Sports Law, Policy & Diplomacy Journal

SLPD Institute

Pravni fakultet Faculty of Law
Sveučilište u Rijeci
University of Rijeka

SPORT&EU
est 2005

Vol. 2 / No. 1 (2024)

UNIVERSITY OF RIJEKA, FACULTY OF LAW
Institute of Sports Law, Sports Policies and Sports Diplomacy &
Jean Monnet Chair in EU Sports Law, Policy & Diplomacy

in partnership with

Sports Law, Policy & Diplomacy Journal

ISSN (*Online*) 2975-6235

UDC 3:796
DOI https://doi.org/10.30925/slpdj

Vol. 2 **No. 1**

Rijeka, 2024

Co-funded by the European Union

SPORT GOVERNANCE AND EU LAW: THE TIMES THEY ARE (FINALLY !) A-CHANGIN'

JEAN-LOUIS DUPONT*

UDC 34:796(4)
DOI https://doi.org/10.30925/slpdj.2.1.1
Received on July 1, 2024
Accepted on July 18, 2024
Professional paper

Abstract

The Times They Are A-Changin': At last, change is a reality for sport governance in Europe, due to the resolute approach of the CJEU in recent high-profile "sport" cases. This article highlights key points from the three judgments of 21 December, 2023 and underlines some of the cardinal points of ongoing cases related to EU law applied to sport, and, particularly in sport governance. In short, through the orthodox enforcement of competition law and fundamental freedoms (and likely also fundamental rights in the near future), the CJEU imposes a strong democratic control on sports regulators. National courts - re centred of the game by the ISU ruling and guided by the Antwerp ruling - have the task of making this control fully effective. In short, no more "sports washing."

Keywords: EU Law Applied to Sport, CJEU Recent Case Law, Ongoing EU Law Cases, Principle of Effective Jurisdictional Protection in Sport.

1. INTRODUCTION

"Come gather 'round people
Wherever you roam
And admit that the waters
Around you have grown
And accept it that soon
You'll be drenched to the bone
If your time to you is worth savin'
And you better start swimmin'
Or you'll sink like a stone
For the times they are a-changin"

This first verse of Bob Dylan's famous song could well serve as a poetic summary of the three 'sport' rulings handed down by the CJEU on 21 December, 2023[1]: the EU's highest court has

* Jean-Louis Dupont, Attorney-at-Law (Barcelona Bar), Dupont-Hissel, Spain. ✉ jld@jldupont.eu.

1 Namely Judgement of 21 December 2023, *International Skating Union* (C-124/21P), ECLI:EU:C:2023:1012; Judgement of 21 December 2023, *Royal Antwerp Football Club* (C-680/21), ECLI:EU:C:2023:1010; Judgement of

indeed sent a very clear message to the current governing bodiesof sport in Europe and beyond: The Times They Are A-Changin'!

As a practitioner of EU law, particularly as applied to the sports sector, and given my professional career[2], I do not claim to be able to analyse the judgments of 21 December, 2023 with perfect Swiss neutrality. The academic world has already done so and will continue to do so.

The sole aim of this article, therefore, is to collect a few 'highlights', a few essential elements, from the three judgments of December 2023 and to point out some of the cardinal points of the ongoing cases.

This selection is necessarily subjective. However, in order to strive for objectivity as much as possible, the opinions I express will be based mainly on recent legal articles by particularly renowned authors. In other words, I will be subjective, but – objectively - in excellent company.

2. ISU JUDGEMENT: LONG LIFE TO THE PRINCIPLE OF EFFECTIVE JURISDICTIONAL PROTECTION (C-124/21 P)

As a practitioner, when faced with a new case, the first question that comes to mindis always the same: who is the competent judge, territorially and materially?

When the opponent is an international sports federation, apart from one exception that proves the rule, this federation systematically maintains that the only "judge" withjurisdiction is the Court of Arbitration for Sport (CAS), in Lausanne, based on this federation's rules imposing such a mandatory arbitration.

This procedural subterfuge guaranteed the sports federations *de facto* immunity from EU law and - just as importantly - the certainty that their disciplinary sanctions would not be challenged by the courts. To ensure the effectiveness of an executive power, what could be more effective than for this executive power to create and control its own "judicial" power?

In other words, Montesquieu is not the favourite author of the presidents of international federations: the separation of powers is not their cup of tea.

Procedurally, this immunity of CAS awards from EU law is ensured by the fact thatthe only possible state recourse against a CAS award– in particular - is an action for annulment before the Swiss "Federal Court," which considers that EU competitionlaw and EU fundamental freedoms are not part of Swiss international public policy.

With its ISU ruling, the CJEU put an end to this incestuous mechanism.

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21 December 2023, *European Superleague Company* (C-333/21), ECLI:EU:C:2023:1011.

2 In particular, regarding EU law applied to sport, in cases involving the CJEU, Bosman, Meca-Medina, Royal Antwerp FC, European Super League, Lassana Diarra, RFC Seraing, Swift Hespérange, FIFPro Europe's action against FIFA concerning the monopoly of the world calendar, etc., most of them with my partner and alter ego Martin Hissel.

