

Kluwer Competition Law Blog

Changing the law without admitting it: The Court's three rulings of 21 December 2023 applied twice in January 2024

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Introduction

On 21 December 2023 the Court changed its interpretation of EU competition law. The three judgments handed down that day asked as many questions as they answered, and it was obvious that further clarification would be required. Already in January 2024 two further rulings – Case C-128/21 *Lietuvos notarų taryba, and others* and Case C-438/22 *Emakaun BG* – have helped us to understand what is at stake. This post, which is an amplification of a comment I made to Ben van Rompuy's discussion on this blog of the rulings of 21 December 2023, explains the Court's stance in these two new rulings. Two points loom large: first, confirmation that defining the category of a restriction of competition *by object* is vital in grasping the scope for private bodies to justify market regulation and, second, that the Court seems mysteriously and unhelpfully intent on denying that 21 December 2023 marked a change in its approach to EU competition law.

What changed on 21 December 2023?

The three rulings of 21 December 2023 are Case C-333/21 *European Superleague Company*, Case C-680/21 *UL, SA Royal Antwerp Football Club v URBSFA, UEFA*, and Case C-124/21 *P International Skating Union v Commission*, hereafter *ESL*, *Royal Antwerp* and *ISU*. Rulings of the Grand Chamber, they are important in the development of EU sports law, in particular in their treatment of the direction in Article 165 TFEU that the EU shall take account of 'the specific nature of sport', but my concern in this post is their effect on general EU competition law, and most of all on the interpretative approach to Article 101(1) initiated in Case C-309/99 *Wouters and Others*.

In *Wouters*, the Court held that the compatibility of practices with EU competition law cannot be assessed in the abstract. Not every agreement between undertakings which restricts the freedom of action of one or more of the parties necessarily falls within the prohibition laid down in Article 101(1) TFEU. Account must be taken of the overall context in which the decision was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them. In the case itself this meant that rules of the Dutch Bar forbidding the creation of partnerships between advocates and accountants exerted an 'adverse effect on

competition’ (paras 86, 87) but the objective of ensuring that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity, independence and experience persuaded the Court that the rules could ‘reasonably be considered to be necessary in order to ensure the proper practice of the legal profession’ (para 107).

Case *C?519/04 P Meca-Medina and Majcen v Commission*, in which this approach was first employed in the application of EU competition law to the practices of a governing body in sport, concerned anti-doping controls and sanctions. Their ‘general objective’ was ‘to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes’ health, the integrity and objectivity of competitive sport and ethical values in sport’ (para 43). Provided they were ‘limited to what is necessary to ensure the proper conduct of competitive sport’ (para 47) they did not fall within the scope of Article 101(1).

In this way measures of market regulation adopted by private parties may be justified by reference to a wider set of interests than those foreseen by Article 101(3). It is an approach which is functionally equivalent to that applied to free movement law by the Court in and since Case 120/78 *Cassis de Dijon*. That is, these are ways to ‘soften’ the impact of the Treaty provisions beyond what is foreseen explicitly by those Treaty provisions. So, for free movement, *Cassis* says a regulator may justify measures by reference to wider types of interests than foreseen by Article 36, for competition *Wouters/ Meca-Medina* says a (private) regulator may justify measures by reference to wider types of interests than foreseen by Article 101(3).

The key structural point of interpretation is that if a practice escapes the reach of Article 101(1) according to this formula, there is no need to assess whether it is a restriction of competition by object or by effect. It is not a restriction of competition within the meaning of Article 101(1) at all.

This is no longer good law.

We learned on 21 December 2023 that conduct which, far from merely having the inherent effect of restricting competition, ‘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’ cannot benefit from the *Wouters/ Meca-Medina* formula (*ESL*, para 186, *Royal Antwerp*, para 115). Nor does it apply to conduct which ‘by its very nature infringes Article 102 TFEU’ (*ESL*, para 185).

This is new. It means that the first stage of the analysis is no longer whether the *Wouters / Meca Medina* test is met, but rather whether conduct has as its object the prevention, restriction or distortion of competition or by its very nature infringes Article 102. Only if it does *not*, *Wouters / Meca Medina* apply as a route for a private regulator to show its practices to be necessary to achieve legitimate objectives and so place its practices beyond the scope of Article 101(1) and Article 102. If it does, only Article 101(3) may save the practice, and that requires a more stringent approach than *Wouters / Meca Medina* (as is explicitly pointed out in *ESL* para 189, *Royal Antwerp* para 118). Presumably also, if it does, only meeting the test of objective justification saves it from condemnation under Article 102 – that test is also more stringent (that is, more focused on economics) than *Wouters / Meca Medina*.

