Chapter 14
Anti-doping Revisited: The Demise of the Rule of 'Purely Sporting Interest'?

Contents

14.1 Introduction

On 18 July 2006 the European Court of Justice (ECJ) set aside the decision of the Court of First Instance (CFI) in *Meca-Medina and Majcen* v. *Commission*.[1] Before the CFI the applicants, who are professional swimmers, had unsuccessfully applied for annulment of the Commission's decision to reject their complaint that bans imposed on them for violation of the sport's anti-doping rules contravened EC competition law.[2] The swimmers also failed before the ECJ which, having set aside the CFI's judgment, dismissed the application for annulment of the Commission's Decision. However, the ECJ's ruling is significant for rejecting the CFI's relatively generous approach to the scope of sporting autonomy to apply rules with economic effects. In what may prove to be the most enduring phrase in the judgment, the ECJ ruled that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person

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[1] Case C-519/04 P, judgment of 18 July 2006.
[2] Case T-313/02, [2004] *ECR* II-3291.

S. Weatherill, *European Sports Law*,
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engaging in the activity governed by that rule or the body which has laid it down'.[3] The ECJ's approach is in line with that suggested in this Review by the present author in a critical comment on the CFI's decision,[4] but the purpose of this contribution is not simply to reflect on (what I consider to be) a helpful correction to the basis of interaction between EC competition law and sport, but rather also to look forward to future challenges. The practical effect of *Meca-Medina and Majcen*, as an authoritative statement of the limits of sporting autonomy under EC competition law, is to assert EC law's firm grip over the choices available to governing bodies, and this has important implications *inter alia* for the looming litigation arising out of FIFA's rules compelling football clubs to release their players for international representative matches.

14.2 The Challenge of EC Law and Sport

The straightforward fact pattern of the case illuminates the sensitive issues at stake when sport and the law collide. The swimmers were deprived of their means of making a living by the ban from competition which, after an appeal, was set at two years in duration. So the economic detriment of the action taken against them was plain. And yet this is clearly not only a matter of economics. Sport is based on fair play – it is structured around rules which define the essence of the endeavour. Keeping out drug cheats has an undeniable economic context, but at the same time it is an existential choice: sport is only sport if there is a level playing field for competitors. This, then, forms the heart of the conundrum. Sporting rules have an economic effect. But without some fundamental rules there is no sport. So how does EC law fit in?

The EC Treaty is not helpful. The EC Treaty does not refer to sport at all. The EC is not constitutionally competent to adopt legislation with the explicit aim of regulating sport. But its economic law provisions apply to sport because sport has an economic context. In Walrave and *Koch* v. *Union Cycliste Internationale*, the first case involving sport to reach the European Court,[5] the Court stated that the practice of sport is subject to Community law 'in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty', an approach followed in *Donà* v. *Mantero*[6] and vigorously confirmed by the European Court in *Bosman*.[7] This is now settled law. What is at stake is a quest to develop a 'policy' that is driven by the dictates of trade integration yet is also appropriately sensitive to the particular needs of sport.

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[3] Para. 27 (ECJ).

[4] Weatherill 2005A, 416.

[5] Case 36/74, [1974] *ECR* 1405.

[6] Case 13/76, [1976] *ECR* 1333.

[7] Case C-415/93, (1995) *ECR* I-4921.

Sport, it is worth noting, is not alone in setting EC law such a challenge. In a number of areas the functionally broad reach of the Treaty provisions on free movement and competition collide with Member States powers to act in realms where the Community lacks competence under the Treaty to usurp national regulatory choices by acting as a substitute legislator. Social security provides a good a example of how EC trade law forces adjustment of national practices which obstruct inter-State trade in the absence of adequate justification[8]; taxation is another[9]; and even the maintenance of public order and the safeguarding of internal security have been revealed as matters of national competence that are nevertheless reviewable in so far as their pursuit impedes cross-border trade.[10] The EC does not become a substitute regulator in these realms, but it confines the exercise of national autonomy in consequence on the consistently extensive interpretation applied to the rules governing the building of an integrated, competitive market. This perspective captures the Court's several rulings which assert the conditional autonomy of sporting bodies under EC law and it also informs the Commission's batch of interventions into the sports field on the basis of the competition rules of the Treaty. From this has grown a rich literature exploring the concept of EC sports law and policy, which explores how the institutions of the EU seek to piece together a coherent approach against a Treaty background which is barren of sports-specific material and reveals how EC law, by empowering a range of actors, tends to erode the self-regulatory paradigm which has for so long been dominant in sports governance.[11]

What precisely is this notion of 'conditional autonomy' under EC law to which governing bodies in sports can lay claim? This plainly matters in determining the basis and scope of legal challenge to penalties imposed for breach of anti-doping rules, but the need for a coherent legal framework goes much further and wider.

As mentioned, the ECJ has consistently placed sport within the scope of Community law 'in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty'; indeed this formula appears prominently in the ECJ's judgment in *Meca-Medina and Majcen*.[12] So if sport is not an economic activity it falls outside the reach of the Treaty. How is this statement of principle elucidated in the case law?

Walrave and Koch[13] involved nationality-based discrimination, which one would normally assume to fall foul of (what is now) Article 12 EC's prohibition of such practices. However, the Court treated the composition of national sports

[8] Cf., e.g., Case C-512/03 J E J Blankaert judgment of 8 September 2005; Case C-372/04 *ex parte Watts*, judgment of 16 May 2006, Para. 121.

[9] Cf., e.g., Case C-446/03 *Marks and Spencer* v. *Halsey*, judgment of 13 December 2005.

[10] Case C-265/95 *Commission* v. *France*, [1997] *ECR* I-6959.

