

Competition law and sports governance: disentangling a complex relationship

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Abstract

Cases like *International Skating Union* and *Super League* show that the application of EU competition law to rules adopted by sports governing bodies is complex and occasionally controversial. This article discusses the peculiarities of sports as an activity and addresses the implications for Articles 101 and 102 TFEU. It shows, first, that the relationship between individual participants in a tournament is best described as co-opetitive, in the sense that their viability and success depend on sustained cooperation. Second, the emergence of a regulatory structure is inevitable. Third, tensions – of a horizontal and a vertical nature – are bound to emerge within an association. These tensions are explained, inter alia, by the opportunistic behaviour of individual participants (which may seek to benefit from the joint venture while simultaneously undermining it).

The case law accounts for the peculiarities of sports. Measures aimed at addressing opportunistic conduct within a cooperative structure (such as the non-compete obligations imposed by governing bodies) do not have, as their object, the restriction of competition and do not invariably have anticompetitive effects, which are to be established case-by-case. Absent exclusive or special rights, moreover, governing bodies are not subject to a general duty of non-discrimination vis-à-vis competing organisations.

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1. Introduction

Organised sport necessitates a governance structure that defines, inter alia, the conditions under which teams and/or individuals are to take part in a competition.¹ Rules enunciated by regulatory bodies may relate to the game itself (including aspects like the size of a pitch, the number of players or the weight of the bicycle) and may also limit participants' freedoms in other ways. For instance, they may place restraints concerning the days when matches take place or the windows during which player transfers can be completed. To the extent that sporting activities are economic in nature,² EU competition law can apply to these rules. They may fall within the scope of Article 101 TFEU. More precisely, they may be characterised as a decision by association of undertakings or as an agreement.³ Where the relevant body enjoys a dominant position, its regulatory functions may be caught by Article 102 TFEU.⁴

The application of EU competition law to sport-related activities is far from a new issue.⁵ Some recent developments, however, have brought it back to the fore. This is the case, in particular, of plans to launch a Europe-wide football Super League rivalling the incumbent tournament – the UEFA Champions League.⁶ This dispute raised the question of whether the creation of a 'closed championship' without opportunities for promotion or the threat of relegation would be compatible with Articles 101 and 102 TFEU.⁷ The potential sanctions that

¹ Thomas Hoehn, 'Governance and governing bodies in sport', in Wladimir Andreff and Stefan Szymanski (eds), *Handbook on the Economics of Sport* (Edward Elgar 2006).

² Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission*, EU:C:2006:492, para 18.

³ *Ibid.*, para 38.

⁴ Case C-49/07 *Motosykletistiki Omospondia Ellados NPID v Elliniko Dimosio*, EU:C:2008:376.

⁵ Past developments were discussed in the literature. For a non-exhaustive overview, see Eric Gippini Fournier, 'Droit de la concurrence et sport automobile. Epilogue des FIA/Formula One' (2001-02) 3 *Revue des affaires européennes* 361; Denis Waelbroeck and Pablo Ibáñez Colomo, 'Case C-171/05 P, Laurent Piau, Order of the Court of Justice (Third Chamber) of 23 February 2006, [2006] ECR I-37' (2006) 43 *Common Market Law Review* 1743; and Stephen Weatherill, 'Anti-doping Revisited: The Demise of the Rule of "Purely Sporting Interest"?' in Stephen Weatherill, *European Sports Law: Collected Papers* (Springer 2013).

⁶ Murad Ahmed and Arash Massoudi, 'Breakaway dozen European football clubs sign up to Super League' *Financial Times* (London, 19 April 2022).

⁷ See for instance Simon Kuper, 'Super League would break football's essential promise' *Financial Times* (London, 19 April 2021).

the governing bodies – FIFA and UEFA – could adopt against the teams taking part in the breakaway tournament are also subject to scrutiny.⁸ A Spanish court submitted a preliminary reference to the Court of Justice (hereinafter, the ‘Court’ or the ‘ECJ’) in May 2021, asking for guidance about the legal status, from an EU competition law standpoint, of some rules set by FIFA and UEFA.⁹

Ongoing disputes are not confined to football. In February 2022, the International Padel Federation brought a complaint, before the European Commission (hereinafter, the Commission), against Setpoint Events (which organises the World Padel Tour) for an alleged breach of EU competition law.¹⁰ The most salient case is, in any event, *International Skating Union*.¹¹ In a 2017 decision, the Commission found that the eligibility rules defined by the body in charge of speed skating were in breach of Article 101 TFEU.¹² The challenge brought by the governing body against this decision was dismissed by the General Court in December 2020.¹³ At the time of writing, the appeal against the first instance judgment before the Court was pending.¹⁴

These cases are interesting both for EU competition law at large and for the application of Articles 101 and 102 TFEU in the specific area of sports governance. Generally speaking, an analysis of the abovementioned cases shows that some misunderstandings persist around the interpretation of the two core provisions of the EU antitrust regime. In particular, there

⁸ Order of the Madrid Commercial Court n° 17 73/22, of 20 April 2022. This order, adopted by a first-instance court in Spain, lifted the interim measures initially adopted against the potential adoption of sanctions by the UEFA and the FIFA against the founders of the breakaway tournament. See Order of the Madrid Commercial Court n° 17 14/2021, of 20 April 2021.

⁹ Case C-333/21 *European Super League Company, S.L. v Union of European Football Associations and Fédération Internationale de Football Association*, pending. See also Request for a preliminary ruling from the Madrid Commercial Court n° 17 lodged on 27 May 2021 – *European Super League Company, S.L. v Union of European Football Associations and Fédération Internationale de Football Association* (Case C-333/21).

¹⁰ Ali Walker, ‘Padel complaint filed with EU over restrictive contracts on brewer-backed circuit’ *Politico* (Brussels, 23 February 2022).

¹¹ Case C-124/21 P *International Skating Union v Commission*, pending.

¹² *International Skating Union’s Eligibility Rules* (Case AT. 40208) Commission Decision of 8 December 2017.

¹³ Case T-93/18 *International Skating Union v Commission*, EU:T:2020:610.

¹⁴ *International Skating Union* (n 11).

appears to be a tendency to conflate the ancillary restraints doctrine and the assessment of the object of an agreement. Put differently, there is an inclination to conclude that a rule is restrictive by its very nature based on the fact that it is not objectively necessary to attain a legitimate aim. A consistent line of case law reveals, however, that these are (and have always been) two separate inquiries. In a similar vein, the criteria to evaluate the restrictive object of an agreement have not always been applied in a consistent manner. Some factors, which are not a part of the assessment, are occasionally considered.

The specificities of sports-related activities, and how they impact legal analysis, also feature prominently in ongoing discussions and deserve to be explored. In the very early cases,¹⁵ the Court sought to distinguish between rules of ‘purely sporting interest’ and other rules that are economic in nature. One unintended consequence of this divide is the tendency to view with suspicion – even as inherently anticompetitive – any measure that seeks to advance the economic interests of an organisation or its members (as opposed to one that simply sets the ‘laws of the game’). Such a binary view, however popular and pervasive, is at odds with long-established principles in EU competition law, whereby the protection of a firm’s economic interests is not necessarily contrary to Articles 101 and 102 TFEU (in fact, most often it is not).

This piece discusses the most salient debates around the application of EU competition law to the governing bodies’ regulatory activity. First, it shows that there are peculiarities that cannot be ignored when evaluating whether rules adopted in this context comply with Articles 101 and 102 TFEU. From an economic perspective, one should take into account that rivals in a sports competition need one another if they are to be successful and viable. A number of consequences follow from this interdependence. From a social perspective, there is consistently

¹⁵ Case 36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, EU:C:1974:140.

strong support for the so-called European model of sport. Second, it is not obvious to draw a clear line between regulations of ‘purely sporting interest’ and those pursuing an economic aim. This point has been acknowledged by the Court at least since *Meca Medina*.¹⁶ In the same vein, the article explains that rules with an economic component may be as fundamental to the viability of organised sports as the ‘laws of the game’.

