SLAUGHTER AND MAY/

NEWSLETTER

4 - 17 JANUARY 2023

ISSUE 1

# COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS



## Two Advocate General opinions issued in relation to sports competitions: European Super League and International Skating Union cases

In recent weeks, Advocate General (AG) Rantos has issued two opinions that could have a significant impact on future cases related to sports competitions, should the European Court of Justice (CJ) agree with the AG's conclusions.

In the European Super League and International Skating Union cases, AG Rantos opined that sports federations can act simultaneously as regulators and organisers of sporting events without necessarily breaching competition law, and that they may deny market access to rival competitions in certain circumstances.

### THE EUROPEAN SUPER LEAGUE CASE

#### *BACKGROUND*

The European Super League (ESL) was announced in April 2021 by twelve of Europe's biggest football clubs. The ESL was designed as a 'closed' competition in which the founding clubs would participate every year regardless of their sporting performance in domestic leagues. The remaining places would be given to clubs who qualified via their domestic league. FIFA and UEFA jointly refused to recognise the new competition and warned that any player or club who took part in the competition would be banned from competitions organised by FIFA and its confederation.

The ESL brought proceedings in Spain alleging that FIFA and UEFA's conduct was anti-competitive under Article 101 TFEU and an abuse of dominance under 102 TFEU. The Spanish court referred questions to the CJ on the compatibility of the FIFA-UEFA statutes with EU competition law. These statutes require any proposed international football competition to obtain their prior approval, and require players and football clubs to only participate in international competitions organised by FIFA or UEFA or by an authorised third-party, or incur sanctions.

#### *OPINION OF AG RANTOS*

AG Rantos considered that the mere fact that the same entity performs the duties both of a regulator and of an organiser of sporting competitions does not entail, in itself, an infringement of EU competition law.

According to AG Rantos, the FIFA-UEFA statutes were pursuing the legitimate objectives of ensuring open competitions, the prioritisation of sporting merit and financial solidarity between different levels of the sport. In his view, these objectives were consistent with the characteristics of, and special place given to, the 'European Sports Model' in the 2009 Lisbon Treaty. While the social character of sport could not be relied on to exclude sporting activities from the scope of EU competition law, the unique nature of sport as affirmed in the Lisbon Treaty was relevant to AG Rantos' assessment of objective justifications for the restrictions in this case.

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As a result, AG Rantos invited the CJ to rule that:

- the FIFA-UEFA statutes could provide that the setting up of a new pan-European interclub football competition was conditional on prior approval, to the extent that, "*taking into account the characteristics of the planned competition, the restrictive effects arising from that scheme appear inherent in, and proportionate for achieving, the legitimate objectives pursued by UEFA and FIFA which are related to the specific nature of sport*"; and
- similarly, FIFA, UEFA, their member federations or their national leagues could issue threats of sanctions against clubs affiliated to those federations, to the extent those clubs participated in a project to set up a new competition which would risk undermining the objectives legitimately pursued by those federations of which they are members.

AG Rantos also observed that sports federations require 'tools' to ensure compliance with their rules as the regulator for their respective sports. The prior authorisation mechanism was, in his view, an "*essential governance mechanism*" and sanctions could prove necessary to ensure rules laid down by the sporting body are complied with. However, in AG Rantos' view, the sanctions involving exclusion targeted at players who have no involvement in the project in question were disproportionate, in particular as regards their exclusion from national teams.

AG Rantos did note that, in light of their dominant position, FIFA and UEFA bear a "*special responsibility*" when examining requests for authorisations of new competitions to ensure that no third parties are "*unduly denied access to the market*". AG Rantos suggested that the authorisation process, including conditions for access, should be made clear, objective, and as detailed as possible. The opinion does not elaborate on how this would apply in practice in the specific context of European football.

## THE INTERNATIONAL SKATING UNION CASE

### *BACKGROUND*

The International Skating Union (ISU) is the sole body recognised to organise skating competitions on ice, including the Winter Olympic Games, the World and European Championships. Under ISU eligibility rules, speed skaters who participate in non-ISU competitions can incur a penalty that ranges from a warning to a lifetime ban, depending on the seriousness and number of infringements. The ISU has discretion to impose such penalties and to authorise non-ISU events.

