EU Competition Law and Sports

Pablo Ibáñez Colomo
London School of Economics and College of Europe

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http://chillingcompetition.com

Summary

- **Legal and economic context**
- Restrictions by object
- The *Wouters-Meca Medina* doctrine
- The notion of abuse
- Looking into the future

Legal and economic context

- The application of competition law to the governance of sports raises complex, and in some respects unique, issues:
  - **Cooperation is a necessity** for participants in a sports competition, not a mere convenience (or a merely pro-competitive arrangement)
  - Cooperation allows participants to offer something that they would otherwise not have been able to offer ('**more than the sum of its parts**')
  - A governance structure is indispensable if participants are to attain their goals and ensure the proper functioning of the competition

→Sporting activities are best described as **co-opetitive**, whereby participants both compete and cooperate

Legal and economic context

- In some respects, the issues raised are not different from those at stake in other co-opetitive joint ventures:
  - It may be necessary to address **free-riding and opportunistic conduct** by participants (see e.g. *Cartes Bancaires*)
  - Some restraints may be **necessary** to the appropriate operation of the joint venture, and as such may escape competition law scrutiny:
    - Preservation of the uniformity and reputation of the brand image, or coherence and unity of the product (e.g. *Pronuptia*)
    - Relationship with third parties, such as the joint sale of products or services (e.g. joint production agreements)
    - Any activities that might frustrate the objectives of the cooperation agreement (e.g. *Gøttrup-Klim*)

Legal and economic context

- In other respects, however, the issues raised by the governance of sports are unique (and many **not economic in nature):**
  - ‘Rules of the game’ in the strict sense of the word
  - Terms and parameters of (sports) competition among participants, including:
    - Closed leagues vs system of **promotion and relegation**
    - The appropriate degree of **competitive balance** among participants, such as:
      - Rules on transfers
      - ‘Home-grown players’
      - Financial fair-play
  - The regulation of the behaviour of other **actors in the system**, such as agents acting for players

Legal and economic context

- One should note, finally, that every sport tends to revolve around a single governance structure ('**pyramid**'):
  - Some of the dynamics are not fundamentally different from that observed in relation to other activities (e.g. **standard-setting**):
    - A single governance structure may be in the interest of participants, supporters and society at large
    - Attempts at competing organisations may not be lasting ones (markets may 'tip' in favour of one tournament; see NBA vs ABA)
  - Other dynamics are about sports: determining the actual '**winner**' (e.g. ULEB Euroleague vs FIBA Suproleague)

Legal and economic context

- It is inevitable that **tensions within co-opetitive structures arise** in some instances:
  - Vertical conflicts might arise in the relationship between participants and governing bodies
    - Allocation of decision-making power
    - Allocation of resources
    - Appropriate balance between competition and cooperation
  - Horizontal conflicts might also arise among participants
  - Oblique conflicts may arise between third parties (e.g. agents, licensees) and governing bodies (or participants)

Legal and economic context

- Competition law struggles with the issues raised in the context of co-opetitive joint ventures (not only in the sports arena):
  - What is the appropriate balance between competition and cooperation?
  - What is the right allocation of power the participants and the governing body?
  - What is the appropriate means to attain a legitimate objective?
  - What if there are more than two was to attain a legitimate objective?

Legal and economic context

- It is not surprising, against this background, that competition law has traditionally been deferential to such arrangements:
  - It is accepted that they typically **improve the conditions of competition** to the benefit of participants, consumers and society at large
  - Competition law **does not prescribe a particular approach** and does not require firms to opt for a less restrictive alternative:
    - It accepts that a particular goal may be attained in more than one way (e.g. selective distribution over franchising)
    - Different approaches may require different responses (e.g. *Wouters*: what is necessary when one approach is followed may not be in another context)

Legal and economic context

- This is the background against which we must make sense of the *Wouters-Meca Medina* doctrine
  - In the context of a co-opetitive joint venture, **the competition law system will be deferential** vis-à-vis the means to attain an objective
  - Provided that the measure remains an appropriate means to attain an objective, it will escape Articles 101(1) TFEU and 102 TFEU
  - Article 101(3) TFEU is only relevant in relatively exceptional circumstances

Legal and economic context

- The sports cases force us to rethink some of the core aspects of this well-established case law:
  - The appropriate balance between Articles 101(1) TFEU and 101(3) TFEU
  - The boundaries of the notion of restriction by object
  - The scope of application of the *Wouters-Meca Medina* doctrine

