

Doping, European Law and the Implications of *Meca-Medina*

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Abstract

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The ruling of the European Court of Justice in the anti-doping case of *Meca Medina v. The Commission* has important implications for athletes, domestic governing bodies, international federations and supra-national actors such as WADA and the Court of Arbitration for Sport. *Meca-Medina* has been criticised as an unwelcome interference by the courts in the legitimate activities of sporting organisations, but after *Bosman* it was fanciful to argue that those organisations should be 'above the law' and the courts should have no jurisdiction over their activities. That said, there is a stark difference between the courts having jurisdiction over sports' decisions and

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being willing to overturn them - the courts have been, and remain, willing to defer to the expertise of sporting organisations. However, the ECJ's ruling in *MOTOE* confirms that the courts will intervene in appropriate circumstances. In order to avoid sanction on competition law grounds sports organisations must thus be able to justify their provisions on (for example) what is an unacceptable level of nandrolone, show that athletes' fundamental rights such as the right to a fair hearing have been respected, and ensure that any sanctions imposed upon athletes who fall foul of doping regulations are proportionate to the offence committed.

Keywords: European Union; competition law; undertaking; ~~g~~; dominant position; abuse; sport; doping

Introduction

This paper seeks to outline the implications for anti-doping organisations, athletes and other sporting stakeholders of the European Court of Justice's decision in *Meca-Medina v The Commission* [2006] ECR I-6991, which concerns the relationship between the putative independence of sporting organisations and the strictures of European competition law. *Meca-Medina* was the first occasion on which any sports-

related dispute had been scrutinised by the ECJ from the perspective of European competition law rather than free movement law, and while the court did not interfere with the doping control regime or the sanctions that had been imposed under its terms, its approach to the issues raised has many implications for sports governing bodies that are either based within the European ~~union~~-Union or which take action that impact upon the activities either of EU citizens or of undertakings that are based within it – which encompasses virtually every global sports organisation. These implications are not limited to doping regulations, but extend to the activities of any sports undertaking which might act in a manner that gives rise to competition law concerns by virtue of its impact on other actors' economic activities.

The paper discusses the background to the case, the rulings of the Court of Arbitration for Sport that preceded the European Court's intervention and the judgments of the European Court in its various guises. It tries to offer advice to sporting organisations that might feel the need to reappraise their anti-doping or other rules in the light of the judgment and suggests that while sporting organisations are right to be concerned about the implications of *Meca-Medina*, it is a decision that can be viewed quite positively by all stakeholders and actually has the potential to be 'good for sport'.

The CAS Ruling

In August 1999 two long-distance swimmers, David Meca-Medina and Igor Majcen, were suspended from competition for a period of four years by FINA (Fédération Internationale de Natation, the international governing body for swimming) for a first doping offence in respect of positive tests for norandrosterone (a metabolite of, and thus a 'related substance' to nandrolone) they had returned at a world championship long-distance race held in Brazil in January of that year. The swimmers had finished first and second at that event, and as such had automatically been selected for testing in accordance with FINA's provision. Following their suspension by FINA the athletes invoked their right (under FINA's Rules) to appeal that decision to the Court of Arbitration for Sport; that appeal was heard in February 2000 and, in accordance with Rule 51 of the CAS Code then in force, it took the form of a *hearing de novo*. That meant the CAS Panel which heard the appeal was not limited to reconsideration of the evidence that had been adduced before FINA's own disciplinary processes and the parties were not limited to simply revisiting the

arguments that had been previously advanced – evidence and arguments that had not been put forward before the FINA panel could be adduced before CAS.

