

Newsletter, 8 February 2024

Antitrust law and sports

In its three decisions *European Super League*, *International Skating Union* and *Royal Antwerp Football Club*, the ECJ once again emphasizes that sport associations are bound by antitrust law

The European Court of Justice (ECJ) closed the year 2023 with a trio of decisions on sports antitrust law. In its *European Super League*¹ ruling, the ECJ found that the current regulations of FIFA and UEFA on prior approval by these associations for international competitions organized by third parties (such as a so-called Super League) violated the cartel prohibition and that FIFA and UEFA were abusing their dominant market positions in this respect. In its *ISU* ruling², the ECJ also considered certain provisions of the International Skating Union anticompetitive. Lastly, in its *Royal Antwerp Football Club*³ ruling, the ECJ considered that so-called Homegrown Player Rules could potentially violate antitrust law.

Background: Antitrust law is also applicable in the sports sector

Antitrust law provisions are generally applicable to agreements, decisions or association regulations in the field of sports, even if they concern regulations of a purely sporting nature, such as regulations on doping control. There is no special statutory exemption from antitrust law for the sports sector, not even under the so-called sport article of Art. 165 TFEU, according to which the EU institutions must take into account the special characteristics of sport in their actions. However, according to the *Meca Medina* ruling of the ECJ⁴ and the so-called *Wouters doctrine*⁵, an exception to the cartel prohibition of Art. 101 TFEU may apply to sport, which must be examined using the following three-stage test in case of a restriction of competition:

- What is the overall context of the behavior in question and what is its (legitimate) objective?

- Is the restriction of competition necessarily related to the pursuit of the stated objectives?
- Is the restriction of competition proportionate to these objectives?

“European Super League (ESL)” ruling

After twelve top European football clubs from Spain, Italy and the UK founded the European Superleague Company (ESLC) and revealed their "Super League" project, an international competition only between these twelve clubs, FIFA and UEFA publicly announced that they would not approve the Super League under any circumstances and would exclude clubs and players participating in it from their own competitions. ESLC then took FIFA and UEFA to the Commercial Court in Madrid which issued an injunction prohibiting FIFA and UEFA from taking any measures against the Super League project and at the same time referred questions to the ECJ for a preliminary ruling.

The ECJ found that associations holding a monopoly in their sector could generally decide on the admissibility of competing events by third parties in the interests of sport, i.e., make such competing events or leagues dependent on their approval. However, according to the ECJ, this requires clearly defined substantive prerequisites and detailed procedural rules to ensure that the approval requirement is handled in a transparent, objective, non-discriminatory and proportionate manner with regard to the competitive situation and the severity of sanctions against clubs and players. The current regulations of FIFA and UEFA, however, leave the approval of competing events solely to the discretion of these associations and therefore constitute both the abuse of a dominant market position (Art. 102 TFEU) and a restriction of competition by object (Art. 101 TFEU).

¹ ECJ, decision of 21.12.2023, [C-333/21](#) - *European Super League*.

² ECJ, decision of. 21.12.2023, [C-124/21 P](#) - *International Skating Union*.

³ ECJ, decision of 21.12.2023 - [C-680/21](#) - *Royal Antwerp Football Club*.

⁴ ECJ, decision of 18.7.2006 - [C-519/04 P](#) - *Meca-Medina*.

⁵ ECJ, decision of 19.2.2002, [C-309/99](#) - *Wouters*.

"International Skating Union (ISU)" ruling

Similar to the Super League case, the *ISU* ruling concerned the admission regulations of the ISU, the international governing body for figure skating and speed skating. The regulations in question stipulate, among other things, that ice skaters could only take part in competitions approved by the ISU. Otherwise, severe sanction mechanisms apply. An arbitration clause provides for the exclusive jurisdiction of the Court of Arbitration for Sports (CAS) for appeals against any ISU measures.

In 2017, the EU Commission found these regulations anticompetitive and issued an injunction against the ISU based on Art. 101 TFEU. The ECJ now confirmed this decision and found that the provisions requiring a prior approval by ISU contained a restriction of competition by object, with the reasoning being identical to that in the *ESL* ruling. Furthermore, the ECJ also considered the arbitration clause inadmissible, as there was no guarantee that an arbitration award could be reviewed by a court with regard to its compatibility with Art. 101 and 102 TFEU.⁶

"Royal Antwerp Football Club (RAFC)" ruling and the Homegrown Players Rules (HPR)

In the *RAFC* case, a Belgian court referred to the ECJ the question of whether HPRs established by UEFA and the Belgian Football Association are compatible with antitrust law. According to UEFA's statutes, professional football clubs participating in international competitions organized by UEFA must include a minimum of eight so-called homegrown players on the squad size limit list sheet that contains a maximum of 25 players. Homegrown players are defined as players who, regardless of their nationality, have been trained by their club or by another club in the same national league for at least three years between the ages of 15 and 21. Out of these eight players, four at least must have been trained by the club at issue. The Belgian Football Association has similar rules.

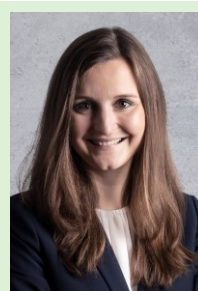
The ECJ found that the HPR could, in principle, have the object or at least the effect of restricting football clubs in competition (both with regard to the recruitment of talented players and in the inter-club competition itself). Ultimately, however, the ECJ held that the referring Belgian court must decide whether this is actually the object or effect of the rules in question.

⁶ For Germany, the Federal Court of Justice (FCJ) recently confirmed this verifiability, see decision of 27.09.2022, [KZB 75/21](#) (German only).

Comment and outlook

With these three judgments, the ECJ confirms its case law on the general applicability of anti-trust law to the field of sports and, in particular, regulatory frameworks by sport associations. Interestingly, the court classifies the association rules established by the ISU and UEFA/FIFA as restrictions of competition by object, to which the Meca-Medina test (which only applies to restrictions by effect) does not apply, leaving only the general exemption from the prohibition of cartels under Art. 101 (3) TFEU. The most recent ECJ's rulings could already pave the way for other questions currently pending before the ECJ⁷ regarding the compatibility of DFB and FIFA regulations on the remuneration to be paid by clubs and players to players' agents. The German Bundeskartellamt recently announced that it would also take the latest decisions into account in its assessment of the so called 50+1 rule in the German football league.

Aside from antitrust law, the withdrawal of the top English clubs is likely to mean the failure of the Super League project. In terms of antitrust law, however, the Super League currently cannot be reviewed and certainly not prohibited. This could change if FIFA and UEFA establish transparent, objective, non-discriminatory and proportionate approval criteria for competitions in the future. The *ESL* ruling is therefore more of a draw for all parties.



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⁷ Reference for a preliminary ruling from District Court of Mainz dated 30.3.2023, case [9 O129/21](#) and from the FCJ dated 13.6.2023, case [KRZ 71/21](#) - *Regulations for players' agents* (German only).