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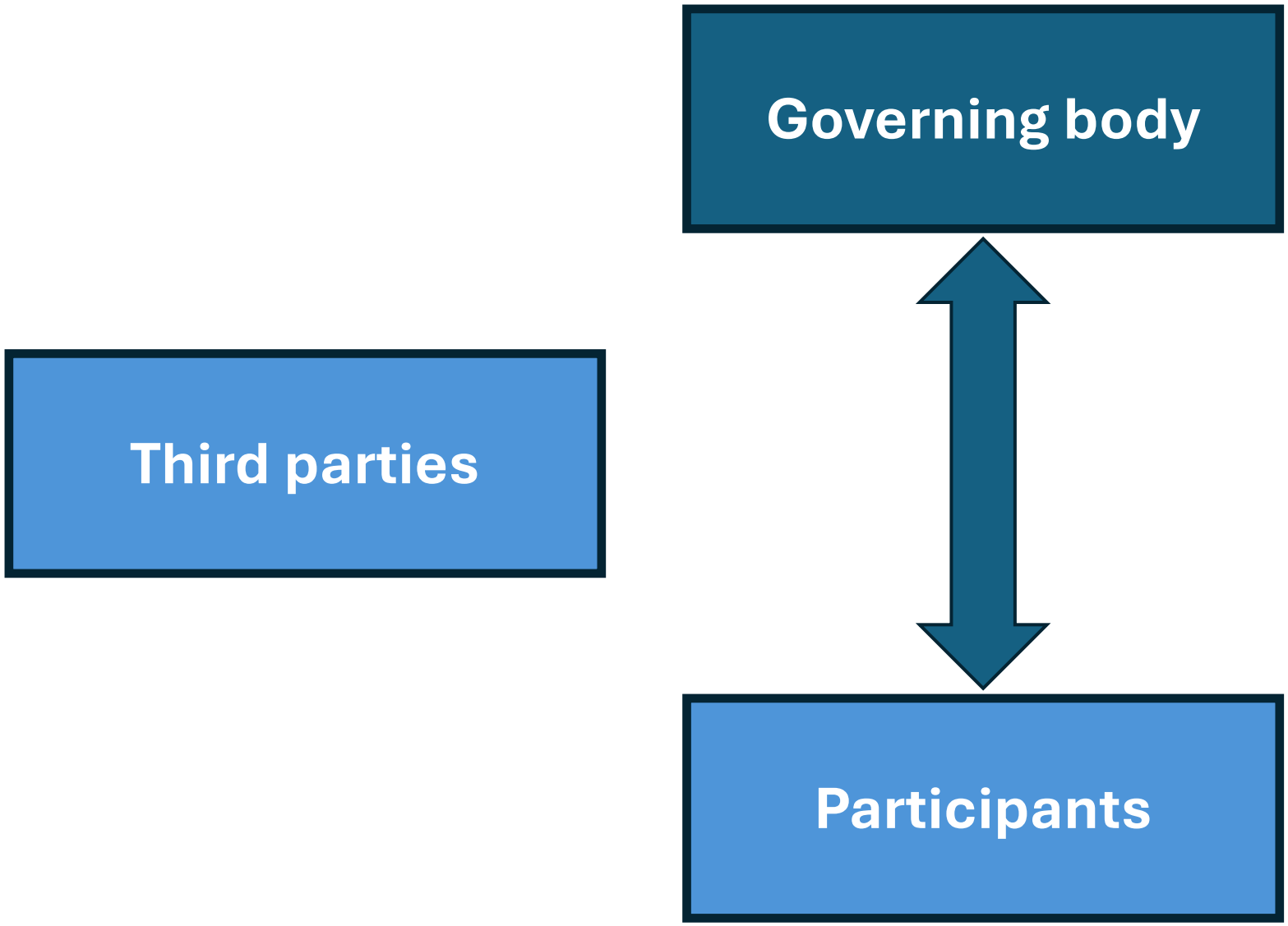
Governing body
Third parties
Participants

Restrictions by object

- The *ISU* and *Superleague* cases clarify the concept of restriction by object in the context of vertical relationships:
  - The **degree of market power may be a relevant factor** in the assessment of the economic and legal context
  - Where a governing body has, de facto, a quasi-regulatory function, is is treated as a State actor
    - In particular, the application of autorisation criteria by a governing body may be subject to duties of **transparency, objectivity and non-discrimination**
    - These rules are both substantive and procedural in nature (and include the administration of sanctions)