Against this background, the article goes on to assess the application of Articles 101 and 102 TFEU to rules adopted by governing bodies. Traditionally, EU competition law took a hands-off approach vis-à-vis regulatory measures of this nature. Not only were they found not to have a restrictive object, but they were also deemed to fall outside the scope of Article 101(1) TFEU altogether where they are deemed ancillary to a legitimate aim. This approach, however, has been questioned in recent years, in part due to the influence of Article 106 TFEU case law. Cases like *International Skating Union* – and even the preliminary reference in *Super League* – suggest that there may be to be greater willingness to scrutinise how sporting activities are organised. For the reasons outlined above, this approach appears to be, in some respects, at odds with well-established doctrines.

2. The peculiarities of sports: what explains ongoing developments?

2.1. The interdependence of participants: co-opetition in sporting activities

From an economic perspective, there is a fundamental difference between sporting activities and many, if not most, business ventures. Typically, firms benefit from increasing their market power at the expense of rivals. Competition law regimes are in fact built on this premise. For instance, an exclusionary strategy is, generally speaking, in the interest of a dominant firm: the

¹⁶ See *Meca Medina* (n 2) and *Weatherill* (n 5).

latter can be presumed to be better off where rivals lack the ability and incentive to compete on the market(s) in which it operates.¹⁷ The same would be true where exclusion is the outcome of inter-firm cooperation (such as a distribution agreement).¹⁸ The textbook monopoly captures this idea effectively: where a firm is the only one providing goods or services in a given market (that is, if it faces no competitive constraints), it is in a position to maximise profits.¹⁹ Conversely, firms subject to perfect competition would lack the ability to do so since they do not have market power.²⁰

In contrast to textbook scenarios, participants in a sports tournament do not benefit from the exclusion of other firms from the relevant market, nor do they benefit from the latter's inability and/or lack of incentive to compete. On the contrary, their success and viability depends precisely on sustained rivalry with other teams or individuals. For instance, the interest in an athletics event (say, the 100 metres or the Heptathlon), and the reputation and prestige of participants, revolves precisely around the competition taking place. This interdependence can also be observed in one-off events – including those in which the outcome is known or assumed in advance. Even exhibition games, such as those involving the Harlem Globetrotters,²¹ seek to mimic the excitement and uncertainty that characterises genuine competitions.

Several consequences follow from this feature. To begin with, the worth of participants as economic entities depends to a substantial extent on their participation in games and tournaments. If a team or individual were deprived from its ability to compete, it would, in all likelihood, struggle to gather the interest of supporters, sponsors and advertisers. The former,

¹⁷ See for instance Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 19, where the Commission assumes that the exclusion allows a dominant firm to 'profitably increase prices' and otherwise affect the relevant parameters of competition.

¹⁸ Guidelines on vertical restraints C(2022) 3006 final, paras 19 and 20.

¹⁹ Luc Peeperkorn and Vincent Verouden, 'The Economics of Competition', in Jonathan Faull and Ali Nikpay (eds), *The EC Law of Competition* (2nd Edition, OUP 2014).

²⁰ *Ibid.*

²¹ The Harlem Globetrotters are a basketball exhibition team. As part of their routine, they compete against rival teams (in particular, the Washington Generals), in shows that seek to mimic the uncertainty of a game taking place within a real tournament. See <https://www.harlemglobetrotters.com/>.

moreover, would most probably not be in a position to attract talent and hire players. The corollary is that in organised sports, any wealth generated by participants is shared wealth. It is shared in the sense that it is the result of cooperation, but also in the sense that cooperation leads to a product that is more than the sum of its parts: a tournament is more valuable than a mere collection of disparate games.

As a result of this interdependence, frictions and disputes about the appropriate allocation of wealth may arise. Such tensions may be of a horizontal or a vertical nature. Frictions are said to be horizontal where they concern the distribution of wealth among the various participants. Not every participant has the same degree of appeal and support (suffice it to think of football teams). Therefore, some degree of wealth imbalance is inevitable. Such imbalances are likely to have major consequences. Disputes between participants can be expected to emerge about the appropriate allocation of resources (including the revenues generated via licensing activities) – and, similarly, about whether resources should be further redistributed in the name of fairness and competitive balance. Frictions may also be vertical in nature, in the sense that they may concern the appropriate allocation of resources between participants and governing bodies; or simply the locus of decision-making (whether decisions about the allocation of resources are to be taken by governing bodies or by participants instead).

A second consequence of interdependence is that cooperation is indispensable. Participants in a match or a tournament cooperate as much as they compete with one another. In this sense, the relationship among participants can more accurately be said to be co-competitive.²² Participants are rivals within and outside the field. As entities engaged in economic activities they may compete, inter alia, for sponsorship opportunities, advertising revenues and (in the case of team sports) the hiring of players. On the other hand, cooperation between them

²² This term is a portmanteau of competition and cooperation. On the concept, see Adam M. Brandenburger and Barry J. Nalebuff, *Co-opetition: A Revolution Mindset that Combines Competition and Cooperation* (Crown Press 1996) and Werner Hoffmann, Dovev Lavie, Jeffrey J. Reuer and Andrew Shipilov ‘The interplay of competition and cooperation’ (2018) 39 *Strategic Management Journal* 3033.

is in some respects indispensable. Any given match, race or (by extension) tournament is necessarily the product of cooperation. A participant, alone, would be incapable of organising it. In this sense, the relevant event (a match, race, or tournament) can be seen as the product of a joint venture. In the same vein, participants can be seen as the parties contributing the necessary inputs to ensure that the event in question takes place.

Because cooperation is indispensable, a governance structure is inevitably bound to emerge in one form or the other.²³ The role of these bodies – however their power is defined, arranged and exercised – is to lay down rules on the issues that require coordination among participants. These mandates may relate to the core aspects of the game (such as the size of the pitch) but also to other questions. For instance, some of the obligations may concern the format of tournaments. These rules may concern a wide range of issues, including the number of participating teams and the stages into which the tournament is divided (say, a group stage and a knock-out stage). They may limit the freedom of participants in other respects. For instance, the amount that participants can spend in players' salaries may be capped, or transfer may only be allowed to take place during a pre-defined window.

The ongoing developments in EU competition law show that tensions tend to emerge between the cooperative and competitive dimensions of sports. Governing bodies must strike a balance between both (they must figure out how much competition is allowed and how much cooperation is required). There may be instances where cooperation is mandated at the expense of competition and, more generally, participants' freedom. For instance, cooperative measures introduced in the name of competitive balance may demand that some rights be exercised jointly through the governing body. Some rules may be more far-reaching and may impose a (qualified or outright, *de iure* or *de facto*) non-compete obligation, whereby cooperation is

²³ Hoehn (n 1).

conditional upon the participant accepting not to set up, or take part in, rival tournaments. These non-compete obligations may come with sanctions, such as disqualification.

It is not difficult to see how these balancing measures can give rise to tensions. Any participant in an organised tournament is likely to be interested in maximising the benefits it derives from cooperation. At the same time, it may also be interested in exploring other opportunities outside that structure. In other words, participants may behave opportunistically, in the sense that they may seek to benefit from the joint venture while simultaneously competing with (and potentially undermining) it. The ongoing developments provide several examples illustrating how conflicting incentives can give rise to disputes in practice. Cases like *International Skating Union* and *Super League* show that participants may be tempted to set up rival tournaments even when subject to a non-compete obligation preventing them from doing so.

2.2. The European model of sport and the emerging alternatives

An overview of the specificities of sport would not be complete without a discussion of the European model.²⁴ It is a question that simply cannot be ignored when attempting to make sense of ongoing developments. The organisation of sporting activities in Europe presents some traits that contrast with other approaches, most notably that followed in North America. More importantly, the European model benefits from wide and explicit political support and has often been presented as a specificity worthy of protection at the national and EU levels.²⁵ It has been argued that the model is necessary to advance some values with which sport is associated, in

²⁴ On this question, see Peter J. Sloane, 'The European Model of Sport', in Wladimir Andreff and Stefan Szymanski (eds), *Handbook on the Economics of Sport* (Edward Elgar 2006).

²⁵ See in particular Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model [2021] C501/1.

particular fairness, openness and solidarity.²⁶ In addition, it is understood to connect seamlessly amateur and grassroots initiatives with professional ventures.