Indeed, in paragraphs 184 to 204 of its *ISU* judgment, the Court held in particular that:

- *"(...) while noting that an individual may enter into an agreement that subjects, in clear and precise wording, all or part of any disputes relating to it to an arbitration body in place of the national court that would have had jurisdiction to rule on those disputes under the applicable national law, and that the requirements relating to the effectiveness of the arbitration proceedings may justify the judicial review of arbitral awards being limited (...), the Court has nevertheless pointed out that such judicial review must, in any event, be able to cover the question whether those awards comply with the fundamental provisions that are a matter of EU public policy, which include Articles 101 and 102 TFEU (...). Such a requirement is particularly necessary when such an arbitration mechanism must be regarded as being, in practice, imposed by a person governed by private law, such as an international sports association, on another, such as an athlete"* (par. 193).

- *"In the absence of such judicial review, the use of an arbitration mechanism is such as to undermine the protection of rights that subjects of the law derive from the direct effect of EU law and the effective compliance with Articles 101 and 102 TFEU, which must be ensured – and would therefore be ensured in the absence of such a mechanism – by the national rules relating to remedies. Compliance with that requirement for effective judicial review applies in particular to arbitration rules such as those imposed by the ISU (...)". "(...) rules such as the prior authorisation and eligibility rules must be subject to effective judicial review as is apparent from paragraphs 127and 134 of the present judgment"* (par. 194, 195 and 197).

- *"That requirement of effective judicial review means that, in the event that such rules contain provisions conferring mandatory and exclusive jurisdiction on an arbitration body, the court having jurisdiction to review the awards made by that body may confirm that those awards comply with Articles 101 and 102 TFEU. In addition, it entails that court's satisfying all the requirements under Article 267 TFEU, so that it is entitled, or, as the case may be, required, to refer a question to the Court of Justice where it considers that a decision of the Court is necessary concerning a matter of EU law raised in a case pending before it (...)"* (par. 198).

- *"As essential as it may be (...), the fact that a person is entitled to seek damages for harm caused by conduct liable to prevent, restrict or distort competition cannot compensate for the lack of a remedy entitling that person to bring an action before the relevant national court seeking, as appropriate following the grant of protective measures, to have that conduct brought to an end,or where it constitutes a measure, the review and annulment of that measure, if necessary following a prior arbitration procedure carried out under an agreement that provides for such a procedure. The same applies to persons practising professional sport, whose career may be especially short, in particular where they practise that sport at a high level. In addition, that fact cannot justify that right's being formally preserved but, in practice, deprived of an essential part of its scope, as would be the case if the judicial review that can be carried out in respect of the conduct or measure in question was excessively limited in law or in fact, in particular because it cannot concern the public policy provisions of EU law"* (par. 201 and 202).

- *"That requirement for effective judicial review"* applies not only to the ISU arbitration rules but, more generally, to all *"arbitration rules such as those imposed by the ISU"* (par. 195).

This is, therefore, the case with the rules of UEFA and FIFA and their members, which impose mandatory arbitration before CAS.

As analysed by Professor Wathelet (former Judge and First Advocate General at the CJUE):

> *"In practice, from now on, when a national court of a Member State is seised of a dispute in which a party alleges a breach by an international or national sports federation of fundamental provisions of EU Law, it will no longer be possible for that federation to try to escape the application of EU Law by claiming any arbitration exception for the benefit of the CAS. This procedural subterfuge is a thing of the past. One can only rejoice.*
>
> *Does this mean that the international federations must definitively and entirely renounce arbitration as soon as a question of EU Law arises? We do not think so. The requirements set out in the ISU ruling are not prima facie incompatible with the establishment of an "EU CAS" within a Member State of the Union, with the consequence that its awards may be appealed before a national court of that State in the event of a breach of a fundamental provision ofEU Law, with that national court also being able, if necessary, to refer questions to the CJEU for a preliminary ruling.*
>
> *Such a "repatriation" of sports arbitration within the EU would make it possible to convince oneself that sports federations are genuinely interested in arbitration as such. And not just in arbitration in Switzerland».*[3]

3. ARTICLE 165 TFEU: LET'S BECOME SERIOUS...

In his Opinion of 15 December, 2022 in the European Super League (*ESL)* case (points 30 and 31), Advocate General *Rantos* states that:

> *"Article 165 expresses (...) the 'constitutional' recognition of the 'European Sports Model'", inwhich "sports federations play a key role."*

In his Opinion of 9 March, 2023 in the *Royal Antwerp FC* case (paragraphs 51 to 54), First Advocate General *Szpunar* has showed much more orthodoxy:

> *"UEFA and the URBSFA cannot obtain a blank cheque for the purposes of restrictions on the fundamental freedom of Article 45 TFEU by reference to Article 165 TFEU. Restrictions of this fundamental freedom by entities such as UEFA and the URBSFA must be appraised like all other restrictions, according to standard principles."*

In its *Royal Antwerp FC* ruling, the Court logically followed the opinion of the First Advocate General:

- Article 165 TFEU confers on the Union only a supporting power and this provision assigns objectives "*to Union action,*" and therefore not to private federations (paragraphs 64 and 65).
- *"(...) as observed by the Court on a number of occasions, sporting activity carries considerable*

3 Melchior Wathelet, "There Has Indeed Been Sport at the Court of Justice of the European Union...And There Will Be More to Come", Football Legal, 31 May, 2024, https://www.football-legal.com/content/there-has-indeed-been-sport-at-the-court-of-justice-of-the-european-union-and-there-will-be-more-to-come-1-by-melchior-wathelet.

social and educational importance, henceforth reflected in Article 165 TFEU, for the Union and for its citizens (...). Sporting activity also undeniably has specific characteristics which, whilst relating especially to amateur sport, may also be found in the pursuit of sport as an economic activity (...). Lastly, such specific characteristics may potentially be taken into account along with other elements and provided they are relevant in the application of Articles 45 and 101 TFEU, although they may be so only in the context of and in compliance with the conditions and criteria of application provided for in each of those articles" (paragraphs 70 to 72).

