BlogDUE

The ball is in the EU's Court (again): the Opinion of AG Szpunar in *Royal Antwerp Football Club*

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SUMMARY: 1. Introduction. – 2. Background and facts. – 3. The Opinion of the Advocate General. – 4. On the role of Article 165 TFEU. – 5. On the suitability of home-grown players rules. – 6. Concluding remarks.

1. On 9 March 2023, Advocate General (AG) Szpunar delivered his Opinion in case C-680/21 *Royal Antwerp Football Club*. At stake in the case is the compatibility of certain rules of sporting associations with Articles 45 and 101 TFEU. However, upon request of the Court of Justice (Court or CJEU), the AG solely addresses the issue concerning Article 45 TFEU, which secures freedom of movement for workers within the EU. The Opinion of AG Szpunar follows the Opinions delivered by AG Rantos on 15 December 2022 in case C-333/21 *European Superleague Company* and case C-124/21 P *International Skating Union*, which also concerned the compatibility of certain sporting rules with the EU law provisions governing the internal market (see A. DUVAL, *Playing the final in Luxembourg: The Court of Justice and the future of transnational sports governance*, in *Maastricht Journal of European and Comparative Law*, 29(4), 2022, p. 409 ff.; L. MARRUZZO, *UEFA's monopoly v the European Super League: chronicle of an already written ending?*, in *European Competition Law Review*, 43(5), 2022, p. 219 ff.).

2. Somewhat similar to *International Skating Union*, which dealt with the eligibility rules of a skating association, in *Royal Antwerp Football Club* the rules at stake concern the mandatory inclusion of a specific number of home-grown players (HGPs) in clubs' squad lists. Such lists, which must contain a maximum of twenty-five players, constitute the teams participating in the interclub competitions organised by two football associations, namely UEFA (Union of European Football Associations) and URBSFA (Union Royale Belge des Sociétés de Football Association). For a club, HGPs are players who were trained, for a minimum period before they reached a certain age, by the club itself *or* by another club affiliated to the national football association to which the first club belongs. For instance, for A.C. Milan, HGPs are players trained in A.C. Milan's academy or trained in the academies of other Italian clubs. In the same vein, F.C. Barcelona may register as HGPs both players trained by F.C. Barcelona and players trained by Real Madrid C.F., Valencia

C.F., etc. In particular, UEFA rules also provide that four out of the (minimum) eight HGPs included by a club in its list must have been trained by the club itself.

The facts can be briefly summarised as follows. UL, a professional football player with the nationality of a third country as well as Belgian nationality, and Royal Antwerp Football Club, a professional football club based in Belgium, brought an action before the Belgian Court of Arbitration for Sport seeking a declaration that UEFA and URBSFA rules breached Article 45 TFEU. The claim was dismissed and the applicants brought an action before the Brussels Court of First Instance for the annulment of the arbitration award. UEFA intervened in the proceedings and the Belgian court stayed the proceeding and referred to the CJEU.

3. In his Opinion, the AG has no doubts about the admissibility of the case. Indeed, the jurisprudence of the CJEU confirms that even purely internal situations may give raise to admissible free movement cases where it is "not inconceivable" that nationals established in another Member State have been or are interested in exercising their freedom of movement to access the market of the first Member State (see case C-268/15, *Ullens*, para 50). This can be the case for professional football players established in a Member State other than Belgium (para 29).

In the same vein, the AG observes that the applicability of Article 45 TFEU to professional football and the rules applied by private entities organising and managing sporting competitions is beyond doubt (paras 34-36), as clarified by the Court since seminal rulings like *Walrave and Koch* (case 36/74, *Walrave and Koch*) and *Bosman* (case C-415/93, *Bosman*; see A. DUVAL, B. VAN ROMPUY, *The Legacy of Bosman*, Springer 2017; S. VAN DEN BOGAERT, Bosman*: One for All*, in *Maastricht Journal of European and Comparative Law*, 22(2), 2015, p. 172 ff.; S. WEATHERILL, *Anti-doping revisited: The demise of the rule of "purely sporting interest"?*, in *European Competition Law Review*, 27(12), 2006, p. 645 ff.).