Two Dutch speed skaters challenged the ISU eligibility rules on competition law grounds. In December 2017, the European Commission concluded that the ISU's rules restricted competition under Article 101 TFEU as they could prevent potential organisers of speed skating events from entering the market. The ISU appealed to the European General Court (GC), who upheld the Commission's decision.

### *OPINION OF AG RANTOS*

AG Rantos' opinion, which invites the CJ to set aside the GC's judgment, reflects many of the principles outlined in his European Super League opinion.

The GC had found that the ISU rules were anti-competitive due to the "*broad discretion to refuse events proposed by third parties*". AG Rantos did not see this as a sufficient basis on which to establish that the ISU rules were, in and of themselves, anti-competitive. This was the case even if the sporting body had not specifically defined the objectives pursued by those rules.

AG Rantos also contended that, even if it were found that one of the objectives behind a rule was the protection of the sporting body's economic interest, the fact that an entity seeks to protect its own economic interests is not in itself anti-competitive: "*the pursuit by a sports federation, such as the ISU, of its own economic interests […] cannot therefore be used as an indication of an anticompetitive objective in the context of the assessment of a restriction of competition*".

## NEXT STEPS

In both opinions, AG Rantos makes clear his view that sports federations can deny market access to rival competitions and impose sanctions on members in the pursuit of legitimate objectives, provided that the measures adopted by those federations are proportionate.

It is important to note that the AG's opinions are not binding on the CJ. Although the CJ follows AG opinions in the majority of cases, it remains to be seen what the outcome will be in these two cases. The CJ is expected to issue its judgments in both cases in the first half of this year.

Should the CJ follow AG Rantos' opinions in both instances, sporting federations' positions as regulators and organisers of sporting events will be vindicated. The impact on future cases related to sports competitions will be significant.

## OTHER DEVELOPMENTS

### MERGER CONTROL

### SAMR CONDITIONALLY CLEARS KOREAN AIR'S ACQUISITION OF A 63.9% STAKE IN ASIANA AIRLINES

On 26 December 2022, China's competition authority, the State Administration for Market Regulation (SAMR), published a decision which conditionally cleared a proposed acquisition of a 63.9% stake in Asiana Airlines by Korean Air.

SAMR found that the proposed acquisition was likely to eliminate or restrict competition in the market for scheduled air passenger transport services on routes between Seoul or Busan and 15 major cities in China, with the merged entity being the largest airline on 13 routes and the second largest on a further two routes. SAMR's review concluded that the merger would risk (i) further increasing the level of market concentration, (ii) enhancing the parties' control over the market, (iii) eliminating the close competition that previously existed between the parties, and (iv) increasing the motivation and capability for collusion on price in the relevant markets.

In line with several recent clearance decisions, SAMR cleared the transaction subject to a number of largely behavioural conditions, which are legally binding and will remain effective for ten years from closing. These were summarised by SAMR as:

- Returning slots at airports under certain conditions and if requested by a new entrant.
- Returning part of the merged entity's traffic rights on certain routes to enable a competitor to use them.
- The parties are required to keep the frequency of flights and numbers of seats at 2019 levels on two specified routes (Seoul—Guangzhou, Seoul—Dalian), unless otherwise approved by SAMR.
- Avoiding the exclusion of new players in air passenger transport agreements and not to reject renewal requests made by airlines in China for existing agreements.
- Continuing the provision of auxiliary services for air passenger transport services, such as ground services at Korean airports for existing and new Chinese competitors.
- Undertaking not to increase prices without justifiable reasons, such as to increase the parties' market share or exclude or restrict competition, and undertaking to take measures to safeguard users' data.

This is latest in a number of conditional clearances from SAMR (see our previous newsletter for the Shanghai Airport/China Eastern Air Logistics/JV conditional clearance), which demonstrates SAMR's continuing willingness to clear deals subject to behavioural remedies, even if relatively high market shares are involved.