[11] E.g., Parrish 2003; Greenfield and Osborn 2000; Barani 2005, 42; Van den Bogaert and Vermeersch 2006.

[12] Case C-519/04P, judgment of 18 July 2006, Para. 22.

[13] Case 36/74 cited above, note 5.

teams as unaffected by the prohibition where their formation is 'a question of purely sporting interest and as such has nothing to do with economic activity'. In *Donà* v. *Mantero*[14] the Court held that the Treaty provisions governing free movement do not prevent practices that exclude foreign players from certain matches for 'reasons which are not of an economic nature' and which are 'of sporting interest only'. In *Bosman*[15] the Court, citing its judgment in Donà, again adopted this formula, but, reflecting the insistence found in the Walrave judgment and repeated subsequently that this 'restriction on the scope of the provisions in question must however remain limited to its proper objective', offered confirmation that the Court will patrol the limits of the autonomy granted to sports federations to set rules undisturbed by the demands of EC law. In *Bosman* the Court refused to accept that nationality-based restrictions in club football constituted legitimate rules of sporting interest.[16] It concluded that they fell within the scope of, and violated the requirements of, the EC Treaty.

In *Bosman* the Court also brought within the scope of the Treaty, and found incompatible with it, rules governing the transfer of players between clubs,[17] while in *Lehtonen* it ruled against transfer windows that vary according to the origin of the player.[18] The Commission found discriminatory ticketing practices for the 1998 World Cup fell foul of Article 82, and imposed a small fine on the organisers.[19] On the other hand, it is not only rules on the composition of national representative teams that have been allowed to continue undisturbed by the EC law.[20] Rules relating to selection for high-level international competitions were similarly favourably treated.[21] A similar approach has been taken by the Commission to rules forbidding multiple ownership of football clubs.[22] Eliminating any suspicion of match-fixing is indispensable to genuine sporting competition, and therefore any consequent restriction on commercial opportunity to acquire clubs could not be regarded as a restriction falling foul of Article 81(1). More generally the Court in *Bosman* acknowledged that '[i]n view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate'.[23] No adequate

[14] Case 13/76 cited above, note 6.

[15] Case C-415/93, [1995] *ECR* I-4921.

[16] See also Case C-438/00, *Deutscher Handballbund eV.* v. *Kolpak*, [2003] *ECR* I-4135.

[17] Case C-415/93 cited above, note 15.

[18] Case C-176/96, [2000] *ECR* I-2681.

[19] Dec. 2000/12 1998, *Football World Cup*, *OJ* 2000 L 5/55. For comment, see Weatherill 2000, 275.

[20] Case 36/74 cited above, note 5, Case 13/76 cited above, note 6.

[21] Cases C-51/96 & C-191/97, *Deliège*, [2000] *ECR* I-2549.

[22] COMP 37.806 *ENIC/UEFA*, IP/02/942, 27 June 2002.

[23] Para. 106 of Case C-415/93 cited above, note 15.

justification was forthcoming for the practices impugned in the case, but the Court here set out a framework for determining when sporting rules may be regarded as legitimate means to achieve such ends.

But why do some sporting rules escape condemnation under EC law? It is submitted that in very few cases is it because they have no economic effects. Normally it is because their economic effects are a necessary consequence of their contribution to the structure of sports governance. So nationality rules governing the composition of national representative teams do have an economic effect – by confining the opportunities enjoyed by players to choose which country to play for, by structuring international football in a way that appeals to spectators, sponsors and so on – but they serve to define the very endeavour of international competition, the character of which would be destroyed without such rules. In similar vein appropriately structured transfer rules and transfer windows might survive inspection against the requirements of the Treaty but not because they are devoid of economic effect. Such rules are not as a category outwith the scope of the Treaty, but provided they are shown to be necessary elements in sports governance the conclusion is that they do not fall foul of the network of provisions regulating trade under the Treaty.

The Court has not always been easy to read on this point. In *Walrave and Koch* the Court referred to 'a question of purely sporting interest' which 'as such has nothing to do with economic activity'. Perhaps there are some such rules which are beyond the reach of the Treaty – the detail of the offside rule perhaps, or the length of a match – but most rules of sporting interest are not purely of sporting interest, they also impinge on economic activity. In practice, the Court's consistent insistence that any restriction on the scope of the Treaty provisions in question must remain limited to its proper objective has helped to contain inflated claims to sporting autonomy via this unhappy 'purely sporting interest' formula. But in *Meca-Medina and Majcen* the CFI fell into error by making improper use of the notion that a rule may be of sporting interest and therefore non-economic for the purposes of the application of EC law. The ECJ has corrected this error and, in particular through its embrace of the '*Wouters* formula' as a basis for reviewing sporting practices, it has provided a much more satisfying basis for understanding the treatment of sporting of rules which have economic effects under Article 81 EC. And, more profoundly still, its judgment is capable of being read as having extinguished the notion that EC law recognises and therefore leaves untouched the 'purely sporting rule', at least where such a rule has economic consequence. *Meca-Medina and Majcen*, then, is a landmark judgment.

14.3 The CFI's Approach in *Meca-Medina and Majcen*

In *Meca-Medina and Majcen* v. *Commission*[24] the CFI, declining to annul the Commission's decision rejecting the swimmers' complaint,[25] twisted itself into knots as a result of failure clearly to grasp what the ECJ had astutely though evasively described in *Bosman* as the 'the difficulty of severing the economic aspects from the sporting aspects of football'.[26] I have criticised the judgment already in this Review[27] and will here do more than summarise the CFI's judgment for the purposes of proving a background to discussion below what the ECJ has now done on appeal.

