

Time for Competition Law Enforcement in Sports: Recent Developments in Latin America

By Marcelo Guimarães | OECD



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I. Introduction

Discussions on the interplay between economic competition and sports, while not a new phenomenon, have attracted greater attention from competition authorities in recent years, including in Latin America.

The topic was discussed in the latest edition of the OECD/IDB Latin American and Caribbean Competition Forum (“LACCF”), held in Quito on September 28 and 29, 2023.² The OECD Competition Committee also explored the topic in a roundtable discussion on December 4, 2023, with the active participation of Latin American countries.³

This article offers a summary of these discussions, with a focus on Latin America. Section 2 presents the specific characteristics of the sports industry which are considered by competition authorities when applying competition law to this sector. Sections 3 to 5 address recent debates over competition issues, i.e. regarding sports broadcasting, sports labor markets and the organization of sports tournaments. Section 6 concludes.

II. Characteristics of the Sports Industry

Sports are part of national and local cultures globally. They are also an important tool in social development initiatives, such as efforts to reduce crime, improve healthcare, and promote social cohesion. Sports represent a unique non-economic relationship between consumers (spectators) and suppliers (individual athletes or clubs/teams), as their connection does not result from the outcome itself (i.e. better or cheaper products), but from elements such as attachment to a community or mere familiarity. Indeed, consumers are usually personally

connected to specific athletes or clubs/teams and are not likely to switch to supporting other athletes or clubs/teams if their current choice do not win, or if their competitors deliver better results. In turn, spectators are also consumers who demand sports broadcasting in an economic relationship with suppliers of sports programming. The personal connection between spectators and athletes or clubs/teams has, therefore, important implications for economic competition, since this loyalty leads to the inelasticity of demand and low degree of substitutability in sports broadcasting markets, resulting in relevant markets often being narrowly defined by competition authorities worldwide.

In addition to their social and cultural dimension, sports (and professional sports in particular) have economic importance due to their ongoing commercialization. This is clear, for instance, when considering the revenue of major international sports events, such as FIFA’s World Cup and the Olympic Games, but also national leagues, including in Latin America, e.g. Brazil’s Brasileiro Serie A, Mexico’s Liga MX, and Argentina’s Primera División.

The concept of a sporting competition (in contrast with economic competition) is also a relevant feature of the industry. Unlike economic competition, increasing a player’s “market power” and excluding competitors is not a desired outcome of a sporting competition, since sports require a minimum number of competitors. In fact, competitors need each other to provide an economically viable product, and therefore a certain degree of co-operation between the participants is necessary.

Moreover, sporting competition relies on the so-called uncertainty of outcome hypothesis,

¹ Competition Expert at the OECD. The opinions are personal and do not necessarily reflect the views of any of the institutions to which the author is affiliated. This article is an adjusted version of the OECD Background Note prepared by the same author for the 2023 Latin American and Caribbean Competition Forum (“LACCF”) and available here: www.oecd.org/competition/latinamerica.

² See <https://www.oecd.org/competition/latinamerica/2023forum/>.

³ See <https://www.oecd.org/daf/competition/competition-and-professional-sports.htm>.

according to which consumers value close, competitive contests. To ensure this uncertainty of outcomes, it is necessary to have sustained rivalry among competitors, who should ideally have similar strength. This involves not only guaranteeing the integrity of competition and achievement based on merit (i.e. absence of match-fixing and doping), but also a competitive balance (i.e. competitive closeness of competitors, who should be sufficiently closely matched).

Another specific characteristic of the sports sector has to do with its distinctive governance structure, which is usually driven by private associations (so-called sport governing bodies, such as national and international federations/associations). These entities often carry out three different functions: (i) legislative/regulatory activity (setting the rules of the game); (ii) executive/organizational duties (organizing and promoting sports competitions, such as leagues and other tournaments); and (iii) judicial (monitoring and enforcing the rules, managing disciplinary procedures and arbitration of disputes).

In Latin America, most jurisdictions and sports organizations follow the so-called European model, where there is a single governance framework for each sport, integrating all levels of sport – from grassroots to top-level professionals – in a pyramid structure, allowing participants to progress from the bottom to the top through a system of promotion and relegation based on sporting merit (open system).⁴

Considering the traits of the sports industry, competition authorities have followed the rule of reason when enforcing competition law in this sector, except for specific harmful behaviors that are considered “*per se*” or “by object” infringements (i.e. wage-fixing and no-poach agreements). This means that potential restrictions on competition can be justified if

they are necessary to achieve legitimate sporting goals and proportionate to said goals (in other words, where there are no less-restrictive options). Such an approach provides competition authorities with enough flexibility to consider the specificities of the sports sector.

