) may have an adverse effect on competition in two markets: the market for the services provided by agents (where competition among agents may be distorted) and the market for the transfer of players (where competition among football clubs may be distorted). The AG suggests that the test to determine if such rules are anticompetitive rests on asking whether they limit 'the ability and incentive of those market operators to compete against their rivals'. When it comes to competition between agents, the advice is to consider whether the rules limit agents' incentives to provide services or decrease their incentives to invest in improving their services. As regards competition between football

clubs, the question is if the rules prevent clubs from offering higher fees to secure their services (*RCC Sports*, paras 65-67).

Looking at these same rules from an abuse of dominance perspective, they serve to leverage one's dominance in the market for the organization of football competition. The abuse could be exploitative by imposing unfair trading conditions or exclusionary insofar as they restrict market access to agents and thus limit competition in the two markets. (*RCC Sports*, paras 114-142)

Note that there is no mention of consumer welfare. Under Article 101 and under a theory of exclusionary abuse, the harm is to the competitive process demonstrated by showing a reduction in allocative or dynamic efficiency. Under an exploitative abuse perspective, the harm is to the economic actors whose welfare is diminished, a distributive justice consideration.

In contrast, the analysis of no poach agreements in *Tondela* is puzzling. At first, the AG suggests that conduct can restrict competition by object when the labour side of the market is harmed. No poach agreements mean that employers do not compete to offer better conditions for workers, resulting in a 'suboptimal allocation of human resources.' (*Tondela*, para 52) Up to here the analysis is comparable to that in the football agents cases: does the agreement harm the other side of the market by reducing efficiency?

However, when looking at the specific facts of the case (i.e. that the no poach agreement was a temporary measure designed to make sure that for the final stretch of the football season rich clubs did not go on a shopping spree of players from poorer clubs) the AG suggests that the agreement would be seen as pro-competitive because it prevented the richest clubs from acquiring all the best players and thereby made the remainder of the football season exciting. If football transfers had been allowed, some clubs would definitely go down while the rich ones would be at the top of the table, having bought all the talent. A predictable league would harm the interests of supporters in watching matches, of sponsors in funding football clubs, and of broadcasters to pay to show matches. This might have led to reduced investments and 'a lose-lose situation for clubs and players.' (*Tondela*, para 65) Furthermore, the AG criticises the competition authority for not providing a meaningful answer to questions about the harm caused to consumers (*Tondela*, para 69). This leaves me a bit puzzled as to what the correct theory of harm should be in cases involving the exercise of monopsony power. Is it sufficient to show harm to the labour side of the market? (A partial equilibrium analysis.) Or must one look at the overall impact on both workers and economic actors on the other side of the market? (A general equilibrium analysis.) Or should one trace any anticompetitive effects to final consumers? For what it's worth, in my view it should suffice to prove harm to one side of the market and there is no need to trace this harm back to final consumers or to carry out some sort of overall welfare standard by which all effects are weighed up. We have Article 101(3) for an holistic analysis. More generally, a restriction of competition is about finding harm in a relevant market and when Article 101(3) is engaged, it is countervailing effects on that market which matter. We don't do total welfare in EU competition law.

Recall that challenges to the agent regulations were also brought under Article 56 TFEU on the basis that they restrict the freedom to provide services. Article 56 applies to a sports federation because they are in a position to impose on a group of individuals (in casu, football agents) rules that adversely affect their capacity to exercise their fundamental freedoms. Triggering this prohibition is much simpler than applying competition law. There is no need to define markets, find market power or show anticompetitive effects. It suffices to show that the rules make it more difficult for service providers and recipients to, respectively, provide and obtain services outside

their jurisdiction. Arguably this is justified because the economic power of a football association where membership is compulsory is such that one can presume that its rules harm economic efficiency (*RCC Sports*, paras 144-145).