Restrictions by object

‘178. For all of the foregoing reasons, the Court finds that, where there is no framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate, such as those referred to in paragraph 151 of the present judgment, rules on prior approval, participation and sanctions such as those at issue in the main proceedings reveal, by their very nature, a sufficient degree of harm to competition and thus have as their object the prevention thereof. They accordingly come within the scope of the prohibition laid down in Article 101(1) TFEU, without its being necessary to examine their actual or potential effects’

Case C-333/21, *Superleague*

Restrictions by object

- On the other hand, **the Court does not question the legitimate objectives pursued by governing bodies**
  - The Court appears to accept that the nature of sports competitions might require certain restraints on participants' freedom of action
  - For instance, rules on prior approval (at stake in *Superleague*) are not necessarily restrictive by object
  - The same may be true of 'home-grown players' regulations, at stake in *Royal Antwerp*
  - In the same vein, **it does not question the joint selling of media rights as such**, but the approach to decision-making

Restrictions by object

‘144. Those various specific characteristics support a finding that **it is legitimate to subject the organisation and conduct of international professional football competitions to common rules intended to guarantee the homogeneity and coordination of those competitions** within an overall match calendar as well as, more broadly, to promote, in a suitable and effective manner, the holding of sporting competitions based on equal opportunities and merit. It is also legitimate to ensure compliance with those common rules through rules such as those put in place by FIFA and UEFA on prior approval of those competitions and the participation of clubs and players therein’

Case C-333/21, *Superleague*

Restrictions by object

‘175. Next, it follows from paragraphs 142 to 149 of the present judgment that, although **the specific nature of international football competitions** and the real conditions of the structure and functioning of the market for the organisation and marketing of those competitions on European Union territory **lend credence to the idea that it is legitimate, in terms of their principle, to have rules on prior approval such as those just recalled**, those contextual elements nevertheless are not capable of legitimising the absence of substantive criteria and detailed procedural rules suitable for ensuring that those rules are transparent, objective, precise and non-discriminatory’

Case C-333/21, *Superleague*

Restrictions by object

‘103. As regards the economic and legal context of the rules in respect of which the national court is referring questions to the Court, it is apparent, first of all, from the case-law of the Court that, bearing in mind the specific nature of the “products”, which sporting competitions are from an economic point of view, it is generally open to associations that are responsible for sporting discipline, such as UEFA and the URBSFA, to adopt rules relating, inter alia, to the organisation of competitions in that discipline, their proper functioning and the participation of athletes in those competitions’

Case C-680/21, *Royal Antwerp*

Restrictions by object

‘104. Next, the specific characteristics of professional football and the economic activities to which the exercise of that sport gives rise suggest that **it is legitimate for associations** such as UEFA and the URBSFA **to regulate**, more particularly, **the conditions in which professional football clubs can put together teams participating in interclub competitions** within their territorial jurisdiction’

Case C-680/21, *Royal Antwerp*

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The *Wouters-Meca Medina* doctrine

- One of the aspects that has been widely discussed concerns the scope of the *Wouters-Meca Medina* doctrine
  - The Court clarifies that **the doctrine is only applicable to restraints that do not restrict competition by object**
  - The Court's position is consistent with the original wording and spirit of both *Wouters* and *Meca Medina*
  - In this regard, it appears to correct what might have been nothing other than a 'slip of the pen' (e.g. *CHEZ*)
  - This point was subsequently confirmed in the follow-of the *CHEZ* case (see *Em akaunt BG*)

Restrictions by object

‘185. However, the case-law referred to in paragraph 183 of the present judgment [*Wouters* and *Meca Medina*] does not apply in situations involving conduct which, irrespective of whether or not it originates from such an association and irrespective of which legitimate objectives in the public interest might be relied on in support thereof, by its very nature infringes Article 102 TFEU, as is, moreover, already implicitly but necessarily apparent from the Court’s case-law […]’