In *Meca-Medina and Majcen* the CFI began by repeating the orthodox judicial view that sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 EC.[28] It then attempted to insist that anti-doping rules concern exclusively non-economic aspects of sport, designed to preserve 'noble competition'[29] and therefore outwith the scope of the EC Treaty. This led it into intellectually murky alleyways. At Paragraph 41 the CFI referred to 'purely sporting rules, that is to say rules concerning questions of purely sporting interest and, as such, having nothing to do with economic activity' and juxtaposed this to a description of 'regulations, which relate to the particular nature and context of sporting events, are inherent in the organisation and proper conduct of sporting competition and cannot be regarded as constituting a restriction on the Community rules on the freedom of movement of workers and the freedom to provide services'. But this is to conflate two different points. Perhaps there is a (small) category of purely sporting rules unassociated with economic activity, but regulations inherent in the organisation and proper conduct of sporting competition form a much larger category in which economic effect is commonly present. Similarly at Paragraph 44 the CFI observed that the 'the campaign against doping does not pursue any economic objective'. That may not be true, for the CFI itself refers at Paragraph 57 to the economic value of a 'clean' sport to its organisers, but even if true, this is not of itself a reason for locating that campaign outside the Treaty. Anti-doping rules certainly have economic effects on those found to have contravened them. Attempts to present such rules as 'sporting' and not 'economic' are unhelpful. They are both.

True, the notion that there is in principle a separation between sporting rules (which escape the scope of application of EC law) and rules of an economic nature

[24] Case T-313/02, [2004] *ECR* II-3291.

[25] COMP 38.158.

[26] Para. 76 of Case C-415/93, cited above note 15.

[27] Weatherill 2005A, 416.

[28] Para. 37.

[29] Para. 49.

(which do not) reflects the nature of the EC as an institution possessing a set of attributed competences, of which sport is not one.[30] But EC law has a broad functional reach because so few activities exert no economic impact. The CFI's attempt in *Meca Medina* to roll back this general trend in the special case of sport, though doubtless a source of delight to sports federations, was constitutionally deeply unconvincing. Rules governing the composition of national sports teams or the conduct of anti-doping controls may define the nature of sporting competition but they visibly have economic repercussions (for players most of all). What is really at stake is not a group of sporting rules and a separate group of economic rules, but rather a group of sporting rules which carry economic implications and which therefore fall for assessment, but not necessarily condemnation, under EC trade law.

14.4 The Appeal: Setting Aside the CFI's Judgment

On appeal, the ECJ took a significantly different and, it is submitted, superior approach. In *Meca-Medina and Majcen* v. *Commission* it dismissed the swimmers' application for annulment of the Commission Decision rejecting their complaint, but it corrected the legal analysis put forward the CFI.[31] In doing so, it took no notice of an Opinion submitted on the very same day as the oral hearing by its Advocate-General, Mr Leger, which proposed dismissal of the appeal while adding reasoning even more unpersuasively convoluted than the CFI's. Mr Leger admitted that sport's commercial context endows anti-doping rules with an economic interest, but asserted that this is 'purely secondary' and cannot deprive the rules of their 'purely sporting' character.[32] This is disappointingly impure reasoning.

The ECJ had no time for such intellectual self-bondage. It began by adding *Meca-Medina* to the list of cases in which it has asserted that 'sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC'. It added that the prohibitions contained in Articles 39 and 49 EC 'do not affect rules concerning questions which are of purely sporting interest and, as such, have nothing to do with economic activity', citing Walrave and Koch. It then referred to 'the difficulty of severing the economic aspects from the sporting aspects of a sport' (which of course derives from *Bosman* though that is not cited in connection with this phrase), confirming its view that the free movement provisions 'do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events', adding

[30] Art. 5(1) EC, vigorously applied by the Court in Case C-376/98, *Germany* v. *Parliament and Council*, [2000] *ECR* I-8419 in finding the 'Tobacco Advertising' Directive invalid.

[31] Case C-519/04 P *Meca-Medina and Majcen* v. *Commission*, judgment of 18 July 2006.

[32] Para. 28 of the Opinion delivered on 23 March 2006.

in line with long-standing judicial practice that such a restriction on the scope of the provisions in question must remain limited to its proper objective.

So 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down'.[33] And if the sporting activity in question falls within the scope of the Treaty, the rules which govern that activity must satisfy the requirements of the Treaty 'which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition'.[34]

The CFI was adjudged to have made an error of law in assuming that purely sporting rules which have nothing to do with economic activity and which therefore do not fall within the scope of Articles 39 EC and 49 EC equally have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC. Instead the specific requirements of Articles 81 and 82 should be considered. In the absence of such analysis, the contested judgment was therefore set aside.

This part of the ECJ's judgment is brief and, in its broad message (if any), not easy to decipher, but it is probably best taken on its own limited terms, and not as a general rebuke to those who would argue for convergence between the provisions on free movement and the competition rules. Kamiel Mortelmans, for instance, has examined the current unsystematic state of the law and put forward the view that a degree of convergence should be recognised and welcomed, but that the provisions are not identical in their objectives and that therefore complete convergence is inappropriate.[35] Renato Nazzini has argued that at the level of detail there is no convergence, although he accepts a methodological comparability in the general trend to allow a 'softening' of basic Treaty provisions by reference to factors other than those expressly set out in the derogations contained in the Treaty (Arts. 30, 46 81(3)).[36]

My own view is that it would be unsatisfactory for a practice that is treated necessary for the organisation of sport under the free movement provisions then to be condemned under the competition rules – and it would be equally unsatisfactory for a practice that is treated necessary for the organisation of sport under the competition rules to be found incompatible with the free movement provisions. In my view there is and should be an ultimate functional comparability between the inquiries conducted under these provisions in order to discover the scope of conditional autonomy properly allowed to sporting bodies – and accordingly in this paper I have placed little emphasis on whether case law arises under the rules on free movement or on competition (or both). If rules are shown to be necessary for the effective organisation of sport, then they are not incompatible with EC trade

[33] Para. 27.