So, two questions: How significant is this change? And why has the Court made this change? We have help in answering these two questions from the two rulings of the Court delivered in January

2024: Case C-128/21 *Lietuvos notarių rėmimai, and others* and Case C-438/22 *Em akaunt BG* ???D.

First question: How significant is this change?

In both *ESL* and *ISU* the Court found a restriction by object (*ESL* para 178, *ISU* para 145). The issue in short was the power of a governing body to approve new competitions, which permitted that body to set the conditions of access to the relevant market, thereby to determine the degree of competition that may exist on that market. The core reason why the governing bodies were held to have violated EU law was the absence from these prior approval procedures of a framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate. That, the Court concluded, was a restriction by object. In *Royal Antwerp*, which concerns UEFA's rules requiring 'home grown' players, the Court was more cautious (paras 108-111). Such rules might be a restriction by object, but the Court leaves the ultimate decision to the national court.

However, the Court did not throw open the door to a free market for football competitions. Instead, it accepted that it is potentially lawful to act to suppress a competition not based on access via sporting merit (*ESL* para 143-144, 175-176, 253; *ISU* para 132). So – provided always that the process meets the requirements of objectivity, transparency, non-discrimination etc – the Court appears to accept the compatibility with EU competition law of a refusal to approve a closed league (and the imposition of penalties on participants). The Court does not spell this out, but presumably, the point is that such a practice is not conduct which has as its object the prevention, restriction or distortion of competition nor conduct which 'by its very nature infringes Article 102 TFEU'. Instead, the object of requiring that new competitions be open and based on sporting merit is not to restrict competition but rather 'the pursuit of legitimate objectives, such as ensuring observance of the principles, values and rules of the game underpinning professional football' (*ESL* para 176). Just as in *Meca-Medina* itself, the Court found an inherent effect of restricting potential competition between athletes as a result of anti-doping but placed the matter beyond the reach of Article 101(1) because the rules had legitimate objectives in upholding 'the ethical values at the heart of sport, including merit' (as explained, citing *Meca-Medina and Majcen v Commission*, C-519/04 P, in *ESL* para 184, *Royal Antwerp* para 114, *ISU* para 112).

Certain types of sporting competition are, it seems, legitimately suppressed by UEFA. Its object is not to restrict competition. Its object is to defend a model based on sporting merit.

So, the message is that how one frames the challenged rule matters. Those seeking to escape subjection to the rules of a governing body (or a private regulator more generally) will want to treat them as conduct which has as its very object the prevention, restriction or distortion of competition or conduct which by its very nature infringes Article 102 TFEU. A governing body (or a private regulator more generally) will instead wish to argue that its rules pursue objectives which are necessary to achieve legitimate objectives in the organisation of sport (or some other activity).

On 18 January 2024 Case C-128/21 *Lietuvos notarių rėmimai, and others* was decided by the Court (First Chamber: rapporteur Judge Arabadjiev). It concerned a private body – of notaries – which had agreed how to calculate fees (in Lithuania). Although the final determination belonged to the referring national court, the Court strongly suggests that what was at stake was the horizontal fixing of the prices of the services concerned, which is so likely to have adverse effects on, in

particular, the price, quantity or quality of products and services that it is to be treated as a restriction of competition ‘by object’ within the meaning of Article 101(1) TFEU.

The vocabulary and analytical structure of 21 December 2023 is openly adopted and confirmed, although it is only *Royal Antwerp* which is cited (three times). Only where conduct does not have as its object to prevent, restrict or distort competition is the wider form of justification developed in and since *Wouters* available – otherwise, Article 101(3) applies. So, this is now the way forward for the assessment of activities of a private regulator. The point, made clear by the Court at paras 101 and 102 of *Lietuvos notarų rėmai, and others*, is that legitimate objectives such as to safeguard the principles of equal treatment and proportionality and to protect notaries from unjustified civil liability by standardising notarial practice and filling a regulatory vacuum, and to avoid dissuading people from pledging property whose value has not been established, may not be advanced once the conduct is classified as a restriction by object.