III. Sports Broadcasting

Competition authorities in Latin America have been particularly active in the sports broadcasting sector. This is not surprising, since this is a multi-billion dollar industry, typically representing the main source of income for sports leagues and clubs. Moreover, sports broadcasting rights are considered premium content, giving the broadcasters a relevant competitive advantage. Therefore, considering the high demand and limited supply resulting from the scarcity of sports events, sports broadcasting rights have extremely high prices.

The sports broadcasting industry is highly complex, comprising several vertically related markets, including the production and licensing of audio-visual content (wholesale market for “raw content”); the aggregation of content (produced in-house or acquired from third parties) and packaging into channels (wholesale supply of channels); as well as the retail service provision to end customers (content distribution).

Competition authorities in Latin America have actively assessed these markets. For instance, regarding the commercialization of broadcast rights, Brazil’s watchdog CADE has been investigating an alleged international cartel with effects in Brazil since 2019. The investigated parties allegedly fixed prices, shared the market and rigged bids in competitive tenders for football broadcasting rights.⁵ Also in 2019, CADE opened an investigation to assess whether the Brazil’s largest broadcaster is abusing its dominant position in the negotiation of broadcasting rights with football clubs,

⁴ On the contrary, in the so-called US model, amateur and professional sports are independent and run under separate structures. Professional sports are generally organised by leagues owned by the clubs that play in the league (called franchises): the participants are pre-determined and there is no promotion and relegation (closed system). Only exceptionally new franchises are admitted, subject to the approval of a supermajority of the existing franchises and to the payment of a substantial entry fee.

⁵ CADE (2022), *CADE investigates international cartel of broadcasting rights for sporting events*, 7 February 2022, <https://www.gov.br/cade/en/matters/news/cade-investigates-international-cartel-of-broadcasting-rights-for-sporting-events>.

including through refusal to deal, price discrimination, and sham litigations.⁶

However, it should be noted that the involvement of competition authorities in the sales of sports broadcasting rights in Latin America is less common than in Europe. Indeed, European competition authorities play a central role in overseeing whether competition is preserved when broadcasting rights are sold, often collectively, by clubs.⁷

Furthermore, Latin American competition authorities have also scrutinized the wholesale and retail supply of sports pay-TV channels. For example, in 2020 Chile's FNE asked the TDLC to sanction an abuse of dominance by a particular TV channel that holds the exclusive rights to broadcast matches of in Chile's national football league. Said TV channel sets a minimum resale price that cable operators can charge for premium packages, restricts the promotions cable operators can offer to final consumers, sets a minimum number of premium customers that each cable operator must have, and requires that the basic channel is included in all packages, even if the customer does not want it. In 2023, the TDLC held a hearing, in which FNE ratified its request to sanction the broadcaster for abuse of dominant position.⁸

Additionally, the 2019 Disney/Fox merger, analyzed by several Latin American jurisdictions (including Argentina, Brazil, Chile and Mexico),

also raised relevant competition concerns related to the pay-TV sports channel market. This transaction was ultimately authorized, although subject to remedies as it would increase market concentration and distort competition, possibly leading to higher prices and lower quality. For instance, Argentina,⁹ Brazil,¹⁰ and Mexico¹¹ all imposed structural remedies that consisted of divestiture of sports channels, while Chile imposed behavioral remedies.¹²

IV. Sports Labor Markets

More recently, another area in the sports sector that has been closely assessed by competition authorities in the region is the issue of labor markets. In fact, this trend is part of a broader movement towards the application of competition law to labor markets in general. Sports labor markets are particularly vulnerable to anti-competitive behavior, especially in team sports,¹³ given the short careers of athletes, the high gender gap with regards to compensation, and the limited opportunities for cross-sectoral employability.

The main concerns in sports labor markets relate to wage-fixing and no-poach agreements. Wage-fixing agreements involve the setting of salaries among clubs (often with the involvement of the relevant governing body),

⁶ Brazil (2023), *Note by Brazil, Working Party No. 2 on Competition and Regulation - Competition and Professional Sports*, [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2023\)30/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2023)30/en/pdf).

⁷ See OECD (2023), *Competition and Sports – Background Note by the Secretariat, Latin American and Caribbean Competition Forum*, [https://one.oecd.org/document/DAF/COMP/LACCF\(2023\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/LACCF(2023)5/en/pdf). pp. 24-25.

⁸ FNE (2023), *FNE pide al TDLC condenar al Canal del Fútbol por abuso de posición monopólica*, 22 August 2023, <https://www.fne.gob.cl/fne-pide-al-tdlc-condenar-al-canal-del-futbol-por-abuso-de-posicion-monopolica/>.

