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Doping: a Rule of Reason for the Sporting Exception?

By Paul Harris and Ben Lask
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1. With Tour de France winner Floyd Landis and Olympic 100m champion Justin Gatlin facing possible bans following their recent positive drugs tests, the ECJ's judgment in *Meca-Medina* provides timely guidance on the specific relationship between sports doping rules and competition law.[1]

2. It also revisits an issue of much wider relevance for competition lawyers: the rule of reason.

3. In 1999, two successful long distance swimmers were suspended under the International Olympic Committee's anti-doping rules, having tested positive for nandrolone. Although their suspensions were reduced on appeal before the relevant sports bodies and the CAS, the swimmers nevertheless lodged a complaint with the European Commission, arguing that the anti-doping rules were incompatible with the Community provisions on economic freedoms and competition.

4. The Commission rejected the swimmers' complaint and, in its judgment of 30 September 2004, the Court of First Instance ("CFI") dismissed a challenge to the Commission's decision.[2] The CFI reasoned that the anti-doping rules were of a purely sporting nature and, as such, had nothing to do with any

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London WC1R 5NR

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

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[1] Case C-519/04 *Meca-Medina and Majcen v Commission* (judgment on 18 July 2006).
[2] Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] ECR II-3291. See Monckton Case Note *From Rio to Meca: Another Step on the Winding Road of Competition Law and Sport* (April 2005).

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economic considerations. As a result, the CFI considered that such rules fell outside the scope of the Treaty provisions on the freedom of movement of workers (Article 39) and the freedom to provide services (Article 49). Then, the CFI went on to conclude that:

"...The fact that purely sporting legislation may have nothing to do with economic activity, with the result, according to the Court, that it does not fall within the scope of Article 39 EC and 49 EC, means, also that it has nothing to do with the economic relationships of competition, with the result that it also does not fall within the scope of Article 81 and 82 EC..."[3]

5. In July the ECJ set aside the CFI's judgment for the legal flaw contained in the passage above, though it upheld the Commission's original rejection of the swimmers' complaint (as referred to further below).

6. The ECJ stated that the "mere fact" that a rule was purely sporting in nature did not remove a sportsperson to whom it applied, or the body which established it, entirely from the scope of the Treaty. Provided the activity itself fell within the scope of the Treaty, its rules were subject to all the obligations flowing from the various Treaty provisions. Thus is was necessary to determine whether the rules satisfied the free movement requirements of Articles 39EC and 49EC and, separately, whether they satisfied the specific competition requirements of Articles 81 and 82.

7. So, whilst a purely sporting rule might escape the prohibitions in Articles 39EC and 49EC because it was "...justified on non-economic grounds which relate to the particular nature of and context of certain sporting events..." (paragraph 26), this fact did not mean that the rule automatically fell outside the scope of Articles 81EC and 82EC. The CFI had erred in concluding that one necessarily followed the other and its judgment had to be set aside.

8. As to the application of Article 81EC, the ECJ reiterated three well established principles concerning the relationship between professional sport and Community law:

    - sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC.
    - thus, where a sporting activity takes the form of gainful employment or the provision of services for remuneration, it falls within the scope of Articles 39 and 49.
    - however, the prohibitions contained within those provisions do not affect rules which are of a "purely sporting interest" and, "as such", have "nothing to do with economic activity" (the so called "sporting exception") (paragraph 25).

9. By its subsequent analysis the ECJ appeared to suggest that the application of the "sporting" exception depends on the particular EC Treaty context. Where the competition provisions are concerned, its application has clear parallels with the competition lawyer's rule of reason. In *Wouters*[4], for example, the ECJ proclaimed that a rule regulating the legal profession had "...effects restrictive of competition that are inherent in it...", yet, because it was "...necessary for the proper practice of the legal profession, as organised in the Member State concerned... [it] does not infringe Article 85(1) of the Treaty..." (paragraph 110). In this regard it was important that the regulation in question did not "...go beyond what is necessary in order to ensure the proper practice of the legal profession..." (paragraph 109) (and see also *DLG*[5]).

[3] Paragraph 42.
[4] Case C-309/99 *Wouters and Others* [2002] ECR I-1577.
[5] Case C-250/92 *DLG* [1994] ECR I-5641.

10. In *Meca-Medina*, the ECJ clarified that the correct approach to the sporting exception in the context of Article 81EC was likewise to consider (paragraph 42):

    - the overall context in which the sporting rule operated, in particular its objectives;
    - whether any restrictions on competition were inherent in the pursuit of those objectives; and
    - whether any such restrictions were proportionate to the objectives.

11. Applying that analysis, the ECJ held that the IOC anti-doping rules in question were justified by a legitimate objective, namely the organisation and proper conduct of competitive sport. Moreover, the limitations placed on athletes' freedom to take performance enhancing drugs were inherent in that objective because they were obviously directed to the maintenance of fair, healthy and competitive sport. There was accordingly no problem with the first two parts of the analysis.

12. The real issue was the extent to which the restrictions were proportionate. The swimmers claimed that the rules were too strict in imposing a 2ng/ml threshold of nandrolone in urine. They also claimed (but seemingly without any real evidence) that the IOC had an ulterior motive in imposing such a severe threshold, namely, that they wished to preserve the economic attractiveness of the Olympic Games.

13. Had they succeeded in this challenge, that would have meant that the rules fell outside the rule of reason type approach and would have been subjected to full competition law scrutiny by the ECJ.

14. The swimmers, however, failed in establishing disproportionality. Crucially, the evidence indicated that the average endogenous production of nandrolone (i.e. occurring naturally within the body) was 20 times lower than the 2ng/ml threshold applicable under the anti-doping rules. Moreover, the suggestion that eating wild boar meat could cause nandrolone levels to soar had not been widely accepted by the scientific community at the time of the Commission's decision. Nor was there any substantiated argument that the levels of penalty went further than was necessary in order to meet the restrictions inherent in the objectives.

15. Thus, as in *Wouters*, Article 81EC was not engaged, notwithstanding the restrictions on (sporting) economic activity. The doping rule had sufficient reason.

For more information on Paul Harris and Ben Lask, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section on www.monckton.com.