

Anonymised version

Translation

C-680/21 – 1

Case C-680/21

Request for a preliminary ruling

Date lodged:

11 November 2021

Referring court:

Tribunal de première instance francophone de Bruxelles (Belgium)

Date of the decision to refer:

15 October 2021

Applicants:

UL

SA Royal Antwerp Football Club

Defendant:

Union royale belge des sociétés de football association ASBL

...

Tribunal de première instance francophone de Bruxelles, Section civile
(Brussels Court of First Instance (French-speaking), Civil Division)

Judgment

...

...

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[Company information]

Applicants;

...

[Identification of lawyers]

v

The Association Sans But Lucratif UNION ROYALE BELGE DES SOCIETES DE FOOTBALL – ASSOCIATION ...; ‘the URBSFA’,
[Association information]

Defendant;

... [Identification of lawyers]

D. CONDUCT OF THE PROCEDURE BEFORE THE REFERRING COURT

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E. SUMMARY OF THE FACTS

- 1 UEFA is an association governed by Swiss law, the members of which are the various European national football associations, including the URBSFA for Belgium, whose mission is to regulate and organise football in Europe.

2

On 2 February 2005, UEFA's Executive Committee decided to adopt a rule requiring clubs taking part in UEFA's interclub competitions to have a maximum of 25 listed players, which must include a minimum number of home-grown players ('HGP').

On 21 April 2005, the 'HGP' rule was approved by UEFA's 52 member associations, including the URBSFA, at the Tallinn Congress.¹

Since the 2007/2008 season, the UEFA regulation has required the clubs registered for one of its competitions to include a minimum of 8 home-grown players in a list of maximum 25 players.

"Home-grown players" are defined by UEFA as players who, regardless of their nationality, have been trained by their club or by another club in the same national association for at least three years between the ages of 15 and 21.

- 2 In a resolution adopted on 29 March 2007, the European Parliament explicitly expressed *'its support for the UEFA measures to encourage the education of young players by requiring a minimum number of home-grown players in a professional club's squad and by placing a limit on the size of the squads; [and] believes that such incentive measures are proportionate and calls on professional clubs to strictly implement this rule'*.²

The European Parliament did, however, take the view *'that it is not clear, for example, whether the Union of European Football Associations (UEFA) rule stipulating that teams must contain a minimum number of home-grown players, a provision which is extremely important for youth development, would, if it were reviewed by the Court of Justice, prove to be consistent with Article 12 of the EC Treaty'*.³

- 3 In a press release dated 28 August 2013, the European Commission stated:

'The European Commission has today published an independent study on the assessment of the "Home-Grown Player" (HGP) rule adopted by UEFA in 2005 and gradually implemented by clubs participating in the Champions League and Europa League competitions in subsequent years.

... since the HGP rule risked having indirect discriminatory effects on the basis of nationality and since its implementation had been gradual over several years, the Commission decided to carry out further analysis on the effects of the rule.

¹ Applicant's Document 3.

² The URBSFA's Document 3.

³ *Ibid.*

The main conclusion of the study is that it cannot be categorically established that the restrictive effects of the HGP rule on the free movement of workers are proportionate to the very limited benefits of the HGP for competitive balance and the training and development of young players. The study also argues that the very modest benefits of the HGP rule are likely to be achieved in a more substantial manner by adoption of alternative and less restrictive means, particularly those which do not have discriminatory effects. The study further notes that UEFA, in conjunction with the key football stakeholders, holds the necessary experience and expertise to explore alternatives and should be afforded the reasonable time of three years to do so. The Commission currently has a number of infringements open in this area.

... Rules similar to UEFA’s HGP rule and applied at national level in various sports are also subject to the scrutiny of the European Commission. The Commission’s services have opened a number of infringement procedures in this context. The Commission’s services intend to use the results of the study published today in their discussion with the national authorities and national sports associations with a view to clarifying the criteria under which rules on the promotion of locally trained players are to be assessed in order to examine their compatibility with EU law.’

- 4 The URBSFA is a not-for-profit association the purpose of which is to provide sporting and administrative organisation and to promote football in Belgium.