In short, contrary to the sport federations' mantra, it is now fully confirmed thatthere is no such thing as a constitutionalized "European Sports Model."

As indicated by Weatherill:

"The Court's froideur towards Article 165 is doubtless entirely calculated. The Court wants to advertise that it is not tempted to endorse Advocate General Rantos's wildly adventurous Opinion in ESL delivered in December 2022, which claimed that Article 165 'constitutionalised' the European Sports Model and that accordingly EU law granted a high level of protection to the sporting status quo. Rantos was criticised at the time as going (far) too far[4] and now one year later the Court's rulings of 21 December 2023 ignore Mr Rantos's Opinion and prefer a much more limited reading of the impact of Article 165 TFEU"[5].

4. NO MORE "SPORTS WASHING"

As accurately observed by Houben, Budzinski andWathelet:

"Obviously, the burden of proof to benefit from the efficiency gains exemption or the Wouters and Meca-Medina exemption, as the case may be, lies with the party claiming them. This is not rocket science. Therefore, it is all the more remarkable that the Court goes out of its way to emphasize this point in the 21 December 2023 verdicts, and that Advocate General Szpunar underlines it again in his Diarra opinion. The Court, furthermore, stresses that domestic courts should not be too lenient in discharging the burden of proof: arguments and evidence must be 'convincing'. This emphasis contains a message to the world of sports: governing bodies cannot get away with anticompetitive conduct by merely claiming to pursue legitimate objectives and/or efficiency; they need to back this up with solid arguments and, ideally,empirical evidence. Vague references to the integrity of sports, ethics, fair play or similar principles may, for example, not in themselves suffice to convince the courts. This is important.

If rules would be simply assumed to pursue legitimate objectives and/or to contribute to efficiency gains, instead of being evidenced to do so, this would be an open invitation for 'sports washing', an equivalent of green washing in sports: the mere acceptance of legitimacy just because a sports governing body claims legitimacy. In other words, "no preferential treatment anymore for the sports federations" and "the end of the Article 165 TFEU myth"."[6]

4 Wathelet, "There Has Indeed Been Sport at the Court of Justice of the European Union... And There Will Be More to Come[1]".

5 Stephen Weatherill, "The impact of the rulings of 21 December 2023 on the structure of EU sports law", *International Sports Law Journal* 23, no. 4 (2023): 409–415, 410. https://doi.org/10.1007/s40318-024-00265-w.

6 Robby Houben, Melchior Wathelet & Oliver Budzinski, "The Transfer System in Football: Diarra and What's

More specifically in paragraph 113 of its *Royal Antwerp FC* ruling, the Court restricted the scope of the *Wouters/Meca-Medina "exception."* A legitimate objective in the general interest must be pursued, *"which [is] not per se anticompetitive in nature."* Additionally, *"the specific means used to pursue those objectives [must be] genuinely necessary for that purpose"* and strictly proportionate. Importantly, the Court states that the objectives in question must be of an "*ethical or principle*" nature and clarifies that the "MECA exception" can only be applied to restrictionsof competition by effect.

Regarding restrictions by object, the only escape door is Article 101 para. 3 TFEU, in which case *"(i)t is for the party relying on such an exemption todemonstrate, by means of convincing arguments and evidence, that all of the conditions required for the exemption are satisfied"* (Royal Antwerp FC ruling, par.120). With regards to the "*efficiency gains"* condition, the sports regulator concerned must prove *"that the efficiency gains made possible by the agreement, decision by an association of undertakings or concerted practice in question have a positive impact on all users, be they traders, intermediate consumers or end consumers"* (Royal Antwerp FC ruling, par. 122). Moreover,*"the 'users' include, first and foremost, professional football clubs and the players themselves. Added to that, more broadly, are the final 'consumers' who are, in the economic sense of the term, the spectators or television viewers" (Royal Antwerp FC ruling, par. 130).*

Regarding Article 45 TFEU, the Court applies the same standard:"As regards, more specifically, the condition relating to the suitability of such measures, it should be borne in mind that they can be held to be suitable for ensuring achievement of the aim relied on only if they genuinely reflect a concern to attain it in a consistent and systematic manner (...). Similarly to situations involving a measure of State origin, it is for the party who introduced those measures of non-State origin to demonstrate that those two cumulative conditions are met (...). In the present case, it will therefore be for the referring court to rule on whether the URBSFA rules at issue in the main proceedings satisfy those conditions, in the light of the arguments and evidence produced by the parties" (Royal Antwerp FC ruling, par. 141 to 143).