Case C-333/21, *Superleague*

The *Wouters-Meca Medina* doctrine

- The Court's clarification is consistent with other aspects of the case law:
  - First, it is consistent with the idea that **the notion of restriction by object is to be interpreted restrictively**
  - Second, it shows that the **goal pursued by the agreement** (as assessed in the relevant economic and legal context) is the key consideration:
    - If the objectives pursued by the governing body are legitimate, this is an indicator that the object of the contentious restraint is not restrictive by its very nature
    - In such circumstances, **the object of the contentious restraints is no other than the attainment of the broader regulatory goals to which it relates**

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The notion of abuse

- There are two main notable aspects concerning the interpretation of the notion of abuse:
  - Article 106 TFEU case law is cited by the Court, thereby suggesting that **a stricter tier of duties applies to governing bodies**
  - The Court, in several passages of Superleague, appears to confirm that there is such thing as an **abuse of a dominant position 'by object'**

The notion of abuse

‘132. Thus, although **a Member State** is not prohibited per se from granting exclusive or special rights on a market to an undertaking through legislative or regulatory measures, such a situation **must not place that undertaking in a position of being able to abuse the resulting dominant position, for example by exercising the rights in question in a manner that prevents potentially competing undertakings from entering the market concerned or related or neighbouring markets** (see, to that effect, judgments of 10 December 1991, Merci convenzionali porto di Genova, C-179/90, EU:C:1991:464, paragraph 14, and of 13 December 1991, GB-Inno-BM, C-18/88, EU:C:1991:474, paragraphs 17 to 19 and 24). That requirement is all the more warranted when such rights confer on that undertaking the power to determine whether and, as the case may be, on what conditions other undertakings are authorised to carry on their economic activity (see, to that effect, judgment of 1 July 2008, MOTOE, C-49/07, EU:C:2008:376, paragraphs 38 and 51) […]’

Case C-333/21, *Superleague*

The notion of abuse

‘149. In that regard, **it is irrelevant that FIFA and UEFA do not enjoy a legal monopoly and that competing undertakings** may, in theory, set up new competitions which would not be subject to the rules adopted and applied by those two associations. Indeed, as is apparent from the statements of the referring court, the dominant position held by FIFA and UEFA on the market for the organisation and marketing of international interclub football competitions is such that, in practice, at the current juncture it is impossible to set up viably a competition outside their ecosystem, given the control they exercise, directly or through their member national football associations, over clubs, players and other types of competitions, such as those organised at national level’

Case C-333/21, *Superleague*

The notion of abuse

‘131. In addition, conduct may be categorised as ‘abuse of a dominant position’ not only where it has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market(s) concerned, but also where it has been proven to have the actual or potential effect – **or even the object** – of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation (see, to that effect, judgment of 30 January 2020, Generics (UK) and Others, C-307/18, EU:C:2020:52, paragraphs 154 to 157)’

Case C-333/21, *Superleague*

The notion of abuse

‘186. Given that the absence of a subjective intention to prevent, restrict or distort competition and the pursuit of potentially legitimate objectives are not decisive either for the purposes of application of Article 101(1) TFEU and that, moreover, **Articles 101 and 102 TFEU must be interpreted consistently**, the Court finds that the case-law referred to in paragraph 183 of the present judgment does not apply either in situations involving conduct which, far from merely having the inherent ‘effect’ of restricting competition, at least potentially, by limiting the freedom of action of certain undertakings, reveals a degree of harm in relation to that competition that justifies a finding that it has as its very ‘object’ the prevention, restriction or distortion of competition. Thus, it is only if, following an examination of the conduct at issue in a given case, that conduct proves not to have as its object the prevention, restriction or distortion of competition, that it must then be determined whether it may come within the scope of that case-law […]’

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Looking into the future

- The trio of judgments delivered in December 2023 can be easily reconciled with the preceding case law
- These judgments are best understood as introducing a **corrective mechanism in vertical relationships**:
  - The Court appears to have reacted to the substantial degree of market power that is inherent in **the 'pyramid' structure of organised sports**
  - On the other hand, it accepts that the the restraints at stake in the cases may be an **appropriate and proportionate reaction to a legitimate aim**
  - Competition law appears to intervene at the margin, by introducing substantive and procedural guarantees (see, by analogy, *Huawei*)

Looking into the future

- Moving forward, competition law may remain deferential to co-opetitive structures if some principles are respected:
  - Restrictions by object must always be assessed in the **relevant economic and legal context**
  - The **formal features** of an agreement (e.g. price-fixing or market sharing) are **very poor indicators of its object**
  - The fact that a parameter of competition is affected does not mean that a practice is restrictive by object