The URBSFA manages a significant proportion of Professional Football ... and Amateur Football ... in Belgium. ...

The URBSFA organises many competitions each year. To that end, it adopted a Regulation, the provisions of which apply either to all football stakeholders who are affiliated with the URBSFA or to certain categories of them ...

As a member of UEFA, the URBSFA has committed to comply with UEFA’s statutes, regulations and decisions, subject to the general principles of law, public policy provisions and relevant national, regional and Community law.⁴

- 5 In 2011, the URBSFA included in its regulation provisions directly inspired by the ‘home-grown players’ rule which require Belgian clubs to have a certain number of home-grown players.

Thus, in the 2019-2020 version thereof, applicable during the arbitration procedure, the URBSFA regulation included inter alia:

- Article P335.11 ‘Professional football divisions 1A and 1B: submission of the “Squad size limit” list’, which states:

⁴ Article 104.2 of the URBSFA Regulation.

‘1. Lists to be submitted

11. All 1A and 1B professional football clubs must submit the following lists via E-Kickoff and keep them updated:

- a maximum list of 25 players older than the U21s, which must include at least eight trained by Belgian clubs within the meaning of Article P1422.12; at least three players must meet the additional requirement laid down in Article P1422.13. If those minimum thresholds are not met, such players cannot be replaced by players who do not satisfy the relevant conditions.*
- a list containing an unlimited number of U21 players.’*

- Article P1422 ‘Mandatory inclusion on the match sheet’, which states inter alia:*

‘1. The following rules shall apply to the first teams of professional football clubs:

11. When taking part in official first-team competitions (Article B1401), professional football clubs shall be required to include on the match sheet at least six players who have been trained by a Belgian club, at least two of whom meet the additional requirement laid down in point 13 below. If the club is unable to include the minimum number of players required under the preceding paragraph, it may not replace them by including players who do not satisfy the relevant condition.

12. Players who have satisfied all requirements for official match inclusion for at least three full seasons for a club in Belgium shall be regarded as having been trained by a Belgian club before their 23rd birthday.

13. Players who have been affiliated club members for at least three full seasons at a club in Belgium before their 21st birthday shall satisfy the additional requirement.

14. If a player joins a club or is transferred in July or August, the period from 1 September to 30 June shall exceptionally be regarded as a full season.

15. 1A and 1B professional football clubs can include on the match sheet only players appearing on the club’s ‘Squad size limit’ lists (Article P335).

16. In case of breach of the above rules, the competent federal body shall impose the penalties stipulated for the inclusion of ineligible players (Article B1026), with the exception of fines.’

Following a restructuring of the URBSFA federal regulation, the contested provisions now appear in Article B4.1[12] of Title 4 ‘Players’:

‘In order to participate in official, first-team matches in competitive football, specific conditions shall apply to professional football and to amateur football.

Article P. All 1A and 1B professional football clubs must submit the following lists via the digital platform and keep them updated:

1° a maximum list of 25 players older than U21s, which must include at least eight trained by Belgian clubs (these are players who have satisfied all requirements for official match inclusion for at least three full seasons for a club in Belgium before their 23rd birthday); at least three players must meet the additional requirement of having satisfied that condition before their 21st birthday. If those minimum thresholds are not met, those players cannot be replaced by players who do not satisfy those conditions.*

2° a list containing an unlimited number of U21 players.

**If*

- a player is registered as a club member or transferred; or*
- the ITC request is submitted by the URBSFA for the player to the foreign federation as part of an international transfer*

in the months of July or August, the period from 1 September to 30 June shall exceptionally be regarded as a full season.

