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ARTICLE

ISU, Royal Antwerp, European Superleague & employment relations in sport

Leanne O'Leary[1]

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Abstract
The *ISU*, *Royal Antwerp* and the *European Superleague* cases have upheld athletes' individual employment rights and provided access to national courts to challenge overly restrictive measures pursuant to EU competition law, amongst other things. The immediate impact on the labour relations environment in sport, however, is less obvious. This article discusses the effects of the CJEU decisions for employment relations and the broader trade union movement in sport. It considers the decisions' effect on collective bargaining, highlights the effectiveness of independent players' associations as a countervailing power to regulatory power and discusses whether the decisions may be a catalyst for the greater use of social dialogue as a mode of governance insofar as concerns regulation of the labour market.

Keywords EU competition law · Players associations · Social dialogue · Labour relations in sport

1 Introduction

Academic and media commentary following the three Court of Justice of the European Union (CJEU) decisions in *International Skating Union (ISU) v European Commission*,[1] *UL & SA Royal Antwerp Football Club (Royal Antwerp) v Union royale belge des sociétés de football association ASBL & Union des associations européennes de football (UEFA)*,[2] and the *European Superleague Company SL (European Superleague) v Fédération internationale de football association and UEFA*,[3] has focussed mainly on the competition law aspects of the cases that relate to restrictions imposed on the power of sports governing bodies to authorise competitions organised by national associations or third parties, and the effect of the *ISU* decision on dispute resolution through the Court of Arbitration for Sport (CAS). Discussion regarding the effects of the CJEU decisions for labour relations and whether the decisions will foster collective bargaining or social dialogue in professional sport, or move professional sports in the European Union (EU) closer to an employment relations model that is characteristic of the major sports leagues in the United States of America (USA), has not been part of the academic debate so far.

The decisions did not directly examine the activities of trade unions that represent athletes (or players' associations) and their interaction with professional clubs or sports governing bodies. They involved claims of competition law and free movement infringements against sports governing bodies. The principles established contribute to the growing body of free movement and EU competition law cases that are specific to the sports industry and are increasingly holding sports governing bodies accountable for restrictive practices, which have an effect on a sport's labour market and frequently infringe workers' rights. The decisions do not create outright the environment that exists in the sports labour market in the USA, in which competition or anti-trust law liability arising from the rules that the leagues and teams wish to introduce incentivises the teams to engage in collective bargaining with players' associations. These collective bargaining agreements then exert the main regulatory control on sports leagues and commissioners, who are

[1] Case C-124/21 P *International Skating Union v Commission*, ECLI:EU:C:2023:1012 (*ISU*).

[2] Case C-680/21 *UL and Union royale belge des sociétés de football association ASBL (URBSFA) & Union des associations européennes de football*, ECLI:EU:C:2023:188 (*Royal Antwerp*).

[3] Case C-333/21 *European Superleague Company SL v Fédération Internationale de football association and UEFA*, ECLI:EU:C:2023:1011 (*European Superleague*).

✉ Leanne O'Leary
olearyl@edgehill.ac.uk

[1] Edge Hill University, Ormskirk, UK

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endowed with the authority to act in the 'bests interests' of the league. The decisions do, however, highlight (again) that a consensus-based approach to determining regulatory rules is desirable, particularly where those rules impinge on the labour market. In turn, this could encourage a greater use of collective bargaining, or social dialogue, processes that have so far been under-utilised in sports in the EU. This article discusses three effects of the CJEU decisions for employment relations in sport, specifically, the effect on collective bargaining, the effectiveness of players' associations as a countervailing power to regulatory power, and the potential for an increased use of collective bargaining or social dialogue processes insofar as concerns regulation of the labour market.