[34] Para. 28.

[35] Mortelmans 2001, 613. Cf. Weatherill 2003, 51, 80–86; O'Loughlin 2003, 62.

[36] Nazzini 2006, 497.

law, whichever provision is invoked. And, as a corollary, where the restrictive effect trespasses beyond what is necessary to achieve the rule's proper objective, the basic Treaty prohibitions bite. So, by insisting on viewing the sporting rules in their proper context, I argue here for 'convergence in outcome' between free movement law and the competition rules. Admittedly the ECJ in *Meca-Medina and Majcen* rebukes the CFI for failing to separate out the different detailed elements at stake in an analysis under Articles 39 and 49, on the one hand, and Articles 81 and 82, on the other, but I do not think the ECJ is doing anything more remarkable than drawing attention to the thinness of the CFI's analysis. The CFI did not even touch on possible differences between the provisions, which could encompass personal scope, need for market analysis, the role of 'internal situations', burden of proof and so on.[37] The ECJ, in Paragraphs 32–33, is merely drawing attention to the inadequacy of Paragraph 42 in the CFI's judgment. It is not making any deeper normative criticism of the convergence thesis.

What is considerably more important than its brief finding that the CFI's analysis is inadequate is how the ECJ then proceeds itself to assess the claim for annulment of the Commission's decision rejecting the swimmers' complaint. Here, I submit, the ECJ puts the interpretation of Article 81 on the right track and should be taken also to have set a (convergent) course for the other economic law provisions in the Treaty that may affect sport.

14.5 The Appeal: Rejecting the Application for Annulment

The ECJ did not remit the case to the CFI. In accordance with Article 61 of the Statute of the Court of Justice, it felt it appropriate to give judgment on the substance of the appellants' claims for annulment of the Commission decision rejecting their complaint. And it rejected their application. That outcome is not of great interest beyond the facts of the case itself, but the most significant element of the ECJ's examination concerns the role of the judgment in *Wouters*.[38] The way this is handled by the ECJ is of profound importance to the future treatment of sport under EC competition law and also – though this is less fully developed in Meca Medina – to the general question of where *Wouters* fits into the general law on Article 81(1) EC.

In *Wouters* the Court stated that in applying Article 81(1) account must be taken of

> 'the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives. […] It has

[37] Cf. Opinion of A-G Poiares Maduro in Case C-205/03P *Fenin* v. *Commission*, especially Para. 51.

[38] Case C-309/99, *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV* v. *Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] *ECR* I-1577.

> then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives'.

The case had nothing to do with sport. It concerned rules prohibiting multi-disciplinary partnerships between members of the Bar and accountants. But the statement of principle that the notion of a restriction falling within Article 81(1) must be assessed in context is readily capable of broader application. In the case of sport, the reasoning in *Wouters* invites an argument that the overall context in which sports regulation occurs, built around pursuit of a broad objective of fair competition, produces effects which though apparently restrictive of competition are nonetheless inherent in the pursuit of those objectives and therefore permitted.

In *Meca-Medina and Majcen* the Commission had explicitly quoted the judgment in *Wouters* in its Decision.[39] It concluded that there could be no true sport without anti-doping controls and that accordingly there was no breach of Article 81.[40] By contrast, the CFI had sidelined *Wouters* for reasons that were logical once it had chosen to analyse the anti-doping rules as 'purely sporting'. The CFI considered that *Wouters* concerned 'market conduct', an 'essentially economic activity, that of lawyers'. Anti-doping cannot be likened to market conduct without distorting the nature of sport, which 'in its very essence has nothing to do with any economic consideration'.[41] The Commission's reliance on *Wouters* was, however, not fatal to the validity of its Decision, largely because the Commission persuaded the CFI at the oral hearing that this was an analysis performed 'in the alternative' or more 'for the sake of completeness'.[42] The core of the Commission's approach was to find anti-doping rules 'purely sporting' in nature, a conclusion of which the CFI approved. But in *Meca-Medina* this approach was not accepted by the ECJ in the part of the judgment that will carry most important long-term resonance.

The appellants' principal contention was that in rejecting their complaint the Commission wrongly decided that the anti-doping rules at issue were not a restriction of competition within the meaning of Article 81 EC. They submitted that the Commission misapplied the criteria established by the Court of Justice in *Wouters*. They argued that the rules were, contrary to the Commission's findings, not inherent in the objectives of safeguarding the integrity of competitive sport and athletes' health, but that they sought to protect the IOC's own economic interests. Second, in laying down a maximum level which did not correspond to any scientifically safe criterion, the rules were criticised as excessive in nature and thus extending beyond what was necessary in order to combat doping effectively.

These, it will be noted, are distinct lines of attack. The first concerns the juridical basis of challenge pursuant to EC law. The second is concerned with the

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[39] Cited above, note 25, p. 10.

[40] Under a similar analysis, nor, in my view, would there be a breach of the free movement provisions.

[41] Para. 65 (CFI).

[42] Para. 62 (CFI).

detail of the review. The appellants could conceivably succeed on the first point, but lose on the second. Roughly speaking, this is what happened.

