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There will be sport at the Court of Justice of the European Union

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by Melchior WATHELET

The next judicial year will see the Court of Justice of the European Union (CJEU) with a copious sport menu, which could be even richer. *Melchior Wathelet*, Minister of State of Belgium and former First Advocate General and Judge at the CJEU, offers us an overview at the end of the judicial vacations.[1]

A. Cases *International Skating Union* (ISU) (C-i 24/21) and *European Super League* (ESL) (C-333/21)

I have brought together these two cases, which are admittedly very different since the first is an appeal against a judgment of the General Court of the European Union (T-93/18) of 16 December 2020, partially annulling a Commission decision of 8 December 2017, which found ISU in breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU), and the second is a preliminary ruling procedure initiated by a Commercial Court of Madrid, but which raise similar issues.

Both cases were heard in the Grand Chamber of the Court (which attests to their importance), with the same Judge-Rapporteur and Advocate General (who will conclude in both cases on 15 December 2022) during a long hearing on 11 and 12 July 2022.

A-1 Case *ISU* (C-124/21)

The ISU is the only international sports federation recognized by the International Olympic Committee, responsible for regulating and managing figure and speed skating worldwide. It is made up of national federations, which include local clubs and associations. The ISU also organizes the most important international competitions for which it holds all rights.

Its statutes provide that, under penalty of lifetime exclusion from its competitions, skaters may only participate in competitions organized or authorized by the ISU or its members (see points 1 to 10 of the T-93/18 judgment cited above).

This case raises two fundamental questions.

First, can a sports federation, in this case the ISU, restrict or prohibit access to the market for the organization of sports competitions while, at the same time, this federation is itself an organizer of competitions in this same market where it is in a dominant position? Is it not in a conflict-of-interest situation since it has established itself as the gatekeeper of the market in which it is, at the same time, the main, or even the only, economic operator?

The Commission saw this as an unjustified restriction of competition and thus an infringement of Article 101 of the TFEU, which the ISU had to end under penalty of a fine (Commission decision of 8 December 2017). The General Court did not annul this part of the decision. The question remains, however, how to put an end to this infringement.

Should the roles be decumulated, a solution adopted by the European Commission in the *FIA* case (Communication Comm. UE concerning cases COMP/35.163, COMP/36.638 and COMP/36.776, OJEU no. C 169, 13 June 2001, p. 5) and by the CJEU in its *GB-INNO* judgment of 13 December 1991 (C-18/88)?

Or should this combination be tolerated but subject to strict conditions (establishment of a transparent procedure, with non-discriminatory and proportionate authorization criteria and review of the federation's decision by a State court), a solution adopted by the CJEU in particular in its *MOTOE* ruling of 1 July 2008 (C-49/07) and *OTOC* ruling of 28 February 2013 (C-1/12)?

However, can such a solution be transposed to the case of international sports federations established outside the European Union since, in *MOTOE* and *OTOC*, there was a legislative basis put in place by a member State, a public mandate, which is lacking in this case?

Secondly, the *ISU* case raises the question of the legality of forced arbitration clauses in favor of the Court of Arbitration for Sport (CAS) contained in the statutes of all international federations. As a result, all EU sports stakeholders, including tens of millions of athletes and hundreds of thousands of sports clubs, are deprived of any access to a State court in an EU Member State, even though this right is guaranteed by the general principles of EU Law and by Article 47 of the EU Charter of Fundamental Rights.

Based in Switzerland, CAS is under no obligation to apply EU Law nor - if it were to decide to apply it - to do so correctly, as the Swiss Federal Tribunal, which may be seized with an application to set aside the CAS award, is not obliged to apply EU competition law either.

Like what the CJEU ruled in its *ACHMEA* judgment of 6 March 2018 (C-284/16), does this procedural loophole not undermine the effectiveness and autonomy of EU Law?

