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The Court of Justice issues important judgments on the application of EU competition law to sports federations in the ISU and ESL cases

On 21 December 2023, the Court of Justice of the European Union ("**Court of Justice**"), in its Grand Chamber composition, delivered two important judgments relating to the application of EU competition law to sports federations in Cases C-124/21 P, International Skating Union ("**ISU**") and C-333/21, European Superleague Company ("**ESL**").

The ISU judgment concerns a Commission decision adopted on 8 December 2017, which was the first decision under Article 7 of Regulation 1/2003 involving a sports federation. In that decision, in which no fine was imposed, the Commission found that the ISU had infringed Article 101 TFEU by adopting and enforcing its eligibility rules with respect to speed skating ("**Eligibility Rules**") which were found to restrict competition by object and by effect. The ISU Eligibility Rules provide that skaters may only take part in skating competitions which are authorised by the ISU or its members and which comply with the rules set out by the ISU. In that decision, the Commission also took the view that the compulsory grant of exclusive jurisdiction to the Court of Arbitration for Sport ("**CAS**") over disputes relating to the application of the ISU Eligibility Rules, while not constituting in itself an infringement of EU competition law, reinforced the restriction of competition resulting from the Eligibility Rules.

In its appeal to the General Court, the ISU argued that the Commission had wrongly found that its conduct amounted to a restriction of competition. All the applications for authorisation of third party skating competitions submitted to the ISU had been approved with the sole exception of an event planned in Dubai to showcase a new concept of speed skating competitions combined with betting which the ISU considered to be inconsistent with its ethical rules.

On appeal, the General Court accepted that a pre-authorisation system, intended to ensure that any third-party event organiser respect common standards, is not prohibited by Article 101 TFEU. The General Court also acknowledged that "*it was legitimate for the applicant to establish rules seeking to prevent sports betting from creating risks of manipulation of competitions and athletes*". The General Court nevertheless upheld the Commission's finding that the ISU's Eligibility Rules constituted a restriction of competition by object on the ground that they went beyond what was necessary to achieve those legitimate objectives in so far as there was no direct link with such legitimate objectives and disproportionate sanctions were imposed. The General Court refrained from considering whether the rules had the effect of restricting competition: according to the Court, the finding of infringement in the Commission decision solely related to the content of the Eligibility Rules and not to the ISU's conduct in applying the rules which was allegedly only referred to as an "*illustration*" of how the rules are applied. As regards the CAS, the General Court disagreed with the Commission's assessment that the grant of jurisdiction to CAS reinforced the restriction of competition at issue and annulled that part of the Commission decision.

The ISU lodged an appeal before the Court of Justice challenging the finding of restriction of competition by object made by the General Court. The ISU also criticised the General Court judgment for failing to address the ISU's argument about the legitimate nature of its refusal to approve the Dubai event, which was the only third party skating event that the ISU had ever refused to authorise under its Eligibility Rules. In an Opinion issued on 15 December 2022, Advocate General Rantos agreed with the ISU's argument that the General Court had not validly established that the ISU's Eligibility Rules are a restriction of competition by object. The Advocate General advised the Court of Justice to annul the finding of restriction of competition by object and to refer the case back to the General Court to ascertain whether the rules at issue have the effect of restricting competition.

In its judgment, the Court of Justice upheld the finding of restriction of competition by object made in the Commission decision and the General Court's judgment. The Court did not address the issue of how the ISU Eligibility Rules had been applied in practice as it considered that the finding of infringement in the Commission decision related exclusively to the rules as they were written and not as they were applied. As regards the CAS, the Court overturned the General Court's annulment of that part of the Commission decision.

The *ESL* judgment stems from a request for a preliminary ruling by a Madrid Commercial Court concerning the interpretation of the TFEU's provisions on competition law and the freedom to provide services in the context of a dispute involving UEFA's refusal to approve the setting up of a new interclub football competition by a third-party undertaking. In reply to the questions posed by the Madrid court, the Court of Justice held in essence that the rules under which UEFA made its decisions infringe Article 101, 102 and 56 TFEU where there is no framework providing for substantive criteria and detailed procedures suitable for ensuring that the rules at issue are transparent, objective, non-discriminatory and proportionate.

While a number of questions relating to the exploitation of commercial and media rights are discussed in the *ESL* judgment, this note will focus on two aspects of the *ISU* and *ESL* judgments which are of major practical interest for international sports federations, namely (1) the status of prior authorisation systems under EU competition law and (2) the extent to which compulsory exclusive jurisdiction can be validly granted to the CAS over disputes involving sports federations under EU competition law.

The status of prior authorisation systems under EU competition law

The question of whether prior authorisation systems applied by sports federations are consistent with EU competition law was at the core of the *ISU* case.

The initial position taken by the Commission in the Statement of Objections issued during the administrative procedure was that a compulsory prior authorisation system, combined with a general prohibition for athletes to participate in unauthorised events, was prohibited by Article 101(1) TFEU and could not be justified as pursuing a legitimate objective under the *Meca Medina* case law. Under the *Meca-Medina* case law, an otherwise restrictive agreement does not fall within the scope of Article 101(1) TFEU if that agreement: 1) is justified by the pursuit of legitimate objectives in the public interest; 2) the means used to pursue those objectives are genuinely necessary for that purpose; and 3) the restriction does not go beyond what is necessary, in particular by eliminating all competition. The Commission was only prepared to accept a voluntary prior authorisation system, not a compulsory one imposed on athletes.

