

## Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?

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### 1. Background

For several years now, both politicians and legal scholars have discussed the much vexed question of the so-called "sporting exception" to European (EU) law, sometimes referred to as the "specificity of sport". In fact, the debate goes all the way back to 1974 and the first real sports case to be heard by the European Court of Justice, namely, *Walrave & Koch*<sup>1</sup>. In that case, the Court confirmed that EU law did not apply to rules that were of pure "sporting interest" on the basis that such rules had nothing to do with the economic activities to which the EC Treaty relates<sup>2</sup>.

Put differently, European law only applies to "economic activities" within the overall meaning of Article 2 of the Treaty. In *Walrave*, the Court held that EU law did not apply to rules governing the composition of national sports teams (so, for example, a rule stipulating that the French football team may only be composed of French nationals cannot be challenged under EU law)<sup>3</sup>.

However, it is not always easy to identify those "sports rules" (or "non-economic" rules) that fall outside the scope of EU law. Essentially, both the European Court and the European Commission have left this question to be resolved on a "case-by-case" basis with the result that, on occasion, relatively far-fetched legal challenges have been brought against rules and practices in the world of sport. One of the best known examples was that of *Deliège*, a female judoka who was not selected to represent her country (Belgium) in an international judo tournament. She claimed that the decision to leave her out of the Belgian team violated her (EU) legal rights, in particular, her right "to provide services" under Article 49 (ex 59) of the EC Treaty. When the matter finally reached the European Court of Justice, it held that selection rules of this nature were "inherent in the organisation of sports competition" and, as such, could not constitute a restriction on freedom to provide services<sup>4</sup>. In *Deliège*, the ECJ also recognised that this type of selection system was best left to sports bodies, on the basis that they had the relevant knowledge and experience to do the job best<sup>5</sup>. Given the wording used and conclusions reached by the Court, the ruling offered at least some comfort to sporting authorities.

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<sup>1</sup> Case 36/74, *Walrave & Koch v. Association Union cycliste internationale* [1974] ECR 1405 ("Walrave")

<sup>2</sup> *Walrave*, para. 4.

<sup>3</sup> *Walrave*, para. 8.

<sup>4</sup> Case C-51/96 and C-191/97, *Deliège* [2000] ECR I – 2549, para 64 ("Deliège").

<sup>5</sup> *Deliège*, paras 67 and 68.

Thus, on the one hand, cases such as *Walrave* tell us that rules "of sporting interest only" fall outside the scope of EU law. On the other hand, cases such as *Deliège* tell us that rules "inherent to the organisation of sporting competition" also fall outside the prohibitions of the EC Treaty.

## **2. Meca-Medina: a sea change in the European Court of Justice case-law**

### **2.1 Introductory remarks**

The *Meca-Medina* case<sup>6</sup> offered the European Court of Justice a good opportunity to further develop and describe the specific "sporting rules" that fall outside the EC Treaty and, in so doing, give sports governing bodies a better understanding of the kind of rules and practices they could apply without fear of challenge under EU law. After all, this case concerned an EU based legal challenge to anti-doping rules - an area that most people would readily accept as falling within the natural and exclusive competence of the expert (sporting) regulator. Fundamentally, anti-doping rules are about detecting and preventing "cheating": if that is not a matter of "sporting interest" or something "inherent to the organisation of sporting competition" then it is difficult to imagine what is.

Unfortunately, in its ruling of 18 July 2006, the European Court of Justice did not clarify the scope and nature of the specific "sporting" rules that fall outside the scope of EU law. To the contrary, the Court appears to have taken a major step backwards by partly reversing the earlier ruling of the Court of First Instance and by setting out an open ended legal test which will, almost inevitably, invite an even greater number of EU based legal challenges to rules and practices in the world of sport. In fact, looking at the precise language used by the Court, it is now more difficult to identify specific sports rules that are not capable of challenge under EU law.

