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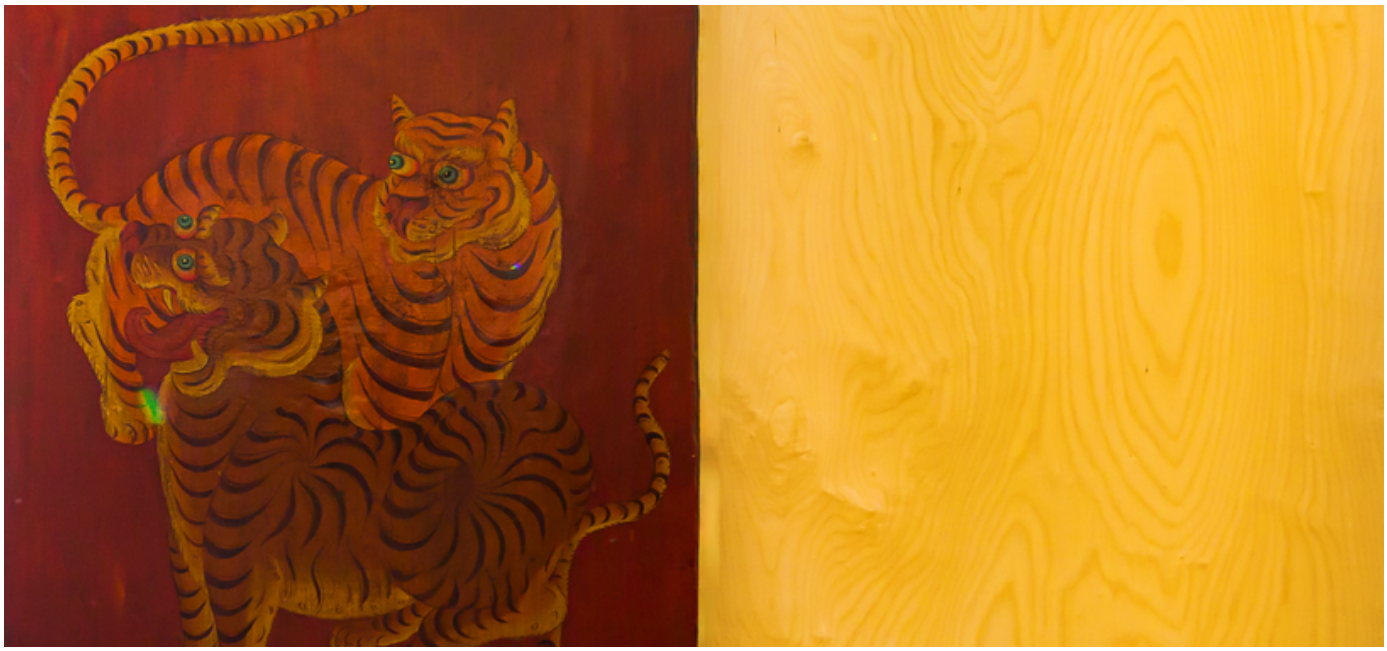

ARTICLE 165 TFEU AS AN OVERRIDING REASON RELATING TO THE PUBLIC INTEREST IN AG SZPUNAR'S OPINION IN ROYAL ANTWERP FOOTBALL

Advocate General ('AG') Maciej Szpunar delivered his Opinion in case Royal Antwerp Football Club (C-680/21) on 9 March 2023, remarkably beginning with the assertion that 'Nobody wants boring football, which is why some restrictions [to article 45 TFEU] can (...) be accepted'.

The reference for a preliminary ruling involves, on the one hand, UL, a football player, and Royal Antwerp Football Club ('Royal Antwerp') and, on the other hand, the Union royale belge des sociétés de football association ASBL ('URBSFA') and the Union of European Football Associations ('UEFA'). At the national level, UL and Royal Antwerp brought an action against a set of rules issued by UEFA and the URBSFA.