The Opinion then assesses whether the rules at stake constitute a restriction on the freedom of movement for workers. The AG considers that the provisions in question indirectly distinguish on the basis of residence (see case C-350/96, *Clean Car Autoservice*, para 29, where the Court held that "national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreigners") - younger players are more likely to reside in their place of origin - and constitute a qualification requirement for admission to the occupation as football players (see case 222/86, *Heylens and others*, paras 9-11). The AG concludes that this is a case of indirect discrimination, whereby neutral rules discourage football players residing in one Member State from leaving a club in that Member State to join a club in another Member State (para 44). Should the Court not find any discrimination, according to the AG the rules would nevertheless be a non-discriminatory restriction prohibited under Article 45 TFEU read in light

of the relevant case-law (para 45; see case, C-176/96 *Lehtonen and Castors Braine*, para 49).

Having established the restriction of freedom of movement for workers, the AG turns his attention to potential justifications. Before delving into the assessment of overriding reasons relating to the public interest, the Opinion includes a detailed reflection on the role played by Article 165 TFEU. This Treaty Article provides that the Union shall contribute to, *inter alia*, the promotion of European sporting issues. Following a literal interpretation, the AG observes that this provision is addressed to the Union, formulated in typical soft law terms, and giving expression to a merely supporting competence (para 51; see Articles 2(5) and 6(e) TFEU). From a systemic and teleological perspective, the AG interprets Article 165 TFEU as a provision devoid of general application and entrusting EU institutions with certain functions that cannot be "outsourced" (para 54) to private entities such as UEFA and URBSFA. In other words, UEFA and URBSFA are not in charge of implementing EU policies and cannot invoke Article 165 TFEU as a "blank cheque" for restrictions on the free movement of workers. The role of Article 165 TFEU is limited, in essence, to *helping* to identify overriding reasons in the public interest justifying the adoption of restrictive measures or serving as an interpretative tool for the application of the proportionality test.

In that regard, the overriding reason relating to the public interest mentioned in the Opinion are:

(i) encouraging the training and recruitment of young players,
(ii) improving the competitive balance of interclub competitions, and
(iii) protecting young players and their education from disruptions in their social and family environment.

The AG observes that, while the Court held in *Bosman* that the public or private nature of the contested provisions is in principle irrelevant, the public interest in the aim pursued by private entities cannot be presumed and should be carefully scrutinised. It is noted in the Opinion that, in its case-law, the Court has already carried out such scrutiny for the overriding reasons relating to the training of players and the competitive balance (paras 56-60). Curiously, the AG does not analyse the overriding reason relating to the protection of young players' education and social and family life.

With regard to the proportionality of the rules in question, the AG assesses their suitability and necessity. In particular, in the key paragraph of his Opinion, the AG concludes that the mandatory rules on HGPs are not suitable to achieve the legitimate aim pursued in so far as they include in the definition of HGP "not only a player trained by the club itself but also one trained by another club in the national league" (para 67). The design of this definition, according to the AG, frustrates both the aims of incentivising the training of young players and improving the competitive balance of interclub competitions. As for young players' training, the AG believes that clubs that can "buy", by signing them on the transfer market, HGPs trained in other clubs belonging to the same national league will not be encouraged to train young players. With regard to the competitive balance, the AG maintains that the

possibility for clubs to "buy" their HGPs undermines the aim of improving the competitive balance of interclub competitions.

Finally, the AG deems the rules at stake as necessary and therefore justified to the extent that they are suitable, that is, to the extent that HGPs cannot emanate from another club in the relevant national football association (para 82).

4. In his Opinion, with respect to the role of Article 165 TFEU, AG Szpunar declares to "fully subscribe" to the Opinion of AG Rantos in the *European Superleague Company* case (note 39). It is interesting, however, that the two Opinions in question do not seem to attach the same value to Article 165 TFEU.

According to AG Szpunar, the protection of the "European Sports Model" and, in more general terms, the promotion, by entities such as UEFA and URBSFA, of the values enshrined in Article 165 TFEU does not necessarily correspond to an overriding reason in the public interest. AG Szpunar stresses the specific, non-general character of Article 165 TFEU, its strictly vertical application – it cannot be invoked against the conduct of private entities – and even its quasi-soft law nature.

On the contrary, AG Rantos adopts a significantly less strict view in his Opinion in the *European Superleague Company* case. There, AG Rantos stresses the horizontal nature of Article 165 TFEU, as a tool for the interpretation of other Treaty provisions and an objective to consider when implementing all EU policies. Furthermore, AG Rantos insists on the constitutional value of the "European Sports Model", understood as the organisational model stemming from the three fundamental characteristics of European sports: pyramid structure, open competitions and financial solidarity. According to AG Rantos, whilst such specific characteristics cannot be relied on to exclude sporting activities from the scope of EU law, they can be relevant for the assessment of any objective justification for restrictions on competition or free movement. Significantly, indeed, AG Rantos believes that the fact that the aims pursued by UEFA rules coincide with the objectives of Article 165 TFEU entails "that their legitimacy cannot be contested" (Opinion of AG Rantos in case C-333/21, *European Superleague Company*, para 93).