### **2.2 From Lausanne to Brussels**

To appreciate the factual and legal context here, it is useful to briefly describe the circumstances that arose in *Meca-Medina*. In this case, two professional swimmers were banned for four years as a result of using a prohibited substance (nandrolone). The ban was imposed by the FINA Doping Panel on 8 August 1999. The swimmers appealed to the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland) and, on 29 February 2000, the four year ban was upheld.

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<sup>6</sup> Case C-519/04 P, *Meca-Medina & Majcen v. Commission*, Judgment of 18 July 2006 ("Meca-Medina").

After new scientific evidence came to light, the parties agreed to refer the matter to CAS once more and, on 23 May 2001, the ban was reduced from four to two years. Evidently unsatisfied with that result, a week later (on 30 May 2001) the swimmers filed a complaint with the European Commission arguing that the IOC rules on doping (as implemented by the FINA) were against the competition provisions (Articles 81/82) of the EC Treaty. Given the timing of events (a week elapsed between the second CAS ruling and the letter to the European Commission) it seems reasonable to assume that this was probably not the weightiest competition law complaint ever submitted to the Brussels authorities.

In any event, in a decision taken in August 2002 the Commission rejected the complaint noting that the anti-doping rules were pure "sports rules" falling outside the scope of the EU competition law. At the time of the decision, Commissioner Monti said:

"it was understandable that the complainants would do whatever they could to contest the ban, which had been imposed under the IOC and FINA anti-doping rules. But this does not justify the intervention of the Commission, which takes the view that it is not its job to take the place of sporting bodies when it comes to choosing the approach they feel is best suited to combat doping."<sup>7</sup>

### 2.3 From Brussels to Luxembourg

However, after losing in Brussels, the swimmers then decided to appeal the decision of the Commission to the European Court of First Instance (CFI).

The CFI upheld the Commission's decision to reject the complaint<sup>8</sup>. It pointed out that the free movement provisions of the EC Treaty did not apply to pure sports rules (such as the anti-doping provisions) since this kind of rule had nothing to do with economic activity<sup>9</sup>. Following the same line of reasoning, the CFI concluded that anti-doping rules also had nothing to do with the economic relationships of competition, and so Articles 81/82 of the EC Treaty did not apply either<sup>10</sup>.

The CFI held that so long as the rules remained limited to their proper objective (protecting the spirit of fair play) and contained no element of discrimination then it was not for the Court (or the European Commission) to judge whether or not the rules were "excessive" or "disproportionate"<sup>11</sup>. It may be inferred that the

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<sup>7</sup> Commission Press Release, IP/02/1211

<sup>8</sup> Case T-313/02, *Meca-Medina v. Commission*, [2004] ECR II – 3291.

<sup>9</sup> *Meca-Medina*, CFI Judgment, para. 41.

<sup>10</sup> *Meca-Medina*, CFI Judgment, para. 42.

<sup>11</sup> *Meca-Medina*, CFI Judgment, para. 55.

Court had - for good reason - concluded that it was not really for the institutions of the European Union to become involved in determining, for example, how much nandralone should be permissible in the body tissue of a professional swimmer. This also seems to have been the concern expressed by Commissioner Monti. The CFI indicated that since the rules in question were "sporting" in nature the matter should be dealt with by sports bodies through their appropriate dispute resolution channels. In this connection, the CFI also referred to the fact that the swimmers had not exhausted all existing avenues of appeal, for example, they did not appeal the second CAS award (of 23 May 2001) to the Swiss Federal Court<sup>12</sup>.

The judgment of the CFI can be seen, therefore, as a firm defence of the Commission decision. In fact, the CFI even indicated that the Commission did more work than it had needed to, by also examining whether the anti-doping rules were intimately linked to the proper conduct of sporting competition and by checking whether they went no further than needed to achieve their objectives (in line with the *Wouters* case law<sup>13</sup> of the ECJ)<sup>14</sup>.

Importantly, the CFI stated that it was not necessary to make this kind of assessment in relation to pure sports rules<sup>15</sup>. Thus, broadly speaking, it may again be inferred that the CFI thought it was not the business of the European Commission or the European Courts to assess sports rules (such as anti-doping rules) under competition law and that disputes relating to such matters could and should be decided in more appropriate fora.