The ECJ drew on existing case law in its interpretation of Article 81(1):

> 'the compatibility of rules with the Community rules on competition cannot be assessed in the abstract (see, to this effect, Case C-250/92 DLG [1994] ECR I > 5641, Para. 31). Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings 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 (*Wouters and Others*, Para. 97) and are proportionate to them'.[43]

So, in contrast to the CFI, the ECJ did not seek to attribute special magic to sporting rules. Anti-doping rules cannot simply be excluded from the scope of review pursuant to EC competition law by reference to their role in ensuring fair play. They must be examined in their proper context, including recognition of their economic effect. But placing the rules within the ambit of the Treaty does not mean they will be forbidden by it. The general objective of the rules was to combat doping in order for competitive sport to be conducted on a fair basis; and the effect of penalties on athletes' freedom of action must be considered to be inherent in the anti-doping rules. The Court considered that the rules did not constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they pursue a legitimate objective.[44]

There is room for sporting autonomy – but it is a conditional autonomy. This is precisely in line with the general trend of the case law which had been mishandled by the CFI in its misplaced zeal to separate sporting rules from economic rules. And the ECJ helps us to see that *Wouters* is indeed capable of providing an intellectually sustainable basis for checking sporting practices against the demands of Article 81.

On the facts, the appellants failed. If penalties imposed on an athlete were ultimately to prove unjustified, adverse effects on competition prohibited by Article 81(1) could follow.[45] Restrictions must be limited to what is necessary to ensure the proper conduct of competitive sport, and this relates to both defining the crime of doping and selecting penalties.[46] I think the ECJ is cautioning sporting bodies against imposing draconian penalties that might severely damage athletes' livelihoods in particular where this is a device to achieve the economic objective of making the sport more appealing to sponsors and broadcasters. Here too some degree of proper procedure is probably also expected as a condition of finding anti-doping rules and associated penalties lawful, although the ECJ does not explore

[43] Para. 42.

[44] Para. 45.

[45] Para. 47.

[46] Para. 48.

this in *Meca-Medina*.[47] Generally, however, a court is understandably wary when invited to make detailed assessments which tend to undermine the expertise of sports administrators. How much nandrolone is too much? Why a two year ban, not three? The ECJ was able to escape these awkward matters of detailed assessment by concluding that the appellants had failed to establish that the Commission made a manifest error of assessment in finding the rules on quantities of permitted nandrolone to be justified. Nor, in the absence of pleading by the appellants, would it question the penalties imposed as excessive. So the swimmers lost. But it is crucial for the development of the law that they lost not because the rules were treated as 'purely sporting' in nature.

14.6 Why *Meca-Medina and Majcen* Matters to the Shaping of EC Law on Sport

In this Review I asked that the ECJ adopt *Wouters* as the best way to handle this application for annulment.[48] Consequently I welcome the judgment. The CFI's explanation that the rules at issue in *Wouters* concerned 'market conduct', while those in *Meca-Medina and Majcen* instead have 'nothing to do with any economic consideration' has been treated as flawed by the ECJ. Rightly so. But what does this mean for sport and for Article 81 generally?

At Paragraph 27 the ECJ states that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down'. In its treatment of the substance of the application the ECJ does not even bother to mention the 'purely sporting' rule. A bold but sustainable interpretation of the ECJ decision in *Meca-Medina and Majcen* would hold that the so-called rule of 'purely sporting interest', originating in Walrave and Koch, has now been eliminated as a basis for immunising sports rules which have an economic effect from review under EC law. All that can be intended by the 'purely sporting rule' is a reference to the small category of rules which govern sport but which are devoid of economic effect – such as the offside rule and fixing the height of goalposts. In the unlikely event that such rules were to provoke litigation, they would be found to lie outside the scope of the EC Treaty.

The approach adopted by the ECJ in *Meca-Medina and Majcen* is to accept that the vast majority of rules adopted by a sporting federation in order to regulate its competitions exert an economic impact, but to appreciate that this does not of itself mean that they will be incompatible with EC law. Consequential restrictive effects of a sporting decision which cause economic hardship are not treated as prohibited

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[47] Cf. Van Vaerenbergh 2005, connecting sport to the general literature on 'global administrative law', on which see, e.g., Krisch and Kingsbury 2006.

[48] Cited above, note 27.

restrictions for the purposes of application of Article 81 – nor, I would submit, Articles 39 or 49 – provided they are inherent in the pursuit of those objectives. This is *Wouters* absorbed by the ECJ in *Meca Medina*. It is conditional autonomy permitted under EC law: the key questions surround which sporting rules are truly necessary for the organisation of a particular sport and therefore sheltered from the impact of EC law even though they have economic implications.

As a matter of procedure, Article 2 of Regulation 1/2003 provides that the burden of proving an infringement of Article 81(1) shall rest on the party or the authority alleging the infringement.[49] So those challenging sports bodies find that the *Wouters* formula is reversed: they must show that the consequential effects restrictive of competition go beyond what is inherent in the pursuit of the practice's objectives. Only then is there a violation of Article 81(1). This may be of some tactical value to sports bodies confronted by the prospect of litigation. However, the larger story of *Meca-Medina* is what sports bodies have lost. The CFI judgment was remarkably generous in its invitation to sports bodies to rest a successful case on the mere fact of a rule's sporting context, even where economic effects were also clearly at stake, but the ECJ has by contrast insisted on the need to review sporting practices which have economic implications. Sports bodies cannot keep out of court simply by asserting that sport is special.

And yet this does not mean that their interests will be ignored. Presumably, given the burden of proof, it is for the applicant, challenging a sporting rule, to demonstrate coherent alternative governance structures as a basis for arguing that there is evidence of a violation of Article 81(1), as interpreted by the ECJ in *Meca-Medina* in the light of *Wouters*. The examination would then permit sporting bodies to demonstrate how and why the rules are necessary to accommodate their particular concerns – fair play, credible competition, national representative teams, and so on. The key argument of this paper is that this is the way to ensure that EC law provides a proper environment for assessment of the interests at stake when sport intersects with the economic project mapped out by the EC Treaty. And the result of *Meca-Medina* itself demonstrates that the sporting expertise informing (*in casu*) anti-doping inquiries will not lightly be set aside by judges.

