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## Does Competition law disappoint football fans? 22<sup>nd</sup> annual meeting of the Association of European Competition Law Judges (AECLJ) – 30.05. – 01.06.2024

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*The Association of European Competition Law Judges (AECLJ) met in Berlin just two weeks before the kickoff of the UEFA European Championships. The topic: "Sports, Arbitration and Competition Law". Wolfgang Kirchhoff, the President of the AECLJ and also the president of the Cartel Chamber of Germany's Federal Court of Justice (BGH), raised a key question: „Does Competition Law disappoint football fans?“ Philipp Eckel reports from the 22<sup>nd</sup> Annual Meeting of the AECLJ.*

### The participants and the venue

More than 120 judges and practitioners working at the EU Commission, NCAs and in private practice from all over Europe and the UK exchanged their views and experiences in respect of competition law and arbitration in sports. The conference, co-organised by the EU Commission and Adam Scott's team from the CAT and supported by the German Federal Ministry of Justice, the *Studienvereinigung Kartellrecht*, *GRUR* and *FIW*, took place at the plenary hall („Großer Plenarsaal“) of the Kammergericht in Berlin – a place of great historical importance where the *Volksgerichtshof* supported the Nazi terror by imposing countless death sentences from 1934 on. Nowadays, only the Constitutional Court of the State of Berlin is allowed to hold its hearings at the plenary hall.

### Part 1: Sports and Competition Law

After a cozy evening reception at the Kammergericht (KG) at 30 May 2024, the academic programme started the next morning with a warm welcome by Angelika Schlunck (Secretary of State in the Federal Ministry of Justice), Svenja Schröder-Lomb (Vice President of the KG) and Wolfgang Kirchhoff.

The first panel with Anne-Marie Witters as chair (President of the Market Court Brussels) tackled the topic „Sports and competition law before the ECJ“. Dr. Gero Meeßen (Legal Service of the Commission), Ben Van Rompuy (Assistant Professor of EU Competition Law at Leiden University) and Jean-François Bellis (advocate for the ISU before the ECJ) discussed the ECJ's latest decisions in European Super League<sup>1</sup>, International Skating Union (ISU)<sup>2</sup> and Royal Antwerp Football Club<sup>3</sup>. The panel stressed the significance of the conceptual change since the ECJ modified the Wouters/Meca-Medina<sup>4</sup>-Doctrine by also applying it to Art. 102 TFEU and at the same time limiting it to infringements by effect. As a result, infringements by object could only be justified by Art. 101(3) TFEU which requires i. a. quantifiable efficiency gains. As regards the practical impact, a lot would depend on how the „by object“ and „by effect“-dichotomy is applied and on how wide Art. 101(3) TFEU can be construed.

The second panel with Mads Bundgaard Larsen (President of the Maritime and Commercial High Court, Copenhagen) as chair shared the point of view of the European Commission and the NCAs as regards the public enforcement of competition law in the sports sector. Inge Bernaerts (Director for strategy and policy at DG

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<sup>1</sup> ECJ, 21.12.2023, Case C-333/21, ECLI:EU:C:2023:1011 - Superleague.

<sup>2</sup> ECJ, 21.12.2023, Case C-124/21 P, ECLI:EU:C:2023:1012 – International Skating Union.

<sup>3</sup> ECJ, 21.12.2023, Case C-680/21, ECLI:EU:C:2023:1010, Royal Antwerp Football Club.

<sup>4</sup> ECJ, 18.7.2006, Case C-519/04 P, ECLI:EU:C:2006:492, Meca-Medina.

COMP) spot-lighted the policy background and i. a. the Commission's Decisions regarding the joint selling of media rights (on FA Premier League<sup>5</sup> and UEFA Champions League<sup>6</sup>). Fabienne Siredey-Garnier (Vice-Présidente de l' Autorité de la concurrence) gave an overview of the French Competition Agency's activity in the sports sector and its 30 decisions between 1995 and 2023 (about 50 % dealing with distribution of sport equipment and about 40 % with the allocation of audiovisual rights). Gunnar Kallfaß (Head of the sports cases-division at the Bundeskartellamt) presented the perspective of the German Competition Agency and the consequences of the ECJ's Super League Judgement for the BKartA's cases concerning the joint selling media rights and the „50+1 ownership clause“ questioning whether the ECJ's assessment of restriction by object was the right categorisation under national law.