In this respect, the approach of the CFI seems entirely sensible from both a legal and policy point of view: even if one accepts that sport is now a "business" (which it often also is), there is still something faintly absurd about the European Commission being asked to adjudicate on whether or not a ban on a swimmer for taking a prohibited substance constitutes an appreciable restriction of competition in a relevant market and therefore contravenes European anti-trust law. Similarly, there was a touch of unreality about the claim by Ms Deliege that the decision of the Belgian judo federation to omit her from the national team infringed her "right to provide services" under EU law. Still, lawyers are nothing if not inventive.

## 2.4 The appeal before the European Court of Justice

Nevertheless, in *Meca-Medina*, the swimmers were not finished yet and they launched an appeal against the ruling of the CFI to the highest Court in Europe,

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<sup>12</sup> *Meca-Medina*, CFI Judgment, para. 67.

<sup>13</sup> Case C-309/99, *Wouters* [2002] ECR I-1577 ("Wouters").

<sup>14</sup> *Meca-Medina*, CFI Judgment, para. 62.

<sup>15</sup> *Meca-Medina*, CFI Judgment, para. 64.

namely the European Court of Justice. After the hearing, Advocate General Léger delivered his opinion<sup>16</sup> and totally rejected the appeal, which he described as "muddled". He observed that anti-doping provisions concerned the ethical aspects of sport and were not subject to the prohibitions of EU law, even if they had some or other ancillary economic consequence<sup>17</sup>. The Advocate-General was perfectly aware that high-level sport could involve big money: but that did not mean that sports rules, such as anti-doping rules, were therefore subject to the full rigours of EU law.

This was because any economic aspect of the rules was clearly secondary to their sporting aspect. Like the CFI, the Advocate General said that since anti-doping rules concerned sporting matters (and not regulation of market activities) there was no need to consider their effect under competition law (applying the *Wouters* test) and no need to engage in discussions about "proportionality"<sup>18</sup>.

Unfortunately, with the ruling of the European Court of Justice on 18 July 2006, the whole matter has been cast into confusion again. In this judgment, after a short reference to previous case law (*Walrave, Dona*<sup>19</sup>, *Bosman*<sup>20</sup>, *Deliège, Lehtonen*<sup>21</sup>), the Court uses some extremely broad language which may have major ramifications for future cases concerning sport. In particular, paragraph 28 of the judgment states as follows:

"If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty".

This key paragraph raises two questions: (1) when does a sporting activity "fall within the scope of the Treaty"?; and (2) what is a condition "for engaging in" (a sporting activity falling within the scope of the Treaty)?

## 2.5 What went wrong before the Court?

As regards (1) it seems likely that in most cases "sporting activity" will be deemed to fall under the Treaty. It certainly appears that all professional sports will be caught. Indeed, it may even be that amateur sport is covered (not so long ago the Commission threatened to take the Spanish Government to court

<sup>16</sup> *Meca-Medina*, Opinion of Advocate General Léger, delivered 23 March 2006 ("AG Opinion").

<sup>17</sup> *Meca-Medina*, AG Opinion, paras 20 and 28.

<sup>18</sup> *Meca-Medina*, AG Opinion, paras 33 and 38. The Advocate General considered that it was not for the European Court of Justice to pronounce on the scientific justification of a regulation which was adopted by the International Olympics Committee in the context of the battle against doping.

<sup>19</sup> Case 13/76, *Dona v. Mantero* [1976] ECR 1333 ("Dona").

<sup>20</sup> Case C-415/93, *Bosman* [1995] ECR I-4921 ("Bosman")

<sup>21</sup> Case C-176/96, *Lehtonen* [2000] ECR I-2681 ("Lehtonen")

because of alleged discrimination regarding access to amateur sports events in Spain)<sup>22</sup>.