14.7 *Meca-Medina and Majcen* and the Future of Sports Litigation Under EC Competition Law

In its judgment the ECJ moves seamlessly between case law which insists that an agreed restriction on commercial freedom is not to be treated as a restriction on competition within Article 81(1) provided it is necessary to ensure that the relevant arrangements function properly[50] and *Wouters* itself, where a restriction of

[49] *OJ* 2003 L 1/1.

[50] E.g., Case C-250/92, *Gottrup Klim* v. *DLB*, [1994] *ECR* I-5641, cited by the ECJ in Para. 42 of *Meca-Medina and Majcen*. In Case T-328/03, *O2* (*Germany*) v. *Commission*, judgment of 2 May

competition is acknowledged but no violation of Article 81(1) is found provided those restrictive effects are inherent in the pursuit of legitimate objectives.[51] Both approaches have important implications for the structure of Article 81: allowing practices to escape subjection to Article 81(1) curtails the importance of Article 81(3), which affects the way arguments about the economics of competition are loaded into Article 81 cases, as well as affecting more practical matters such as the burden of proof. In principle, however, these lines of case law are capable of being treated as analytically distinct.[52] The fear generated by the second approach, but not the first, is that *Wouters* may cause the interpretation of Article 81(1) to become infected by all manner of obscure 'non-economic' values. The Court has not used *Meca Medina* to provide clear guidance on that broader debate about the future of Article 81(1), which has important descriptive and normative dimensions that will not be entered into here.[53] Probably, however, *Meca-Medina* should not be read as favouring a wider application of *Wouters*. The Court has run together two analytically distinct lines of case law because in sport – but not necessarily more generally – they are functionally equivalent. The heart of the legal analysis asks whether the challenged rules, which exert a prejudicial economic effect on those excluded from participation by them, are necessary to achieve legitimate objectives. If so – but only if so – they do not infringe Article 81(1). In sports cases it does not matter whether one's conclusion is that there is no restriction of competition or that there is a restriction of competition which is permitted. Whichever line of analysis is followed, the result should be the same – context is all. In fact, in accordance with the 'convergence in outcome' thesis advanced above, the rules need to be assessed in the same contextually sensitive way whichever Treaty provision they happen to be attacked under, and their capacity to fall under Articles 49, 81 and 82 again reveals their unusual, if not quite *sui generis*, quasi-regulatory nature. *Wouters* is fit for the purpose of examining how the law should treat sporting rules that define the nature of the activity but have an impact on (would-be) participants, as it was fit for the purpose of dealing with rules of the Dutch bar association in the case itself. But this does not mean it is helpful as a general tool in the interpretation of Article 81 beyond cases involving rules established by non-State actors to govern the conduct of a profession.

For the time being sport alone offers plenty of testing grounds. Using *Meca-Medina and Majcen* one can conclude that there may be a restriction involved in

(Footnote 50 continued)
2006 the CFI treated that decision as a particular manifestation of a wider principle that insists that an agreement be considered in its true context: 'The examination required in the light of Art. 81(1) EC consists essentially in taking account of the impact of the agreement on existing and potential competition – and the competition situation in the absence of the agreement –, those two factors being intrinsically linked' (Para. 71).

[51] Para. 42, set out above (text attached to note 43), also Para. 45.

[52] For an exploration of the nuances in the relevant case law, see Whish 2003, pp. 115–128.

[53] See Odudu 2006; also, with different emphasis, Nazzini 2006; Loozen 2006, 28; Komninos 2004; De Vries 2006, especially pp. 189–198.

the application of anti-doping rules, yet there need not be a violation of Article 81(1) when those rules are seen in their proper context as a guarantee of sport's pharmaceutical-free level playing field. So too, for example, agreeing fixtures in a league would not be a 'restriction' on competition, but rather essential to its organisation – though, by contrast, an agreement to sell rights to broadcast matches in common is not essential and so is a restriction which can stand only if exempted according to the orthodox criteria set out in Article 81(3).[54] The Commission placed heavy reliance on *Wouters* in its ENIC/UEFA decision,[55] in which it concluded that rules forbidding multiple ownership of football clubs suppressed demand but were indispensable to the maintenance of a credible competition marked by uncertainty as to the outcome of all matches. The *Wouters* formula has therefore been used to allow the peculiar features of sport to inform the application of the relevant legal rules. It fits! So for example this analytical framework can cope satisfyingly with rules governing selection of individuals for teams – restrictive but necessary[56] -, rules framing transfer windows – restrictive but necessary to create the conditions for fair competition, especially in the later stages of a tournament,[57] and rules limiting ticket sales for major events to particular nationals or residents – restrictive and unnecessary, so unlawful.[58] There is scope too in debating whether 'salary caps' may be treated as restrictions on commercial freedom that are nonetheless necessary in the delivery of a viable sporting competition and therefore not restrictions within the meaning of EC trade law.[59]

Wouters, absorbed in *Meca-Medina*, is, in short, a statement of the conditional autonomy of sports federations under Article 81. Moreover, as suggested above, it is capable of application in a functionally comparable manner to provide routes under other relevant provisions of EC trade law to ensure scope for continued application of proper sporting practices. I do not suggest it is simple to discover what rules are necessary for the effective organisation of sport, but I believe the *Wouters* line of analysis ensures the right questions are asked.