A week later, on 25 January 2024, the ruling in Case C-438/22 *Em akaunt BG* arrived (Second Chamber, rapporteur Judge Wahl). It concerns a decision of a professional association of lawyers fixing the minimum amount of fees (in Bulgaria). Again, the vocabulary and analytical structure of 21 December 2023 is adopted, although on this occasion it is *ESL* which is cited (three times), and again the Court condemns the arrangement as horizontal price fixing and therefore a restriction of competition by object. Consequently, the *Wouters / Meca-Medina* case-law does not apply. ‘[S]uch restrictions may not in any event be justified by the pursuit of “legitimate objectives” such as those allegedly pursued by the rules on minimum amounts of lawyers’ fees at issue in the main proceedings’ (para 53). Article 101(3) is the only possible route to justify the scheme.

Given what happened on 21 December 2023, these decisions do not seem to me to be surprising on this point. Even though the Court on 21 December 2023 confirmed, fully in line with its existing case law (*C-179/16 F. Hoffmann-La Roche*, para 78 and *C-307/18 Generics (UK)*, para 67), that the concept of a restriction by object must be interpreted strictly, because finding an object restriction entails no assessment of a practice’s effects in the application of Article 101(1) (*ESL* paras 161-2, *Royal Antwerp* paras 88-89, *ISU* paras 101-2), it appears that notaries in Lithuania and lawyers in Bulgaria were engaged in setting their own prices, to the detriment of competition in the market. That smells like a restriction of competition by object.

But it is the structural point which is important. Once a practice is regarded as a restriction by object, the scope to justify it is limited, and no longer embraces the legitimate objectives recognised by the *Wouters / Meca-Medina* case law. Remember that under free movement law it is possible to justify price regulation by reference to wider legitimate objectives (eg *C-94/04 Cipolla*, *C-377/17 Commission v Germany*). So, 21 December 2023 introduced a newly sceptical mood about the legitimate role of private regulators under EU competition law.

It is clear, then, that determining whether a practice is or is not a restriction by object is critically important to the likelihood of its survival when tested against the standards required by EU competition law. It’s worth remembering that in *Wouters* the claimants argued that the rules had the object of restricting competition (paras 74, 79), but the Court preferred instead to treat them as a restriction by effect. One can expect future parties challenging such rules to want to depict them as restrictions by object, thereby to shrink the scope of the rulemaker to justify them. Take the FFAR, FIFA’s Football Agent Regulations, which introduce certain standards of conduct and include regulation of prices charged by agents. Their compatibility with EU competition law is

currently pending before the Court (C-209/23 *RRC Sports*, C-428/23 *ROGON*). In 2023, in *PROFAA v FIFA* the CAS relied on *Meca-Medina* and found the rules compatible with EU law (CAS/2023/O/9370). The Court may do the same – but now, after 21 December 2023, it will be necessary to ask first whether they are restrictions by object and therefore incapable of being defended via *Meca-Medina*. This is not a question that is conclusively answered by the rulings of 21 December 2023. The agents will doubtless portray the FFAR as an agreement between FIFA, national associations and clubs, and so as a horizontal restriction of competition by object. FIFA will contend that the object of the FFAR is to improve the functioning of the market for supply of agents' services by addressing market failures (such as intransparency and asymmetry of economic power) and that they are not a (horizontal) restriction of competition but rather (vertical) market regulation by a private party (FIFA) to which *Meca-Medina* can be applied. The Court's decisions of December 2023 and January 2024 make clear that if the agents' arguments prevail, FIFA's justification for the FFAR will have to be based on Article 101(3), not the more generous *Wouters / Meca-Medina* test.

I do not know which way the Court will jump. In the two cases decided in January 2024 it seems that the notaries and lawyers who made the rules enjoyed a direct economic benefit from those rules, whereas FIFA, in regulating prices of agents, is not enjoying any such direct economic benefit. Rather FIFA is trying to protect contractual stability and the integrity of the sport – just as, on 21 December 2023, the Court recognised the legitimate object of protecting sporting merit as an organisational principle. So, it is at least plausible that, unlike the rulings concerning notaries and lawyers in January 2024, the FFAR will not be categorised as a restriction by object. The point, however, is that this inquiry is required in consequence of the Court's rulings of 21 December 2023. We need to classify the type of practices we are dealing with – do they have as their object the prevention, restriction or distortion of competition or do they by their very nature infringe Article 102 – before we can determine the breadth of justification which may be advanced in their support.

Second question: Why has the Court made this change?