2 Effect on collective bargaining

The CJEU decisions have had a positive effect for the recognition of athletes' individual employment rights by highlighting the potential for the UEFA homegrown player rule to infringe Article 101 TFEU,[4] confirming that ISU sanctions imposed against athletes for participation in unsanctioned competitions were disproportionate and infringed EU competition law,[5] allowing access to national courts to challenge restrictive practices under EU law that was previously restricted by arbitration clauses,[6] and confirming that the power of sports governing bodies to authorise competitions organised by other entities must be exercised in a transparent, objective, non-discriminatory and proportionate manner for the benefit, in particular, of athletes who seek to participate in them.[7] These significant developments uphold the individual employment rights of athletes.

The immediate impact on the collective labour relations environment in sport, however, is less obvious. The CJEU decisions do not extend or provide greater rights for players' associations when engaged in collective bargaining with a professional league or competition organiser, whether representing workers or solo self-employed athletes. The extent of trade union formation in professional sports differs markedly in individual Member States and between sports,[8] and the levels of collective bargaining or the use of social dialogue processes across professional sport is low, particularly in Olympic sports.[9] None of the CJEU cases formed part of a broader trade union litigation strategy surrounding a specific collective negotiation at a national level or European level. Competition law claims can form part of a broader litigation strategy to compel a counterparty to compromise during negotiations for a collective agreement as demonstrated in labour disputes in professional sports in the USA,[10] or to resolve a regulatory dispute that affects the labour market, such as the FIFPRO competition law complaint lodged with the European Commission (EC) regarding the player transfer system.[11] For those sports in which a collective bargaining relationship exists at a national level, the individual rights of athletes that have been confirmed by these decisions may be the subject of collective bargaining, depending on the nature of the working conditions that the employer wishes to introduce. The *ISU* case has facilitated access for sport stakeholders to national courts for EU law claims, which may strengthen a negotiating strategy during a collective bargaining process.

3 The effectiveness of players' associations as a countervailing power to regulatory power

The *ISU* case, in particular, is a useful example of the benefits of collective organisation and the support available for athletes to protect their employment rights and hold sports governing bodies accountable for regulatory decisions. In *ISU*, Dutch Olympic speed skaters Mark Tuitert and Niels Kertsholt successfully challenged disproportionately punitive sanctions imposed on athletes that participated in competitions not sanctioned by a sports governing body, thereby discouraging athletes from providing services to rival competitions and limiting employment opportunities. The speed skaters were supported in their complaint to the EC, and throughout the legal proceedings that ensued between ISU and the EC, by EU Athletes, a federation of national players'

[4] Note the *Royal Antwerp* case dealt with questions referred from the Belgian national court regarding the legality of the UEFA and Belgian Football Association's respective homegrown player rules. The CJEU left the substantive question of whether in fact these rules infringed Article 45 TFEU to the national court to determine.

[5] Note the *ISU* case was an appeal against the General Court decision T-93/18 EU:T:2020:610, the latter decision finding at para 92 that the sanctions imposed on athletes (at that time a life ban) were "*manifestly disproportionate*" when considering the ISU rules' objective of protecting the integrity of skating. The CJEU dismissed the ISU appeal.

[6] *ISU* (n 1) paras 188–204.

[7] *European Superleague* (n 3) paras 151–152.

[8] For information regarding the collective agreements in place in European sports, see the database available at <https://www.easesport.eu/main-outcomes-of-social-dialogue-in-professional-sports/> last accessed 15 February 2024.

[9] Mittag et al. 2022, p. 25.

[10] For example see the anti-trust law claims arising following deadlock in negotiations for a new collective bargaining agreement in the NBA in 2011: *Anthony v National Basketball Association* (Complaint No. 11-05525 (N.D. Cal. 15 November 2011) and *Butler v National Basketball Association* (Complaint, No. 11-03352 (D. Minn. 15 November 2011).

[11] Nick de Marco 2016.

associations.[12] The support provided to the speedskaters and their success demonstrates the effectiveness of the collective organisation of athletes as a countervailing power to the regulatory power of private sports governing bodies or the bargaining power of professional clubs and other competition organisers. These independent representative organisations hold sports governing bodies accountable for their regulatory decision-making and players' associations will wish to capitalise on the publicity surrounding the support provided in the *ISU* case to encourage and strengthen trade union organisation in professional sport. This, in turn, may assist athletes to obtain greater influence within the wider regulatory framework of sport at the national, European and international levels.