The European model presents three main characteristics. First, there has traditionally been a single governance structure for each sport (captured in the motto ‘one association per sport’²⁷). The idea of competing organisations running rival tournaments of a given sport is relatively common in North America.²⁸ Suffice it to think of the rivalry that existed, at a given point in time, between two basketball associations, the NBA (the incumbent player) and the ABA (the new entrant)²⁹ and of the attempts to develop an alternative to the NFL.³⁰ It is, however, alien to the European tradition and as such relatively unusual. This fact explains why tensions have arisen whenever there have been attempts to organise new or breakaway competitions and why such attempts have, more often than not, proved short-lived.³¹

A second feature of the model is the so-called pyramid structure.³² Rather than a single body overseeing a discipline, there is a division of labour, whereby, at each level (local, regional, national, European and global), there is a separate organisation, starting with grassroots competitions and culminating with a body with Europe-wide or worldwide jurisdiction (think of FIFA, in the case of football, and of FIBA as far as basketball is concerned). The bottom of the multi-layered structure would be made up of amateur and semi-

²⁶ Ibid. See in particular para 7: ‘Organisation of sport in Europe is based on the fundamental right of freedom of association. It is also based on values, such as solidarity between different levels in sport, in particular between professional and grassroots sport, fairness, integrity, openness, gender equality and good governance.’

²⁷ Ibid, para 9: ‘Values-based organised sport in Europe is usually structured on a national basis and in principle organised by one federation per sport, allowing for a comprehensive approach to rules, regulations, and standards as well as respecting competition calendars and qualifications for competitions. These organisations are committed to financial solidarity between professional and grassroots sport as well as to highest levels of good governance, fundamental and human rights, mental and physical health and to the safety of athletes, to the prevention of any form of discrimination and to the promotion of integrity of sport’.

²⁸ Roger G. Noll, ‘The Organization of Sports Leagues’ (2003) 19 *Oxford Review of Economic Policy* 530, 547-9.

²⁹ Ibid. See also Michael A. Leeds and Peter von Allmen, *The Economics of Sports* (5th edn, Routledge 2016), Chapter 3.

³⁰ Ibid. As far as American football is concerned, the rise of the USFL gave rise to antitrust litigation. See *US Football League v National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986).

³¹ See Katarina Pijetlovic, *EU Sports Law and Breakaway Leagues in Football* (Springer 2015).

³² For a discussion of the pyramid structure, see Floris de Witte and Jan Zglinski, ‘The Idea of Europe in Football’ (2021) LSE Law, Society and Economy Working Papers 17/2021.

amateur initiatives, organising tournaments at the local and regional levels. As one moves further up the pyramid, activities become increasingly professionalised and tournaments have a wider reach in terms of territorial scope. Think, for instance, of top tier football championships such as the Premier League or the Serie A and Europe-wide tournaments, such as the UEFA Champions League. Again, the pyramid structure contrasts with the North American model, where one can identify a stark divide between amateur (NCAA) and professional (say, NBA) activities.³³

The third feature is the corollary of the preceding two. The seamless link between amateur and professional sport means that, at least in theory, a participant can progress all the way from the lower ranks to the upper tiers of the pyramid. Progress would be guaranteed by a system of promotion and relegation that would reward success in the lower tiers and penalise defeat in the upper ones. Similarly, participation in Europe-wide championships would be contingent on qualifying among the top teams in the domestic championship. The necessary implication of this feature is that the European model is inimical to so-called ‘closed’ tournaments and to guaranteed places for all or certain participants (typically, the most popular or wealthier ones). Again, ‘closed’ tournaments, where there is no prospect of promotion or threat of relegation, are a distinctive feature of the North American professional sport.

Some of the most recent initiatives, discussed in this paper, can be said to be (and have been said to be) at odds with the European model. To begin with, breakaway tournaments would be at odds with the ‘one association per sport’ principle and would jeopardise the pyramid structure, in the sense that they would run in parallel to the multi-layered system. To the extent that this is the case, one could argue, such initiatives would break the link between grassroots and professional ventures and would also undermine existing solidarity

³³ Noll (n 28), 533-4.

mechanisms.³⁴ These effects would be all the more acute if one considers that some of the most recent initiatives have been presented as closed or partially closed ventures. This is the case, for instance, of the Super League, which was presented as a project that would guarantee a place to the founding members of the tournament.³⁵

3. Rules adopted by governing bodies: a taxonomy

3.1. Beyond rules of 'purely sporting interest'

When discussing the application of EU law, there is a tendency to draw a line between rules of 'purely sporting interest' (which would not be subject to scrutiny) and other rules which, to the extent that they relate to an economic activity, could be caught by the provisions on free movement and competition law. The former category would relate, in essence, to the 'laws of the game' (including, in particular, the regulation of aspects such as the size of the field, the number of players allowed to take part in the competition or the weight and dimensions of the ball). The *summa divisio* between rules of 'purely sporting interest' and other mandates dates back to the *Walrave* ruling of 1974;³⁶ and was relied upon in subsequent judgments.³⁷ However, it has proved to be of little theoretical or practical relevance.³⁸ This is so for two main reasons. First, the category of rules of 'purely sporting interest' is too restrictive to have any significance in concrete cases. Second, it does not capture the full spectrum of regulatory obligations in place and the different (economic and non-economic) roles they fulfil.

³⁴ Amitai Winehouse, 'Fans group launches campaign to block Super League breakaways through EU law' *The Athletic* (San Francisco, 26 March 2022).

³⁵ According to the championship's own website, there would be guaranteed places for the founders. See <https://thesuperleague.com/>.

³⁶ *Walrave* (n 15), para 8.

³⁷ See in particular Case 13/76 *Gaetano Donà v Mario Mantero*, EU:C:1976:115; and Joined Cases C-51/96 and C-191/97, *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée*, EU:C:2000:199.

³⁸ For a discussion, see Weatherill (n 5).

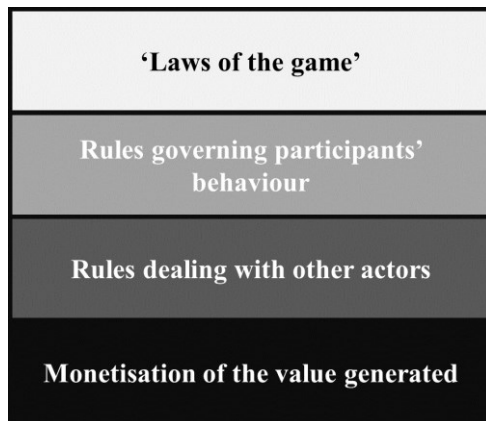


Figure 1: A taxonomy of sports rules

Meaningfully capturing the whole range of rules associated with the regulation of sport demands a more nuanced categorisation. An attempt in this sense can be found in Figure 1. From this perspective, rules of 'purely sporting interest' represent only one end of a broader spectrum of measures adopted by governing bodies. As can be seen in the figure, one may identify a second category, which deals with the behaviour of participants in a competition. Some examples in this regard have already been identified above. Rules limiting participants' freedom of action include the introduction of 'transfer windows' outside of which money players may not be hired, as well as salary caps. One can think of other rules, such as those concerning banned substances (at stake in *Meca Medina*³⁹) and those placing limits or prohibitions on team ownership.

Another category deals with the relationship between third parties that are peripheral to the co-competitive ecosystem, on the one hand, and participants (or governing bodies), on the other. The European Commission's practice provides some examples in this regard. Suffice it to think, for instance, of the regulation of players' agents' activities, which gave rise to the *Laurent Piau* case.⁴⁰ Finally, there is a fourth category, which encompasses strategies aimed at the monetisation of the value generated by the organisation. It includes dealings with, inter alia,

³⁹ *Meca Medina* (n 1).

⁴⁰ Case C-171/05 P *Laurent Piau v Commission*, EU:C:2006:149.

sponsors, advertisers and broadcasters. The body of administrative decisions dealing with the sale of media rights to sporting events – including cases such as *UEFA Champions League*⁴¹ and *FA Premier League*⁴² – illustrates the nature of this category well.