In force since the 2008/2009 season, the contested UEFA rules, known as 'home-grown players' ('HGP') – players trained by a club or in the national football association to which that club belongs –, require clubs registered for one of UEFA's European club competitions to include a minimum of 8 home-grown players in a list of maximum 25 players. Out of those eight players, at least four, regardless of their nationality, must have been trained by their club or by another club in the same national association for at least three years

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between the ages of 15 and 21 (paragraph 7). URBSFA, based on these rules, has adopted essentially similar rules for clubs participating in the professional football divisions (paragraph 8). At both levels, if the minimum thresholds are not met, the players concerned cannot be replaced by players who do not satisfy the relevant conditions (paragraph 10).

The question that arises is whether the mandatory inclusion of a given number of HGPs on a match list of players amounts to an unjustified restriction to the free movement of workers under Article 45 of the Treaty on the Functioning of the European Union ('TFEU').

AG Szpunar concluded, in his Opinion, that the contested provisions are (only) precluded by Article 45 TFEU to the extent that they apply to players who do not come from the specific club in the relevant national football association (paragraph 83).

1. Restrictions to free movement

Dismissing the submissions of inadmissibility of the questions referred for a preliminary ruling, inter alia because it is not inconceivable that footballers established in other Member States are deterred by the contested provisions from accessing the Belgian market, AG Szpunar examined whether the contested provisions constituted a restriction to Article 45 TFEU.

Considering that HGP rules are likely to create indirect discrimination against nationals of other Member States, since the younger a player is, the more likely it is that that player resides in his place of origin, the AG stated that, albeit neutral in wording, the rules on HGPs place local players at an advantage over players from other Member States (paragraphs 43 and 44).

He thus concludes that there is a restriction on the freedom of movement. However, according to established case law of the Court of Justice, a restriction to the free movement of workers may be justified if it meets one of the grounds listed in Article 45(3) TFEU or an overriding reason relating to the public interest and, furthermore, if it respects the principle of proportionality (paragraph 47).

The next logical step is, accordingly, to examine whether such restriction may be justified.

2. Article 165 TFEU as an overriding reason relating to the public interest

The core of AG Szpunar's Opinion lies in his analysis of Article 165 TFEU, which has found its way into the Treaties with the Treaty of Lisbon (paragraph 49) and allows the European Union ('EU' or 'Union') to adopt incentive measures in the field of Sports.

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Article 165 TFEU establishes that the Union is to contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, by 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest'.

The AG presented, first, some general considerations regarding Article 165 TFEU's literal, systemic and teleological interpretations (paragraphs 51 to 54) which, in a certain way, appear to reduce the legal significance of that provision: (i) the wording employed is typically found in soft law; (ii) article 165(4) TFEU is not a legal basis for allowing the political institutions to adopt legally-binding acts; and (iii) it is not a provision having general application.

Moreover, AG Szpunar makes the application of Article 165 TFEU dependent on whether the legal question at stake is one of positive or negative integration. In his Opinion, in Royal Antwerp there is negative integration, meaning that UEFA and URBSFA seek to rely on a public policy objective to justify a restriction to a fundamental freedom.

Along these lines, Article 165 TFEU is helpful to identify a ground of justification for a restriction to article 45 TFEU, and as an indication of what is acceptable in and throughout the Union when it comes to carrying out the proportionality test when it comes to sports (paragraph 55). It is not a justification in itself but provides key criteria to assess what is acceptable when it comes to proportionality.

A different, more substantive, approach regarding Article 165 TFEU is proposed by AG Rantos in his Opinion in European SuperLeague Company (C-333/21), according to which Article 165 TFEU gives expression to the 'constitutional' recognition of the 'European Sports Model' (paragraph 30) and is a 'horizontal' provision, inasmuch as it must be taken into consideration when implementing other EU policies as well as 'a standard in the interpretation and the application' of EU competition law (paragraph 35), thus offering a strong justification ground. In this he followed the same approach advocated by the Portuguese Government in its observations submitted at the oral hearing in the same case.