4 Encouragement of a more consensus-based approach to sports regulation insofar as labour market rules are concerned

Working conditions are the subject of labour law and may be agreed through the process of collective bargaining or social dialogue. The regulatory process in European sport is used to implement rules that impinge on working conditions (e.g. a homegrown players' rule, a salary cap, or a ban that prevent athletes from participating in a competition) and which fall within the scope of labour law. Even though a sports governing body may include consultative forums for athletes and employers within its governance framework, the agreement of athletes and employers to restrictive measures that affect working conditions is not always present because of the competing interests and influence of dominant entities in the regulatory framework. With these three decisions, the CJEU again encourages a more consensus-based approach to sports regulation, which, in turn, may encourage use of social dialogue and collective bargaining processes at transnational or national levels.

The CJEU reiterated in *ISU*, *Royal Antwerp*, and *European Superleague* that the context in which an anti-competitive regulatory rule is implemented is a relevant consideration in a competition law claim.[13] Social dialogue or collective bargaining can provide the process and the context for agreement on restrictive measures between employers and athletes, which could be implemented through a sports regulatory framework, and withstand competition law challenges, or avoid them altogether. It is useful to recall the interaction between competition law, free movement and labour relations generally in the EU. The freedom to form a trade union, to engage in collective bargaining with a view to concluding a collective bargaining agreement, and to take collective action to defend those interests, underpins employment relations and is recognised as a human right in the Charter of Fundamental Rights of the European Union [14] and in international law.[15] At a national level, most Member States regulate the conditions upon which collective bargaining may occur, the legal status of collective agreements and conditions (if any) for strike action. The activities pursued by trade unions in the course of protecting the collective interests of workers, however, conflict with the Treaty objective of establishing an integrated market through recognition of the fundamental freedoms and a system of undistorted competition. [16]

Recognising that there are certain restrictions inherent in collective agreements and that the social policy objectives of these would be undermined if, for example, collective agreements reached between organisations representing employers and workers were subject to competition law analysis, the CJEU established a limited exemption in the case of *Albany International BV (Albany) v Stichting Bedrijfspensioenfonds Textielindustrie.*[17] *Albany* reconciles the conflict between the EU's competition policy and its policy in the social sphere of establishing high levels of employment and guaranteeing adequate social protection.[18] The *Albany* exemption confirms that agreements made in the course of collective negotiations between an employer or employers' association and an employees' association, and which improve working conditions, are excluded from competition law challenge under Article 101 TFEU.[19]

The exemption was extended to certain self-employed individuals in *FNV Kunsten Informatie en Media v Netherlands*,[20] a case in which the CJEU accepted that collective agreements concluded on behalf of the 'false

[12] EU Athletes (December 2023).

[13] *ISU* (n 1) para 96; *Royal Antwerp* (n 2) para 96; and *European Superleague* (n 3) para 105.

[14] Charter of the Fundamental Rights of the European Union, arts 12 and 28.

[15] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR), art 11, *Demir and Baykara v Turkey* (2008) ECHR 1345, *Enerji Yapi-Yol Sen v Turkey* (2009) ECHR 2251; ILO Conventions 98 and 154; and in various State constitutions.

[16] See the line of authority that prioritises internal market free movement rights ahead of collective action, commencing with C-438/05 *International Transport Workers' Federation v Viking Line ABP*, ECLI:EU:C:2007:772 and C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet*, ECLI:EU:C:2007:809.

[17] C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430. Also note Case-22/98 *Criminal Proceedings Against Becu*, ECLI:EU:C:1999:419 and Case E-14/15 *Holship Norge As* v *Transportarbeiderforbund* Case E-14/15 [2016] 4 CMLR 29.

[18] TFEU, art 9.

[19] *Albany* (n 17) paras 59–60.

