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BlogDUE

Final Whistle in Luxembourg? *Royal Antwerp* as yet Another Reminder of EU law's Demand for Better Sports Governance

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SUMMARY: 1. Introduction. – 2. Background. – 3. The judgment. – 4. Football in EU law: special… but not too much. – 5. The singularity of the economic constitution. - 6. Conclusion or extra time?

1. Christmas 2023 will be remembered by EU lawyers for the remarkable series of judgments gifted by the Court of Justice of the European Union ("Court" or "CJEU") on 21 December 2023. In particular, it will live long in the memory of sports *aficionados* due to the three judgments concerning the relation between EU law and sports governance in the *Superleague* (C-333/21), *I.S.U.* (C-124/21 P) and *Royal Antwerp* (C-680/21) cases.

Almost one year ago, a comment was published on this Blog concerning the Opinion of Advocate General (AG) Szpunar in the *Royal Antwerp* case (G. BELLENGHI, *The Ball Is in the EU's Court (Again): the Opinion of AG Szpunar in* Royal Antwerp Football Club, in *BlogDUE*, 2023). That post highlighted especially the relevance of this case for both *(i)* the interpretation of Article 165 TFEU that enshrines in the Treaties the promotion of European sporting issues as an objective of Union action and *(ii)* its implications for the application of the proportionality principle when analysing the compatibility of certain rules of European sporting associations with EU law. In this follow-up contribution, we critically analyse whether and how the CJEU addressed those two interconnected issues. Here, a disclaimer: this case had both a free movement and a competition law dimension, since the referring court doubted about the compatibility of certain sporting associations' rules with Articles 45 and 101 TFEU. However, this blogpost will mostly analyse the free movement component of the case, mirroring the scope of AG Szpunar's Opinion. Indeed, the AG had been asked by the CJEU to address solely the compatibility of certain UEFA (Union of European Football Associations) and URBSFA (Union Royale Belge des Sociétés de Football Association) rules on players' registration with the free movement of workers enshrined in Article 45 TFEU.

2. While for a more detailed description of the case facts and the AG Opinion we refer the reader to the abovementioned blogpost (G. BELLENGHI, *op. cit*.), it is sufficient here to recall some key points.

Regarding the facts, the *Royal Antwerp* case concerned a preliminary question on the compatibility with EU law of certain rules of UEFA and URBSFA prescribing specific limitations to the registration of squad lists. According to these rules, each club has to register in its squad list a minimum number of home-grown players ("HGPs"), that is, players who have been trained, for a minimum period before they reached a certain age, in the academy of the club itself or of another club affiliated to the same sporting association. For example, to put it simply, under the rules currently applicable for the season 2023/2024, the Belgian club Royal Antwerp F.C. has to register in its squad list for both Belgian and European interclub competitions a minimum of 8 players developed either in Royal Antwerp's own academy or that of any other Belgian club (e.g., R.S.C. Anderlecht or R. Union Saint Gilloise).

At the core of the AG Opinion was the proportionality of the free movement restriction caused by HGP rules. The AG suggested that the Court declared the incompatibility of such rules with Article 45 TFEU. In his view, while those rules could be deemed to pursue legitimate aims - the training and recruitment of young players and improving the competitive balance of interclub competitions - they were however not suitable, and thus disproportionate, to achieve those objectives. Two elements of the AG's reasoning were noteworthy, namely the role played by Article 165 TFEU and the assessment of the suitability of the controversial rules.

First, concerning Article 165 TFEU, the Opinion of AG Szpunar was in sharp contrast with the Opinion of AG Rantos in the *Superleague* case. Both AGs assessed how and to what extent that provision could be invoked to justify restrictions to competition and/or free movement. AG Szpunar stressed the specific character of Article 165 TFEU and its strictly vertical applicability, meaning that it cannot be invoked against the conduct of private entities and is instead directed at EU institutions. Since UEFA and URBSFA are not functionally comparable to an EU institution and do not exercise any competence outsourced to them by EU institutions, they cannot rely on Article 165 TFEU and the policy objectives enshrined therein as a "blank cheque" for justifying any restriction to the fundamental freedom enshrined in Article 45 TFEU. Conversely, AG Rantos insisted on the horizontal nature of Article 165 TFEU, deemed as an interpretative tool for other Treaty provisions and an objective to consider when implementing all EU policies. Furthermore, he argued that that Article embedded a constitutional recognition of a set of principles constituting the "European Sports Model". In such a scheme, sporting associations play a key organisational role, structuring competitions and ensuring compliance with their respective rules. As a corollary, and unlike AG Szpunar, AG Rantos submitted that the fact that the aims pursued by UEFA rules coincided with the objectives of Article 165 TFEU automatically entailed their legitimacy from an EU law perspective. Consequently, and

applying the ancillary restraints doctrine (see Case C-309/99, *Wouters and Others*), this led to the exclusion of UEFA rules from the scope of Article 101(1) TFEU.