In *ESL*, the Court held that *"(...) none of the specific attributes that characterise professional football makes it possible to consider as legitimate the adoption nor, a fortiori, the implementation of rules on prior approval and participation which are, in a general way, not subject to restrictions, obligations and review that are capable of eliminating the risk of abuse of a dominant position and, more specifically, where there is no framework for substantive criteria and detailed procedural rules for ensuring that they are transparent, objective, precise and non-discriminatory, when they confer on the entity called on to implement them the power to deny any competing undertaking access to the market. Such rules must be held to infringe Article 102 TFEU (...)"* (ESL ruling, par. 147). In paragraphs 177 to 179 of its ruling, the Court reiterates these same requirements with regard to Article 101 TFEU (see also paragraph 4 below).

In short, "no more sports washing."

Next", Football Legal, 25 June 2024, https://www.football-legal.com/content/the-transfer-system-in-football-diarra-and-whats-next.

As a practitioner, I would like to make two final comments:

- It is to be hoped that - at long last - the European Commission will take note of the fact that sports federations are associations of undertakings "like any others",
- As the doctrine rightly points out: *"In its assessment, the Court refers to sport specific features such as maintaining a balance and preserving a certain equality of opportunity as between the participating professional football clubs in European or global interclub competitions, given the interdependence that binds them together.Moreover, the Court refers to a trickle-down effect from those competitions into smaller professional football clubs and amateur football clubs which, whilst not participating therein, invest at local level in the recruitment and training of young, talented players, some of whom will turn professional and aspire to join a participating club. In addition, it emphasizes the solidarity role of football, as long as it is genuine, serving to bolster its educational and social function within the European Union. These arguments go beyond the typical economic consideration – but do stand in line with the special economics of sports - and seem to allow sports governing bodies to make their case on the basis of the specificity of sport, even in event of a 'by object' restriction. However, not in a gratuitous way: the context of the exercise – the efficiency gains exemption with its four cumulative conditions – ensures the seriousness of the debate, and requires sports governing bodies to really and thoroughly demonstrate that their rules are efficient, with facts and figures, and among others involving a comparison of alternatives. It requires sports governing bodies to present (empirical) evidence that the sports-specific efficiencies are actually met (and are not just cheap talk) and that no alternatives exist that are capable of achieving the same goals with less distortive effects on competition"*[7].

In a nutshell: yes to the specificities of sport (but within a rigorously defined analytical framework); no to cheap talk and 'sports washing.'

5. ESL: NO NEED TO BREAKAWAY

So much has already been written about the ESL judgment.

I will therefore confine myself to a single comment, which presupposes to first read paragraphs 149 to 151 of the judgment carefully:

> *"149. In that regard, it is irrelevant that FIFA and UEFA do not enjoy a legal monopoly and that competing undertakings may, in theory, set up new competitions which would not be subject to the rules adopted and applied by those two associations. Indeed, as is apparent from the statements of the referring court, the dominant position held by FIFA and UEFA on the market for the organisation and marketing of international interclub football competitions is such that, in practice, at the current juncture it is impossible to set up viably acompetition outside their ecosystem, given the control they exercise, directly or through their member national football associations, over clubs, players and other types of competitions, such as those organised at national level.*

7 Houben, Wathelet & Budzinski, "The Transfer System in Football: Diarra and What's Next".

> *In the present case, however, it will be for the referring court to categorise the rules at issue in the main proceedings in the light of Article 102 TFEU, after carrying out the additional verifications it may deem necessary.*
>
> *In that perspective, it should be noted that, in order for it to be held that the rules on prior approval of sporting competitions and participation in those competitions, such as those at issue in the main proceedings, are subject to transparent, objective and precise substantive criteria as well as to transparent and non-discriminatory detailed procedural rules that do not deny effective access to the market, it is necessary, in particular, that those criteria and those detailed rules should have been laid down in an accessible form prior to any implementation of those rules. Moreover, in order for those criteria and detailed rules to be regarded as being non-discriminatory, it is necessary, given, inter alia, the fact that entities such as FIFA and UEFA themselves carry on various economic activities on the market concerned by their rules on prior approval and participation, that those same criteria and detailed rules should not make the organisation and marketing of third-party competitions and the participation of clubs and players therein subject to requirements which are either different from those applicable to competitions organised and marketed by the decision- making entity, or are identical or similar to them but are impossible or excessively difficult to* fulfil in practice for an undertaking that does not have the same status as an association or does not have the same powers at its disposal as that entity and accordingly is in a different situation to that entity. Lastly, in order for the sanctions introduced as an adjunct to rules on prior approval and participation, such as those at issue in the main proceedings, not to be discretionary, they must be governed by criteria that must not only be transparent, objective, precise and non-discriminatory, but must also guarantee that those sanctions are determined, in each specific case, in accordance with the principle of proportionality, in the light of, inter alia, the nature, duration and seriousness of the infringement found".

In my view, the CJEU has - in a manner of speaking - given FIFA and UEFA a "Judas kiss":

- First, the Court confirms the right of any competitor to exist outside the FIFA- UEFA ecosystem. This is the necessary consequence of the premise that Article 165 TFEU does not constitutionalise a "European Sports Model," atemple of which the international federations claimed to be the guardians).