The Commission considered in its decision that this arbitration rule reinforced the restrictions on competition created by the ISU Constitution insofar as it did not ensure effective jurisdictional protection for skaters forced to accept this rule.

The EU General Court disagreed, finding that:

- this regulation was justified by legitimate interests linked to the specificity of sport (§ 156 of judgment T-93/18);
- skaters could bring an action before a national court for compensation for the damage caused to them by the cartel prohibited by Article 101 TFEU (§157 of the judgment) and file a complaint with their national competition authority (with the usual consequences to which such a complaint may give rise before the national courts and even the CJEU - §160 of the judgment);
- unlike the circumstances in *ACHMEA*, the constitution of the CAS did not originate in a bilateral investment treaty signed by two member States (§ 162 of the judgment), a strange argument, to say the least, since, in this case, the arbitration is forced. In contrast, the Court had only immunized commercial arbitration in *ACHMEA* (§ 55) because it "*originated in the autonomy of the will of the parties concerned.*"

The EU General Court, therefore, annulled this part of the Commission's decision.

A-2 Case *ESL* (C-333/21)

Twelve of Europe's biggest football clubs were ambitious enough to set up a competition to rival the UEFA *Champions League*.

As soon as the project was announced, UEFA opened disciplinary proceedings against the clubs concerned, openly threatening them with heavy sanctions.

Nine of them have now given up on the project and returned to UEFA, agreeing in an "*agreement*" with UEFA to pay a fine of EUR 100 million if they do it again.

Like French comic characters *Astérix* and *Obélix*, three intrepid clubs - *Real Madrid, FC Barcelona* and *Juventus* - continue to resist UEFA, having succeeded in getting the Commercial Court of Madrid to protect them from UEFA's disciplinary wrath temporarily and to refer questions to the CJEU for a preliminary ruling.

The hearing on 11 and 12 July was exceptional because it set a record for the number of States that took part in a preliminary ruling procedure: 21, including both the written and oral phases of the procedure, plus two EFTA member States, parties to the EEA Agreement, namely Iceland and Norway.

This is unprecedented! Much more than the 14 who participated in the proceedings in the *Quadrature du Net* case (0511/18) or the 15 who participated in the proceedings in the *ACHMEA* case (0284/16). Obviously, the rule of law and the actions for annulment of Hungary and Poland against the regulation on the conditionality of European funds, dealt with by the plenary Court (156/21 and 157/21), are of much less interest to the States than football: only ten of them had participated in these proceedings!

Another striking element is the near unanimity of the States in defending the current organization of European football: 21 out of 23 clearly supported UEFA and, exceptionally, a State that during the written procedure had supported the thesis of the promoters of the ESL "*changed jerseys during the match*" to defend UEFA's thesis during the oral procedure.

The political indication is clear, but what about the legal one?

The issues are basically the same as in the *ISU* case.

On the conflict of interest first, perhaps the solution depends on the size of the market and the operators. While it might be excessive to impose a decumulation on ISU - a "*small*" federation presiding over the destiny of a sport whose dimensions are not comparable to those of football - and while it might be sufficient to impose the "OTOC" framework on its Judgment C-1/12), on the other hand, with regard to the European inter-club football competitions optimization of “Big Business”, one might think that only a decumulation is capable of guaranteeing free competition. Who can seriously believe that UEFA is capable of being judge and jury in all integrity, that it will not, in any case, favor its own commercial interests to the detriment of its potential competitors?

Secondly, whatever solution is chosen, it is essential that sports federations do not escape a sound and genuine application of EU Law through a double sleight of hand, namely the benefit of a "*light*" proportionality test (according to UEFA, these federations would only be censured if their rules are "*manifestly unreasonable*") and forced arbitration before CAS. It is clear that the combination of these two devices grants - *de facto* - to sports federations a "*sports exception*", an immunity from EU Law, which the Lisbon Treaty has knowingly denied them!