Second, AG Szpunar drastically ruled out the suitability of HGP rules insofar as they included in the definition of "HGPs" also players trained by another club affiliated to the same sporting association. In particular, the AG considered that the fact that a club could "buy" HGP players from other clubs of the same association frustrated the objective of encouraging the training of young players by the clubs themselves. Nor would this have contributed to pursuing the objective of improving the competitive balance in interclub competitions.

3. These two controversial legal issues are finally addressed by the Court in its judgment.

First, the long-awaited clarifications on the meaning and scope of Article 165 TFEU arrive at paras 63 to 75, which reproduce the same wording used in the corresponding part of the *Superleague* ruling (*Superleague,* paras 95-197). The Court sides with AG Szpunar, thereby fully dismissing AG Rantos' position: it holds that, while EU institutions should take into account the objectives listed in Article 165 TFEU when adopting sports promotion measures, that provision is not of cross-cutting and general nature (para. 68). Therefore, it must not "be regarded as […] a special rule exempting sport from all or some of the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application" (para. 69).

After this much-welcome elucidation, the Court addresses the subsequent question of what would then be the role played by Article 165 TFEU in the proportionality assessment of the rules in question. In that respect, the judges reject the argument that the objectives listed in Article 165 TFEU constitute in themselves overriding reasons in the public interest able to justify a restriction to free movement. In other words, the fact that the EU is committed to the development of sports "by promoting fairness and openness in sporting competitions" and "by protecting […] especially the youngest sportsmen and sportswomen" (Article 165(2) TFEU) does not mean that any rule which aims at fostering interclub competition or incentivising the training of young players will be automatically considered as pursuing a legitimate objective within the framework of Article 45 TFEU. Instead, the question of whether certain rules imposed by sporting associations illegally restrict free movement has to be analysed by the national referring court on a case-by-case basis, taking into account "the specific characteristics of the sport concerned" (para. 74). Such characteristics are non-exhaustively exemplified as "the nature, organisation or functioning of the sport concerned and, more specifically, how professionalised it is, the manner in which it is practised, the manner of interaction between the various participating stakeholders and the role played by the structures and bodies responsible for it at all levels" (para. 73). Consistently, the Court will then refer to Article 165 TFEU as one specific *but*

not in itself conclusive indicator of the legitimacy of the aims pursued by HGP rules (para. 144). Finally, it is within this analysis of Article 165 TFEU that we find a first bridge built by the Court between free movement and competition rules, for the same parameters may allow the characterisation of a rule as either an obstacle to free movement or a restriction of competition (para. 73).

In the free movement section of the ruling, the Court further elaborates on the factors to be taken into account when analysing the proportionality of HGP rules. In this respect, the Court's ruling seems less drastic than AG Szpunar's Opinion. Like the AG, the Court does not hide its general scepticism about the suitability of HGP rules (para. 147). Yet, the judges highlight that it is ultimately for the sporting associations in question to demonstrate, before the referring national court, that their rules are suitable to pursue a legitimate and non-purely economic objective in the public interest and that they "genuinely reflect a concern to attain it in a consistent and systematic manner" (para. 141). The national court, in turn, will have to consider all relevant factors, and in particular whether the HGP rules in question *(i)* constitute real and significant incentives for all clubs, *(ii)* take into account the costly, time-consuming and uncertain nature of recruitment and training policies and *(iii)* foster local investment, where appropriate through interclub partnerships and possibly with a cross-border dimension (para. 147). It is precisely at this stage that the Court builds a second bridge between free movement and competition rules: the necessity and proportionality of the restriction of free movement under Article 45 TFEU have to be gauged in accordance with the proportionality assessment carried out within the framework of Article 101(3) TFEU (para. 148).

Finally, the Court makes an important clarification that can be decisive in appraising the proportionality of HGP rules: those can be justified even if it cannot be quantifiably demonstrated that they lead to an increase of the recruitment and training of young players. On the contrary, it could suffice that they create "real and significant incentives in that direction" (para. 145).

4. In clarifying the limited reach of Article 165 TFEU, the Court abruptly extinguishes the hopes of those who were hoping to find in that provision a shield against the disruption of the current European football model or, at least, some form of safety valve vis-à-vis football governance liberalisation. In that sense, the ruling fits easily within the line of the *Bosman* jurisprudence (Case C-415/93, *Bosman*; see A. DUVAL, B. VAN ROMPUY, *The Legacy of Bosman*, The Hague, 2017), which affirmed EU law as an effective tool of scrutiny of the football rules set by sport governing bodies and thus forced the latter to engage in a continuous "dialogue" with EU institutions.