Justifications

There are four pathways that may be pursued by undertakings who seek to justify anticompetitive practices. The AG discusses three of these fully and brings some novelties to each. To foreshadow the analysis, note that since multiple EU rules may be applied to challenge the same conduct, it is important that the justifications that may be provided are consistently applied irrespective of how the case against the defendant is framed.

Purely sporting exclusion

The first is to claim that the rule is purely about sport. This excludes the application of EU internal market and competition law. According to the AG this rule is an application of two principles (*RCC Sports*, paras 17 to 28): (1) that EU internal market and competition law are concerned with economic activities and a pure sporting rule is not directly linked to an economic activity and (2) even if there is some indirect effect on economic activities, this is de minimis. These two legal foundations do not really work well as principles: the second contradicts the first. The AG is right in saying that some regulatory choices should not require a costly discussion about their compatibility with EU Law (e.g. the number of players that each team may field). However, this is a category that is difficult to define ex ante as there may be settings when we do want to test a rule's compatibility with the internal market even if at first blush it looks like the rule is only about sport. A better approach might be to create safe harbours where it is presumed some rules do not offend EU Law.

Albany International

The second (of which the Albany International strand of case-law is the sole exemplar) is to claim that there is more to life than competition because the EU ranks other things more highly. On the facts of *Albany International*, collective bargaining between workers and employers when this concerns working conditions falls outside of Article 101 and no explicit trade-off is necessary. We tolerate anticompetitive effects in the name of protecting workers' rights to bargain collectively, irrespective of the consequences this has for economic welfare. Somewhat bizarrely, the AG seems to subsume this precedent under sporting rules (*RCC Sports*, footnote 20). With respect, this is not right. The *Albany International* judgment creates a self-standing rule of exclusion. It is a generous exclusionary rule because all that has to be shown is that the 'nature and purpose' or the agreement justifies the exclusion of Article 101(1) (See *Albany International* para 60). However, since proportionality is a general principle of EU Law, it probably should also apply to this exclusion.

What remains open for discussion is what other public interests can benefit from this exclusionary rule. What about, for example, Article 11 TFEU, requiring that environmental considerations be

integrated in the EU's policies?

The Wouters defence

In Wouters v General Council of the Dutch Bar, the Court found a third way to justify restrictive agreements. AG Emiliou summarises the standard (which he refers to as the Meca Medina test, a judgment where *Wouters* was applied to FINA's anti-doping rules) by reference to Superleague: (i) they are justified by the pursuit of one or more legitimate objectives in the public interest which are not per se anticompetitive; (ii) the specific means used to pursue those objectives are genuinely necessary for that purpose; and (iii) even if those means prove to have an inherent effect of, at the very least potentially, restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition." (*RCC Sports*, para 49). In discussing this justification, the AG makes a number of points worthy of comment, by which the AG provides safeguards so that this justification does not become a 'Get Out of Jail Free' card for self-governing bodies (*Rogon*, para 41):

- It applies when public authorities have either assigned the body in question the responsibility to pursue a public interest objective or they have 'acknowledged and accepted the body's activity of self-regulation.' (*Rogon*, para 42) However, later in the Opinion, this is diluted because a public authority's acknowledgment may be expressed 'by simple tolerance' (*Rogon*, para 63). If Member State silence suffices, then this requirement has no meaning. However, it seems a potentially useful way of delimiting the Wouters defence because it would reveal a Member State's interest in protecting certain public goods.

- It only applies if the public interest is 'worthy of protection under EU Law.' (*Tondela*, para 78) Rules preserving the health of athletes or preventing abusive, fraudulent or unethical practices vis-à-vis athletes are objectives that pursue a 'public non-economic interest' (*RCC Sports*, para 70) and qualify. But it is not clear why they are worthy of protection under EU Law. Relatedly, the AG refers to the protection of the sports ecosystem so that it works based on the principles in art 165 TFEU (*RCC Sports*, para 71) – on this basis one can examine if the rules improve the quality of services agents provide or improve financial transparency. This suggests that looking into the EU Treaties gives us clues about what public interests EU Law protects. If so, rules designed to secure gender equality would also count for example. But what of a justification that cannot be traced to the Treaty? How does one decide then what is and is not worthy of protection under EU Law? We need a rule to help us recognise these interests.