The application of competition law to the latter category is uncontroversial. There is little doubt that activities such as the licensing of media rights to sports content and sponsorship agreements are economic in nature within the meaning of Articles 101 and 102 TFEU. The concerns to which these practices can potentially give rise are also well known. For instance, the exclusive sale of media rights to a single broadcaster in a given territory might lead to the foreclosure of rival operators.⁴³ To the extent that a governing body enjoys a dominant position, moreover, Article 102 TFEU may also apply to exploitative behaviour, which may relate to the excessive prices charged by the organisation or to the fact that it engages in discriminatory conduct.⁴⁴

The application of competition law provisions to other categories may be more controversial. For the same reason, authorities may be less inclined to enforce Articles 101 and 102 TFEU in relation to them. It is not surprising, in this sense, that the judgments in *Laurent Piau* and *Meca Medina* followed the rejection of two complaints by the Commission.⁴⁵ It is equally unsurprising that the activities of football governing bodies have not been subject to frequent scrutiny by competition agencies in Europe. One can think of two main factors that might explain this reluctance. First, these activities are essentially regulatory in nature (for instance, the conditions that players' agents would need to satisfy to exercise the activity or the limits on the use of performance-enhancing substances). As a result, the formulation of

⁴¹ *Joint selling of the commercial rights of the UEFA Champions League* (Case COMP/C.2-37.398) Commission Decision 2003/778/EC [2003] L291/25.

⁴² *Joint selling of the media rights to the FA Premier League* (Case COMP/38.173) Commission Decision of 22 March 2006.

⁴³ *Ibid*, paras 25-6.

⁴⁴ *1998 Football World Cup* (Case IV/36.888) Commission Decision 2000/12/EC [2000] OJ L5/55.

⁴⁵ *Laurent Piau*, Commission Decision of 16 April 2002; and *Meca Medina and Majcen* (Case COMP/38158) Commission Decision of 1 August 2002.

competition concerns and, similarly, of a coherent theory of harm is far from straightforward. Consider the example of players' agents. It is not immediately obvious to see how defining a set of requirements and checks for individuals to act as agents can be a competition law issue, even if it necessarily has an impact on who can exercise the activity.

A second reason why competition authorities have historically been more reluctant to interfere with the upper layers of the spectrum has to do with the fact that intervention in those areas is, by definition, more intrusive. The application of Articles 101 and 102 TFEU to the regulation of sporting activities interferes with the internal choices made within the co-opetitive joint venture. As explained above, these arrangements involve complex trade-offs relating, in particular, to the adequate level of autonomy and the optimal degree of cooperation. Competition authorities have traditionally avoided second-guessing the balancing exercises made within these organisations. The same reluctance can be observed in relation to comparable co-opetitive arrangements, including franchising⁴⁶ and selective distribution systems,⁴⁷ as well as with regards to exploitative conduct (namely excessive and discriminatory pricing⁴⁸), in which similar trade-offs arise.

The reasons behind this reluctance are well understood. Generally speaking, competition authorities are not particularly well placed to regulate sporting activities on behalf of governing bodies. While the choices made by one of these bodies may restrain freedom of action (at least to some extent), it is not necessarily the case that the choices made by the authority will on the whole improve the balance between competition and cooperation. In the absence of a compelling case for intervention, and provided that the balance struck by governing bodies is at least reasonable, competition authorities will refrain from imposing its

⁴⁶ Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41.

⁴⁷ Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission*, EU:C:1977:167.

⁴⁸ For a discussion addressing this traditional reluctance, see Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (3rd edn, Hart Publishing 2020).

choices upon the relevant governing body and, in the same vein, err on the side of preserving the autonomy of sport and its institutions.

3.2. How economic and non-economic objectives are intertwined

Rules adopted by governing bodies can also be categorised by reference to whether or not they pursue a profit-making aim. From this perspective, there would be rules that are non-economic in nature, such as those that seek to achieve a competitive balance among participants, and other rules that are driven by economic objectives, such as the maximisation of organisation's profits (through, for instance, the sale of media rights). This approach to the categorisation of rules can be identified in relatively recent decisions, such as *International Skating Union*.⁴⁹ The case concerned a set of regulations that amounted, de facto, to a qualified non-compete obligation (the so-called 'eligibility rules'). The breach of the non-compete obligation (that is, participation in an unauthorised event) could lead the disqualification of individual athletes.⁵⁰

In its decision, the Commission ascertained whether the non-compete obligation could be rationalised as a means to attain objectives of a purely sporting nature, such as the integrity of the competition, athletes' health and safety or the proper organisation of sport.⁵¹ It concluded that the eligibility rules were driven by other considerations, namely the protection of the governing body's economic interests (in the sense that the rules sought to prevent the emergence of competing organisations). From this perspective, the fact that the rules pursue a non-sporting objective would mean that they are not immune from scrutiny under competition

⁴⁹ *International Skating Union's Eligibility Rules* (n 12).

⁵⁰ *Ibid*, paras 42-54. The Commission decision identifies several iterations of the eligibility rules in its decision, which addressed the conditions under which a breach of the obligation would lead to the disqualification of athletes taking part in speed skating competitions not sanctioned by the International Skating Union (or otherwise in breach of the relevant regulations).

⁵¹ *Ibid*, para 185.

law. In the specific circumstances of the case, the Commission concluded that the rules had a restrictive object, in part because they have an economic aim.⁵²

This approach to the categorisation of sporting rules fails to consider the extent to which economic and non-economic objectives are intertwined. This divide, in fact, comes across as artificial. Consider the example of the non-compete obligations at stake in *International Skating Union*. There should be little doubt that the eligibility rules seek to protect the economic interests of the organisation by preventing free-riding by a rival. If one considers the features of the European model of sport, however, it becomes apparent that the measure is also intimately linked to non-economic aims. As explained in Section 2, the ‘one association per sport’ principle is deemed to be an effective means to promote solidarity and support amateur and grassroots activities. From this perspective, the protection of the economic interests of the organisation through non-compete obligations seeks to attain an end that is ultimately sports related.

It is not difficult to think of other examples. For instance, the joint licensing of the media rights to a tournament has an obvious economic component (namely the maximisation of the organisation’s profits through collective action and the centralisation of resources). At the same time, these economic objectives are inextricably linked to a number of sports-related aims. For instance, centralised licensing makes it possible to achieve a more even distribution of the revenues generated by the sale of media rights.⁵³ To the extent that this is the case, the activity is a mechanism to attain and preserve competitive balance within the tournament and, in some cases, to promote solidarity across the pyramid structure (if, for instance, some of the revenues are earmarked for amateur and grassroots activities).

⁵² Ibid, in particular paras 169 and 184.

⁵³ For a discussion, see Martin Cave and Robert W. Crandall, ‘Sports Rights and the Broadcast Industry’ (2001) 111 *Economic Journal* F24.

4. The Court's traditional approach to sporting rules

4.1. *The principles of the case law after Meca Medina*

It has been explained in the preceding section that competition authorities have traditionally been reluctant to interfere with the choices made by governing bodies. The default position is one of deference to these bodies. The principles of the case law as enunciated by the Court can be summarised as follows. First, measures that pursue sports-related aims are not restrictive of competition by object within the meaning of Article 101(1) TFEU (and, by extension, Article 102 TFEU). Accordingly, such measures may only be prohibited, if at all, where they have actual or potential restrictive effects in the economic and legal context of which they are a part. In *Meca Medina*, for instance, the Court concluded that the antidoping regulations at stake in the case were related to sports objectives such as fairness, competitive balance, integrity and health.⁵⁴

Second, where measures are ancillary to a sports-related objective (in the sense that they are objectively necessary to attain the latter), they fall outside the scope of Article 101(1) TFEU altogether. This principle is not exclusive to sport. It is an expression of the so-called ancillary restraints doctrine, which initially developed, as pointed out above, in the context of distribution agreements.⁵⁵ More precisely, the Court's approach in cases like *Meca Medina* is an expression of the idea of the so-called 'regulatory ancillarity', which is a concept first introduced in *Wouters*.⁵⁶ According to this variation of the doctrine, rules that are inherent in

⁵⁴ *Meca Medina* (n 1), para 43.

⁵⁵ See in this sense *Pronuptia* (n 46) and *Metro I* (n 47). See also the Guidelines on the application of Article 81(3) of the Treaty [2009] OJ C101/97, paras 28-31.