Question (2) is more difficult but nevertheless of critical importance. What is a condition "for engaging in" sporting activity? There are certainly many sports rules and practices regulating eligibility to participate in competitions which could reasonably be described as representing conditions for "engaging in" professional sport. It now seems that if a sports rule can be classed as a condition "for engaging in" sporting activity then review of that rule under free movement law or competition law becomes inevitable.

Whilst the picture is not entirely clear, it would appear that what the Court is particularly concerned about here are those rules or regulations which concern access to (economic) sporting activity, especially measures which affect employment. In this connection, it is notable that all the previous cases cited by the Court - *Walrave*, *Dona*, *Bosman*, *Deliège*, *Lehtonen* - concerned challenges to sports rules or practices which impacted on access to "gainful employment" in the sports business, one way or another. It seems to be in this particular area that the ECJ believes EU law really has to bite.

If this interpretation is correct, it would at least mean that there are some categories of sports rules - for example concerning the size of the ball or the kind of advertising allowed on kit - which would not be subject to EU legal challenge. These rules cannot be sensibly described as representing conditions "for engaging in" sporting activity. Following this approach, the so-called "player release" rule (currently being challenged in the Charleroi case) might also not fall within the prohibitions of the EC Treaty: that rule exists for pure sports related reasons (i.e. the fair and efficient organization of national team competitions) and does not constitute any kind of barrier to employment.

Nevertheless, it is not difficult to see how the position adopted by the Court may still open up a "Pandora's box" of potential legal problems. For a start, almost any sports disciplinary measure for any offence (e.g. doping, match-fixing, gambling, bad conduct, etc) might be described as representing a condition "for engaging in" sporting activity (in the sense that such measures may restrict somebody from "working"). Thus, all disciplinary measures (especially those imposing significant penalties) could, it seems, now be susceptible to challenge under EU competition law. It may also be assumed that the view taken by the Court applies to the position of clubs as well as players. There are a myriad of sports rules and regulations concerning the eligibility of clubs to participate ("engage in") sporting competition. Should all of them be subject to review under EU law? The judgment of the ECJ seems to indicate that the answer is yes, even though it seems difficult to imagine the ECJ would have wished for such a result.

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<sup>22</sup> Commission Press Release, IP/04/1222.

To add to the confusion, the ECJ also indicated that even if a rule is considered a sports rule for the purposes of free movement law, it is still necessary to assess (separately) whether the same measure is a sports rule for the purposes of competition law. On this point, it is important to recall that the European Court of First Instance reasoned that if a sports rule was "non-economic" in character (and so outside the prohibitions of free movement law) then logically the same rule would be outside the prohibitions of competition law as well. It is submitted that there is a powerful logic to this position, stemming from the fact that the EC Treaty itself only applies to "economic activities" within the meaning of Article 2 (an approach that goes back to Walrave). Consequently, if a sports rule is "non-economic" in character the Treaty (i.e. all of it) does not apply and that is the end of the matter.

However, in what can only be described as a strange twist, the ECJ held that even if a sports rule has nothing to do with economic activity for the purposes of free movement law, that conclusion did not necessarily mean that the same rule has nothing to do with economic activity for the purposes of competition law<sup>23</sup>. In other words, the Court appears to contemplate that a sports rule could be "non-economic" (and outside the scope of free movement law) but could nevertheless infringe Articles 81/82, despite the fact that these latter Treaty provisions are only concerned with the economic relationships of competition. It is very difficult to find logic in this.

In any event, the bottom line appears to be that a separate competition law assessment needs to be made even in cases where it is established that the free movement prohibitions are inapplicable. Moreover, in making this separate (competition law) assessment the test to apply is whether any restrictions are inherent in the objectives pursued by the contested rule and whether these restrictions are "proportionate" and "limited to what is necessary to ensure the proper conduct of competitive sport"<sup>24</sup>. In sum, therefore, it seems that any sports rule that represents a condition "for engaging in" (economic) sporting activity will have to satisfy these competition law tests. For the avoidance of doubt, it should be emphasised once again that these are exactly the kind of uncertain and subjective tests that the CFI and the Advocate General had - quite properly - said it was not necessary to satisfy in the case of true sports rules. However, the ECJ has now reversed this position.