Having recognised the protection of the European Sports Model as the legitimate objective pursued by UEFA, AG Rantos applies the other steps of the ancillary restraints doctrine established in cases such as *Wouters* (case C-309/99, *Wouters and Others*) and *Meca-Medina* (case C-519/04 P, *Meca-Medina and Majcen v Commission*) to conclude that the UEFA rules in question can be excluded from the scope of Article 101(1) TFEU (See P. IBÁÑEZ COLOMO, *AG Rantos in Super League and ISU: towards continuity and consistency in the case law*, in *eulawlive.com*, 2022; G. GRECO, *Le conclusioni dell'Avvocato generale Rantos nella delicata questione della Superlega*, in this *Blog*, 2023). Conversely, AG Szpunar is reluctant to provide

the *Wouters* test with the role of "general principle" allowing private entities, such as UEFA, a wide margin of discretion in free movement cases (para 75).

When comparing the Opinions of AG Szpunar and AG Rantos, the question arises as to the role played by Article 165 TFEU in the assessment of internal market restrictions. At the time of landmark cases such as *Bosman* and *Deliège* (case C-51/96, *Deliège*), Article 165 TFEU had not entered the EU constitutional picture yet. Instead, it would have been later introduced by the Lisbon Treaty. In *Olympique Lyonnais*, the Court made use of Article 165 TFEU at the stage of the proportionality test (case C-325/08, *Olympique Lyonnais*, para 40). Therefore, there is no doubt that Article 165 TFEU has a significant weight in the typical balancing exercise proper of EU law's proportionality test. Instead, it is unclear whether the pursuit, by sporting associations, of the objectives enshrined in Article 165 TFEU could be automatically considered as an overriding reason in the public interest justifying restrictions on free movement.

In that respect, among the arguments provided by AG Szpunar to highlight the limited function of Article 165 TFEU there is its correspondence with a merely supporting competence under Article 6 TFEU. This is not convincing. In fact, grounds for justification corresponding to areas of EU supporting competence are widely recognised in the Treaties (for example the protection of human health in Article 36 TFEU) and in the case-law (for example cultural policy in case C-288/89, *Gouda*, para 23). On the contrary, the fact that UEFA is pursuing an objective recognised in a horizontal provision such as Article 165 TFEU seems to suggest that, as suggested by AG Rantos, the legitimacy of such an objective should be presumed.

It remains to be seen whether the legal value of Article 165 TFEU, described in different ways by AG Szpunar – "*helpful* […] *to identify* a ground of justification" (emphasis added) – and AG Rantos – "*relevant for the purposes […] of analysing*, in the field of sport, any objective justification" (emphasis added) –, will be clarified in the Court's upcoming judgments.

5. The indirectly discriminatory effect of HGP rules is beyond doubt (see L. FREEBURN, *European Football's Home-Grown Players Rules and Nationality Discrimination Under the European Community Treaty*, in *Marquette Sports Law Review*, 20(1), 2009, p. 177 ff.). Conversely, it is the application of the proportionality test, and in particular the analysis of the suitability requirement, that provides food for thought. Two premises are necessary here. First, the concrete application of the proportionality test to the facts of each case remains in principle a prerogative of national courts. The CJEU should normally limit itself to provide guidance. At times, however, this guidance is extremely generous and does not leave much room for discretion to national authorities (see for instance case C-118/20, *JY v. Wiener Landesregierung*, paras 58-74; see also C. BARNARD, *The Substantive Law of the EU: The Four Freedoms*, Oxford, 2019, p. 510). Second, the assessment of the suitability of a given measure is a question of fact (case C-145/88, *Torfaen*, para 16; see also T. MARZAL, *From Hercules to Pareto: Of bathos,*

proportionality, and EU law, in *International Journal of Constitutional Law*, 15(3), 2017, p. 621 ff.). Based on empirical findings, a court can determine whether a certain rule is effectively achieving the objective that it is legitimately pursuing.