⁵⁶ Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, EU:C:2002:98. For a discussion of the concept, see Ian S. Forrester, 'Where Law Meets Competition: Is Wouters Like a Cassis de Dijon or a Platypus?', in Claus-Dieter Ehlermann and Isabela Atanasiu, *European Competition Law Annual 2004: The Relationship Between Competition Law and the (Liberal) Professions* (Hart Publishing 2006).

the pursuit of a legitimate regulatory objective are not caught by the prohibition if they remain proportionate.⁵⁷

Third, a measure that goes beyond what is necessary to attain a legitimate sports-related objective does not necessarily fall within the scope of Article 101(1) TFEU. In other words, the fact that the rule is disproportionate does not mean that it is restrictive of competition. As is true across the board, such a measure can only be found to amount to a *prima facie* breach of Article 101 TFEU (or Article 102 TFEU) following an assessment of its anticompetitive effects. This is a point made explicit by the Court in *Meca Medina*.⁵⁸ It is clear, in this regard, that a mere limitation of the participants' freedom of action is insufficient to establish a restriction.⁵⁹ Such a finding needs to be established by reference to the relevant market affected by the rule.⁶⁰

The approach to the evaluation of the restrictive effects of regulatory measures was sketched in *Ordem dos Técnicos Oficiais de Contas*.⁶¹ According to that judgment, the measures adopted by governing bodies may lead to the 'elimination of competition on a substantial part of the internal market' or 'the fixing of discriminatory conditions'.⁶² The assessment of the likelihood of such effects is to be undertaken by paying attention to the economic and legal context in which firms operate, including factors such as the structure of the relevant market(s), the nature of the goods and, more generally, the prevailing conditions of competition.⁶³ Finally, where a rule is found to restrict competition, it may escape the prohibition if it satisfies the conditions set out in Article 101(3) TFEU⁶⁴ (and, by analogy, where it can be objectively justified under Article 102 TFEU).

⁵⁷ *Ibid*, paras 97-110.

⁵⁸ *Meca Medina* (n 1), para 48.

⁵⁹ *Ibid*, para 45.

⁶⁰ The framework for the assessment of the effects of an agreement can be found in Case C-234/89 *Stergios Delimitis v Henninger Bräu AG*, EU:C:1991:91.

⁶¹ Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, EU:C:2013:127.

⁶² *Ibid*, para 97.

⁶³ *Ibid*, para 70.

⁶⁴ *Ordem dos Técnicos Oficiais de Contas* (n 61), paras 101-3. See also *Laurent Piau* (n 45), para 29.

4.2. *Non-compete obligations and opportunistic conduct under Article 101(1) TFEU*

The legal status of rules pursuing an economic objective is best understood by applying, by analogy, the case law developed in other industries. According to this case law, the fact that a measure seeks to attain an economic aim does not mean that it is necessarily in breach of Articles 101 and/or 102 TFEU. This conclusion may come across not only as uncontroversial, but as self-evident. After all, competition law applies to practices that firms implement to advance their economic interests, either unilaterally (think of a refusal to deal) or by means of cooperation (think of a research and development agreement). Thus, claiming that rules driven by an economic aim are inherently restrictive or presumptively anticompetitive would amount to questioning virtually every rule subject to EU antitrust provisions.

Uncontroversial or self-evident as this point might be, it is at the origin of some of the most significant frictions in the field of sports. Accordingly, it makes sense to illustrate it by reference to some examples. One that shows why protecting an undertaking's economic interests is not inherently anticompetitive can be drawn from *Cartes Bancaires*.⁶⁵ The rules at stake in that case sought to protect some members of the joint venture from the risk of free-riding by other members. In spite of (or, rather, because of) this fact, the Court concluded that they did not have, as their object, the restriction of competition.⁶⁶ The ECJ reached the same conclusion in *Maxima Latvija*. Again, there was little doubt that the restraint in that case sought to advance a firm's economic interest. In this second example, the contentious clause gave the owner of the flagship store in a shopping centre the ability to veto the letting of other premises

⁶⁵ Case C-67/13 P, *Groupement des cartes bancaires v Commission*, EU:C:2014:2204.

⁶⁶ *Ibid*, paras 74-5.

within the centre (and thus the ability to exclude commercial activities competing with its own).⁶⁷

One can draw a number of conclusions from the above examples. The key one, for the purposes of the present paper, is that measures addressing the consequences of opportunistic conduct do not necessarily have, as their object, the restriction of competition. In the circumstances described above, it is not inherently contrary to Articles 101 and 102 TFEU for a firm to try and protect its own economic interests. In fact, there are instances in which such measures may fall outside the scope of the prohibition altogether. Consider the non-compete obligation at stake in *Remia*.⁶⁸ The Court accepted that a mandate of that kind may be objectively necessary to ensure that the sale of a business takes place.⁶⁹ In its absence, the seller may be tempted to behave opportunistically and exploit the goodwill that comes with the physical aspects of the undertaking that is being transferred.

This conclusion holds in other factual settings analogous to those considered in this piece. Franchising agreements, for instance, can be seen as the sort of co-opetitive joint venture that demands a balance between coordination and autonomy. In that context, individual franchisees may feel tempted to behave opportunistically. More precisely, they may try to benefit from their participation in the distribution system while simultaneously trying to compete with it. In *Pronuptia*, the Court ruled that measures (such as a non-compete obligation) aimed at preventing such opportunism would not restrict competition, whether by object or effect.⁷⁰ In this regard, the ECJ understood that a firm would not resort to franchising if doing so would benefit its rivals. Similarly, a selective distribution system would not hold together if individual distributors were able to resell the contractual products to non-members of the

⁶⁷ Case C-345/14 *SIA „Maxima Latvija” v Konkurences padome*, EU:C:2015:784.

⁶⁸ Case 42/84 *Remia BV and others v Commission*, EU:C:1985:327.

⁶⁹ *Ibid*, para 19.

⁷⁰ *Pronuptia* (n 46), paras 16-17.

system. Thus, clauses preventing this sort of opportunistic behaviour fall outside the scope of Article 101(1) TFEU altogether.⁷¹

4.3. *Conflicts of interest in the case law*

A theme that regularly emerges in cases involving governing bodies – in the sports contexts or in similar contexts – is that of conflicts of interest. It is in fact not unusual that the organisation in charge of setting the rules gives itself the authority to veto tournaments competing with its own. Where the body in question enjoys a monopolistic position, it may be empowering itself to eliminate all competition and to deny rivals the chance to operate. The question of whether, and if so in what instances, conflicts of interest amount to a breach of EU competition law has been considered by the Court. One may identify two main scenarios in the case law. The first one is one where there is State involvement in the form of exclusive or special rights (and thus Article 106 TFEU applies); the second one where there is not.

In the first scenario, a consistent line of case law dating back to the 1980s shows that it is contrary to Article 106 TFEU (applied together with Articles 101 and/or 102 TFEU) for the State to adopt legislation giving a body the regulatory power to veto economic activities competing with its own.⁷² This line of case law was applied in the specific context of sports activities in *MOTOE*.⁷³ In that case, the Court held that a national rule that entrusts a body with the dual role of running sports events and of authorising the organisation, by third parties, of competing events is contrary to Articles 102 and 106 TFEU. The judgment points out, in this

⁷¹ *Metro I* (n 47),

⁷² Case 41/83 *Italy v Commission*, EU:C:1985:120; Case C-202/88 *France v Commission*, EU:C:1991:120; and Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, EU:C:1991:254.

⁷³ Case 49/07, *Motosykletistiki Omospondia Ellados NPID v Elliniko Dimosio*, EU:C:2008:376.

regard, that Member States must legislate in a manner that is consistent with the principle of equality of opportunity.⁷⁴

The second scenario is one in which there is no State involvement. In such circumstances, a conflict of interest such as the one described above is not always anticompetitive by its very nature. As *Ordem dos Técnicos Oficiais de Contas* shows, an agreement does not necessarily amount to a restriction by object even when it gives the governing body the ability to veto economic activities competing with its own.⁷⁵ As explained above, such an agreement may pursue a legitimate aim. On the other hand, a regulatory scheme leading to a conflict of interest may have restrictive effects on competition in the economic and legal context of which it is a part.⁷⁶ Such effects would be more likely where the body in question is the only one governing the activity in the relevant geographic market, as is typically the case in a sports context conforming to the ‘one association per sport’ principle.