Now, how will these unfortunate legal conclusions fit the reality of sport in practice? A few examples may be illustrative in this respect. Could this mean, for example, that a decision to reduce the number of clubs in a national league (e.g. from 20 to 16) should be examined to determine whether it (i.e. the "restriction" on the number of clubs) is properly "limited to what is necessary" to

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<sup>23</sup> *Meca-Medina*, para. 31.

<sup>24</sup> *Meca-Medina*, para. 42.

protect competitive sport? Obviously, such a rule may concern the issue of "access" to the league competition. One could ask the same question in relation to a sports sanction relegating a team to a lower division or possibly even imposing a deduction of points. There have - unfortunately - been several such instances over the years. Now, apparently, it may be necessary to assess whether relegation was a "proportionate" response, as a matter of competition law. Similar questions could arise in relation to a rule imposing e.g. maximum squad size limits. Whilst there are obvious sporting reasons for having such a limit it again seems that EU anti-trust law may be invoked to establish whether a limit would go "no further than needed" to protect sporting competition, in particular since such a limit may impact on "access" to the employment market. Of course, everyone is entitled to their personal opinion on these matters but if this trend continues what we will end up with is the effective transfer of "normal" regulatory functions from sports governing bodies to the European Commission in Brussels and/or the European Courts in Luxembourg.

This wider danger is, indeed, starkly illustrated by the Meca-Medina case itself. Here, having set out what it considered to be the correct legal test, the European Court of Justice went on to examine the impact nandrolone could have on athletic performance, whether the substance could be produced endogenously by the body above certain levels and so on. One might say that in having to conduct such an exercise - in order to ascertain compliance with Articles 81/82 of the EC Treaty - the Court itself had eloquently demonstrated the error of its earlier legal analysis. Moreover, at no point did the Court seem to consider it relevant to mention that exactly the same issue had already been considered (twice) by the CAS, by any standards a far more appropriate forum for examining matters of this nature. Nor was there any reference (as in *Deliège*) to the role and expertise of sports regulators in this sphere. Indeed, the Court of Justice stated that one of the mistakes the applicants made in pleading the case was not to argue that the penalties imposed on the swimmers actually were excessive<sup>25</sup>.

Without question, the final judgment is unsatisfactory from a legal point of view and may well fuel (competition law) claims against sports bodies in the future. The reality is that such claims are frequently couched in competition law terms these days. Complainants or litigants can turn to the European Commission, to national courts or to national competition authorities as well. A typical feature of such claims is that complainants often tend not to bother with the niceties of competition law (such as setting out an intelligible market definition) and prefer instead to argue that a sports governing body is, by definition, "dominant" on some or other market and/or that a unpopular rule constitutes an "abuse" of that dominant position.

Encouraged by the judgment in Meca-Medina, it is to be expected that complainants will now amplify arguments to the effect that sports rules and

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<sup>25</sup> *Meca-Medina*, para. 55.

practices have "disproportionate" effects or are "not limited to what is necessary for the proper conduct of competitive sport" and, in this way, "prove" a violation of competition law. It seems the European Court of Justice (unlike the CFI) has now declared its interest and willingness to examine all manner of such arguments in the future. The European Commission may also have a harder job in rejecting vexatious claims under competition law.

### **3. More general policy conclusions**

Over the past 30 years or so (and especially in the last decade), the Court of Justice, the Court of First Instance and the European Commission have all tried to articulate the meaning of "sporting specificity" and to define more clearly the boundaries of Community law in relation to sports matters. Admittedly, this has been done on a case-by-case basis, with the result that both sports bodies and their legal advisers have had to find common themes in the case-law and then assess what scope remains for autonomous decision making. Whilst this approach is not entirely satisfactory, at least certain key principles seemed to be emerging and it was also against this background that the European Heads of Governments adopted the Nice Declaration in 2000, in which they explicitly recognized the right of sports bodies to organise and promote their respective sports, in particular as regards specifically sporting rules. It is very difficult to reconcile the policy sentiment expressed in Nice with a judgment of the European Court of Justice that envisages anti-doping rules being examined under EU competition law. Thus, both legally and politically, therefore, this ruling is a major step backwards.

