

From Rio to Meca: Another Step on the Winding Road of Competition Law and Sport

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On 19 December 2003, a Football Association ("FA") disciplinary hearing found Rio Ferdinand, the Manchester United and England defender, guilty of failing to submit to drug testing, and imposed a fine of £50,000 and an eight-month playing ban. Alex Ferguson publicly attributed United's failure to win the 2003/04 Premiership title in part to the loss of his key defender. However, United's loss was not merely sporting: reports suggest that the cost of the club's decision to continue paying Ferdinand's wages in full during his eight months of inactivity was more than £2.4 million.

Doping rules of the type applied to Ferdinand are common in professional and amateur sports. In Case T-313/02 *Meca-Medina v. Commission*, the Court of First Instance ("CFI") considered the compatibility with the competition rules of the EC Treaty of the doping control rules of the International Olympic Committee ("IOC"). In doing so, the CFI set out its approach to the vexed issue of how competition law, and in particular Article 81, should be applied to the rules of sporting organisations and agreements in the sporting sector more generally.

The issue is vexed because, as has been noted by commentators (e.g. Lewis & Taylor, *Sport: law and practice* (Butterworths, 2003), p. 346), "[t]he competition rules of the EC Treaty were drafted with more orthodox industries in mind than sport". Horizontal co-operation between economic competitors is generally viewed with suspicion by competition law. In sport, however, a degree of co-operation between sporting competitors is often necessary to create the sporting product itself (e.g. a league competition) and/or to safeguard certain intrinsically valuable aspects of a sport (e.g. agreement on doping rules in order to maintain a perception of fairness of competition). A degree of financial redistribution between sporting competitors (typically from stronger to weaker participants) may also be desirable in order to maintain uncertainty of outcome. However, those considerations do not apply to all forms of co-operation in the sporting sector: certain agreements, such as the joint or centralised marketing of sporting media rights, are primarily economic in nature and are not directly related to the characteristics or organisation of the sporting competition itself.

It is accepted by both the European Commission and the European Court of Justice ("ECJ") that Article 81 should be applied in a way that is sensitive to the special characteristics of sport. The issue is precisely how this should be achieved within the legal framework.

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Even if a sporting rule or agreement imposes *de facto* restrictions on sporting undertakings, there are at least three potential pathways for it to be compatible with Article 81. First, agreements in the sporting sector will not be subject to Community law at all if they do not constitute economic activity within the meaning of Article 2 of the EC Treaty (C-36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 4). Secondly, agreements which might otherwise be considered to restrict competition may be compatible with Article 81(1) if they are “indispensable for attaining legitimate objectives deriving from the particular nature of [the sport]” (C-51/96 *Deliege* [2000] ECR I-2549, Opinion of Advocate General Cosmas, paragraph 112). That possibility falls within the line of case law sometimes referred to as the ‘rule of reason’ cases, including C-250/92 *Göttrup-Klim* [1994] ECR I-5641 and C-303/99 *Wouters* [2002] ECR I-1577. Thirdly, even if sporting agreements are caught by Article 81(1), they may satisfy the Article 81(3) exemption criteria.

In *Meca-Medina*, two swimmers who had been banned under the IOC’s doping rules for two years for testing positive for the drug nandrolone argued that the doping provisions were contrary to Article 81. The CFI accepted that high-level sport had become, to a great extent, an economic activity, and that sporting rules such as the IOC’s doping rules had economic repercussions for sportsmen and sportswomen. However, the CFI nonetheless held that the doping rules fell outside the scope of the competition rules and other Community provisions relating to the economic freedoms on the basis that “the prohibition of doping is based on purely sporting considerations and therefore has nothing to do with any economic consideration” (paragraph 47).

Although it is easy to accept that the IOC’s doping rules were justifiable and ought not to have been prohibited by Article 81, the CFI’s reasoning is problematic. The basis for the CFI’s judgment was that, although doping rules may have significant economic consequences (such as those experienced in the Ferdinand example), they fall outside the scope of Article 2 EC and hence the competition rules because their *objective* is sporting rather than economic. However, as a matter of principle, the question of whether rules relating to certain activity fall within the scope of Article 2 should be determined by reference to whether or not the activity affected by the rules is economic in nature, and not by reference to the nature of the rules’ objective. In addition to being contrary to principle, an approach based on the objective of a rule is likely to generate uncertainty, as the actual objective of a rule may be the subject of controversy, and rules may have more than one objective.

The CFI’s approach is also difficult to reconcile with that of the ECJ in joined cases C-51/96 and C-191/97 *Deliege* [2000] ECR I-2549, in which the ECJ considered whether certain tournament selection rules of a Belgian judo association fell within the scope of Article 2. As the case concerned two references under Article 177 (now Article 234) EC, the ECJ left the final decision on the facts to the national court. Nonetheless, in setting out its criteria of interpretation, the ECJ considered the activities affected by the selection rules and noted that “sporting activities and, in particular, a high-ranking athlete’s participation in international competition are capable of involving the provision of a number of separate, but closely related, services”. The ECJ did not state that the fact that the selection rules had a sporting objective was sufficient to take the rules outside the scope of Article 2.

The CFI’s approach appears to be motivated by a desire to avoid subjecting rules with a sporting objective to a full assessment under Article 81, almost certainly because of doubts as to the appropriateness of EC law closely scrutinising sporting rules. That is not a wholly unreasonable concern. However, it is not the case that competition law is incapable of taking sporting considerations into account: if a rule has a good sporting justification and is proportionate, there is no reason why it could not be justified either on the basis of a *Wouters*-type analysis under Article 81(1) or under the Article 81(3) exemption criteria. If, on the other hand, a rule in the sporting sector generates appreciably restrictive effects on competition and is not in fact necessary and proportionate, for example because the same benefits could be achieved by a less restrictive rule, it is not obvious why the rule should not be prohibited by Article 81. This area therefore remains difficult and the correct legal approach uncertain. It is to be hoped that the ECJ will in due course have an opportunity to consider the CFI’s judgment in *Meca-Medina* and provide clarity.

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