Why did the Court decide to reduce the reach of *Wouters / Meca-Medina*? As a general observation, one may well suspect that some members of the Court were becoming increasingly uncomfortable with the sense that the *Wouters / Meca-Medina* line of case law offered an unprincipled and unpredictable means to subvert the dictates of EU competition law. So now only the more structured and well-understood Article 101(3) exemption applies to restrictions by object rather than the looser *Wouters / Meca-Medina* test. On this point competition law orthodoxy prevails over sporting specificity.

But never mind a general observation: what do the judgments tell us?

The Court on 21 December 2023 claims that it is 'already implicitly but necessarily apparent from the Court's case-law' that conduct which by its very nature infringes Article 102 may not benefit from the *Meca-Medina* approach – and it declares 'see, to that effect, judgment of 1 July 2008, *MOTOE*, C?49/07, paragraph 53' (*ESL* para 185). I fully agree with Ben van Rompuy ([in his post on this blog](#)) that the Court's assertion that the limitation on the scope of the *Wouters / Meca-Medina* case law was already '*implicitly but necessarily apparent*' from the *MOTOE* case is not convincing. As Ben shows in the third of the four points he makes about 'when and where' the

Wouters exception applies, the existing case law is inconsistent and incomplete. It cannot be read as supporting the firm claim that conduct which by its very nature infringes Article 102 (or conduct that restricts competition by object) may not benefit from the *Meca-Medina* approach. It is only on 21 December 2023 that this was made plain.

Use of the word ‘implicitly’ in the *ESL* ruling seems to me to give the game away. The Court, using the benefit of hindsight, is trying to rewrite its previous rulings. It could – in *MOTOE*, or in *Meca-Medina* – have made clear that conduct that restricts competition by object or by its very nature infringes Article 102 may not benefit from the *Meca-Medina* approach. But it didn’t. It did this only on 21 December 2023. It is unnecessarily defensive of the Court to pretend this was ‘necessarily apparent’ from the ruling in *MOTOE*. Why not simply come clean, and explain that it felt necessary to clarify a point previously unaddressed? The only other example I can think of in the Court’s case law lies a long way from competition law, in the area of citizenship rights. It is an equally unhappy instance. In 2011 in Case C-34/09 *Ruiz Zambrano* the Court held that Article 20 TFEU ‘precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’. This was a new formula, which on the Court’s interpretation had the important effect of reducing the scope of the ‘purely internal’ situation in which an individual may not rely on EU law. But instead of admitting this novelty, the Court claimed that the test derived from its earlier ruling in Case C-135/08 *Rottmann*. But it didn’t: the cited paragraph of *Rottmann* was not written in such grand style at all, and in any event, *Rottmann* addressed a much narrower issue than *Ruiz Zambrano*. The Court’s sleight of hand received a deservedly critical response from those writing in the area.

I did not and do not understand why the Court was not willing on 21 December 2023 to be fully open about its change of approach. But it is now worse. In Case C-438/22 *Em akaunt BG ???D*, the second of the Court’s two rulings of January 2024, the Court follows the 21 December 2023 approach. So, the *Wouters / Meca-Medina* case-law does not apply to conduct that has as its very ‘object’ the prevention, restriction or distortion of competition. So far, so good. However, *Em akaunt BG ???D* is a case seeking clarification of an earlier case, also concerning price-fixing in Bulgaria: Joined cases C-427/16 and C-428/16 *CHEZ Elektro*. In *CHEZ Elektro* the Court did *not* distinguish between object and effect for the purposes of application of *Wouters / Meca-Medina*. Quite the opposite! In para 53, it declared that ‘it should be noted that the legislation at issue in the main proceedings making mandatory a decision of an association of undertakings which has the object or effect of restricting competition or restricting the freedom of action of the parties or of one of them does not necessarily fall within the prohibition laid down in Article 101(1) TFEU’. Clearly, then, no distinction is drawn between object and effect. Yet in January 2024 in *Em akaunt BG ???D* the Court claims:

‘It follows from all of those considerations that, although the Court also referred to paragraphs 51 and 53 of the judgment of 23 November 2017, *CHEZ Elektro Bulgaria and FrontEx International* (C-427/16 and C-428/16, EU:C:2017:890), to the *Wouters* case-law in a situation involving national legislation providing for a horizontal pricing agreement, it did so only to guide the referring court in the event that it found, at the end of an assessment of all the facts of the case, that that national legislation made it mandatory to have a decision by an association of undertakings that had only the ‘effect’ of restricting competition. It is apparent from paragraphs 56 and 57 of the judgment of 23 November 2017, *CHEZ Elektro Bulgaria and FrontEx International* (C-427/16 and C-428/16, EU:C:2017:890), that the Court had found that it did not have all the information relating to the overall context in

which the regulation issued by the Supreme Council of the Legal Profession had been taken or applied’ (para 34).