For a player to be eligible for inclusion on the Squad Size Limit list:

- he must be an affiliated member of the federation and an affiliated club member or temporarily eligible for official match inclusion for the club requesting his inclusion; and*
- in the case of paid sportsman who is not a national of a member country of the EEA, a copy either of the single permit (which must still be valid) or of the official certificate issued by the local authority in his place of residence in Belgium confirming that the paid sportsman has reported to the authority must be furnished in order for him to be issued the single permit to which he is entitled (Annex 49). In the latter situation, a copy of the single permit must be sent to the URBSFA before the validity of the Annex 49 [permit] has expired. If that is not the case, the player concerned is not eligible to take part in official matches of his club’s first team until a copy of a valid single permit has been produced for the player.*

- *he must satisfy the requirements for official match inclusion. Amendments to that list may be approved only by the Federal Authority.’*

And in Article B6.109 of Title 6 ‘Matches’:

‘The following requirements shall apply vis-à-vis the inclusion of players on the match sheet.

Article P The following provisions shall apply to the first teams of professional football clubs:

In the context of their participation in official first-team competitions, professional football clubs are required to include on the match sheet at least six players who have been trained by a Belgian club, at least two of whom satisfy the additional requirement laid down hereinafter.

If the club cannot include the minimum number of players required under the preceding paragraph, it may not replace them by including players who do not satisfy the relevant conditions.

- *Players who have satisfied all requirements for official match inclusion for at least three full seasons for a club in Belgium shall be regarded as having been trained by a Belgian club before their 23rd birthday.*
- *Players who have been affiliated club members for at least three full seasons at a club in Belgium before their 21st birthday shall satisfy the additional requirement.*

If a player joins a club or is transferred in July or August, the period from 1 September to 30 June shall exceptionally be regarded as a full season.

1A and 1B professional football clubs can include on the match sheet only players appearing on the club’s “Squad size limit” lists.

In case of breach of the above rules, the competent federal body shall impose the penalties stipulated for the inclusion of ineligible players, with the exception of fines.’

- 6 UL is a professional football player born ... [in] 1986. Originally of Israeli nationality, UL began his professional career in 2004 at ... [an Israeli club]. In 2011, UL was recruited by ... [a Belgian club]. [He has since gone on to play for a series of Belgian clubs and holds] ... today dual Belgian and Israeli nationality. ...
- 7 On 13 February 2020, UL and the RAFC brought proceedings before the Cour belge d’arbitrage pour le sport (Belgian Court of Arbitration for Sport, ‘the CBAS’) seeking:

‘after consultation with the Autorité belge de la Concurrence (Belgian Competition Authority) pursuant to Article IV.88 [of the Code of Economic Law]:

– a declaration that Articles P335 and P1422 of the URBSFA Regulation, as well as the regulatory provisions relating to “home-grown players” applied by UEFA concerning its own competitions and the similar rules adopted and implemented by other UEFA member federations (all those articles and rules stemming from the plan agreed at the Tallinn Congress), are unlawful because they infringe – first – Article 45 TFEU and non-discrimination clauses in employment matters comparable to those referred to in the judgment in SIMUTENKOV (as appear in many cooperation and partnership agreements concluded between the EU and non-member countries), and – second – Article 101 TFEU, as well as – additionally – Article 14 ECHR;

– a declaration that, in particular pursuant to Article 101(2) TFEU, those articles and rules are therefore void, as is, moreover, the overall plan from which they stem;

– a prohibition from applying Articles P335 and P1422 of the URBSFA regulation and from contributing to the implementation of the UEFA provisions or of any rules arising from the plan agreed at the Tallinn Congress, all with effect from the notification of the future decision, failing which a penalty payment of EUR 100 000 per infringement shall be imposed;

An order that the URBSFA must compensate the applicants for their loss or damage valued, provisionally, at EUR 1.’

8 By an arbitration award made on 10 July 2020, the CBAS decided as follows:

‘Due to a lack of standing, the applications are inadmissible in so far as they seek:

– a declaration that ... the regulatory provisions relating to “home-grown players” applied by UEFA concerning its own competitions and the similar rules adopted and implemented by other UEFA member federations (all those articles and rules stemming from the plan agreed at the Tallinn Congress), are unlawful because they infringe – first – Article 45 TFEU and non-discrimination clauses in employment matters comparable to those referred to in the judgment in SIMUTENKOV (as appear in many cooperation and partnership agreements concluded between the EU and non-member countries), and – second – Article 101 TFEU, as well as – additionally – Article 14 ECHR;

– a declaration that, in particular pursuant to Article 101(2) TFEU, those articles and rules are therefore void, as is, moreover, the overall plan from which they stem.