## ANTITRUST

### EUROPEAN COMMISSION ACCEPTS COMMITMENTS OFFERED BY AMAZON IN AMAZON MARKETPLACE, AND AMAZON BUY BOX AND PRIME INVESTIGATIONS

On 20 December 2022, the European Commission announced that it has accepted commitments from Amazon and is making them binding in relation to two investigations: (i) the Amazon Marketplace investigation, in which the Commission in November 2020 preliminarily found that Amazon's use of non-public marketplace seller data allowed it to avoid the normal risks of retail competition and to leverage its dominance in the market for the provision of marketplace services in France and Germany; and (ii) the "Buy Box" and "Prime" programme investigation, which was launched in November 2020. Under Amazon's business practices, winning the "Buy Box" allows a seller to appear as the default seller when a customer purchases a product, whilst participating in the "Prime" programme allows a seller to benefit from Amazon-fulfilled expedited delivery. The Commission was concerned that Amazon's criteria for the features unfairly favoured its own retail business and delivery services, amounting to an abuse of a dominant position under Article 102 of the Treaty on the Functioning of the European Union on the French, German and Spanish markets.

Amazon made a number of commitments in order to address the Commission's concerns. As regards the Marketplace investigation, Amazon proposed not to use non-public data relating to, or derived from, the independent sellers' activities on its marketplace for its retail business, nor to use such data for the purposes of selling branded goods as well as its private label products.

In relation to the Commission's "Buy Box" and "Prime" concerns, Amazon's proposed commitments included treating all sellers equally when selecting the "Buy Box" winner, displaying a second seller for the "Buy Box", setting non-discriminatory conditions for the seller to qualify for the "Prime" programme, allowing "Prime" sellers to freely choose their own delivery services, and not using any information obtained through "Prime" on the performance of third-party carriers for improvements to its own delivery service.

The Commission duly market tested the commitments, and on the basis of the outcome, Amazon then further improved its first set of proposed commitments to include, *inter alia*, a review mechanism for the competing second "Buy Box" offer, should it not attract sufficient interest. Also, it will give sellers direct lines of contact with customers to offer their own delivery services, and set up a centralised complaints mechanism in the case of non-compliance. The commitments will be in place for a duration of seven years.

## SUBSIDY CONTROL

### UK SUBSIDY CONTROL ACT 2022 AND EU FOREIGN SUBSIDIES REGULATION NOW IN FORCE

The UK Subsidy Control Act 2022 came into force on 4 January 2023. The Act represents a development of the UK subsidy control regime that was put in place at the end of 2020 as part of the implementation of the UK's commitments in the EU-UK Trade and Cooperation Agreement. It builds on the new procedural regime for the assessment of subsidies, with the introduction of a new Subsidy Advice Unit at the Competition and Markets Authority (CMA) that will be able to review and issue opinions on certain types of subsidy that have been identified as having greater potential to lead to negative effects on competition, trade or investment: Subsidies of Particular Interest and Subsidies of Interest.

The key difference between the UK subsidy control regime and EU State aid law is procedural: the UK regime is to a large extent based on self-assessment by the entity that is giving a subsidy. It has no equivalent to the mandatory pre-notification and approval requirements of EU State aid law, with the new role of the CMA being advisory.

For a more details on the UK subsidy regime, see our client publication and blog post published earlier this month.

On 12 January 2023, the EU Foreign Subsidies Regulation also entered into force. The Foreign Subsidies Regulation empowers the European Commission to investigate and address the effects of distortive foreign subsidies in the EU. The Regulation will start to apply as of 12 July 2023. The notification obligation for companies will be effective as of 12 October 2023. For more details on the EU Foreign Subsidies Regulation, see a previous edition of this Newsletter.

## GENERAL COMPETITION

### EUROPEAN COMMISSION EXTENDS SCOPE OF ITS ANTITRUST WHISTLE-BLOWER TOOL TO INCLUDE MERGERS AND STATE AID ISSUES

The European Commission announced that it has extended the scope of its antitrust whistle-blower tool to include merger control and State aid issues. The tool, which enables confidential and encrypted communications between whistle-blowers and the Commission, has been credited with emboldening the EC's ability to investigate and call to account antitrust violations, for instance price-fixing arrangements, unlawful procurement bids or the co-ordinated exclusion of rivals. The extension to merger control and state aid issues means that the whistle-blower hotline now applies to all competition law breaches. It will enable the anonymous reporting of issues such as gun-jumping in merger cases or unlawful state subsidies.

Following its introduction in 2017, the whistle-blower hotline has resulted in around 100 anonymous contacts per year.

The service is run by an external provider, who relays only the message content, preventing any data being passed to the Commission that would render an individual identifiable, thereby preserving their anonymity.

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