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The Belgian Competition Authority rules that a national football association's conditions to obtain a professional licence are *prima facie* incompatible with competition law and orders interim measures (*Virton / RBFA*)

PROCEDURES, BELGIUM, BURDEN OF PROOF, INTERIM MEASURES, REFUSAL TO DEAL, SPORTS, BARRIERS TO ENTRY, JUDICIAL REVIEW

Belgian Competition Authority, (*Virton / RBFA*), Decision No. ABC-2020-V/M-36, 19 November 2020 (French)

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On 19 November 2020, the Belgian Competition Authority ("BCA") ordered interim measures against the Royal Belgian Football Association ("RBFA") following a request filed by the professional football club Royal Excelsior Virton ("RE Virton"). The BCA considered that the RBFA's refusal to grant a licence to RE Virton was based on rules that were *prima facie* incompatible with competition law. As a result, RE Virton was allowed to submit a new licence application in order to re-enter the first division league for the 2021-2022 season.

I. The parties

RE Virton is a Belgian football club created in 1992. At the time of the dispute, RE Virton played in first division B (D1B) of the Belgian league.

The RBFA (formerly known as Union Royale Belge des Sociétés de Football Association) is the governing body of football in Belgium, in charge of the organisation of all football competitions (i.e., professional and amateur). Its licensing board is responsible for issuing licences to professional clubs.

II. The background of the dispute

In April 2020, the RBFA refused to issue a new professional licence to RE Virton on the basis that the club did not satisfy the licence requirements of the RBFA regulation [7].

RE Virton lodged an appeal before the Belgian Court of Arbitration for Sport (“BCAS”), which upheld the RBFA’s decision [2]. The BCAS confirmed that the club did not meet the general conditions to obtain a licence [3] and that it failed to comply with the continuity principle, which requires football clubs to guarantee their continuity until the end of the season for which the licence is requested. In the case at hand, the BCAS considered that RE Virton was facing financial difficulties likely to jeopardise its continuity and that it failed to provide sufficient evidence (such as a letter of comfort or a sponsorship contract) that would offset its negative net working capital. As a result, RE Virton was relegated to the second-tier division with three penalty points.

RE Virton subsequently filed a complaint with the BCA and requested interim measures, alleging that the RBFA’s rules on licensing amounted to a restriction of competition. In June 2020, the BCA’s Competition College rejected the request for interim measures, holding that RE Virton had failed to demonstrate its fulfilment of the conditions to obtain a licence, even when discounting the criteria alleged as incompatible with competition law.

RE Virton brought an action for annulment against this decision before the Markets Court, a specialised court of the Brussels Court of Appeal. In a judgment delivered on 23 September 2020, the Markets Court annulled the BCA decision for failure to provide adequate reasons and referred the matter back to a differently constituted Competition College.

III. The BCA decision

The Competition College examined the RBFA’s refusal to issue a licence in the light of Article 101 TFEU (and its national equivalent) regarding it as a decision of an association of undertakings. In its preliminary analysis, the Competition College held that requiring a licence and subjecting it to conditions may indeed restrict competition, as it could result in the exclusion of unsuccessful applicants. It held that while the requirement of obtaining a football licence has previously been considered compatible with competition law, the conditions thereof may infringe Article 101 TFEU, unless they aim at achieving a legitimate objective and are necessary and proportionate to the objective pursued [4].

When examining these requirements, the BCA noted that the RBFA’s rules were implemented to ensure the fair conduct of sporting competition and the continuity of clubs. Some of these rules (in particular the continuity requirements) were however deemed as disproportionate. For instance, the RBFA did not carry out a case-by-case analysis of the club’s situation at the time of the application (e.g., the outgoing transfers to an entity linked to RE Virton made after the 1st of January 2020 were not taken into account). It also assessed the club’s financial capacity on the sole basis of its liquidity, disregarding its solvency and ignored the sponsorship or advertising contracts that were not paid directly to the club. The BCA therefore concluded that the RBFA’s rules to grant a licence rules were disproportionate and amounted to a *prima facie* infringement of competition law.

The Competition College then assessed whether RE Virton would have obtained the licence, should these disproportionate criteria were not applied and concluded that it was the case. It first noted that the BCAS erred in considering that the club did not meet the general conditions to obtain a licence. Also, the BCA pointed out that the RBFA disregarded relevant elements pointing to the club’s compliance with the continuity requirements, such as comfort letters provided by one of RE Virton’s main shareholders, as well as sponsoring contracts concluded by an entity linked to the club.

In light of the above, the BCA ruled that the RBFA’s decision caused a damage which would be difficult to repair, as RE Virton was prohibited from competing in the first division championship. The BCA therefore imposed interim measures and ordered the RBFA to adopt new licensing rules and to allow RE Virton to apply for a new licence for

the 2021-2022 season [5].

III. Comment

This ruling represents a significant victory for RE Virton which was allowed to submit a new licence application to be reintegrated in the first division league for the 2021-2022 season. The club obtained the long-awaited licence on 14 April 2021. Importantly, RE Virton has announced its intention to claim 15 million euros for damages.

This is not the first time that football clubs turn to competition law to challenge unfavourable decisions by their federation, such as a relegation to a lower division or a suspension or termination of a season. In Belgium the BCA has ruled before in disputes between the RBFA and football clubs . The Virton case reiterates the increasing relevance of competition law for football associations and sports federations in general which should be aware that their decisions could be subject to the scrutiny of competition authorities.

[1] See Article P407 of the RBFA's regulation.

[2] Final arbitration award Arb. 183/20.

[3] The RBFA requires clubs to fulfill several criteria such as taking out an insurance policy against accidents at work, presenting an organisation chart of the club's legal structure or demonstrating that the club is not in default of payment. In the case at hand, RE Virton did not prove that its social security contributions and a debt vis-à-vis another club were fully paid.

[4] In accordance with settled case law of the European Court of Justice, see C-309/99, Wouters, 19 February 2002, §97; C-519/04 P, Meca-Medina and Majcen v. Commission, 18 July 2006, §42.

[5] RE Virton initially asked to be allowed to re-enter the first division during the ongoing season but the Competition College held that it would be disproportionate.