That is a shameless re-writing of the earlier judgment! True, the Court in *CHEZ Elektro* did not have all the relevant information – but it did *not* distinguish between object and effect for the purposes of the application of *Wouters / Meca-Medina*.

The inapplicability of *Wouters / Meca-Medina* to restrictions by object was invented on 21 December 2023, but now the Court is pretending it was always the law. I do not know why. It is mysterious and it is unhelpful. Where would lie the harm in admitting that on 21 December 2023, it changed its interpretation of Articles 101(1) and 102? What’s wrong with channelling *Keck and Mithouard* and saying: ‘Contrary to what has previously been decided the *Wouters / Meca-Medina* case law does not apply in situations involving conduct which has as its very object the prevention, restriction or distortion of competition or by its very nature infringes Article 102 TFEU’?

Conclusion

Conduct which has as its object the prevention, restriction or distortion of competition and conduct which by its very nature infringes Article 102 TFEU cannot benefit from the *Wouters/ Meca-Medina* formula. This is how the Court now plans to review the activities of a private regulator in the light of EU competition law, in sports and in other contexts too.

I am open-minded about the merit of the change the Court made on 21 December 2023. I have sympathy for [Ben van Rompuy’s view expressed on this blog](#) that excluding the applicability of the *Wouters* formula ‘was a wholly unnecessary move: the finding that the conduct appears to restrict competition by object should simply have been a pertinent factor in the proportionality assessment’. Giorgio Monti is of a similar mind: he finds the Court’s position to be ‘illogical’ and ‘confusing’ (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4686842). But on the other hand, I am also tempted by the thought that, given my view that *Wouters / Meca-Medina* is functionally equivalent to *Cassis de Dijon* as a means to ‘soften’ the impact of the Treaty provisions on the internal market beyond what is foreseen explicitly by those Treaty provisions, then maybe, to preserve functional alignment, the point now is that in free movement law the wider interests are not available where a measure is discriminatory, while in competition law the wider interests are not available where the restriction is by object.

In any event, definitional precision is vital. Discrimination is a slippery concept in free movement law, as anyone familiar with the cases on environmental protection (eg *Case 302/86 Commission v Denmark*, *Case C-379/98 PreussenElektra*) will attest, and restriction by object is similarly an elusive concept needing careful articulation. I do hope that the Court will not adopt an aggressively broad interpretation of the notion of a restriction of competition by object in its review of sporting practices. That would risk undermining legitimate choices about sporting governance. Article 101(3) is not well suited to evaluate the mix of economic and non-economic values which motivate governing bodies in sport, and so there is much to be said for treating their practices as presumptively driven by the object of doing ‘what is necessary to ensure the proper conduct of competitive sport’ (*Meca-Medina* para 47). That then unlocks access to the *Wouters / Meca-Medina* store of justifications, subject always to convincing and detailed demonstration that the

chosen regulatory practices truly achieve their stated goals (another key theme of the 21 December 2023 rulings) and are supported by objective, transparent and non-discriminatory procedures.

But I also hope the Court, an institution for which I have great respect and admiration, does not make a habit of disguising new interpretative choices as mere application of existing case law.

** In preparing this I benefited from conversations with Jan Zglinski and Ben van Rompuy, but responsibility for the views expressed belongs to me alone.*

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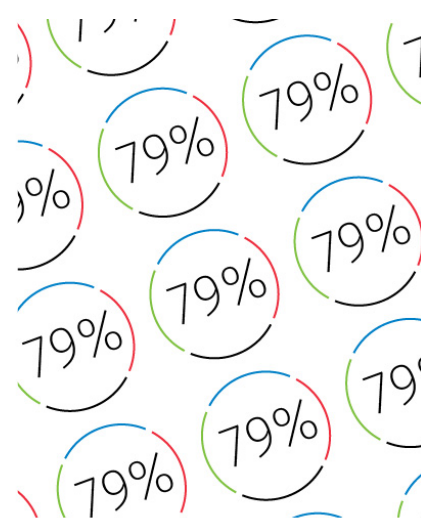
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