It is evident from the CAS determination that testing for nandrolone use has been consistently problematic. The practicalities of nandrolone testing changed as a consequence of improved understanding of its ability to [be produced](#) endogenously and its potential to form in the course of an actual urine test sample. This improved understanding of nandrolone production, discussed in *Bernhard v. ITU, CAS 1998/222*, had a far-reaching effect on testing procedures because it meant that doping organisations had to respond to what science had revealed. The evidence that a number of freely-available supplements contained traces of nandrolone (Foschi, 2006, p.479) confused matters still further, so much so that “athletes who were never able to explain their positive analytical findings may wish to reopen their cases and attempt to have their stored sample retested” (McLaren, 2006, p.9). One can thus understand the complexity of the issues with which CAS, and thereafter the European courts, had to engage. CAS, in dispensing with the “grey area” concept that had been utilised in earlier decisions such as *Mason, Bouras, and Bernhard*, held that the permissible maximum level of nandrolone would be no more than 2ng/ml. This figure was comfortably in excess of any recorded naturally-occurring levels and clearly gave the benefit of any doubt to the athletes concerned, but the corollary was that any athlete whose readings exceeded that level would face an onerous task in advancing an innocent explanation for those readings. CAS heard that, because nandrolone could be produced endogenously, the level of nandrolone or nandrolone metabolites that a sample had to reveal before a doping offence would be regarded as having been committed had to incorporate a ‘safe margin’ in order to protect those athletes who naturally produced high levels. Accordingly, a doping offence for endogenous norandrosterone was only deemed to have *prima facie* occurred if more than 2 ng/ml was present (this figure being more than twenty times the highest level of endogenous production ever recorded in the scientific literature). David Meca-Medina’s A and B samples recorded levels of 14.2 ng/ml and 15.3 ng/ml respectively; Igor Majcen’s levels were 3.6 ng/ml and 3.1 ng/ml respectively (TAS 99/A/234, 235 para 2), and in accordance with FINA’s [anti-doping rules \(the current version of which may be found in Article DC 3 of its doping control rules\)](#) the presence of the banned substance thus “shift(ed) to the athlete/competitor

the burden of establishing why he should not be sanctioned to the full extent provided for under (the rules)” (para TAS 99/A/234, 235 para-3.4):

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~~She~~ will do this only by showing ‘clearly’ both how the prohibited substance got into his/her body and that there was no negligence on his or her part in allowing it to do so. The adverb ‘clearly’ designedly imports in our view a less stringent standard than the ordinary common law criminal standard of ‘beyond reasonable doubt’ but a more stringent one than the ordinary common civil law standard ‘on the balance of probability’. The perceptible purpose is to prevent a competitor from simply (and sufficiently) asserting ignorance of how such substance got into his/her body (para 4.7).

The athletes advanced several grounds for contending that no doping offence had been committed and that the ban imposed by FINA should be rescinded. Specifically, they questioned the collection and custody of their urine samples, the standard of proof that was applicable in doping cases and whether the substance in question was banned at all. They also argued that, if a banned substance had indeed been found in their urine samples, its presence was due to the innocent ingestion of pork offal which contained that substance and they could thus ‘clearly’ show that they were not responsible. If all else failed, they would argue that a four-year ban for a first offence was disproportionate and contrary to the applicable (Swiss) law (para 6.1).

The arguments advanced to support the contention that no offence had been committed were dealt with in short order: the athletes had failed to show any anomalies with the collection, custody and transportation procedures, and while precursors of nandrolone had only been explicitly added to FINA’s list of banned substances some months after these athletes’ failed tests, they had previously been prohibited as ‘related substances’ and bans imposed in respect of them under that classification had been considered by CAS on previous occasions (see for example CAS 98/212 *UCI v FCI* and CAS 98/222 *B v ITU*).

However, the arguments in favour of the ‘innocent ingestion’ hypothesis caused more difficulty for the ~~P~~Panel. Although the possibility that their high readings were a result of eating meat products from animals which had been injected

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with nandrolone was regarded as merely 'theoretical', CAS was troubled by the argument that, in the run-up to the competition, the applicants had eaten sarapatel (a local speciality made of uncastrated boars' meat) on several occasions at the restaurant's daily buffet and that their failed tests were either a direct consequence of the practice of injecting growth-enhancing hormones (such as nandrolone) into boars; or because endogenous nandrolone could be present in non-castrated boars in sufficiently high levels to cause the positive tests (CAS 99/A/234, para 10). CAS resolved the matter by asserting that, even if all the available scientific and circumstantial evidence was interpreted in the manner most favourable to the athletes, the 'innocent ingestion' hypotheses remained unverified and thus could not amount to evidence that 'clearly' showed the athletes' lack of culpability as the FINA rules required. Finally, while CAS accepted that a two-year ban was often the minimum sanction that governing bodies imposed for such offences it was open to FINA to have a higher sanction; neither CAS, the Swiss courts nor other domestic courts that have been charged with reviewing doping penalties have regarded such penalties as disproportionate (see for example *Wilander v Tobin* (1997) 2 CMLR 348). Accordingly, the athletes' appeals failed on all grounds.

Four months after the CAS ruling a series of scientific tests were carried out (at the swimmers' behest) on three volunteers who ate a meal prepared from the meat of uncastrated boars. The results led to speculation that such meals could indeed result in high levels of endogenous production of nandrolone metabolites among consumers. FINA and the athletes agreed that those results merited further examination, and thus the matter was referred back to CAS so that the same three-member panel could consider whether the decision should be revised on the basis that the new scientific evidence meant the panel could now be 'reasonably satisfied' that the source of the finding of nandrolone metabolites might have been the consumption of meat from uncastrated boars.