⁹ CNDC (2022), *Fusión Disney-Fox: la CNDC dictaminó la desinversión y puso condiciones para garantizar la competencia en el mercado de señales deportivas*, 18 January 2022, <https://www.argentina.gob.ar/noticias/fusion-disney-fox-la-cndc-dictamino-la-desinversion-y-puso-condiciones-para-garantizar-la>.

¹⁰ CADE (2019), *Cade clears Disney/Fox merger with restrictions*, 1 March 2019, <https://www.gov.br/cade/en/matters/news/cade-clears-disney-fox-merger-with-restrictions>. However, the structural remedy was not implemented in Brazil and was ultimately replaced by behavioural remedies (CADE (2020), *Cade aprova com restrições compra da Fox pela Disney*, 6 May 2020, <https://www.gov.br/cade/pt-br/assuntos/noticias/cade-aprova-com-restricoes-compra-da-fox-pela-disney>).

¹¹ IFT (2019), *Resolución mediante la cual el pleno del Instituto Federal de Telecomunicaciones autoriza llevar a cabo la concentración - radicada bajo el expediente no. UCE/CNC-001-2018, notificada por the Walt Disney Company y Twenty-First Century-Fox, Inc. sujeta al cumplimiento de condiciones*, 11 March 2019, <https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/verpubpift110319122canxuce.pdf>.

¹² FNE (2019), *FNE approves with remedies Disney's acquisition of Fox*, 21 March 2019, <https://www.fne.gob.cl/en/fne-approves-with-remedies-disneys-acquisition-of-fox/>.

¹³ In individual sports, athletes are usually independent contractors or self-employed workers, not being subject labor benefits.

most commonly through salary caps.¹⁴ No-poach agreements occur when clubs agree to refrain from soliciting, hiring, or recruiting one another's players. In both cases, competition in the labor market may be restricted, resulting in an inefficient allocation of athletes among clubs and reducing the quality of the game and its attractiveness to consumers.

No-poach and wage-fixing agreements have been considered as "by object" or "per se" infringements by competition authorities, as they are presumed to be so harmful that assessing their competition effects is not necessary to sanction them.¹⁵

For example, in September 2021 Mexico's COFECE sanctioned a collusive scheme in the drafting of football players that involved 17 football clubs, the Mexican Football Federation, and eight individuals. One of the anti-competitive conducts consisted of a no-poach agreement through which the clubs established a right of retention, segmenting the market of male football players by preventing the athletes from freely negotiating and signing with new clubs. Another anti-competitive behavior was a wage-fixing agreement imposing maximum wage caps for female football players. According to COFECE, these practices caused a harm of MXN 83.4 million and the violating agents were fined a total of MXN 177.6 million.¹⁶

Likewise, Colombia's SIC is currently investigating two different practices related to football labor markets in Colombia. The first investigation was launched in 2021 and involves the organizer of the national football league and 16 football clubs, who allegedly participated in a

no-poach agreement.¹⁷ The second investigation was opened in 2023 against the national football federation, the organizer of the national football league, and 29 clubs, which are accused of engaging in an anti-competitive behavior in the women's professional football market. In particular, the investigated parties are accused of having standardized key clauses in player's labor contracts (including regarding their duration and the rights over players' image), as well as fixing wages.¹⁸

Nevertheless, some jurisdictions in Latin America face significant challenges in attempting to apply competition law to sports labor markets. For example, Costa Rica's COPROCOM suggested that the Costa Rican Competition Act could not be fully applied to agreements between clubs regarding their athletes, as such behaviors are not covered by the exhaustive list of anti-competitive practices established by their legislation.¹⁹

V. Organization of Sports Tournaments

While the sports industry requires a minimum number of competitors to work – and therefore there are no incentives for a club to become the only player in a tournament – sports governing bodies tend to monopolize the market for organizing sports competitions. In most sports and jurisdictions, governing bodies hold a *de facto* monopoly on this market. Furthermore, as mentioned above, such entities concentrate regulatory, administrative and judicial roles, which may create a systematic conflict of interest, allowing them to leverage their market

¹⁴ Salary caps can take different forms, for instance individual salary caps (maximum salaries paid to individual athletes), club salary caps (maximum total wage expenses of a club) or luxury taxes (surcharges paid by clubs whose payrolls exceed the salary caps).

¹⁵ Nevertheless, if such conducts are included within the context of a collective bargaining agreement between clubs and athletes (through the relevant players' union), they are exempted from the application of competition law.

¹⁶ COFECE (2021), *COFECE sanctions 17 clubs of the Liga MX, the Mexican Football Federation and 8 natural persons for colluding in the market of women and male soccer players' draft*, 23 September 2021, https://www.cofece.mx/wp-content/uploads/2021/09/COFECE-028-2021_ENG.pdf.