The reminder that sports federations, like all business associations, are subject to the traditional proportionality test (are there measures that are less restrictive of the freedom in question?) and the reaffirmation of everyone's right to have access to a real state judge as soon as a right conferred by the EU is at stake will be enough to avoid such a drift.

B. Case *Refaelov - Antwerp* (C-680/21)

After this very intense warm-up, the CJEU will have to continue its sports program with the preliminary ruling case C-680/21, which pits before the court of first instance of Brussels a first division football club, namely *Antwerp*, third of the last Belgian Championship, and one of its players, Mr *Refaelov*, against UEFA and the URBSFA (the Belgian Football Association). UEFA and its member associations adopted in 2005 the so-called "*Locally Trained Players*"[2] or “*Homegrown Players*” rules (hereinafter HGP rules), which are at the heart of the debate. UEFA applies them to European club competitions and has asked its 55 member associations to apply them to national competitions.

These HGP rules require each club to sign up a certain number of players who have been trained for at least three years, between their 15 and 21 birthdays, in the relevant federation. Some HGP rules also require that a certain number of these players appear on the match list or the field. To date, 34 federations have adopted HGP rules, and 28 have adopted "*nationality requirements*", *i.e.* strengthened HGP rules.

In the case at hand, Mr *Refaelov* was recruited by *FC Brugge* in 2011, at 25, after starting his professional football career in Israel. He became a Belgian national and was transferred to *Antwerp* in 2018.

In 2020, Mr *Refaelov* and *Antwerp* brought an action before the CBAS (Belgian Court of Arbitration for Sport) seeking a declaration that the HGP rules violated Articles 45 of the TFEU (free movement of workers) and 101 of the TFEU (prohibition of agreements between undertakings restricting competition) because they made it more difficult for a professional club to hire and select Mr *Refaelov* and restricted *Antwerp*'s freedom to recruit, field and transfer professional players.

Mr *Refaelov* and *Antwerp* appealed to the French-speaking Court of First Instance of Brussels against the CBAS arbitration award that found their claim inadmissible on the grounds that it was not contrary to public policy. The Court - on the contrary - considered that public policy provisions were at issue in the case and referred the matter

to the CJEU for a preliminary ruling on 15 October 2021.

The CJEU will have to decide whether, as UEFA maintains, these rules pursue the legitimate objective of training young players and, above all, whether they are proportionate to this objective or, alternatively, whether these rules are merely indirect discriminations based on nationality (in truth barely disguised) aimed at reversing the ban on nationality provisions pronounced by the CJEU in its *Bosman* judgment of 15 December 1995 (C-415/93).

The debate should focus on the proportionality of rules that undermine the free movement of workers and competition. In contrast, the objective of training young people could perfectly well be achieved by other measures, for example, by imposing on each club the training of a certain number of young people, without making it compulsory for them to be part of a professional roster, and by financial incentives, by rewarding clubs whose training is of a high standard (which is already the case with the "*training compensation*" mechanism set up by FIFA).

C. Cases *Diarra - Financial Fair Play (FFP) - Third Party Ownership (TPO) - Swift*

Everything indicates that the CJEU's sporting career will not be limited to this triathlon, *ISU, ESL, or Antwerp,* which is already quite strong. Other preliminary rulings may soon be forthcoming in the same sector.

C-1 *Diarra* case (pending at the Mons Court of Appeal)

The Court of Appeal of Mons will soon render its decision in a case between Mr *Lassana Diarra*, former *Real Madrid* and French national team player, and FIFA and the Belgian Football Association.

Mr *Diarra* questions the conformity with EU Law of certain provisions of the FIFA regulations on player transfers, and more particularly, the rule according to which, in the event of a termination of the employment contract at his own fault, a player is liable to his former employer for the unamortized part of the transfer fee that the latter had paid to hire him, an amount that is beyond the player's control. Moreover, in such a case, the player's future employer automatically becomes a co-debtor of the compensation the player will ultimately have to pay his former employer.