In the event, CAS said that while it was "in the realm of possibility" that the metabolites in the athletes' urine "could have had the same source as the results of the three volunteers in the...experiment...that possibility has not reached the level required by the arbitration agreement of 'reasonable satisfaction'" (para 6.8). It reached that conclusion having considered, *inter alia*, the massive difference between the swimmers' ng/ml readings and the much lower ones of the volunteers, which had been in the region of 6 ng/ml; the fact that at least 18 hours had elapsed

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between the swimmers' ingesting the meat and their positive sample being given (as opposed to 15 hours in the case of the volunteers' much lower readings (para 6.6)); that there were several other variables that made it impossible to 'read across' between the two sets of results; that other features of the swimmers' readings were "the hallmark of oral ingestion of (a) prohibited substance" (para 6.9); and that sarapatel "cannot in (the Panel's) view sensibly have been a diet of choice for an athlete shortly before competition" (para 7.6). However, CAS said it was "sympathetic to the proposition that a four years' suspension is very severe in case of a first offence" (para 9.1), and while it had no grounds for finding that its length was contrary to the applicable Swiss law (under which sports governing bodies enjoy considerable autonomy in disciplinary matters (*Wang v FINA* 5P 83/1999)), it did note that at the time many international sports federations stipulated a two-year ban for a first offence. It thus reduced the swimmers' ban to one of two years in order to accord with the terms of the Olympic Antidoping Code, which had come into force in January 2000 (para 9.12).

Proceedings before the Commission and the Court of First Instance

In *Meca-Medina* the Community created an indirect anti-doping policy through the jurisprudence of the European courts. This was accomplished via the application of European competition law (especially the provisions formerly laid down in Articles 81 and 82 EC Treaty and now to be found in Articles 101 and 102 of the Treaty of the Functioning of the European Union ([TFEU](#), the Lisbon Treaty)) to the contentious practices of a sporting body. In the wake of the 1998 Festina tour, doping had become an area in which the EU rapidly developed both interest and influence even though there was no mention of sport in the EC Treaty and it thus lacked the competence to take direct action in the area (Vermeersch, 2006, p.1). However *Meca-Medina* did not concern the Community's nascent anti-doping influence but the legality of the regulations of the IOC, a private body whose rules had an inherent public context and (according to the athletes) fell within scope of the EC Treaty because its monopoly powers had been used in a way which prevented them from participating in their chosen economic activity. As was recognised in *Meca-Medina*, however, the complexity of the rules was compounded by the nature of the substance allegedly ingested by the swimmers: because nandrolone is a naturally-occurring substance and people naturally produce different amounts of it there is a

clear difficulty in establishing with the requisite degree of certainty that a doping offence has been committed. The decision by CAS is notable for its detailed analysis of the nandrolone intake of Meca-Medina and Majcen, its performance-enhancing potential and the difficulties in establishing a reliable 'test' for it, and this must have been helpful for the European courts in their attempts to understand the scientific basis of nandrolone testing.

The CAS decision was followed by a joint complaint to the European Commission (Case COMP 38.158). This was not an appeal against the CAS ruling but a completely new course of action, exploring aspects of European competition law that could not have been explored before the CAS itself by virtue of the *ex aequo et bono* concept (a fundamental tenet of arbitration, empowering arbiters to 'do what is right' in the circumstances rather than being bound by the law, as discussed in CAS 2008/A/1644 *Mutu v Chelsea FC*). While the mere idea of the ordinary courts having oversight of sporting rules excites widespread disquiet within those organisations, it was perfectly proper for the swimmers to take this course of action. As a citizen of an EU member state (in Meca-Medina's case) and of a state which then had an association agreement with the EU (Majcen), both could avail themselves of the remedies potentially afforded by European competition law once they had exhausted the internal appeals procedures. The fact that FINA has its seat in Lausanne, Switzerland rather than in an EU member state is immaterial, although it would be unhelpful to glibly assert that an organisation whose rules or practices impact upon an individual or an undertaking based within the EU is compelled to abide by EU law. There are many important jurisdictional issues that potentially arise when international sporting federation's rules conflict with the law, but at no stage in *Meca-Medina* was it argued that the European courts did not have jurisdiction over the case. They clearly did have *jurisdiction* in the proper sense of having the power to entertain the application; the issue to be decided by those courts was whether European law did indeed afford the swimmers a *remedy* (Hoey and McArdle, 2008).