- It only applies when the association issues rules closely related to its core activity, for example FIFA may issue rules to protect young athletes but perhaps not to protect the environment. It is not clear why not. For example, I think the International Skating Union could forbid the organization of ice skating in Qatar to safeguard the environment because of the huge environmental impact of cooling a skating rink in the desert. This seems to be a legitimate public interest that someone regulating this sport may well feel are within its competence. The AG responds that it is for the public authorities to find the optimal way of achieving an equilibrium (*Rogon*, para 45) between public interests. However, if so, why delegate some to self-regulatory bodies? There is a tension here between authorizing self-regulation and saying that the public interest is for the state to determine. You cannot have it both ways.

- It applies if the pursuit of the public interest is achieved in a transparent manner. (*Rogon*, paras

46 and 70-73). The AG explains that the influence of third parties in the association's decision-making is a relevant consideration. On the facts, the more FIFA affords agents opportunities for 'genuine and meaningful participation', the greater the input legitimacy of the rules and the more likely are the restrictions likely to be judged necessary and proportionate. These procedures echo the indications already found in *Superleague*.

- It applies to rules that affect members of the association as well as rules that an association drafts that affect non-members provided that the services provided by those non-members have a 'direct and significant influence' on the core activities of the association. (*Rogon*, para 74) This is nothing new, as in *Wouters* the rules set by the Bar Council affected the economic interests of accountants.

- It applies when the regulations are genuinely necessary to achieve the public interest. The AG suggests this point requires proof of three aspects: (a) there is an objective need; (b) the agreement genuinely reflects the objective in a consistent manner; (c) it is suitable to achieve that objective. (*RCC Sports*, para 72). The AG suggests that when testing for suitability the associations have a degree of discretion – this is not about finding out if the agreement is the least restrictive measure, rather merely to consider if a less restrictive alternative might have been considered (*Tondela*, para 86). One remarkable point to note here is that the AG refers to the ECN's statement about the need for businesses to cooperate during Covid. In his view this "might corroborate the view" that the defendants "could reasonably consider that some degree of cooperation … was, exceptionally, necessary in that period."(*Tondela*, para 90) This does not seem to be a useful source on two fronts. First, it does not help work out the necessity requirement: the ECN suggests that there may need to be cooperation, it does not loosen the necessity requirement. Second, it is hard to see how a soft law document can create any sort of legitimate expectation about the need to restrict competition.

What all of these points have in common is that they align the *Wouters* defence to the analysis of justifications carried out when Member States justify restrictions of free movement. As I argued many years ago, *Wouters* is best seen as an application of the so-called mandatory requirements case-law in internal market law to EU competition law.

Article 101(3) TFEU

The fourth pathway to escape Article 101 is found in Article 101(3). There is ample literature debating the scope of Article 101(3). The most through account today is Or Brook's Non-Competition Interests in EU Antitrust Law (Cambridge, 2022). The AG Opinion makes significant points with respect to the first and second conditions of this provision.

The first condition is that the agreement 'contributes to improving the production or distribution of goods or to promoting technical or economic progress.' According to the AG this includes 'benefits of a non-economic nature, provided that they have tangible positive repercussions on the relevant market or on markets which are strictly connected to them.' (*RCC Sports*, para 93). He goes on to explain that if a rule restricting competition serves to prevent the abusive exploitation of young athletes, then this is a positive effect that counts under Article 101(3) because it improves the functioning of the 'football ecosystem'. This wide approach is defended in four ways (*RCC Sports*, paras 88-92, but reshuffled in this list): (i) it is consistent with precedent; (ii) there is no need to quantify the positive effect, but the association has to have adequate reasons and evidence

that there is a real positive effect (in passing the AG criticises the 2004 Guidelines on Article 101(3) as being too strict); (iii) the concept of 'economic progress' is the lynchpin on which non-economic gains may be pleaded and this term is not a synonym of economic growth; (iv) this interpretation is consistent with the defences available in the case-law on free movement rules and a comparable framework of analysis is logical, he says, to avoid paradoxical results. (Observe the similarity of the interests protected with the list in the *Wouters* defence above.)