## Part 2: Arbitration and Competition Law

Andreas Mundt (President of the Bundeskartellamt) welcomed the participants for the second part of the day, which focused on the relationship between Arbitration and Competition Law. Mundt explained the particular role of sports for the BKartA's policy („no-winner-topic“) and stressed individual liberty as one of the important objectives of Competition Law besides price and volume.

The first panel („Arbitration, sport and competition law“) – chaired by Mercedes Pedraz Calvo (La Audencia Nacional, Madrid) – started with a statement by Christopher Vajda (former UK judge on the CJEU, now arbitrator in competition cases) who gave an overview over the jurisdiction in the UK and the influence of EU Competition Law. Since Christopher was part of the FA Tribunal London which objected last year against the FIFA Cap on football agents, he gave insights in the

challenges for the tribunal and the plans in the UK about creating an independent football regulator. Florian Bien (Professor of Global Business Law, International Arbitration Law and Private Law at the Julius Maximilians University of Würzburg) explained the special factual features of sports & arbitration (need of speedy decisions, international dimension, one single federation per sport) and pointed out that – due to the very narrow scope of judicial control by the Swiss State Courts – awards by CAS were de facto excluded from state recognition procedures. Laura Melusine Baudenbacher (President of the Swiss Competition Commission) and Romano Subiotto (chairman at CAS) explained the (non-) legal reasons for the attractiveness of swiss substantive law, the history and advantages of CAS and its legal legitimacy.

The second panel of the afternoon – chaired by Wolfgang Kirchhoff – focused on competition law and arbitration in general. Daniel Zimmer (Director of the Institute of Commercial and Economic Law and of the Centre for Advanced Studies in Law and Economics at the University of Bonn) explained the legal framework how arbitration agreements are controlled by competition law („ordre public“) and hereby discussed a recent BGH decision dealing with quarries.<sup>7</sup> The panel closed with statements by Daniel Barlow (President of the International Chamber of the Cour d'Appel de Paris) delineate the French competition law-arbitration-approach and Yves Herinckx (arbitrator and deputy judge at the Market Court in Brussels) explaining the role of an arbitrator and its challenges.

The day finished with a culinary dinner highlight at „The Käfer Roof Garden Restaurant“ at the top of the Reichstag. The wide roof-top terrace of the restaurant was the perfect place to reflect the day and to enjoy a

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<sup>5</sup> European Commission, Summary of Commission Decision of 22 March 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/38.173 — Joint selling of the media rights to the FA Premier League), 2008, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0112%2803%29> (last accessed 21.6.2024).

<sup>6</sup> European Commission, 2003/778/EC: Commission Decision of 23 July 2003 relating to a proceeding pursuant to

Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League), 2003, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A32003D0778> (last accessed 21.6.2024).

<sup>7</sup> BGH, 27.9.2022, Az. KZB 75/21, WuW 2023, 108.

glass of wine with colleagues and old friends in a relaxed atmosphere.

### **The final day / Conclusion**

The conference finished on 1 June 2024 with Mira Raycheva's (Supreme Court of Bulgaria, Sofia) and Max Barret's (High Court of Ireland, Dublin) panels giving national case law updates.

The Annual Meeting was – once again – a great opportunity to exchange the different experiences and national approaches to Competition Law and Arbitration in sports. As regards the opening question, whether Competition Law disappoints football fans, in my opinion, the conference showed that – especially after the recent ECJ's judgements – consumer welfare plays a major role while applying competition law in the sports sector. It will be one of the major tasks and challenges for competition authorities and courts to safeguard the interests of sport fans in the long term by applying these principles. However, one could doubt whether the recent practice of joint selling of media rights in Germany – at least in the short run – really benefits the interests of football fans who have to purchase several subscriptions at a significant higher overall price than before in order to be able to watch the matches of their teams