However, following interventions by the International Olympic Committee and EU Athletes (an association representing professional athletes which intervened in the judicial proceedings in support of the Commission), the Commission changed its position. In the Decision, the Commission gave the ISU the option of either abandoning its pre-authorisation system or maintaining it by making a number of changes. The ISU took the latter option and, following implementation discussions with the Commission, adopted a new version of its Eligibility Rules. As regards the legal status of prior authorisation system, however, the Commission refrained from determining whether a compulsory prior authorisation system was consistent with Article 101 TFEU.

This question, which the Commission left unanswered in the Decision, was addressed by the General Court in its judgment. The General Court accepted that the ISU's pre-authorisation system is a "*suitable mechanism*"

to achieve the legitimate objective of ensuring compliance with common standards. Nevertheless, the General Court upheld the Commission's conclusion that the ISU's pre-authorisation system restricted competition by object because some aspects of the approval process for third-party events allegedly went beyond what was necessary to pursue the legitimate objective of ensuring that sporting competitions comply with common standards.

Advocate General Rantos in his Opinion agreed with the ISU that an analysis of whether or not the prior authorisation rules at issue were disproportionate to the legitimate objective pursued by such a system could not serve as a basis for a finding of a restriction of competition by object. The Advocate General considered that such an approach would unduly extend the concept of restriction of competition by object, contrary to the established case-law of the Court of Justice requiring a restrictive interpretation of that concept. According to the Opinion, it is only by looking at how the rules are applied in practice under a by effect analysis that their consistency with Article 101 can be validly assessed.

This approach was not followed by the Court of Justice in its judgment. The Court considered that the mere fact that the rules of a prior authorisation system may be regarded as not being "*transparent, objective, non-discriminatory and proportionate*" suffices for the system to be characterised as a restriction of competition by object. The anti-competitive object of the rules may be inferred from the mere fact that they "*are thus able to be used to allow or exclude from that market any competing undertaking, even an equally efficient undertaking, or at least restrict the creation and marketing of alternative or new competitions in terms of their format or content*". This conclusion is based exclusively on an analysis of the wording of the rules "*considered as such and therefore independently of their application to specific cases*". The Court also made it clear that whether or not the rules were intended to exclude third-party sporting event organisers is irrelevant to the finding of that specific restriction by object.

In embracing this purely procedural interpretation of the concept of a by object restriction of competition under Article 101(1) TFEU, the Court of Justice judgment has in effect introduced into Article 101 TFEU the concept of abuse of a dominant position which it developed in the parallel *ESL* judgment. In that judgment, the Court held that the prior authorisation rules of a sports federation constitute an abuse of a dominant position where there is no framework providing for substantive criteria and detailed procedures suitable for ensuring that the rules are transparent, objective, non-discriminatory and proportionate.

Since, as shown above, the by object restriction of competition set out by the Court integrates the *Meca-Medina* case law, that case law cannot be relied upon to call into question the finding of restriction of competition by object applied to a pre-authorisation system that is not based on transparent, objective, non-discriminatory and proportionate rules, as the Court has made it clear. The *Meca Medina* case law may, however, be relied upon to justify actual decisions by a sports federation not to authorise third party events in the context of a by effect analysis.

As a practical matter, sports federations should take comfort in the fact that their right to have a prior authorisation system for third-party sporting events has been expressly upheld by the Court of Justice. Such a prior authorisation system does not constitute a restriction of competition by object as long as it is based on substantive criteria and detailed procedural rules that are transparent, objective, non-discriminatory and proportionate. In the analysis of whether the application of such a system has the effect of restricting competition, sports federations may rely on the legitimate objectives pursued by the rules.

The extent to which compulsory exclusive jurisdiction can be validly granted to the CAS over disputes involving sports federations under EU competition law

The ISU Court of Justice judgment addresses the question of whether compulsory exclusive jurisdiction granted to the CAS is consistent with EU competition law.

In its decision, the Commission had taken view that such a grant, while not constituting in itself an infringement of EU competition law, reinforced the restriction of competition in the ISU pre-authorisation system, as then written. According to the Commission, the grant of exclusive jurisdiction to the CAS prevented interested parties from raising EU competition law arguments before Member State courts which alone have the power to submit requests for preliminary rulings to the Court of Justice. While the General Court

and Advocate General Rantos disagreed with that assessment, the Court of Justice upheld it even though the Commission had not appealed the General Court judgment on this point (which was only the subject of a cross-appeal by the interveners).

The Court of Justice, however, went out of its way to stress the very limited impact of its judgment. First, the Court of Justice made it clear that it does not question the existence, organisation or operation of the CAS as an arbitration body, nor its exclusive jurisdiction with respect to pure sporting or technical rules. Second, the Court also emphasised that EU law only applies to the implementation of pre-authorisation rules in the territory of the EU, not outside of the EU. This is somewhat ironic bearing in mind that the refusal to approve a third-party speed skating event that triggered the complaint which led to the ISU decision concerned an event planned in Dubai. Third, the Court also noted that the grant of exclusive jurisdiction to the CAS was imposed on athletes in the ISU rules.

From the careful language used by the Court in its judgment it can be inferred that, in cases involving the application of a prior authorisation system relating to an event taking place in the territory of the EU, the relevant parties should not be required by the rules to have exclusively recourse to the CAS. This matter should be left to their discretion. But, for all other disputes, in particular those relating primarily to the application of ethical, technical and sporting rules, as well as those involving events in non-EU countries, a compulsory grant of exclusive jurisdiction to the CAS should not raise any EU law issue.

The ISU was represented in the proceedings before the General Court and the Court of Justice by Jean-François Bellis and Steve Ross.

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