In first instance, the Commercial Court of Charleroi ruled in favor of Mr *Diarra* and described this second rule as a "*pre-Bosman*" rule since no club would risk hiring a player who had breached his contract as long as FIFA and then CAS had not ruled on the dispute. In this case, this rule resulted in Mr *Diarra* remaining unemployed for a whole season. Following the appeal lodged by his opponents, Mr *Diarra* asked the Court of Appeal of Mons to refer questions to the CJEU for a preliminary ruling.

If the Court of Appeal would not refer the case to the CJEU, the Belgian Court of Cassation could still do so on appeal.

C-2 "*Financial Fair Play*" and "*Third Party Ownership*" cases

Two other football cases, in which preliminary questions are requested by one of the parties, a player's agent in the first case and the Belgian football club *Seraing* in the second, are currently pending before the Belgian Court of Cassation.

The first raises the question of the legality under European competition law of a central rule of UEFA's "*Financial Fair Play*" regulation, namely the prohibition for each club to "*spend more than it earns*" and, therefore, the correlative prohibition on the owner of a club to dip into his assets to invest in his club, to cover an additional expense.

Is there not, as the professor of competition law at the University of Liège, *Nicolas Petit*, pointed out in 2014, a discrimination *"that would reserve for a restricted oligopoly of rich clubs - an Oligopoleague - the right to make important investments (a form of investment rent) and would exclude the others?"* He adds that the "*Financial Fair Play regulation*" does not, therefore, clearly contribute to putting clubs on an "*equal footing*", as its objectives claim.[3]

The second case concerns the legality, again under European competition law, of FIFA Circular 1464/2014's total ban on "*Third Party Ownership*" (TPO), *i.e.* the prohibition on any third party investing in a player's "*economic and federative rights*".

More specifically, it is a *"synallagmatic contract by which a legal alternatively, a natural person acquires, in exchange for a financial service, the right to obtain from an athlete or his or her employer a share generally expressed as a percentage of the value of any future claims related to the career of the said athlete (employment contract, transfer contracts, image contracts, competition winnings, etc.)."* (J.-M. Marmayou, '*Les contrats de Third Party Ownership*' FTD Com., 2017, p. 763).

The vast majority of the doctrine considered that the total ban decreed by FIFA was excessive and that a proportionate regulation would be more appropriate (see, for example, P. Moyersoen, '*Faut-il vraiment interdire la TPO?*', Lettre de l'Officiel Juridique du Sport, no. 88, Oct. 2014).

These two cases raise the same question: on what basis and limits can a sports federation restrict or prohibit investments, whether by a club owner or a third party, in the sport it regulates?

In this respect, it should be recalled that in its *Piau* judgment of 26 January 2005 (T-193/02) concerning the FIFA regulation on players' agents, the Court of First Instance of the European Union ruled that:

> "(§ 77) *The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sports associations by a private-law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties.*
>
> (§ 78) *In principle, such regulation, which constitutes policing of an economic activity and touches on fundamental freedoms, falls within the competence of the public authorities. Nevertheless, in the present dispute, the rule-making power exercised by FIFA, in the almost complete absence of national rules, can be examined only in so far as it affects the rules on competition, in the light of which the lawfulness of the contested decision must be assessed, while considerations relating to the legal basis that allows FIFA to carry on regulatory activity, however important they may be, are not the subject of judicial review in this case".*

Since Article 267 of the TFEU requires the supreme courts to refer to the CJEU the preliminary questions requested by a party (unless one of the rare exceptions of strict interpretation, formulated in the *CILFIT* case law - judgment of 29 February 1984, C-77/83, can be invoked), these preliminary questions should soon end up at the CJEU.

C-3 *Swift* case

In the cases mentioned above, we have seen prestigious football clubs, playing the leading roles in European competitions, or Belgian first division clubs such as *Antwerp*, which, given their good national ranking, are in any case participating in the first rounds of these competitions, struggling with UEFA and national federations.