¹⁷ SIC (2021), *SIC abre investigación contra DIMAYOR y 16 clubes de fútbol, por presuntos actos anticompetitivos*, 26 November 2021, <https://www.sic.gov.co/boletin/juridico/integraciones-empresariales/sic-abre-investigaci%C3%B3n-contra-dimayor-y-16-clubes-de-f%C3%BAtbol-por-presuntos-actos-anticompetitivos>.

¹⁸ SIC (2023), *Superindustria abrió investigación a la DIMAYOR, la Federación Colombiana de Fútbol y 29 clubes por presunta cartelización en la liga profesional femenina*, 22 September 2023, <https://www.sic.gov.co/slider/superindustria-abrio-investigacion-la-dimayor-la-federacion-colombiana-de-futbol-y-29-clubes-por-presunta-cartelizacion-en-la-liga-profesional-femenina>.

¹⁹ Costa Rica (2023), *Contribution from Costa Rica, Latin American and Caribbean Competition Forum, Session III – Competition and Sports*, [https://one.oecd.org/document/DAF/COMP/LACCF\(2023\)7/en/pdf](https://one.oecd.org/document/DAF/COMP/LACCF(2023)7/en/pdf).

power from one activity to another, thereby foreclosing entry of new competitors. This may give sports organizations incentives to engage in anti-competitive behaviors.

In the market of the organization of sports events, there are two main categories of practices by sports organizations that might distort economic competition. First, conducts against competing leagues (so-called breakaway leagues). Second, practices against clubs or athletes that participate or might participate in a tournament.

So far, only one case has addressed this market in Latin America. In Chile, the national football association was sanctioned in 2020 for imposing an entry fee on clubs promoted from the third to the second division of the national football league. According to the TDLC, this conduct distorted competition, excluding from the market of sports events any teams who could not pay the fee and negatively affecting those that could. The TDLC's decision was confirmed by the Chilean Supreme Court in 2021.²⁰

While competition authorities in Latin America have not yet actively engaged in the discussion over the organization of sports leagues, experiences from foreign jurisdictions indicate that relevant competition concerns can arise in this area, especially as regards breakaway leagues.

In Europe, there are several cases related to exclusionary restrictions of breakaway leagues. In general, non-compete obligations or eligibility rules are imposed by sports organizations on their members, creating an *ex ante* control regime over third-party events. In practice, new tournaments need to be previously authorized by the incumbent sports organization under penalty of both clubs and athletes facing sanctions, including fines and exclusion from official competitions. In this context, the *ex ante*

control of new competitions can amount to an anti-competitive behavior if such powers are not “placed within a framework of either substantive criteria or detailed procedural rules suitable for ensuring that they are transparent, objective and non-discriminatory.”²¹

Indeed, there is a robust caselaw in the European Union – including recent decisions issued by the European Court of Justice in December 2023 – highlighting that sports organizations can be sanctioned for anti-competitive behavior for preventing, without objective reasons, breakaway leagues from entering the market, with negative effects on competing organizers of sports events, clubs, athletes, consumers, and broadcast audiences.²² Similar cases can also be found in the United States and in India.²³

VI. Conclusions

Despite its specificities, the sports industry is not immune to the application of competition law. In addition to sports competition, ensuring economic competition is crucial to further growth in this sector.

The enforcement of competition law in the sports sector is not new, but in recent years, competition authorities have been more active in assessing these markets. This international trend is also reflected in Latin America, where different cases have been brought by competition authorities regarding various aspects of the sports industry. While in some areas (e.g. sports broadcasting) the scrutiny has been more intense, in the years to come more cases should also emerge in other areas, such as in the market for the organization of sports events. This will ultimately help ensure that sports markets are more competitive from an economic perspective.

²⁰ Chile (2022), *Annual Report on Competition Policy Developments in Chile*, [https://one.oecd.org/document/DAF/COMP/AR\(2022\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2022)5/en/pdf).

²¹ Case C-333/21 (European Superleague Company SL v. FIFA and UEFA), judgment of the Court (Grand Chamber) of 21 December 2023.

²² For instance, Case C-333/21 (European Superleague Company SL v. FIFA and UEFA), judgment of the Court (Grand Chamber) of 21 December 2023, Case C-124/21 P (International Skating Union v. European Commission), judgment of the Court (Grand Chamber) of 21 December 2023. A number of EU national cases have also sanctioned sports organizations for similar exclusionary restrictions in various sports.

²³ See OECD (2023), *Competition and Professional Sports*, *OECD Competition Policy Roundtable Background Note*, www.oecd.org/daf/competition/competition-and-professional-sports-2023.pdf.