It is not only unwelcome but also ironic that the European Court of Justice has chosen this particular moment to potentially open the floodgates for legal claims in relation to sports rules. Political leaders are, at precisely this time, calling for greater clarity with regard to the legal environment in which sport operates and for a better and clearer definition of sporting specificity. Indeed, this is largely a continuation of the political mood that resulted in the adoption of the Nice Declaration in the first place: namely, a general concern about the special place of sport in the Community, the fact that it is different from other forms of economic activity and the obvious dangers that result from applying the law to sport as though it was simply just some other form of "business".

In this respect, the Independent Review of European Sport, recently completed and conducted under the Chairmanship of former Portuguese Deputy Prime Minister Jose Luis Arnaut, had the task of proposing measures to secure the effective implementation of the Nice Declaration and a key Recommendation emerging from the Review is the need to clarify the kind of "sports rules" that fall outside the scope of the EC Treaty, where the legitimate autonomy of sports governing bodies must be recognised and respected. In *Meca-Medina*, the European Court of Justice appears to have paid not the slightest bit of attention

to this political background, perhaps indicating that the judges in Luxembourg (or at least some of them) are quite detached from the prevailing political mood in Europe.

The main task of the Court of Justice is to interpret and apply the EU Treaties, frequently for the benefit of national courts facing difficult questions of EU law in cases arising before them. In fact, over the years, most of the sports cases ending up in the European Court of Justice arrived following a reference for a "preliminary ruling" by a national court (*Walrave, Bosman, Lehtonen, Deliège, Simutenkov*<sup>26</sup>, to name a few). And, of course, there are other high profile references pending before the ECJ, where a ruling may be expected at some point in the future (the *Charleroi* case being perhaps the best example<sup>27</sup>). The *Meca-Medina* case, where the applicant made a direct challenge to a decision of the European Commission is something of an exception. In any event, rulings of the European Court of Justice are followed not only by national courts in the European Union but also by the European Commission, when it applies European law (for example, in the sphere of competition law). National competition authorities will, by and large, also follow the pronouncements of the Commission on competition law matters. All this means that judgments of the European Court of Justice have very major ramifications for all courts and administrative authorities involved in the business of applying competition law.

However, in the European Community, as in most national legal systems, the principle is that courts (including the Court of Justice) apply the law rather than make it. It may be observed, on the basis of *Meca-Medina*, that the Court of Justice has shown little interest in defining more clearly the scope of the sporting exception and has, for the reasons explained above, moved in the opposite direction in such a way that is likely to increase the scope for legal uncertainty and result in more competition law claims being levelled against sports bodies, often on spurious grounds that have little if anything to do with the functioning of economic competition in the European Union.

Against this background, greater clarification as to the meaning of sporting specificity will, in all probability, have to be delivered by the political leaders of Europe once they have had an opportunity to reflect further and if they also determine that this kind of judicial activism has gone too far.

The Treaty can, of course, be amended by the Member States and if the Constitutional Treaty had not been abandoned in the wake of the French "no" vote it would have, for the first time, contained an Article dedicated to sport<sup>28</sup>. Thus, on the positive side, it appears that there is a political will to address some of the issues and concerns faced by sports bodies and this feeling came through

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<sup>26</sup> Case C-265/03, *Simutenkov* [2005] ECR I-2579 ("Simutenkov").

<sup>27</sup> Case C-243/06, *Sporting Charleroi and G14 v. FIFA and others*, pending.

<sup>28</sup> Article I-17 and Article III-282, Treaty establishing a Constitution for Europe (2004) OJ C 310.

both in the lead up work and in the final conclusions of the Independent Review. Now, more than ever, there is a need for politicians to re-visit and focus on this issue to see what corrective measures can be taken to produce greater legal certainty, not only for the protection of sport but also to deter possible abuses of the EU legal system for purposes that were never intended.

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