With its judgment, the Court makes clear that there is no direct equation between the objectives of EU supporting action under Article 165 TFEU and the legitimacy of the aims pursued by the rules of private sporting associations. Yet, concerning the full set of possible legitimate aims pursued by HGP rules, it remains unclear why the aims considered have been gradually

narrowed down throughout the case. Indeed, AG Szpunar initially referred to three possible overriding reasons in the public interest, namely *(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. Nevertheless, the legal analysis of the AG only focused on reasons *(i)* and *(ii)*. Even more curiously, the Court further ignores reason *(ii)* so that it only gives indications for the assessment of the proportionality of HGP rules in light of the aim of encouraging the training of young players. It would have been interesting to see whether the CJEU considers the other aims as possible legitimate objectives and, if so, whether it would indicate different parameters when providing guidance on the related proportionality assessment in light of reasons *(ii)* and *(iii)*.

Turning to the proportionality test, the approach of the Court is commendable. It is legitimate, we argue, that the Court shows its general scepticism about the outcome of a proportionality assessment. Nevertheless, it remains crucial that the Court confines itself to providing guidelines on how to carry out that proportionality test rather than de facto carrying it out, as often happens. In doing so, the Court reaffirms that the assessment of the suitability of a rule is, in principle, a matter of fact, to be ascertained by national courts. In the absence of sufficient evidence, the broadest possible range of factors should be taken into consideration before concluding for the (non-)suitability of a measure. This is what the referring court will now be able to do, in light of the CJEU's judgment and, crucially, the factual evidence put forward by the sporting associations concerned. In essence, regardless of whether one agrees with the current design of HGP rules, the judicial approach taken by the Court is methodologically sound.

So what future now for HGP rules? It is still too soon to tell, and, to borrow yet another football term, the ball is now with the referring Belgian court. What is made clear by the CJEU is that the burden of proof to demonstrate the proportionality (and especially the suitability) of these rules falls upon UEFA and URBSFA. The task of discharging that burden of proof was made manageable by the Court: sporting associations must merely prove the suitability of their HGP rules by demonstrating that they create "real and significant incentives" for the training of young players. Thus, the legal discussion on suitability calls crucially for empirical evidence. A previous European Commission study on the effects of HGP rules was inconclusive on this point, citing the lack of available data due to the recency of those rules (M. DALZIEL AND OTHERS, *Study on the Assessment of UEFA's 'Home Grown Player Rule*, European Commission, 2013). That study was however carried out in 2013 and, a decade later, it is high time to carry out such an analysis. Otherwise, any reasoning on the suitability and overall proportionality of HGP rules risks being reduced to abstract conjectures.

Can it really be said, for example, that, in the absence of HGP rules for clubs' first teams, "[t]alented club-trained young players will make their way [from academies] to A-teams on the basis of merit" (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)? Such a view, we argue, does not sufficiently consider the countless factors upon which the ascension of a young football player depends. These include, for example, coaches' preferences, positional needs of the first team, and the myriad technical, physical and psychological elements that can delay or even impede the maturity of a young player. Take, for instance, Bernardo Silva, Manchester City's top-class midfielder, who left S.L. Benfica, his original club, after having almost never played for the first team (D. HYTNER, *"I'm Built This Way": Bernardo Silva's Total Vision Shaped by Benfica Rejection*, in *The Guardian*, 2023).

Similarly, the claim that allowing clubs to also register as HGPs those players trained in other clubs of the same association distorts interclub competition and disincentivises clubs to train their own youngsters cannot be taken for granted. The competitiveness of the football systems of several European countries, such as Portugal or the Netherlands, mostly depends on the development of young players and that is achieved by both recruiting and training them. What is more, players will often be developed by a club in its academy *after* being recruited. Over time, some of them will also leave to play for other clubs. Teams like Sporting C.P., AZ Alkmaar, Atalanta B.C. or Borussia Dortmund are, across the EU, living proof that the local training of young players may well be compatible with the recruitment of other youngsters, thereby contributing to the social and educational function of football.

5. In more than one point of its ruling, the Court draws a fascinating connection between competition and free movement rules. A tale as old as time, the complementarity between these two legal branches of the internal market has very recently re-emerged in the EU law discourse (EDITORIAL, *Missing in Action? Competition Law as Part of the Internal Market*, in *Common Market Law Review*, 2023, p. 1503 ff.). On the one hand, a bridge between competition and free movement promotes the singularity of the EU economic constitution (J. BAQUERO CRUZ, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, Oxford, 2002) and must in that sense be welcomed from a theoretical perspective. This is, to a certain extent, coherent with the Treaty design, where the dividing line between the two branches is more blurred than in practice – think for instance of Articles 114-116 TFEU, which do not distinguish between market and competition distortions (Case C-376/98 *Germany v Parliament and Council*, para. 84). On the other hand, it cannot be ignored that the practices of competition and free movement laws significantly diverge, and so do the types of competences – exclusive and shared respectively – associated with them in the TFEU. It is surprising, furthermore, that this attempt at reconciling competition and free movement occurs within the framework of proportionality. The latter is, in fact, a *polytropon* principle, arguably emblematic of the unresolved points of inconsistency within EU law

(T. HARBO, *The Function of the Proportionality Principle in EU Law*, in *European Law Journal*, 2010, p. 95 ff.). In sum, we argue, efforts to achieve consistency across internal market law, understood as encompassing both competition and free movement rules, make sense in so far as they occur within a broader tendency towards convergence. Otherwise, isolated and unsystematic action will only result in an even more fragmented legal landscape.