- Secondly, the Court enshrines the right of competitors - if they so wish - to develop their alternative competitions within the existing ecosystem. Ifcompetitors make this choice, sports federations (in this case, FIFA and UEFA) can only prevent them from entering the market for extremely specific and limited reasons, without favouring their own competitions. Whether such neutrality is possible in practice for an organisation affected by an existential conflict of interests is extremely doubtful. In other words, what the Court has enshrined is much more a right for competitors to access the existing ecosystem rather than a right for the regulators of that ecosystem to modulate it as they see fit.

6. ROYAL ANTWERP FC: A PERFECT ASSIST TO THE NATIONAL JUDGES

As analysed by Wathelet, in its Royal Antwerp FC judgment, the Court gave the national judges an "assist" that could make Kevin De Bruyne himself jealous:

> *"(...) the Court took care to provide the referring court (and, by the same token, all national courts that might have to deal with similar questions) with a veritable "user's manual". In our view, these "guidelines" for national courts are formulated in such a way as to enable them to understand not only the rules on "home-grown players" but also, in the future, a large number of other rules adopted and implemented by sports regulators. From this guidance exercise for national courts, I would like to highlight the following points in particular:*

- *As mentioned in the previous point, the Court put an end to the sports regulators' claim to benefit from any preferential treatment, by insisting on the burden of proof that lies with them when they attempt to justify an obstacle or restriction to some fundamentalfreedoms conferred by Union Law.*

- In paragraphs 95 et seq. of its ruling, the Court strongly emphasises that *"agreements aimed at partitioning markets according to national borders, tending to restore the partitioning of national markets or making the interpenetration of national markets more difficult (...) must, for that reason, be categorised, in principle, as agreements that have as their 'object' the restriction of competition within the meaning of Article 101(1) TFEU". It isa fact that, given the political model of international federations, which are made up of national members, many of their rules may, directly or indirectly, have such a partitioning effect. In the present case, in order to assess whether such a partitioning effect may result from the rules at issue relating to "home-grown players", it should be remembered that "home-grown" is in fact a euphemism designed to conceal a "national training" criterion. That is exactly what the Court said to the national court in paragraph 147 of its ruling on Article 45 TFEU, when it stated that "it is (...) local investment in the training of young players, in particular when it is carried out by small clubs, where appropriate in partnership with other clubs in the same region and possibly with a cross-border dimension, which contributes to fulfilling the social and educational function of sport."*

Clearly and quite rightly, the CJEU has no desire to turn itself into a "European Court of Sport". It has therefore ensured that the national courts have the fundamentals to enable them, as a general rule, to assess for themselves whether a particular rule of a sports regulator complies with EU Law"[8].
From a practitioner's perspective, this "empowerment" of national courts is an essential ingredient in the imposition of genuine respect for the EU rule of law (and beyond) by sports regulators.

Finally, with specific regard to UEFA's Home-Grown Player Rules, the doctrine emphasises that:

8 Wathelet, "There Has Indeed Been Sport at the Court of Justice of the European Union... And There Will Be More to Come[1]".

- "The Court did not decide the point on 21 December 2023. It leaves the final conclusion to the national court. But its preference seems to be to treat the home grown rules as a restriction by object, not effect.

In Royal Antwerp the Court instructs the national court to examine the economic and legal context in which the rules were adopted 'together with the specific characteristicsof football' (para 110), but it offers no elaboration of what this entails, and emphasises instead that the rules limit the recruitment of talented players, which has an impact on the competition in which the clubs may engage, not only in the 'upstream or supply market' (the recruitment of players), but also in the 'downstream market' (interclub football competitions). It adds that the rules may partition markets according to national borders or make the interpenetration of national markets more difficult by establishing a form of national preference":[9]

> *"The Court's new framework seems straightforward: conduct that by its very nature is anticompetitive, can only be justified by economic efficiency gains; conduct that "merely" has an anticompetitive effect, may be justified in view of the more lenient Wouters and Meca-Medina exemption too.*

In fact, however, the application of the framework may prove difficult, and discussions will shift to focus on whether a certain conduct is anticompetitive "by object" or "by effect". This is a question akin to theological discussions over the nature of the divine. The difficulty is already apparent in RAFC, where the Court itself declined to categorize the "home grown player rule" in either bucket and passed the hot potato to the national court. Nonetheless, without being explicit, the Court did seem to have nudged the referring court towards a qualification of the current homegrown player rules as a "by object" restriction, instead of a "by effect" restriction"[10].

This is exactly the position defended by our clients in this case: based on the Royal Antwerp FC judgment, all current rules on 'home-grown players,' boththose of UEFA and those of its member national federations, constitute restrictions ofcompetition 'by object,' contrary to Article 101.1 TFEU.

7. THE DIARRA CASE

In this case, on 30 April 2024, the First Advocate General Szpunar delivered conclusions that, in short, applied the jurisprudential grid established by the CJEU (in the Grand Chamber) in its three judgments of 21 December, 2023 to the case in point, namely the FIFA rules relating to the termination of professional players' contracts, which are a key component of the so-called "FIFA transfer system".