14.8 The *Oulmers* Case: Putting *Meca-Medina* to the Test

Under FIFA's rules governing the release of players for international representative matches, clubs must release players – their employees – for a defined period of time and for a defined group of matches. The rules make no provision for the clubs

[54] Dec. 2003/778 Champions League, *OJ* 2003 L 291/25, Paras. 125–131. Exemption pursuant to Art. 81(3) was granted on the facts.

[55] COMP 37.806 cited above at note 22.

[56] Cases C-51/96 and C-191/97 *Deliège* v. *Ligue de Judo*, [2000] *ECR* I-2549.

[57] Case C-176/96, *Lehtonen et al.* v. *FRSB*, [2000] *ECR* I-2681.

[58] Dec. 2000/12 1998 *Football World Cup* cited above note 19.

[59] Hornsby 2002, 142; Taylor and Newton 2003, 158.

to receive payment. The clubs, not the national association nor the international federations, are explicitly stated to be responsible for the purchase of insurance to cover the risk that the player will be injured when playing for his country. Even if the player is not injured, he will arrive back at his club tired. There is no question of compensation for the club. This system seems imbalanced. Is it lawful?

Litigation is underway. In Belgium, Charleroi found that a highly promising young player, *Oulmers*, returned seriously injured in November 2004 from international duty with his home country, Morocco. Charleroi's fortunes on the field slumped without their young star, while they continued to have to pay his wages. They were entitled to no compensation. They brought a case before the Belgian courts. They claimed damages from FIFA, alleging a violation of Article 82 EC. The case was the subject of an intervention supportive of Charleroi's case by the G-14 group of 18 (!) major clubs, who pay the highest wages and consequently have the largest incentive to procure adjustment of the current rules. FIFA, for its part, enjoyed the support of interventions from over 50 continental and national associations. In May 2006 the Tribunal de Commerce in Charleroi agreed to make an Article 234 preliminary reference to Luxembourg.[60] It brushed aside a number of arguments advanced by football's governing bodies, some involving technical points of procedure, others of a more fundamental nature, some rooted in Belgian law, others arising under EC law. The Tribunal concluded that as a matter of Belgian public policy it would not defer to the jurisdictional exclusivity claimed by FIFA for the Court of Arbitration in Sport – doubtless an important finding on a point likely commonly to arise in such litigation. Of particular current relevance, the Tribunal was asked to treat the rules as purely sporting in nature. It considered the matter only briefly, and took the view that the complexity of the case law, combined with the transnational importance of the issue under examination, made this an appropriate case for referral to Luxembourg in search of an authoritative uniform interpretation of EC law.

That the Court in Charleroi refused to set aside the commercial implications of the rule, and proceeded to make a reference despite the 'sporting' context is doubtless of tactical value to the clubs. However, in line with the case advanced in this paper, this is not to make any assumption that the economic context overrides the sporting. The point is that both value systems are involved. The test will be to assess whether the player release rules survive being put to the test under EC law. If they do not, the damages claim will proceed – raising in its turn some fiendishly difficult questions of causation and quantification of loss in the context of an activity as unpredictable as football.

And *Wouters* will surely supply the relevant framework for analysis in Luxembourg given its ready acceptance by the ECJ in *Meca-Medina*. Account must be taken of

[60] The ruling is available via the Tribunal's website: www.tcch.be. The case is Pending Case C-000/06, referred to the European Court by Tribunal de Commerce de Charleroi in May 2006. For background, see Weatherill 2005B, 3.

> 'the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives. […] It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives'.

That needs to be adjusted to take account of the role of Article 82, but it is the consistent assumption of this paper that the same basic analysis does and should apply: that is, the essence of the inquiry asks whether the objectives pursued by the practice can be met by measures which exert a less prejudicial impact on affected parties. If so, the practice is unlawful – in Article 82 terms, it would not be proportionate, nor could it be held to be objectively justified. EC law contains nothing that calls into question the legitimacy of international football, and there is nothing that would rule out a priori action taken by football governing bodies to protect and promote international football. Nevertheless such measures would be classic examples of measures taken for sporting reasons which also have economic effects for those clubs which get their players back in a state of disrepair. If clubs were free to choose whether to release players, international football would be reduced to a competition dependent on the whims of clubs. So mandatory player release seems indispensable if international football is to survive. But is this system of mandatory player release necessary to achieve that end? I suspect that just as in *Bosman* the Court was prepared to hold that a transfer system could be justified (perhaps of the type that has been subsequently introduced[61]) but it would not accept the particular transfer system under attack in the case, so too in *Oulmers* the Court will conclude that a mandatory player release system is justifiable but that this one is not.

International football is extraordinarily lucrative, yet the clubs, who provide the players, their often highly-paid employees, as indispensable resources to adorn the major tournaments receive no direct financial benefit. Any advantage they receive arrives only indirectly, via proceeds transferred to the national association of which they are a member. Football's 'pyramid' structure of governance rules out any direct formal contact between clubs and international governing bodies, instead routing the representation of club interests through national associations. One may also note that there is an element of competition at stake. International football tournaments are to some extent in the same market as club competitions when one considers potential interest from broadcasters and sponsors. So clubs are required to provide a free resource, the players, to an undertaking that is at least in part seeking to make profits from exactly the same sources on which the clubs would wish to draw. One would certainly not find this in a normal industry. Sport truly is special.

The crispest objection to the system is that mandatory player release is necessary – but not in a form that leaves clubs uncompensated. The arrangements can be treated as compatible with EC law only provided clubs are allowed to defray at

[61] A revised version has been subsequently introduced – see Dabscheck 2004, 69 – though it too may be vulnerable to legal challenge, e.g., Drolet 2006, 66.

least part, if not all, of the cost of paying their players while they are absent on international duty by being allowed access to the pot of gold accumulated by the organisation of international football tournaments.