Moreover, AG Rantos was of the opinion that the references to the specific nature and the social and educational function of sport may be relevant for the purposes of examining, in the field of sport, any objective justification for restrictions on competition or on the fundamental freedoms (paragraph 42). This finding, which was also vital in his legal analysis in that case, led the AG to conclude that UEFA's actions are justified. Both AGs thus seem to agree on Article 165's vocation to provide justification grounds.

Secondly, AG Szpunar put forward three important points to demonstrate that the concept of sports as an autonomous activity should be reconsidered: (i) contrary to a Member State

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as a public entity, private entities such as UEFA and URBSFA pursue objectives which are economic in nature and may be in conflict with public objectives; (ii) UEFA and the URBSFA exercise both regulatory and economic functions, which are not structurally separated and may lead to conflicts of interest; (iii) UEFA and the URBSFA would behave irrationally if they attempted to further public objectives which ran directly counter to their commercial interests (paragraph 58).

Taking into account all the circumstances analysed, AG Szpunar concluded that, in view of the considerable social importance of sporting activities and in particular football in the EU, the objectives of encouraging the recruitment and training of young players and the aim of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results, advanced by UEFA and the URBSFA, must be accepted as legitimate (paragraph 60).

Regarding the principle of proportionality, in particular in its suitability dimension, AG Szpunar questions the contested measures' general coherence regarding the definition of a home-grown player, which includes players trained by other clubs but inside the national league, and suggests that this may not actually encourage clubs to train young players (paragraph 67). So, while the Advocate General considers the requirement to include a predefined number of HGPs justified, he does not see the rationale – from a training perspective – in extending the definition of an HGP to players outside a given club, but inside the relevant national league (paragraph 69).

As regards necessity, UEFA contended that it follows from settled case-law that 'professional regulators' enjoy a 'considerable discretion' when choosing a specific solution to a given problem (paragraph 74). However, since the judgment referred by UEFA in order to justify the HGP rules adopted concerned measures taken by the Bar of the Netherlands (Wouters and Others (C-309/99), AG Szpunar found it difficult to deduce a general principle from the particularities of that case. In that way, he decided that standard case law applies, meaning that those bound by Article 45 TFEU do have some latitude when it comes to assessing whether the pursuit of certain concerns is necessary and by what means this should be done, depending on the subject matter of the objective pursued by the ground of justification (paragraph 76).

But Mr. Szpunar also concluded that there is no reason to depart from standard case-law of the Court of Justice and to afford UEFA and URBSFA a wider discretion than would be the norm for a Member State to justify a restriction of Article 45 TFEU (paragraph 78). The contested provisions, to the extent that they are suitable, appear to be necessary for achieving the objectives of training young players and of improving the competitive balance of teams (paragraph 82).

Notwithstanding the clear intersection between Royal Antwerp and European Superleague

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cases, in particular as regards what UEFA considers to be proportionate measures to pursue legitimate goals in its governance of European football, AG Szpunar seems to suggest a reassessment of the exceptionalism of sport and of the role of entities such as UEFA within the wider European legal framework.

3. Conclusion

There is no bigger sport in Europe than football, and it is widely accepted that it embodies important social and cultural functions, as well as a massive economic impact. In the last years, however, football has been confronted with the application of EU law provisions.

Albeit AG's Maciej Szpunar Opinion is not binding on the Court of Justice, he recalls the fundamentals of EU law regarding free movement laws. If his recommendations are followed, European clubs may have to change the way they recruit young players.

The European Judges will deliver a judgment in the next months in this case and in other three cases concerning the intersection between sports and EU law: European Super League Company (C-333/21) and International Skating Union (C-124/21 P), regarding the compatibility with competition law of pre-authorisation rules for the organisation of sporting competitions other than those organised by the relevant governing bodies, coupled with sanctions in case of participation in unauthorised competitions; and FIFA (C-650/22), concerning the compatibility with EU law of the FIFA Regulations on the Status and Transfer of Players.

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