Wathelet summarises the conclusions of his successor as follows:

> *"(...) the First Advocate General proposes that the Court should hold that Articles 45 and*

9 Stephen Weatherill, "EU Law Analysis", Blogspot, 11 May 2024, https://eulawanalysis.blogspot.com/2024/05/protecting-conditional-autonomy-of.html.

10 Robby Houben, "The Transfer System in Football: A First Case Study of the CJEU's Novel Competition Law Framework (for Sports)" (May 23, 2024). http://dx.doi.org/10.2139/ssrn.4838909.

101TFEU preclude the FIFA rules at issue.
First, he considers that those rules create a restriction of competition between clubs, theelements of which he analyses "are strong indications that there is a restriction of competition BY OBJECT", which cannot therefore benefit from the Wouters-Meca exception (which may apply only where the restriction is 'BY EFFECT') and which, in the present case and according to the First Advocate General, does not satisfy the four cumulative conditions of Article 101. 3 TFEU, those conditions being "clearly not met" (paragraph 58 of the Opinion). Consequently, there is no need to consider whether it constitutes a restriction of competition by effect and could be justified. However, the First Advocate General makes that analysis for the eventuality that the Court favours restriction by effect.

The First Advocate General adds that the 'Albany' exception does not apply in casu, for the simple reason that the provisions at issue do not constitute collective agreements between employers and employees.

Secondly, the First Advocate General is equally clear about the restriction on the free movement of workers guaranteed by Article 45 TFEU, a restriction created by the contested provisions insofar as they purely and simply prevent players from being transferred to clubsin other Member States. This is what happened to Mr Diarra, who was prevented from exercising his profession for a long period.

This observation, made in relation to Article 45 TFEU, is - according to the First Advocate General - fully transposable to the case where the Court were to assess the restriction of competition by effect rather than by object: "In the event that the Court were to find there to be a restriction of competition not by object, but by effect, the next step would be to examine the contested provisions in the light of other objectives under the Wouters and Others case- law, so as to ascertain whether they are justified by the pursuit of one or more legitimate objectives in the public interest which are not per se anticompetitive in nature. In this respect, the test would, in essence, be comparable to the justification test under Article 45 TFEU, (...)."(paragraph 59).
The First Advocate General completed his reasoning by referring to Article 15 of the EU Charter of Fundamental Rights, which provides for 'the right to engage in work and to pursuea freely chosen or accepted occupation', which he considered applicable to the case before the referring court"[11].

The Court will deliver its ruling in the coming months. I would like to highlight two particularities of this case:

- The Diarra case provides the CJEU the opportunity to examine the rules of sports federations from the perspective of the EU Charter of Fundamental Rights, rather than solely focusing on competition law and freedom of movement. In fact, it wasthe Court itself that requested to comment on this point ahead of the hearing.

11 Wathelet, "There Has Indeed Been Sport at the Court of Justice of the European Union... And There Will Be More to Come[1]".

- In addition to addressing the EU legality of a particular FIFA rule, the judgment could also settle the question of FIFA's legitimacy to regulate an EU labour market in principle. According to FIFPRO Europe, FIFPRO and UNFP (the international and national players' unions supporting Mr. Diarra in the case), this right belongs to the social partners.

8. THE RRC SPORT CASE (C-209/23)

The key question submitted to the CJEU by the *Landgericht Mainz* is as follows: DoesArticle 15(2) of the new FIFA regulations on *"football agents,"* which prohibits the agreement of remuneration for players' agents or the payment to players' agents of remuneration that exceeds a maximum calculated as a percentage of the transfer amount or the annual remuneration of the players, infringe Articles 101 and 102 TFEU and Article 56 TFEU (freedom to provide services)?

In an article entitled "Legitimate Objectives in Antitrust Analysis: The FIFA Regulations of Agents and the Right to Regulate Football in Europe,"[12] Mavroidis and Neven accurately identify the crux of the matter: "As per the ONP judgment, for the CJEU to examine whether FFAR pursues a legitimate objective, it must first ensure that FIFA is entitled to pursue this objective, that, in other words, it is entitled to legislate in this realm and it has the power to adopt the necessary means to this end. Otherwise, anyone could pursue anything and thus use the pursuit of legitimate objective as means to undo the distribution of competencies decided between member states and the EU institutions or possibly conflict with national regulations. Could, for example, FIFA, in the name of promoting universal service, request from TV stations to transmit football matches for a nominal fee? Should not the judiciary first ask whether FIFA is entrusted with the competence to promote universal service?"

This key issue goes far beyond sports regulation.

9. THE ROYAL FOOTBALL CLUB SERAING CASE (C-600/23)

In that case, the Belgian Court of Cassation asks the CJUE whether the national courts of the EU Member States must recognise the arbitration awards of the CAS, based in Switzerland, as having any *res judicata* effect (between the parties and *vis-à-vis*third parties) when those awards decide questions of EU Law.
The *Cour de Cassation* seems to suspect that forced arbitration in Switzerland violates the general (and essential) EU Law principle of *"effective judicial protection,"* which was latter on confirmed by the *ISU* judgment of 21 December, 2023. Wathelet considers as follows:

> *"Case C-600/23 is nonetheless of interest, particularly in that it could enable the Court to consider the question, not addressed in its judgment in ISU, of the CAS's independence from FIFA, which is both a major contributor and the main provider of business to the arbitral tribunal, as well as the question of whether a third party may rely on a CAS award and, if so, the consequences of such a possibility in terms of the burden of proof"*[13].