As can be seen, the Court’s standards vis-à-vis conflicts of interest are more stringent in the first scenario. This divergence should not come as a surprise. Article 106 TFEU comes into play where the State awards exclusive or special rights to an undertaking. In such circumstances, it is reasonable to demand that the exercise of its powers strictly conform to equality of opportunity. Standards are necessarily different when the regulations originate from a purely private initiative. Unlike Member States, undertakings are not expected to ensure non-discrimination between their own activities and third parties’. For instance, there is no general rule requiring dominant companies to place their affiliates and their rivals on a level playing field.⁷⁷ It is only in certain circumstances, to be established on a case-by-case basis, that a non-discrimination obligation may be imposed.⁷⁸

⁷⁴ Ibid, para 51.

⁷⁵ *Ordem dos Técnicos Oficiais de Contas* (n 61), para 68.

⁷⁶ Ibid, para 69.

⁷⁷ For a discussion, see Pablo Ibáñez Colomo, ‘Self-Preferencing: Yet Another Epithet in Need of Limiting Principles’ (2020) 43 *World Competition* 417.

⁷⁸ *Ordem dos Técnicos Oficiais de Contas* (n 61), para 70-100.

It is not difficult to rationalise the duality of standards in the case law. One should consider, in particular, that the likelihood of anticompetitive effects changes depending on whether regulatory intervention emanates from the State – directly or indirectly – or from a purely private venture. Where an undertaking enjoys a legal monopoly, it will generally be in a position to eliminate all competition through the exercise of its regulatory powers. Exclusive rights raise ‘insurmountable barriers to entry’ within the meaning of the case law and thus preclude lawful competition.⁷⁹ The situation is necessarily different where the activity does not benefit from such degree of protection. As some of the ongoing developments show, it seems plausible, absent a legal monopoly, to create viable tournaments competing with incumbent ones.

5. Frictions between the case law and recent developments

5.1. Economic and non-economic objectives in International Skating Union

Ongoing developments show that tensions have emerged between the case law – as described in the preceding section – and the administrative practice of competition authorities. The Commission’s assessment in *International Skating Union* exemplifies particularly well these tensions. One of the most salient aspects of this decision concerns the relationship between economic and non-economic aims. As explained above, the Commission concluded that the eligibility rules at stake in the case were restrictive by object insofar as they sought to protect the economic interests of the organisation.⁸⁰ This conclusion would suggest that sports organisations would not be entitled to advance profit-making objectives when laying down

⁷⁹ Case C-307/18, *Generics (UK) Ltd and others v Competition and Markets Authority*, EU:C:2020:52, para 45.

⁸⁰ *International Skating Union’s Eligibility Rules* (n 12), paras 169 and 184. See also the discussion above.

regulations (or at least that such objectives are presumptively anticompetitive). It has already been pointed out in this piece that this position appears to ignore not only that sporting and non-sporting aims tend to be intertwined but that behaviour examined under competition law is by definition driven by the economic interest of the undertakings engaged in it.

Against this background, it is not surprising that the General Court found that the Commission had erred when relying on the economic nature of the objectives pursued by the pre-authorisation system put in place by the International Skating Union.⁸¹ In line with the above, the first-instance judgment pointed out that the protection of an organisation's economic interests is an 'inherent feature of any undertaking' engaged in an economic activity, 'including a sports federation'.⁸² Accordingly, it cannot be considered to be anticompetitive 'in itself',⁸³ or, more precisely, restrictive of competition by object. On the other hand, the General Court found that the eligibility rules went beyond what was necessary to attain the objectives that they are said to attain.⁸⁴

5.2. The conflation of ancillarity and restrictions by object in International Skating Union

As already explained, the fact that a rule goes beyond what is objectively necessary to attain a legitimate objective does not mean that it is restrictive by object. This conclusion is clear from *Meca Medina* and *Ordem dos Técnicos Oficiais de Contas*. The Commission decision in *International Skating Union*, however, ruled that the eligibility conditions at stake in the case were caught, by their very nature, by Article 101(1) TFEU. The authority argued, in essence, that those regulations were aimed at restricting the opportunities of professional skaters and at

⁸¹ *International Skating Union* (n 13), para 109.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*, para 103.

foreclosing competition from other organisations.⁸⁵ It rejected, in this same vein, that there was a link between the pre-authorisation regime and sports-related objectives, such as the protection of athletes' health, or the appropriate conduct of competitions.⁸⁶ It noted, in addition, the severity of the penalties imposed on athletes, which could lead to a lifetime ban.⁸⁷

In its first-instance judgment, the General Court had to engage with the question of whether the Commission's arguments were sufficient to establish, to the requisite legal standard, that the eligibility rules restrict competition by their very nature. In this regard, the first-instance judgment appears to be based on the idea that a 'by object' infringement can be shown to exist based on the disproportionate nature of the measure and, similarly, based on the fact that there would have been less restrictive means to attain the objective. The General Court appears to give particular weight to the fact that the exercise of the organisation's powers were not 'clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring the organisers of events effective access to the relevant market'.⁸⁸ In addition, it refers – as much as the Commission did in its decision – to the penalties as an additional factor in support of its conclusion.⁸⁹

It is difficult to see how this aspect of the judgment can be reconciled with the case law described in the preceding section. As already pointed out, the fact that a rule goes beyond what is necessary to attain a legitimate objective does not say anything about whether it is restrictive of competition by object. The two steps of the analysis are not to be conflated. At most, showing that a rule fails the objective necessity test tells us that it might be caught by Article 101(1) TFEU – not that it is. Accordingly, evidence in this sense would as such be insufficient to establish, to the requisite legal standard, a restriction of competition. In fact,

⁸⁵ *International Skating Union's Eligibility Rules* (n 12), para 163.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, para 168.

⁸⁸ *International Skating Union* (n 13), para 88.

⁸⁹ *Ibid.*, paras 90-95.

both *Meca Medina* and *Ordem dos Técnicos Oficiais de Contas* show that, once it is established that the rules relate to a legitimate aim, they would only fall within the scope of Article 101(1) TFEU following an assessment of their effects on competition.⁹⁰

That the first-instance judgment conflates two steps of the analysis – whether a rule is objectively necessary and whether it has a restrictive object and/or effect – is particularly well exemplified by the way in which the General Court engages with *Ordem dos Técnicos Oficiais de Contas*. In this judgment, the Court explained that the rules at stake would not have restrictive effects if they allowed entry by third parties and fulfilled the conditions of transparency, non-discrimination and reviewability.⁹¹ The first-instance judgment in *International Skating Union* attaches a different meaning to this passage. More precisely, the General Court relies on it to argue that sports regulations are restrictive by object unless they satisfy the abovementioned conditions of transparency, non-discrimination and reviewability. In other words, the lower court transformed what was a safe harbour allowing firms to escape liability and turned it into a strict requirement that governing bodies need to satisfy to avoid infringing Article 101(1) TFEU.

5.3. *The conflation of the assessment of restrictions by object and by effect*

The discussion in the preceding sub-section reveals that there is a tendency to conflate the assessment of the objective necessity of an agreement and the evaluation of its restrictive object. Authorities may, in addition, conflate the ‘by object’ and ‘by effect’ stages of the analysis. *International Skating Union* exemplifies this idea particularly eloquently. When dealing with the object of the rules, the first-instance judgment relies on *Ordem dos Técnicos*

⁹⁰ See in particular *Meca Medina* (n 1), para 47 and *Ordem dos Técnicos Oficiais de Contas* (n 61), para 68.

⁹¹ *Ordem dos Técnicos Oficiais de Contas* (n 61), para 99.

Oficiais de Contas. In the latter, however, the Court expressly held that the regulations at stake in the case did not restrict competition by object.⁹² Crucially, moreover, the passage relied upon by the General Court does not deal with the object of the measures, but with a different question, namely their impact on competition.