Declares the applications admissible as to the remainder. Rules that they are unfounded, finding against the applicants.'

- 9 By a summons served on 1 September 2020, UL and the RAFC brought proceedings against the URBSFA before the referring court for the annulment of the arbitration award of 10 July 2020.
- 10 ... [UL currently plays for a Belgian professional football club]

F. SUBJECT MATTER OF THE DISPUTE IN THE MAIN PROCEEDINGS

UL considers that the objet and the effect of the 'HGP' rules laid down by UEFA and by the URBSFA are, first, to make it more difficult for him to be recruited by a Belgian professional club and, second, to reduce his chances of being included on the match sheet and actually taking to the field. For its part, the RAFC takes the view that those same rules affect its freedom to recruit and field its players.

They claim, as a matter of law, that those regulatory 'HGP' provisions imposed by the URBSFA and UEFA infringe Articles 45 and 101 TFEU and Article 23 of the Constitution belge (Belgian Constitution).

UL and the RAFC therefore seek the annulment of the arbitration award made on 10 July 2020 by the CBAS for infringement of public policy, pursuant to Article 1717(3)(b)(ii) of the Code judiciaire belge (Belgian Judicial Code).

For its part, the URBSFA contends that the 'HGP' rules laid down both by UEFA and by the URBSFA are consistent with Articles 45 and 101 TFEU, and that therefore the application for annulment of the arbitration award must be dismissed.

G. REASONS FOR THE REFERRING COURT'S REFERENCE TO THE COURT OF JUSTICE

A. Application of European law

- 11 Before the CBAS, UL and the RAFC have already called into question the compatibility of the 'HGP' rules with Articles 45 and 101 TFEU, in so far as those regulatory provisions were adopted by UEFA, the URBSFA or other UEFA member federations.

By its award decision of 10 July 2020, the CBAS concluded:

- first, that, due to a lack of standing, the application for a declaration that the 'HGP' rules ... [at issue] are contrary to Articles 45 and 101 TFEU and void pursuant to Article 101(2) TFEU is inadmissible; second, that the 'HGP'

rules laid down by the URBSFA are consistent with Articles 45 and 101 TFEU.

12 Article 45 TFEU provides inter alia that:

- ‘1. Freedom of movement for workers shall be secured within the Union.*
- 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. ...’*

Article 101 TFEU states that:

- ‘1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, ...*
- 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.’*

The practices covered by Article 101 TFEU entail not only the undertakings concerned concerting with each other but also *‘subsequent conduct on the market and a relationship of cause and effect between the two’*.⁵

13 The dispute brought before the CBAS involved, in particular, determining whether or not the ‘HGP’ rule adopted by UEFA at the Tallinn Congress and approved by UEFA’s 52 member associations, including the URBSFA, was an agreement between undertakings, a decision by an association of undertakings or a concerted practice between undertakings within the meaning of Article 101 TFEU.

In that regard, the arbitration award states, under the heading ‘*Admissibility*’, that:

‘24. The applicants claim in vain that, notwithstanding that UEFA is not a party to the action, their application is admissible on account of collusion between that “undertaking” and [the URBSFA].

25. Existence of the “collusion” invoked by the applicants is not shown, and, on the contrary, the defendant rightly observes that UEFA, the URBSFA and other UEFA member federations have their own (separate) rules.

⁵ Judgment of 14 March 2013, *Dole Food and Dole Germany v Commission* (T-588/08, EU:T:2013:130, paragraph 57).