6. Referees bring football matches to an end with three long whistles. If the *Superleague* and *Royal Antwerp* rulings are the first two, the third whistle for FIFA and UEFA might be on its way in the pending case *FIFA* (C-650/22), concerning the compatibility with Articles 45 and 101 TFEU of certain rules on players' transfers. The question is thus whether FIFA and UEFA will have access to extra time to reform their competitive organisational model or have instead lost their match.

The judgments at stake do not seem to open the gates for new, revolutionised models of football governance, such as, for instance, those based on uncontrolled breakaway leagues (for a more nuanced position, see S. WEATHERHILL, *Football Revolution: How Do the Court's Rulings of 21 December 2023 Affect UEFA's Role as a "Gatekeeper"?*, in *EU Law Analysis*, 2024). Instead, they point out the incompatibility with EU law of any arbitrary and inconsistent approach to football organisation.

Article 165 TFEU recognises the specificities of sports and that may well justify a cautious take on football cases concerning Article 45 TFEU and beyond. After all, as AG Szpunar puts it, "[n]obody wants boring football, which is why some restrictions to this fundamental provision can […] be accepted" (Opinion in *Royal Antwerp*, para. 3). Yet, such specificities are not enough to allow blank derogations from the EU economic constitution, understood as the Treaty framework governing competition and free movement. This is only logic when one considers the centrality – recognised in actually horizontal provisions - of democracy and transparency in the EU Treaties. Evidently, the models proposed by FIFA and UEFA over the past decades lack overall objectivity and consistency and warrant reform. In this respect, these judgments are yet another reminder for these organisations to "comply with principles of good governance and forms of democratic accountability" (M. POIARES MADURO, *Is the Superleague Judgment a Game Changer?*, in *Europa Felix*, 2023).

Granted, the merely ancillary sport competence enshrined in Article 165 TFEU is a considerable obstacle to any Union's direct regulatory intervention (on the need to re-regulate the European Sports Model, see M. MOTA DELGADO, *The European Game*, in *verfassungsblog.de*, 2024). Nevertheless, the understanding of the European Sports Model highlighted by the CJEU as a model based on genuine fairness, openness and cooperation could be the starting point for the rehabilitation of European sporting associations. Rules concerning not only squad lists' requirements but also, for instance, financial limitations can be beneficial to protect European football, provided that their

design and enforcement are open to public scrutiny and other serious forms of democratic legitimation (F. DE WITTE, J. ZGLINSKI, *The Idea of Europe in Football*, in *European Law Open*, 2022, p. 286 ff.). And there, we argue, courts should also keep "playing the game". If anything, that is the positive effect of a judgment like *Royal Antwerp*: it forces sport governing bodies to interact with EU law once again and submit their rules to independent (judicial) scrutiny. This can ultimately kickstart the overall improvement of the European sports governance model. One where rules are demonstrably correct, proportionate and in the public interest; and not simply assumed to be so.

ABSTRACT (ITA)

Il contributo analizza la sentenza della Corte di giustizia nel caso C-680/21, *Royal Antwerp*, focalizzandosi sull'interazione tra sport *governance* e diritto dell'Unione europea, con particolare attenzione alle norme sulla libera circolazione. In particolare, il caso offre spunti di riflessione su due aspetti giuridici strettamente interconnessi. Innanzitutto, sulla portata normativa dell'articolo 165 del TFUE, e in secondo luogo, sull'applicazione del principio di proporzionalità, anche al di là dell'ambito sportivo. La sentenza della Corte enfatizza ancora una volta la necessità di un miglioramento della governance dello sport europeo, da attuarsi mediante un rafforzamento della sua legittimazione democratica.

ABSTRACT (ENG)

This contribution analyses the judgment of the Court of Justice in Case C-680/21, *Royal Antwerp*. It focuses on the interaction between sports governance and EU law, considering especially free movement rules. Two interconnected aspects are discussed. First, the Court's clarification on the scope and meaning of Article 165 TFEU, and second, the application of the principle of proportionality in sports cases and beyond. It is argued that the ruling calls for an improvement of sports governance based on the enhancement of its democratic legitimation.