[20] C-413/13 *FNV Kunsten Informatie en Media v Netherlands*, ECLI:EU:C:2014:2411.

self-employed' were also exempt.[21] The false self-employed are those individuals whose contractual relationship with an entity contains the hallmarks of a worker relationship under EU law (e.g. dependence, control and provision of services for remuneration) but for tax, administrative or organisational reasons, the individuals are categorised under national law as self-employed. Subsequent to *FNV*, the EC has taken steps to extend the exemption to all self-employed workers by setting out guidelines on the compatibility of agreements relating to working conditions and negotiated on behalf of solo self-employed people with Article 101 TFEU.[22] The effect of *Albany, FNV* and the EC Guidelines is that collective agreements negotiated on behalf of workers or the solo self-employed fall outside the scope of EU competition law. A similar exemption does not exist for other trade union activities or provisions in an agreement that infringe the free movement provisions. A measure that impedes free movement may be permitted if it pursues a legitimate non-economic objective in the public interest, and observes the principle of proportionality, i.e. is suitable for attaining that objective and does not go beyond what it necessary to achieve it.[23]

The exemption established in *Albany* and *FNV*, and the EC guidelines, are applicable to collective agreements negotiated in the professional sports industry. The CJEU has not yet had to reconcile the provisions of a collective bargaining agreement applicable to the employment of athletes in a professional sports competition with Article 101 TFEU or to determine conclusively whether a regulatory rule that produces restrictive effects in a market and is collectively agreed by stakeholders is justified under the *Meca-Medina* test. Accordingly, there is an element of uncertainty surrounding the scope of the exemption established in *Albany* and *FNV*, with respect to the unique working conditions of athletes that may produce anti-competitive effects and harm competition in the market, for example, by a salary cap that has an anticompetitive object. The CJEU has long recognised that sports competitions have specific characteristics that may be taken into consideration, together with other relevant elements, when considering potential infringements under free movement and competition law.[24] If the circumstances do not enable the application of the exemption established in *Albany* and *FNV* because, for example, the athletes concerned do not fall within the definition of employee or solo self-employed, the restrictive practice may still be justified under EU competition law based on the test established in the *Wouters*[25] and *Meca Medina*[26] cases.

The three decisions could be a catalyst for a move towards an increased use of collective bargaining or social dialogue, particularly since the *ISU* case has confirmed an avenue of claim for clubs and players at a national level which may hitherto have been precluded by arbitration agreements that favoured resolution through CAS. The homegrown players' rule in *Royal Antwerp* and the disciplinary sanction in *ISU*, both of which impede access to employment for certain athletes, and the dispute resolution process to resolve employment disputes, may be characterised as working conditions and fall within the scope of labour law, and therefore subject to agreement in a collective bargaining forum at a national level or at a European level. The subject of dispute in the *European Superleague* case was the pre-authorisation criteria for a rival competition in European football, an issue not directly the subject of labour law, but which has effects for the interests of clubs, football players, and the regulator, and may be the subject of consultation between these and other stakeholders.

Social dialogue has its legal basis in Articles 151 to 156 TFEU and may overcome the obstacles present at a national level in some Member States that prevent collective agreement on working conditions e.g. athletes' legal status. It provides a procedure for the EC to consult with the social partners regarding social policy initiatives that may affect the industry and also provides a mechanism through which the social partners can agree working conditions in an industry to be implemented voluntarily or through EU law provided certain conditions are met.[27] Social dialogue is viewed as one of the fundamental ways in which the EU can achieve the political objective of improving living and working conditions, and it has long been advocated as a tool of good governance and encouraged politically in the sports industry.[28]

[21] *FNV*, ibid., paras 31–37. For a discussion regarding the definition of worker, see Case C-256/01 *Allonby v Accrington & Rossendale College*, ECLI:EU:C:2004:18, para 67 and Case C-610/18 *AFMB Ltd v Raad van bestuur van de Sociale verzekeringsbank*, ECLI:EU:C:2020:565, paras 60–61.