26. *The mere fact that a club applying for a European licence must, pursuant to the UEFA Club Licensing and Financial Fair Play Regulations (2018 edition) sign a declaration, to be sent to UEFA, by which it undertakes to comply with UEFA's regulations, and that the URBSFA forwards that declaration, does not mean that the URBSFA applies UEFA's specific regulations vis-à-vis home-grown players.*

27. *Furthermore, UEFA's provisions on the requirement that clubs participating in its competitions field home-grown players are contained not in the "UEFA Club Licensing and Financial Fair Play Regulations (2018 edition)", but rather in the specific Regulations for the competitions organised by UEFA (Champions League, Europa League and Super Cup).'*

Finding, on the basis of those considerations, that the application concerning the 'HGP' rules laid down by UEFA is inadmissible, the CBAS held, implicitly but undeniably, that the conditions under Article 101 TFEU were not fulfilled in the present case.

In so doing, the CBAS applied a provision of EU law, any non-compliance with which could, as the case may be, constitute an infringement of public policy within the meaning of Article 1717(3)(b)(ii) of the Judicial Code.

- 14 The URBSFA wrongly contends that the assessment of the standing to bring proceedings is not a matter of public order, and that therefore the CBAS' award decision in that connection cannot be contrary to public policy within the meaning of Article 1717(3)(b)(ii) of the Belgian Judicial Code.

That simplistic contention is inconsistent with the very wording of the award decision, from which it may be inferred that the question of the standing to bring proceedings against rules adopted by a third party is directly linked to that of the scope of Article 101 TFEU.

- 15 With regard to the 'HGP' rules laid down by the URBSFA, the CBAS found that they did not undermine the free movement of players within the meaning of Article 45 TFEU and appeared appropriate and proportionate in the light of the objective pursued, such that they did not infringe Article 101 TFEU.

In so doing, the CBAS again applied provisions of European law, any non-compliance with which could, as the case may be, constitute an infringement of public policy within the meaning of Article 1717(3)(b)(ii) of the Judicial Code.

It follows from the findings set out above that, both in relation to the rules laid down by UEFA and UEFA member federations and in relation to those laid down by the URBSFA, the scope and the interpretation of Articles 45 and 101 TFEU lie at the core of the debate.

B. Relevance of the question referred for a preliminary ruling

- 16 Under Article 267 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union has jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union.

The second paragraph of Article 267 TFEU states:

‘Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.’

- 17 The Court regularly recalls that, *‘in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case in the main action, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court’*.⁶

- 18 Article 1717(3)(b)(ii) of the Belgian Judicial Code provides that an arbitration award is to be annulled if the court finds that that award is contrary to public policy.

Thus, in the context of an action for annulment of an arbitration award on the ground that it is contrary to public policy, it is for the court before which that action is brought to determine whether a public policy provision applied to the facts and to rule on the annulment of the award if the solution adopted by the arbitrator is contrary to the applicable provision.⁷

- 19 Furthermore, in the context of such an action, the concept of public policy is interpreted broadly so as to encompass mandatory law.⁸

Moreover, in relation to secondary European law, the Court has taken the view that an arbitration award that is contrary to European provisions both of public

⁶ Judgment of 2 September 2021, *Republic of Moldova* (C-741/19, EU:C:2021:655, paragraph 35).

⁷ See CHOCHITAICHVILI, D., ‘Annulation d’une sentence arbitrale pour contrariété à l’ordre public: normes d’urbanisme et de logement’, *b-Arbitra*, 2018/2, p. 368 and the references to legal literature cited.

⁸ LEFEBVRE, P. and SERVAIS, M., ‘Vers une conception large de l’ordre public à l’instar de la portée qui lui est conférée dans le cadre de l’annulation de sentences arbitrales’, *b-Arbitra*, 2014/2, p. 325 and the references cited in note 101.

policy and of mandatory law had to be annulled based on the ground that it is contrary to public policy.⁹

The Court has also found, more specifically, that infringement of the rules of competition law, and in particular of Article 101 TFEU, was a breach of public policy constituting a ground for annulment of an arbitration award.¹⁰

- 20 In the present case, it is neither disputed nor disputable that Articles 45 and 101 TFEU are mandatory rules, if not public policy rules, infringement of which can, as the case may be, entail the annulment of an arbitration award.

In addition, the evidence put before the court, and in particular the study conducted in 2013 for the European Commission,¹¹ justify the Court of Justice of the European Union being asked, by means of the preliminary ruling procedure, about the impact of Articles 45 and 101 TFEU on the ‘HGP’ rules laid down by UEFA, UEFA’s member federations and the URBSFA.