12 Pedros C. Mavroidis, Damien J Neven, "Legitimate Objectives in Antitrust Analysis The FIFA Regulation of Agents and the Right to Regulate Football in Europe" SSRN (January 14, 2024), p. 23, http://dx.doi.org/10.2139/ssrn.4694407.

13 Wathelet, "There Has Indeed Been Sport at the Court of Justice of the European Union... And There Will Be More

In case C-600/23, the hearing will take place in the CJEU (Grand Chamber) on 1st October, 2024.

10. AND THERE IS MORE TO COME...

A number of cases currently pending before national courts could soon be added to the CJEU's sporting output, as some parties have requested preliminary rulings in cases pending before of national jurisdictions.

I will mention three of them, quoting extracts from press releases issued by the claimants.[14]

The first is the case of "Swift Hespérange FC v UEFA and Fédération Luxembourgeoise de Football (FLF)," pending before the Tribunal d'arrondissement de Luxembourg.

In a press release dated 22 July, 2022, Swift Hespérange stated:

> *"FC SWIFT HESPERANGE, a Luxembourg football club, is bringing an action against the Fédération Luxembourgeoise de Football (FLF) and UEFA before theTribunal d'arrondissement de Luxembourg, requesting a preliminary ruling from the CJEU for infringement of free competition (Article 101 TFEU), free movement of capital (Article 63 TFEU), free movement of workers (Article 45 TFEU) and freedom to provide services (Article 56 TFEU)."*

Indeed, SWIFT HESPERANGE denounces the illegality of various UEFA and FLF rules: UEFA and FLF rules prohibiting clubs from creating and running transnational competitions (e.g. a BENELUX league or a pan-European competition); UEFA and FLF rules imposing quotas for "locally trained players." FLF rules imposing a financial scale for national transfers; FLF transfer rules violating the BOSMAN judgment and FLF rules prohibiting clubs from incorporating as commercial companies.

This conglomeration of rules, which are in direct conflict with EU law, effectively condemns SWIFT HESPERANGE to remain a micro-enterprise forever.[15]

Next, the "TICOMBO v Belgian State" case, is pending before the Brussels Court of First Instance.

In a press release dated 4 June, 2024, TICOMBO stated that:

> *"TICOMBO, a digital platform for securing the resale of tickets for cultural and sporting events, and some consumers are suing the Belgian State: they are asking the Brussels Courtof First Instance to refer questions to the CJEU for a preliminary ruling on the legality, under EU law, of the Belgian law prohibiting the provision of services such as those offered to consumers by TICOMBO.*

to Come[1]".

14 In these cases, the claimants are represented in particular by "DUPONT-HISSEL".

15 Regarding this case, see SWIFT HESPERANGE official webpage: https://www.swifthesper.lu/archiv-44605v4/news/34834?lang=fr

At the same time, TICOMBO lodged a complaint with the European Commission against UEFA, denouncing the illegality, under EU competition law, of UEFA's self-proclaimed monopoly on the ticket resale market, particularly with a view to Euro 2024. This monopoly and the unreasonable restrictions of UEFA's resale site are directly harmful towards consumer interests. Most organisers of major sporting events behave in a similar way.

(...)

In the proceedings brought against the Belgian State, TICOMBO and the consumers areasking the Brussels Court of First Instance to refer the following questions to the CJEU for a preliminary ruling:

1. *Is the obstacle to the freedom to provide services, guaranteed by Article 56 TFEU, generated by Article 5 §1 of the Law of 30 July 2013, which provides that "Resale on aregular basis is prohibited, as well as the act of displaying with a view to resale on a regular basis and the act of providing means to be used for resale on a regular basis", justifiable by consumer protection or by another overriding reason in the general interest, insofar as - while making it possible to prevent certain deviant commercial behaviour - it also results in the prohibition of secure intermediation services of the nature offered to consumers by TICOMBO?*

2. *Insofar as the Law of 30 July 2013 results in conferring on the organiser of an event (and any vendors approved by it) the exclusive right to control and operate the resale market "on a regular basis", should that law be considered to be contrary to Article 106 TFEU read in conjunction with Article 102 TFEU, in particular in that those legislative provisions create a structural inequality of opportunity between, on theone hand, that organiser and, on the other hand, TICOMBO or any similar operators, and in that they reinforce the self-proclaimed monopoly on the resale market of the organisers of major sporting events, with the result that consumers are prevented from escaping any abusive conduct on the part of those organisers?*

3. *Does the absolute prohibition, contained in Article 5(2) of the Law of 30 July 2013, on the resale of an access right - in all circumstances - at a price higher than its initial sale price infringe Articles 15 and 16 of Directive 2006/123/EC ("Services Directive") and Article 56 TFEU, in particular in that the obstacle thus created to the detriment of operators such as TICOMBO is neither adequate nor proportionate to the objective of consumer protection?*

By putting all operators in the same basket, laws such as the Belgian law are ineffective, excessive and discriminatory.