The second condition is that 'consumers' (or users if you look at e.g. the French, Italian and Dutch versions of the Treaty) secure a fair share of the resulting benefits. The AG says that while football supporters are clearly included, other categories of users count. Following *Superleague*, this includes national football associations and players as well as TV viewers. However, the AG's conclusion may be queried: 'the benefits for the different types of users can be considered in combination when balancing them against the restrictive effects produced.' (*RCC Sports*, para 95) This is not consistent with *Superleague* where the Grand Chamber was clear that a restrictive agreement must have a positive effect on each of the parties who suffer harm (*Superleague*, para 194). This makes it imperative that we understand how to frame the theory of harm for Article 101(3) must reflect those theories.

There is a further point in his discussion of the second condition to discuss: it requires that users obtain a 'fair share' of the benefits. According to the AG this requires that the net impact on users is positive. However, in my view, this is mistaken. When one balances positive and negative effects, the positive effects are those in the first limb of Article 101(3), not the second. The Court understood this as far back as 1966: "This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition." (Joined Cases 56 and 58/64 Consten and Grundig, p.348) To illustrate: an agreement that reduces environmental pollution to the value of EUR 100 million annually (measured by increased biodiversity, better health for plants, animals and people) which raises the price of a product bought by 500,000 people annually by EUR 5 when users would only be willing to pay EUR 4 for more sustainability probably gives the users a fair share, as they are only EUR 1 worse off while the overall societal gains are greater than the anticompetitive effects.

Internal market justifications

Remember that the association's rules may also be pursued for infringing Article 56 TFEU (freedom to provide services). Here we have a case-law created justification (which some EU lawyers had, confusingly, called a rule of reason!) by which the association may justify the harm to the economic freedom of businesses by reference to: (a) a legitimate objective in the public interest which is other than of a purely economic nature; (b) secured by a rule which is suitable for ensuring the achievement of that objective and does not go beyond what is necessary for that purpose. (*RCC Sports*, para 146)

The public interest basket seems to include the same considerations as in Wouters. With respect to the second, proportionality -based, limb one 'should assess whether those rules genuinely reflect a concern about attaining those objectives in a consistent and systematic manner.' (*RCC Sports*, para 153)

The AG's take is that the genuine concern element needs close scrutiny because any justification

'may be knocked together ex post' to justify a restriction of the free movement rules (*RCC Sports*, para 154). Moreover, the AG calls for a proportionality stricto sensu test, by which one must show: (a) that there is no less restrictive alternative and (b) that the restrictions strike a fair balance between the public interest and the interests of the agents. This aligns with his reading of the *Wouters* justification in *Superleague*. Indeed, if one compares the AG's discussion in *Wouters* with the analysis of justifications in the free movement case-law, there is much similarity.

Overlaps

One final set of considerations is about how these defences all work together. There are a number of points to untangle because all four defences can be marshalled at the same time, but some seem to overlap.

The most complex overlap is between the Wouters rule and the Article 101(3). Some points are clear: Wouters does not apply when the decision of the association is found to restrict competition by object. (I disagree, but this is now the law.) Wouters only applies when there is a decision of an association of undertakings and not when there is another form of agreement. But this leaves a wide field of overlap and here the AG says something worth noting at footnote 67 in *RCC Sports*: if 'such rules aim at ensuring that agents act in the best interest of their clients, avoiding conflicts of interest, those rules might be justified under the Meca-Medina case-law or exempted under Article 101(3) TFEU.' If we consider this passage together with the AG's reading the notion of progress widely, it seems that according to the AG every positive effect that falls under the *Wouters* rule could also be discussed under Article 101(3). If this were true, then the *Wouters* doctrine would become largely irrelevant as it is just applicable to a subset of cases, all of which can also be examined using Article 101(3). Of course engaging Article 101(3) is more tricky because it has an additional requirement – users must secure a fair share of the benefits.