I find this convincing. Admittedly, exposure to a wider audience watching international representative football raises the value of the player to the club, so clubs conceivably acquire an indirect benefit from international football. But that is no reason for arguing for a system of mandatory uncompensated release of the extreme type that currently prevails. It is merely a basis for considering whether players' wages need not be paid in full out of the proceeds of international football. Similarly, although it is true that international bodies, unlike the clubs, have responsibilities to nurture the game throughout the world by sharing money raised from international tournaments, it is submitted that this too seems a plausible reason for running a system in which clubs cannot raid the entirety of the income generated by international football, not a good reason for denying the clubs any share in the money.

An apparently more promising argument would assert that some national associations are too poor to compensate clubs. This would mean that such associations would simply not pick highly-paid players. Countries would field teams that would not reflect their true strength, and the pattern of international competitions would be distorted. However, one could respond that international governing bodies could cope with this by establishing a revenue pool into which a slice of profits from international competitions could be paid before distribution to individual countries, and from which clubs could be compensated. Rich countries would subsidise poor countries from profits made through international football – at present clubs subsidise all countries despite taking no profits from international football. Is this feasible? Are there impediments to making such arrangements? That would require close analysis of the way that the industry works, and could work. The point is that it is precisely this inquiry that would and should follow from the adoption of the *Wouters* formula, absorbed in *Meca-Medina*, as the basis for the legal investigation. That the (mandatory, uncompensated) player release rules are of sporting interest in no way immunises them from review. Demonstrating that their prejudicial economic effect is essential in order to preserve the activity of international football is the way to secure free rein under EC law.

Moreover there is a procedural dimension to the submission that the current arrangements violate Article 82 EC. There is support in EC law for the case that sporting bodies' conditional autonomy in setting rules to govern the game depends on something more democratic than the 'pyramid'. Soft law material pertaining to sport issued at EU level has been a common feature of the last few years and the Court has made clear in *Deliège* and in *Lehtonen*,[62] this material is apt for citation in exploring the nature and scope of the relevant EC rules. The Declaration attached to the Nice Treaty includes consideration of the Role of sports

[62] Cases C-51/96 and 191/97 cited above at note 56, Paras. 41–42 of the judgment; Case C-176/96 cited above at note 57, Paras. 32–33 of the judgment.

federations. It refers *inter alia* to the need 'for a democratic and transparent method of operation' and 'a form of organisation providing a guarantee of sporting cohesion and participatory democracy'. Insistence on the virtues of participation chimes with the broader agenda mapped by the Commission in its 2001 White Paper on European Governance.[63] It is perfectly possible to argue that football's neglect of these broad recommendations of transparent and participatory governance serves as a powerful reason for arguing that practices imposed on clubs fall foul of EC law. It is not necessary for the federations to exclude direct input by clubs. A committee representing a wider range of affected interests could readily be set up to determine the balance of rights and obligations in this matter. By formalising dialogue between transnational governing bodies and clubs-as-employers this, of course, would challenge the pure lines of the organisational 'pyramid', an argument that has purchase in other contexts, such as the aspirations of the clubs to acquire a more direct role in the management of club tournaments such as UEFA's Champions League. It is no secret that the *Oulmers* litigation is an element in a broader political strategy pursued by richer clubs eager for a louder voice in the game's governance.

It is submitted that the rules governing mandatory uncompensated player release go too far, both in substance and in the exclusionary way they are agreed and administered. Large profits are made through international football, and it is abusive for federations to enforce rules which allow them to take the benefit while imposing the burden of supplying players on the clubs. One could readily imagine an adjusted and potentially lawful system involving an obligation to release players imposed on clubs with corresponding obligations imposed on the governing bodies to provide compensation (*inter alia* to take account of the element of market competition for broadcasting and sponsorship money which is also at stake in this matter of regulation). The gratifying point of this paper is that the ECJ in *Meca-Medina and Majcen* has prepared the ground for *Oulmers* to be decided with due recognition for both the sporting and the economic context of the player release rules, and has set aside the unhelpful separation between the spheres clumsily attempted by the CFI.

14.9 Conclusion

Using *Wouters* does not unlock the door to simple answers to the several conundrums that surround the application of EC law to sport. But it prevents intellectually wasteful arguments at the slippery margin between sport and the economy. The principal virtue of *Wouters* is that it brings the right questions centre-stage in the legal analysis. Most of all, *Meca-Medina and Majcen* seems to have brought to an end the practical value to sports bodies of arguing that their

[63] COM (2001) 428.

rules are of 'purely sporting interest'. This will be true only in trivial circumstances where one scarcely imagine litigation being pursued. Instead the emphasis will be on whether rules, carrying economic impact, produce consequential restrictive effects which are inherent in the pursuit of their objectives. If so, but only if so, they escape prohibition under Article 81(1). The same point, delivered in slightly different vocabulary and in relation to Article 39 not Article 81, is found in the Court's judgment in *Bosman* which accepts as 'legitimate' the perceived sports-specific anxiety to maintain a balance between clubs by preserving a certain degree of equality and uncertainty as to results and to encourage the recruitment and training of young players.[64] And in Deliège, an Article 49 case, the Court accepted that selection rules limited the number of participants in a tournament, but were 'inherent' in the event's organisation.[65] Such rules are not beyond the reach of the Treaty, but they are not incompatible with its requirements. But, as *Meca-Medina* itself shows, there remains scope for sport to protect its right to assert internal expertise in taking decisions that have both sporting and economic implications. The ECJ has collapsed the idea that there are purely sporting practices unaffected by EC law despite their economic effect, but it has not refused to accept that sport is special. Its message to governing bodies – explain how!

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