The Commission decision in *International Skating Union* also conflates the ‘by object’ and ‘by effect’ stages of the assessment. More precisely, the authority infers the restrictive nature of the measure from its potential impact. The decision attaches particular importance to the fact that the rules could lead to the lifetime ban of skaters.⁹³ The first-instance judgment takes the view that the authority was right to consider this factor in its assessment. This conclusion relies on *Meca Medina* and, more precisely on the fact that a lifetime ban would go beyond what is necessary to attain a legitimate objective.⁹⁴ As pointed out above, however, the relevant passage of *Meca Medina* addressed the restrictive effects of the regulations, not their nature. Nowhere did the Court suggest in that judgment that disproportionate measures amount to a ‘by object’ infringement. More generally, it is not because an agreement can be expected to have an appreciable impact on competition that it is necessarily restrictive by object. Suffice it to think, for instance, of an exclusive dealing agreement covering a substantial fraction of the relevant market.⁹⁵ Such an agreement is likely to foreclose rivals. It does not follow however, that it is anticompetitive by its very nature.

⁹² See *Ordem dos Técnicos Oficiais de Contas* (n 61), para 68 and the discussion above.

⁹³ *International Skating Union’s Eligibility Rules* (n 12), in particular paras 163, 168, 186. See also the references above to this factor.

⁹⁴ *International Skating Union* (n 13), para 92.

⁹⁵ See for instance Case T-65/98 *Van den Bergh Foods Ltd v Commission*, EU:T:2003:281, which concerned a set of de facto exclusivity obligations imposed by a firm with an 89% market share.

5.4. *The assessment of conflicts of interest*

It has been explained above that, as far as conflicts of interest are concerned, the standards that apply to Member States are not the same as those set for private undertakings. For the reasons already mentioned, public authorities (and the undertakings protected via exclusive or special rights) are subject to more stringent duties in the name of equality of opportunity. *International Skating Union* suggests that this duality of standards may not last, or that may become blurred over time. As a result, the strict obligations of transparency, non-discrimination and reviewability may end up becoming a minimum requirement that applies across the board to all governing bodies, irrespective of whether they benefit from exclusive or special rights. It remains to be seen whether the Court will embrace this ongoing shift, which can be observed in other areas of EU competition law.⁹⁶

One cannot underestimate the consequences that this shift would have for regulatory bodies. Once conflicts of interests are deemed *prima facie* unlawful, the balance between cooperation and competition would be permanently tilted in favour of the latter. The autonomy of governing bodies would be significantly curtailed, in the sense that any restriction would be presumptively anticompetitive. An authority or claimant would no longer need to show that the conflict of interest has, or is likely to have, anticompetitive effects. Instead, it would be for the governing body to show why the balance struck between cooperation and competition is overall appropriate. It is well-known that establishing that the conditions set out in Article 101(3) TFEU are fulfilled in a given case and/or that they are justified under Article 102 TFEU is most challenging for any defendant.⁹⁷ As a result, this scenario would open the door to significant

⁹⁶ See in this sense Case T-612/17 *Google LLC v Commission*, EU:T:2021:763, in which similar vocabulary has been used by the General Court. Paragraph 155, in particular, refers to Article 106 TFEU case law in support of the proposition that dominant firms are subject to a duty of equal treatment.

⁹⁷ For a discussion of the issue, see Andriani Kalintiri, 'The Allocation of the Legal Burden of Proof in Article 101 TFEU Cases: A "Clear" Rule with Not-So-Clear Implications' (2015) 34 *Yearbook of European Law* 232; and O'Donoghue and Padilla (n 48), 351-4.

fine-tuning by competition authority and, through the judiciary, by claimants. By the same token, it would lead to more frequent and more intrusive intervention under EU competition law.

6. Looking ahead: the status of the most salient legal issues

6.1. Competition law and non-compete obligations

The discussion in the preceding sections already provides the framework to evaluate the legality of non-compete obligations imposed by governing bodies on its members. Such obligations prohibit – directly or indirectly, in an outright or qualified way – the organisation of competing tournaments and/or participation in them. Summing up the points already made above, it would seem that such obligations – including the sanctions with which they are typically assorted – are not incompatible, in and of themselves, with Articles 101 and/or 102 TFEU. In particular, it seems difficult to argue, following *Cartes Bancaires*, that they are restrictive of competition by object within the meaning of Article 101(1) TFEU. As that judgment made clear, rules that purport to prevent opportunistic conduct by the parties to a procompetitive joint venture do not fall, by their very nature, within the scope of the prohibition.

Non-compete obligations of this kind may either escape the prohibition altogether – where they are objectively necessary to attain legitimate aim (whether economic or non-economic in nature) – or may be subject to a case-by-case evaluation of their actual or potential impact on competition under Article 101(1) TFEU. A question that has not been addressed in the preceding sections is that of whether anticompetitive effects are an inevitable consequence of a non-compete obligation. To the extent that the ‘one association per sport’ principle is the

prevailing one in Europe, it would not be unreasonable to assume that rules prohibiting the setting up of rival tournaments and/or participation in them can be safely presumed to have a restrictive impact on competition. After all, these rules would cover the vast majority of, if not all, the relevant market(s).

An analysis of some of the ongoing disputes, however, suggests that anticompetitive effects are not an inevitability of non-compete duties imposed on the members of a sports association. Therefore, a case-by-case assessment (which is in any event the rule under Article 101(1) TFEU) would be justified. Consider the example of the Super League. At least as originally presented, this initiative brought together some of the most powerful and successful football teams in Europe and the world.⁹⁸ Even if the non-compete obligations had been enforced against them, there is no reason to assume that these clubs will have been foreclosed from the relevant markets (in fact, it is at least plausible that they would have been able to compete effectively against the tournaments organised around the pyramid structure run by the incumbent bodies).

6.2. Competition law and 'closed leagues'

As explained above, some of the most recent initiatives seek to create closed or partially closed tournaments, whereby at least some teams enjoy a guaranteed place in them and do not face the threat of relegation. As a result of this regulatory choice, other teams may not have the chance to join the competition (or may have to do so on more precarious or more onerous conditions). This is the model at the heart of the Super League, already described, but has also been implemented elsewhere, as is the case of the Euroleague Basketball.⁹⁹ In addition to

⁹⁸ 'Europe's top football clubs plan a Super League of their own' *The Economist* (London, 19 April 2021).

⁹⁹ For a discussion from a competition law standpoint, see Marine Montejo, 'FIBA/Euroleague: Basketball's EU Competition Law Champions League- first leg in the Landgericht München' (Asser International Sports Law Blog, 15 June 2016), available at <https://www.asser.nl/SportsLaw/Blog/>.

contradicting one of the defining features of the European model of sport, the question that emerges is whether a closed tournament is contrary to Articles 101 and/or 102 TFEU, and this insofar as it could lead, in particular, to the foreclosure of competing teams or to discrimination against other participants.

Nothing in the EU competition law as currently interpreted appears to support the proposition that the compatibility of sports championships with Articles 101 and 102 TFEU hinges on the introduction of promotion and relegation mechanisms. This conclusion comes across as self-evident if one sees sports ventures as a cooperation agreement alongside, *inter alia*, standard-setting, joint production or joint purchasing arrangements. The relevant case law¹⁰⁰ and Commission Guidelines¹⁰¹ do not suggest that agreements between actual or potential competitors need to be open to rivals for them to escape Article 101 TFEU. At most, one could argue that, in certain (and only certain) circumstances, openness to third parties would make them fall outside Article 101(1) TFEU altogether. Such would be the case, for instance, of standard-setting agreements.¹⁰² In line with the discussion above on objective necessity, the fact that openness allows the parties to escape the prohibition does not mean that it is a prerequisite for their compatibility.

While it seems difficult to argue that EU competition law mandates a system of relegation and promotion, a closed championship may, in some circumstances, have restrictive effects of competition. The case law suggests that such effects (in particular, foreclosure) are more likely where the tournament covers a large fraction of the market.¹⁰³ This line of analysis would not differ in any way from that applying to other horizontal arrangements or unilateral

¹⁰⁰ Case C-250/92 *Gøttrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, EU:C:1994:413.

¹⁰¹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1.

¹⁰² *Ibid*, paras 277-286.