In 2012 the European Commission funded a study to assess the effectiveness of the HGP rules introduced by UEFA in 2007 (see the study by M. DALZIEL AND OTHERS, *Study on the Assessment of UEFA's 'Home Grown Player Rule'*, European Commission, 2013; the results of the study are also presented in P. DOWNWARD AND OTHERS, *An assessment of the compatibility of UEFA's home grown player rule with article 45 TFEU*, in *European Law Review*, 39(4), 2014, p. 493 ff.). The study could not rely on sufficient quantitative data to provide reliable predictions as to the long-term effect of HGP rules. Nevertheless, it concluded that the restriction on free movement caused by HGP rules should be considered proportionate, also in light of their very modest restrictive effect, to the extent that no other less restrictive measures could be adopted to achieve an equally effective impact in terms of competitive balance and youth development. In other words, according to that study, it was not the suitability of HGP rules but their necessity that had to be demonstrated (see K. PIJETLOVIC, *EU Sports Law and Breakaway Leagues in Football*, The Hague, 2015, pp. 116-118). Remarkably, as observed above, AG Szpunar reaches the opposite conclusion in his Opinion, ruling out the suitability of those rules to the extent that they include players trained by other national clubs within the definition of HGPs.

In the absence of conclusive empirical findings, the assessment of the AG is necessarily carried out in the abstract. While this would have allowed to carefully consider several potential effects of the inclusion of players trained by other national clubs within the definition of HGPs, the assessment of the AG does not take into account a number of relevant elements.

First, with regard to the aim of encouraging the training of young players, the possibility to "buy" players trained by other national teams to comply with HGP rules comes at a cost, that is, the cost of signing those players on the transfer market and paying "compensation fees for training" (see case C-325/08, cit.). It could well be economically more convenient for clubs to train their own HGPs. Moreover, UEFA (and URBSFA) current rules increase the attractiveness of players trained by national clubs on the transfer market. By increasing the demand, HGP rules may allow the clubs which sell HGPs on the transfer market to obtain a higher price. In light of HGPs' attractiveness on the market, furthermore, clubs may be incentivised to train more players than just the minimum number required by HGP rules.

Second, when considering the objective of improving the competitive balance, one should keep in mind that clubs established in more populated areas will most likely have more opportunities for talent scouting. For instance, when recruiting young talents, a team based in Madrid or Rome will probably have more choices than a team based in Vila-real or Bergamo. The inclusion of players trained by other national clubs within the meaning of HGPs may allow clubs to compensate for the differences stemming from their

location. In this way, such inclusion would benefit the competitive balance of intraclub competitions (for a different opinion, that is, that these rules, framed within the "territorial model of football", favour clubs which reside in larger countries, see R. HOUBEN, S. PETROVIĆ, *The State of Football Governance - Advocate General Szpunar Paves the Way for a Critical Assessment of the Status Quo*, in *Asser International Sports Law Blog*, 2023).

Although these arguments may not be decisive to determine the suitability of the HGP rules at stake, they should at least be considered by the Court in its decision.

6. The *Royal Antwerp Football Club* case will be decided at a time when football is particularly topical from an EU law perspective. While competition lawyers debate about breakaway leagues, the European Parliament discusses the exclusion of Belarus from international football tournaments (see N. CAMUT, *EU lawmakers demand UEFA bans Belarus from football tournament*, in *politico.eu*, 2023).

In the case at hand, the Court will have an opportunity to further clarify the role of Article 165 TFEU beyond proportionality assessments. In particular, in its decision, the Court may define the exact relationship between the objectives promoted in that Treaty provision and the overriding reasons relating to the public interest that can be invoked in sports cases.

Concerning the specific issue of HGP rules, the Court will assess their proportionality and will hopefully do so in light of the broadest possible range of considerations. That being said, new empirical studies concerning the suitability and necessity of HGP rules remain desirable. In the absence of such studies, it is difficult to exclude, in the abstract, the suitability of those rules to achieve the aim of encouraging the training of young players and improving the competitive balance of interclub competitions.

Should the Court follow the Opinion of AG Szpunar, UEFA and URBSFA will be forced to change their HGP rules. In particular, for UEFA, which has "welcomed" the Opinion of AG Szpunar and "take[n] note of the Advocate General's recommendation to improve the effectiveness of the existing rules in place", two options are conceivable: deleting HGP rules or changing the definition of "HGP" so that it does not include players trained by other clubs. Within the latter scenario, UEFA could soften HGP rules and only require four HGPs. In this case, not much would change in practice for European teams, as UEFA already requires that four out of the eight mandatory HGPs are trained in each club's own academy. Alternatively, UEFA could decide to apply the new, narrower definition while maintaining the minimum requirement of eight HGPs. This - similar consideration would also apply for any minimum requirement above four HGPs - would force many clubs to replace players trained by other national teams with players trained within their own academies. In turn, new significant legal and economic challenges may arise.