The main interest of the *Swift* case will be to question the same rules (and others) as those which are the subject of the above-mentioned cases, but at the initiative of a Luxembourg club, *FC Swift Hesperange* (fourth of the last Luxembourg championship) which, together with one of its sponsors and one of its supporters, has just summoned UEFA and the Luxembourg football federation (hereafter FLF) before the *Tribunal d'arrondissement de Luxembourg* for a preliminary reference to the CJEU for infringement of free competition (Article 101 of the TFEU), free movement of capital (Article 63 TFEU), free movement of workers (Article 45 TFEU) and freedom to provide Services (Article 56 TFEU).

This "*small*" club, from a "*small*" country, denounces "*as in the ESL case*" the UEFA and FLF rules which forbid it to *"join forces with other clubs from the other Member States to create a transnational competition that would allow all the clubs involved to develop and offer their fans, the consumers, a better quality of entertainment."*[4]

The "*territorial model*" of UEFA structurally deprives about 20 EU countries of "*premium club football*" and forbids them any international initiative that could, for example, give rise to a regional league (Benelux or other) or a European Cup, bringing together clubs that are certainly less powerful and less prestigious than the usual winners of the *Champions League*, but still with a strong sporting and commercial potential.

FC Swift Hesperange also denounces (as in the *Antwerp* case) the HGP rules of the FLF, which require that on the match list comprising 16 players, at least 5 of them must be players *"who have taken out their first player's license with the FLF."* This means that only young players from Luxembourg can be involved, which raises the problem of the compatibility of these rules with the *Bosman* ruling.

Moreover, the Luxembourg club denounces the FLF rules organizing a scale of transfers between Luxembourg clubs, which constitutes a real "*price fixing*". Finally, *FC Swift Hesperange* denounces the rule of the FLF, which condemns it to remain a non-profit association and thus forbids it to develop substantial economic activities and prevents an investor established in another Member State from bringing capital to this club as to any other Luxembourg club.

Conclusion

Sport represents more than 2% of the EU's GDP.

Can such a socio-economic activity, which concerns thousands of companies and millions of people within the EU and depends on private associations established in Switzerland and mainly composed of non-EU members, escape a real application of EU Law, notably through the subterfuge of arbitration entrusted to the CAS alone?

The Member States seem to be happy with this, given the absence of any initiative and the positions they adopt, particularly in cases such as that of the *ESL*. The Commission does not seem to want to reproach UEFA for what it has condemned in the practices of the modest International Skating Union. The European Parliament does not seem more sensitive to the possible problems posed by UEFA or FIFA rules.

This leaves the national courts and the CJEU to establish a complete framework to define the right balance between economic freedoms and sporting specificities through various relevant preliminary questions. Everyone is familiar with the *Bosman* ruling, but it was only made possible because a court in Liège considered it necessary to

refer the matter to the CJEU.

This ruling revolutionized the football industry by establishing a single labor market throughout the EU. However, UEFA and its federations have not decided to adjust the production market to the labor market's new realities by maintaining national territorial compartmentalization.

Let us hope that the national courts confronted with such problems, especially those of the supreme courts, will make sure that the CJEU is in a position to "*say the law*" of the Union by making good use of the judge-to-judge dialogue offered by Article 267 of the TFEU.

In this matter, the CJEU depends on the "*assists*" that the national courts can give. Let's bet they will do so as efficiently as *Kevin De Bruyne*. The Belgian courts will certainly play their part and, in that case, there will be hardly any "*Hazard*"!

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[1] This article was previously published in the Belgian publication *Journal des Tribunaux* (B) 2022, p. 441

[2] Homegrown rule.

[3] See https://orbi.uliege.be/handle/2268/207344

[4] See the press release published on the website of *Swift Hespérange*: www.swifthesper.lu/news/communique-de-presse~plainte-envers-la-flf-et-l-uefa-34834/