¹⁰³ On coverage, see *Delimitis* (n 60), *Van den Bergh Foods* (n 95) and Case T-286/09 RENV *Intel Corporation Inc. v Commission*, EU:T:2022:19.

practices examined under Article 102 TFEU. Suffice it to think, for instance, of joint production¹⁰⁴ or information exchange agreements,¹⁰⁵ which may also lead to the exclusion of rivals. Conversely, restrictive effects are less likely where non-participants in the closed championship have access to effective alternatives.¹⁰⁶ Such would be the case, for instance, where the tournament is a breakaway one that has been set up to compete with the incumbent.

6.3.Competition law, salary caps and competitive balance

One of the most interesting questions, from a theoretical and a practical standpoint, relates to the status of salary caps in EU competition law. Salary caps are a key component of North American leagues and an effective mechanism to ensure competitive balance. By limiting how much each participant is allowed to spend in wages, the disparities between the wealthier and the less well-off teams can be mitigated. At first glance, there are reasons to view these measures with suspicion. On the surface, an arrangement providing for the coordination of competitors' salaries comes across as problematic. It seemingly amounts to the sort of 'naked' price-fixing one observes around cartel agreements. Accordingly, one may be tempted to conclude that the setting of a limit on expenditure is restrictive of competition by object and unlikely to satisfy the conditions of Article 101(3) TFEU.

Such an impression, however, is based on a partial understanding of the nature of the interactions among participants. As such, it would be a source of enforcement errors. As explained above, teams are best seen as members of a co-opetitive arrangement. Unlike the members of a cartel, they are not only competitors, but also partners in a joint venture that

¹⁰⁴ Guidelines on horizontal cooperation agreements (n 101), paras 159 and 165.

¹⁰⁵ Ibid, paras 69-71.

¹⁰⁶ This idea pervades the case law. See in particular *Delimitis* (n 60), para 21; and Case C-377/20, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, EU:C:2022:379, para 83.

allows them to offer services that would otherwise be unavailable to them. For this very reason, the setting of a salary cap cannot be likened to ‘naked’ price-fixing. Instead, the cap is an ingredient of a broader collaborative effort that is unquestionably procompetitive. One should consider, in particular, that a league or tournament necessitates cooperation. Once these factors are accounted for and the co-opetitive relationship is grasped in its full complexity, the conclusion that the object of the salary caps is not to restrict competition, but to achieve competitive balance, seems difficult to dispute. One could argue, in the same vein, that the point of the cap is to reflect the shared nature of the wealth generated by the competition, and, similarly, participants’ interdependence.

A similar argument can be drawn from the case law. By limiting the inequality among participating teams, salary caps make intra-tournament rivalry more intense, in the sense that it adds to the uncertainty that is inherent in, and expected from, sporting events. It is clear at least since *Budapest Bank* that, where conduct improves the conditions of competition relative to the situation that would have prevailed in its absence, it is not caught, by its very nature, under Article 101(1) TFEU.¹⁰⁷ To the extent that salary caps make tournaments more competitive, and to the extent that any impact on teams’ freedom of action remain within the boundaries of the co-opetitive joint venture, one could reasonably ask whether they restrict competition at all. Within the ecosystem that is the joint venture, in other words, it would not be self-evident for an authority or claimant to argue, against the relevant counterfactual, that the presence of the cap reduces competition on the relevant market(s).

The above conclusions can be extended to other rules that are capable of preserving or enhancing competitive balance. For instance, the ability of the wealthier teams to hire the best players from the less well-off is an important source of imbalances and tends to perpetuate inequality, in the sense that it enables wealthy teams to spend their way to success. Transfers

¹⁰⁷ Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and others*, EU:C:2020:265, paras 82-83.

can also reduce the excitement and uncertainty around competitions, insofar as the outcome may become predictable based on the participants' ability to hire the best and most promising or successful players.¹⁰⁸ Against this background, rules banning or restricting transfers between teams (for instance, by setting a cap on how much can be spent on transfers in any given year) look like an effective complement to salary caps. For the same reasons, it seems clear, at the very least, that they are not restrictive of competition by object.

6.4. Competition law and ownership limits

A final question, which follows an inquiry by the *Bundeskartellamt*, concerns the status of limitations relating to the ownership of the participants. The example of the German 50+1 rule illustrates effectively the nature and purpose of these regulations.¹⁰⁹ The Bundesliga introduced this mechanism to strike a balance between the protection of football as a club sport (and its link with grassroots and amateur activities) and the need for teams to open their activities to investors and professionalise their operations. In accordance with the basic principle of the 50+1 rule, a for-profit venture cannot have a majority stake in the professional activities of a club. In May 2021, the *Bundeskartellamt* expressed the preliminary view that such rules are, as a matter of principle, unproblematic from a competition law standpoint.¹¹⁰

The conclusion reached by the German competition authority is unsurprising if one considers the discussions above. A co-competitive joint venture should in principle be free to decide the conditions under which its members are to take part in its activities. In fact, the very creation and operation of such a joint venture demands the imposition of restrictions on its

¹⁰⁸ For an analysis of the transfer system, see KEA and CDES, 'The Economic and Legal Aspects of Transfers of Players' (January 2013), available at <https://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf>.

¹⁰⁹ *Bundeskartellamt*, 'Bundeskartellamt provides preliminary assessment of DFL's 50+1 ownership rule' (31 May 2021).

¹¹⁰ *Ibid.*

members. The idea that regulations such as the 50+1 rule are unproblematic is further reinforced by the fact that the goal of preserving the ‘club’ character of a league (and, by extension, competitive balance, as well as the specificity of sport) does not seem to be inherently anticompetitive. As the Bundeskartellamt suggests, it looks like the sort of arrangement that falls outside the scope of Article 101(1) TFEU altogether in accordance with the *Gottrup-Klim* and *Wouters* lines of case law.¹¹¹

7. Conclusions

The regulation of sports by governing bodies is currently a source of frictions and controversies. Two main factors explain these. First, the specificities of sport as an economic activity (and, more precisely, interdependence) are not always considered by stakeholders. As explained in this paper, the relationship among participants is best understood and scrutinised as a co-opetitive joint venture that needs to strike a delicate balance between cooperation and competition. Thus, any analysis that starts from the premise that individuals or teams are merely competitors is flawed. Second, the evaluation of potential restrictions, in particular under Article 101 TFEU, can lead to errors. There appears to be a marked inclination to conflate the analysis of the objective necessity of an agreement and that of its restrictive object. There is, moreover, a tendency to treat safe harbours as if they were the conditions that agreements need to satisfy to escape the prohibition. These conclusions become apparent in the pending (at the time of writing) *International Skating Union* case.

¹¹¹ Ibid: ‘Although the rule constitutes a restriction of competition as it sets certain conditions for participation in the Bundesliga and Bundesliga 2, DFL is nevertheless pursuing legitimate objectives, i.e. to ensure the organisation of competition between membership clubs and an even balance in sports competition. Requirements of sport associations regarding participants in a contest can escape competition law if these serve the purpose of furthering certain aspects of the sports competition, but also if they serve ethical/social objectives’.

On the basis of this analysis, it is possible to shed light on some of the ongoing controversies around sports regulations. First, non-compete obligations (which may limit participants' ability to set up rival tournaments or to become involved in them) are not restrictive of competition by their very nature and do not invariably have anticompetitive effects. As a result, a case-by-case inquiry seems necessary. Second, EU competition law does not prohibit, nor is it biased against, 'closed leagues'. Such ventures are to be examined just like any other economic activity (and, more precisely, like any other horizontal cooperation agreement). Third, the same can be said of other rules, including salary caps and rules restricting or banning transfers between players, which may prove to be key instruments in preserving competitive balance.

The observed frictions and controversies reflect a debate about the changing attitudes, in some quarters, vis-à-vis the activities of sports governing bodies. The case law, as traditionally interpreted, prevented the sort of frequent and far-reaching intervention that some stakeholders expect from institutions. Competition authorities, in turn, were careful not to interfere and second-guess the balance between cooperation and competition within sports organisations. This hands-off approach may be changing, in part due to the influence of Article 106 TFEU case law and the stricter standards it embraces. Against this background, the pending cases at the time, namely *International Skating Union* and *Super League*, will determine whether the changing attitudes will be reflected in the case law.