At the same time, TICOMBO has lodged a complaint with the European Commission against UEFA for breaches of EU competition law committed by UEFA concerning its policy on the resale of tickets for access to the event, in particular in connection with Euro 2024.

According to TICOMBO, the resale policy imposed by UEFA constitutes an abuse of a dominant position.[16]

16 Press release, TICOMBO (LinkedIn), *"Anti-competitive practices within the European Union in ticket resales for*

Thirdly, in a case between FIFPRO Europe and some of its national member unions against FIFA and the Belgian federation, pending before the Brussels Industrial Tribunal, the claimants stated in a press release dated 13 June, 2024, *inter alia*:

> *"FIFPRO Europe member unions have today submitted a legal claim against FIFA, challenging the legality of FIFA's decisions to unilaterally set the International Match Calendar and, in particular, the decision to create and schedule the FIFA Club World Cup 2025.*
>
> *Player unions believe that these decisions violate the rights of players and their unions underthe EU Charter of Fundamental Rights while also potentially violating EU competition law.*
>
> *The English Professional Footballers Association (PFA) and the Union Nationale des Footballeurs Professionnels (French player union) are, with the support of FIFPRO Europe, asking the Brussels Court of Commerce to refer the case to the European Court of Justice (ECJ)with four questions for a preliminary ruling.*
>
> *The EU Charter of Fundamental Rights guarantees workers and their trade unions various fundamental rights. These include the prohibition of forced or compulsory labour, freedom of work, the right to negotiate and conclude collective agreements, the right to healthy working conditions and the right to anannual period of paid leave. These rights are covered under Articles 5, 15, 28 and 31 of the Charter.*

Players and their unions have consistently highlighted the current football calendar as overloaded and unworkable.

However, FIFA, as highlighted in recent representations by international unions and leagues, have failed to meaningfully engage or negotiate and have unilaterally continued a programme of competition expansion despite the opposition of player unions. This has included the decision to proceed with a newly expanded FIFA Club World Cup.

The new tournament will see 32 clubs and their players have to take part in this new competition in the United States from mid-June to mid-July 2025. Once preparation periods and travel are included, the tournament is likely to create up to six weeks of additional work to be added to an already crowded schedule.

The role of FIFPRO Europe and its members is not to favour or oppose one competition over another.

However, in the wider context of the global football calendar, the new FIFA Club World Cup is seen by players and unions as representing a tipping point.

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sports and cultural events: TICOMBO takes legal action against the Belgian state and UEFA denouncing practices contrary to European Law and an abuse of dominant position directly harming consumers' interests". PaRR, Ticketing platform Ticombo files UEFA antitrust complaint with EC; seeks ECJ referral from Belgian court, https://www.dupont-hissel.com/assets/13749d7e-c0f3-4541-9319-3d6e47dae27e/parr.pdf

For the players most in demand for both club matches and national team competitions, the right to a guaranteed annual break has become virtually non-existent, with the FIFA Club World Cup 2025 being held during the only period of the year theoretically available toplayers to take such breaks. Player unions believe that such decisions by FIFA are in breach of the EU Charter of Fundamental Rights (CFREU), without any serious justification. Ultimately, player unions believe the aim of this new competition is to increase the wealth and power of football's global governing body, with no proper regard for the impact on the players involved or on other stakeholders within professional football. Furthermore, player unions believe that, in the light of the ECJ's 'European Super League' ruling, such unilateral and discretionary decisions – which are not the result of clear, objective, transparent, non-discriminatory and democratic legal frameworks – constitute 'restrictions of competition by object within the meaning of Article 101 TFEU"[17].

It seems that the CJEU is not over with its intensive sports program.

11. CONCLUSION

Over and above their specific content, the three judgments handed down by the Grand Chamber of the CJEU on 23 December, 2024 send a strong and unambiguousmessage to all those involved in the sports sector, particularly professional sports:it is up to sport to adapt to the EU rule of law, not the EU rule of law to adapt to sport.The specific characteristics of sport will always be taken into account, but they are nolonger a "licence to kill."

In other words, through competition law and fundamental freedoms (and undoubtedly fundamental rights in the near future), the CJEU has imposed a genuine and strong democratic control on sports regulators. The national courts, reinstated at the centre of the game by the ISU ruling and guided by the Antwerp ruling, have the task of making this control fully effective, including by referring questions to the CJEU for a preliminary ruling if necessary.

I am convinced that the case law of the CJEU will lead to changes and even, for certain sports, to concrete sporting and commercial revolutions.

Not everything will be perfect. It never is. But I believe, perhaps naively, that overall, the various stakeholders in the sector will be better off (and consumers better served) in a system of governance that is open and democratic than in the existing autocratic system, that is resolutely resistant to the rule of law and to which the CJEU has shown a red card.

In short, and to paraphrase another famous song, the best-known version of which is by "The Clash," in 2024, we can finally say about certain international sports regulators: "*They fought EU Law and EU Law won*".

17 FIFPRO, FIFPRO Europe Statement: Legal claim against FIFA, Media Release, 13 June 2024, https://www.fifpro.org/en/supporting-players/health-and-performance/player-workload/fifpro-europe-statement-legal-claim-against-fifa.

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