To a certain extent, the AG is forced into this move by the ECJ's earlier mistake of stating that the Wouters defence does not apply when there is a restriction by object. This could lead to the paradoxical effect where a decision of an association which is found to both restrict competition by object and restrict the free movement of services could be justified under the internal market rules because it pursues a public interest, but could not be justified for infringing competition law under the public interest test in Wouters. A wider scope for Article 101(3) is the only way to save the agreement and to treat the justifications offered consistently.

Two more elegant solutions could have been considered: (1) to say that the *Wouters* rule applies to public interest justifications, while Article 101(3) TFEU is limited to economic efficiency justifications. (2) to say that *Wouters* is wrongly decided and to expand Article 101(3). In fact, one might consider that *Wouters* is a judgment relevant in the pre-modernization days when national courts could not decide that Article 101(3) does not apply, this being the prerogative of the Commission when agreements are notified to it. In that epoch, *Wouters* solved a procedural tangle. Now that courts (but not NCAs) may decide that Article 101(3) applies, the need for an alternative defence has disappeared.

A second overlap is when the decision by a dominant association is covered by both Articles 101 and 102. Here the AG Opinion confirms the trend in the case-law by which the justifications that apply to one also apply to the other. The case-law has constructed a de facto Article 102(3) and the

AG indicates that the *Wouters* defence (to the extent that this is different) also applies to the conduct of dominant firms. This is logical because the two prohibitions seek to obtain the same objective.

A third overlap is when conduct is challenged under both competition law and internal market law. In both *Wouters* and *RCC Sports* the challenge was brought under both sets of rules. The AG brings some symmetry to the defences by indicating that under internal market law one applies a balancing test as well, even if this is phrased somewhat differently: in *Wouters* one must show that the agreement does not eliminate competition, while under internal market there should be a fair balance between the two competing interests. A fair balance entails that the economic freedom of agents is not completely eliminated.

Conclusions

The judgment is important for the shape of competition law generally, and not only for the application of competition law to private rule-making by sports bodies. Many might see the AG's Opinions as opening a pandora's box of discretion and politics as nearly any public interest counts under either Article 101(3) and/or *Wouters*. To this response, two replies: first the EU system is designed to take non-competition considerations into account and generations of scholars have pointed this out. Second, the AG recalls that these justifications require evidence not just words.

The real problem, in my view, is the inelegance by which the theories of harm and the justifications are set up. Suppose you want to challenge anti-competitive regulations: using internal market law seems the smoothest way to go as there is no need to show economic effects. Then justifications require a showing by the defendant that they are protecting a public interest in a proportionate way. But using competition law requires more of a claimant in terms of evidence and we still have some way to go to rationalise theories of harm. Concomitantly, this route provides a confused menu of grounds on which the defendant may rely to justify such conduct, some of which match with the public interest defence in free movement law (*Wouters*), some which provide a more powerful justification (*Albany International* where even elimination of competition may be allowed) and some which add further requirements (Art 101(3) with the consumer pass-on test). In my view, this is unnecessarily byzantine and likely to lead to errors and inconsistencies. Perhaps the AG should have advised the Court to start from scratch and build a coherent approach rather than trying to make the case-law fit together in ways that are not always convincing.

**Following the ASCOLA Declaration, the author has no disclosures to make.*

**See further the coverage on this blog of the previous antitrust sports cases (Superleague, ISU, Royal Antwerp): e.g.* here, here, here and here.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Tuesday, June 3rd, 2025 at 10:14 am and is filed under Advocate General, Source: OECD">Antitrust, European Court of Justice, European Union, Exemptions, Justifications, Restriction by object, Sport, Sports law
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.