[22] Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons [2022] OJ C374/02.

[23] *Royal Antwerp* (n 2) para 141; C-415/93 Union royale belge des sociétés de football association and Others v *Bosman*, ECLI:EU:C:1995:463, para 104; C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United FC*, EU:C:2010:143, para 38; and C-22/18 *Topfit and Biffi v Deutscher Leichtathletikverband eV*, EU:C:2019:497, para 48.

[24] For example see C-176/96 *Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL*, ECLI:EU:C:2000:201, para 33.

[25] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2001:390.

[26] C-519/04 P *Meca-Medina and Majcen v Commission*, ECLI:EU:C:2006:492, paras 42–48.

[27] TFEU, arts 154 and 155.

[28] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening Social Dialogue in the European Union: harnessing its full potential for managing fair

There is already a social dialogue committee in football, although it has been criticised for the time taken to reach agreement, the outputs achieved, and the level of regulatory control exerted.[29] A social dialogue committee also existed in the broader active sport and leisure sector, which was dissolved in 2020 after a test phase. Despite the criticism levelled towards social dialogue at a European level in football or the challenges of structuring a social dialogue committee for professional sport generally, social dialogue has a role to play in a sport's regulatory framework. The *status quo* in sports regulation is resulting in an increased number of disputes through the European court system, which also take time and money to resolve. Moving the emphasis to social dialogue as a process for agreement on regulatory rules that affect the labour market, improves good governance in sport and preserves the sporting autonomy that sports governing bodies seek to maintain.[30] The process should be organised to cater for the unique characteristics of professional sport, include the regulator, the employers and athletes and, if necessary, be process-managed by a neutral person or entity, in order to achieve agreement regarding the regulatory rules that affect the labour market. There is no compulsion to engage in social dialogue and it requires those involved to buy-in to a process that involves compromise. It may, however, protect certain regulatory rules that affect the labour market from competition law scrutiny and the three decisions could prove to be the catalyst for a more widespread and effective use of the process.

5 Conclusion

The *ISU*, *Royal Antwerp* and *European Superleague* cases uphold certain individual employment rights for athletes but have a more limited immediate impact on employment relations in sport in the EU. The level of competition law scrutiny that these decisions signal, however, may encourage sports governing bodies to engage in more consensus-based decision-making, which could be the catalyst for an increased use of social dialogue as a mode of governance insofar as concerns the regulatory rules that impinge on the labour market.

transitions COM/2023/40 final; and in respect of the sports sector, White Paper on Sport COM (2007) 391 final and Communication on Developing the European Dimension in Sport COM (2011) 12 final.

[29] Cattaneo et al. (2020), para 415.

[30] Sports governing bodies' claim to autonomy is conditioned in the EU by good governance practices, such practices including, amongst others engagement with stakeholders and inclusion in decision-making: Wetherill (2017) 10.13.

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Declarations

Competing interests The author declares no competing interests.

References

Cattaneo A, Parrish R (2020) Sports Law in the European Union. Wolters Kluwer, The Netherlands

De Marco N (2016) Football challenges the football transfer system. https://www.sportslawbulletin.org/fifpro-challenge-the-football-transfer-system/. Accessed 15 Feb 2024

EU Athletes Statement on the Judgment of the Court of Justice in the ISU Case (21 (2023) <https://euathletes.org/eu-athletes-statement-on-the-judgement-of-the-court-of-justice-in-the-isu-case/#:~:text=EU%20Athletes%20is%20pleased%20with,Niels%20Kerstholt%20and%20EU%20Athletes.> last accessed 15 February 2024

Mittag J et al (2022) Good Governance in the Employment Relations of Athletes in Olympic Sports in Europe. University of Rijeka - Faculty of Law, Croatia. A copy is available at <https://repository.pravri.uniri.hr/en/islandora/object/pravri%3A3107>

Wetherill S (2017) Principles and practice in EU sports Law. Oxford University Press, Oxford