C. Formulation of the question referred for a preliminary ruling

- 21 UL and the RAFC suggest that the court submit a question to the Court of Justice of the European Union for a preliminary ruling that reads as follows:

‘Are the plan adopted in 2005 at its Tallinn Congress by UEFA and its members, including the URBSFA, in relation to home-grown players, and/or the URBSFA’s rules on home-grown players and/or UEFA’s rules, and/or – similar – rules adopted by other UEFA members compatible or not with:

- *Article 45 TFEU;*
- *and/or non-discrimination clauses in employment matters similar to that referred to in the judgment in SIMUTENKOV;*
- *and/or Article 101 TFEU?*

More specifically, can such rules – particularly the URBSFA’s rules and UEFA’s rules – be regarded as satisfying the proportionality criterion, since their drafters do not establish with precision why certain alternatives, identified in legal literature as more respectful of fundamental rights, for example the financial incentive, would be impracticable?

In addition, must those rules, taken as a whole, be regarded as constituting a general concerted practice, which has its origin in the discussions held and

⁹ Judgment of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675).

¹⁰ Judgment of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 37).

¹¹ Study on the assessment of UEFA “Home Grown player Rule” 2013, the URBSFA’s Document 16.

decisions taken at the UEFA congress in Tallinn, with the result that the URBSFA must be regarded as being a party to that general concerted practice and that it may therefore be held liable for all the loss or damage resulting from that concerted practice for a particular player or club?

- 22 Two comments must be made in relation to the wording of the questions.
- 23 It is not for the referring court to refer to the Court of Justice of the European Union a question relating to the compliance with Article 45 TFEU of the ‘HGP’ rules adopted by UEFA’s Executive Committee or other clubs which are UEFA members, as such.

At the very most, the Court will itself consider that point of fact in its assessment of the existence of a concerted practice within the meaning of Article 101 TFEU.

- 24 Furthermore, UL and the RAFC fail to demonstrate the relevance of the reference to the judgment in *SIMUTENKOV*.¹² In that judgment, the Court had precluded the application to a professional sportsman of Russian nationality, who was lawfully employed by a club established in a Member State, of a rule laying down a limitation, based on nationality, on the number of players who may be fielded at the same time.

In addition, it is accepted that the URBSFA’s current ‘HGP’ rules no longer include a direct limitation, based on nationality, on the number of players fielded.

The question referred for a preliminary ruling will therefore be reformulated as set out below.

H. ANNEXES TO THIS REQUEST FOR A PRELIMINARY RULING

25 ...¹³ ...

...

– ... [Inventory of the file submitted to the Court]

¹² Judgment of 12 April 2005, *Simutenkov* (C-265/03, EU:C:2005:213).

¹³ ... [Note that is irrelevant for the purposes of the reference for a preliminary ruling]

I. DECISION – QUESTIONS REFERRED FOR A PRELIMINARY RULING

For the reasons set out above, the French-speaking Brussels Court of First Instance ... hereby:

- decides, before giving its ruling, to refer the following two (2) questions to the Court of Justice of the European Union for a preliminary ruling:
 - *‘Is Article 101 TFEU to be interpreted as precluding the plan relating to “HGPs” adopted on 2 February 2005 by UEFA’s Executive Committee, approved by UEFA’s 52 member associations at the Tallinn Congress on 21 April 2005 and implemented by means of regulations adopted both by UEFA and by its member federations?’*
 - *‘Are Articles 45 and 101 TFEU to be interpreted as precluding the application of the rules on the inclusion on the match sheet and the fielding of locally trained players, as formalised by Articles P335.11 and P.1422 of the URBSFA’s federal regulation and reproduced in Articles B4.1[12] of Title 4 and B6.109 of Title 6 of the new URBSFA regulation?’*
- ... [Communication to the Court]
- in the meantime, ...
- stays the proceedings as to the remainder ...

...

[Date and signatures]

...

... [Formal close]