The swimmers argued that the anti-doping rules adopted by the IOC and FINA restricted competition within the meaning of Articles 81 and 82 EC of the Treaty and that fixing the 2 ng/mL limit was established by an unlawful concerted practice between the IOC, FINA and the testing laboratories (they also argued that the rules unjustifiably restricted their freedom to provide services under Article 49 as was). The Commission accepted that the IOC was both an undertaking and an

association of undertakings for the purposes of competition law but “immediately pointed out that the rules and alleged concerted practices at stake did not come within the scope of ‘economic activities’....The Commission stated that anti-doping rules may limit the athlete’s freedom of action but are intimately linked to the proper conduct of sporting competition” (Colomo, 2005, para 23). That being the case, European law was not applicable because Article 2 of the EC Treaty provided that European law was only engaged if the dispute had arisen in the context of economic activity.

This rejection of the swimmers’ application was appealed to the Court of First Instance (CFI), which seemed to “reverse the trend of giving Community law a broad functional reach” (Szyszczak, 2007, p.102) by agreeing with the Commission and affirming that the anti-doping rules did not constitute an infringement of economic activity at all. The CFI commented that “while it is true that high-level sport has become, to a great extent, an economic activity, the campaign against doping does not pursue any economic objective. It is intended to preserve, first, the spirit of fair play...and secondly, the health of athletes” (*Meca-Medina v. Commission* [2004] ECR II-3291, para 44).

This approach was akin to the ‘sporting exception’ that had existed in the context of free movement law prior to *Bosman* and which some sporting organisations had lobbied for ever since: it would allow the sporting organisations unfettered autonomy over their anti-doping policies, to the potential detriment of athletes who would have no redress in European law because European law only becomes applicable if ‘economic activity’ can be discerned. However, that attempt to separate the economic aspects from the sporting aspects was flawed in several ways. In particular, the CFI’s approach not be reconciled with the existing jurisprudence on competition law, specifically the ECJ’s ruling in *Wouters v ARNOA* [2002] ECR I-1577. The CFI’s eagerness to distinguish sporting from economic ties had led to a very problematic analytical framework. Its approach would have been heartily welcomed by the anti-doping community and by sports organisations generally, but it was certainly not welcomed by *Meca-Medina* or *Majcen* and they appealed the decision to the European Court of Justice.

The European Court of Justice’s Decision

The ECJ's decision did not overturn the CFI's judgment in the sense of granting the swimmers the remedy they sought, but it is legally very significant because it corrected the errors made by the lower courts and denied sports bodies the 'sporting exception' to European law that the CFI ruling seemed to have granted them. In considering the CFI's difficulty in severing anti-doping rules' economic aspects from their sporting aspects the ECJ rejected the Opinion of the Advocate-General (who advised that the anti-doping rules were indeed 'purely sporting' in nature) and decided instead that "it is apparent 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" (*Meca-Medina v Commission* [2006] ECR I-6991, para 27). The focus thus shifted away from an artificial distinction between sporting rules and economic rules in favour of a more realistic distinction between the activities of sportsmen, and the rules governing these activities.

Accordingly, the ECJ analysed the anti-doping rules in the context of the competition law provisions - and specifically what is now Article 101 TFEU (ex Article 81), which prohibits agreements between undertakings and concerted practices "which have as their object or effect the prevention, restriction or distortion of competition within the internal market". In deciding whether the agreement between anti-doping actors to establish these rules represented a breach of this provision, the Court was interested to ascertain the rules' objectives and their effects on the sporting community, and thereafter to consider whether those rules were proportionate to the objectives thus identified. This was done by considering the anti-doping rules in the light of the ECJ's earlier judgment in *Wouters*, the application of which was certainly not an excursion into new territory (as Weatherill (2009, p. 84) indicates the Court was "simply applying general principles governing the interpretation of Article 81(1)"). Furthermore, the *Wouters* approach was not new even in sporting circles - ~~the~~ *DLG* case [1994] ECR I-5641 (which concerned the application of European competition law to an agricultural co-operative's purchasing rules which and underpinned the ECJ's reasoning in *Wouters*) had been cited before the courts in *Bosman* and in *Deliege* [2000] ECR I-2549 (which concerned the selection of participants for international judo competitions) and, and it was also considered by the Commission in the competition law case of *Mouscron* (which concerned UEFA's 'home-and-away rule' in European club tournaments). Further,

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Wouters itself was considered in another Commission decision, *ENIC/UEFA Com* (2002) 37/806 (which concerned prohibitions on the ownership or control by an undertaking ownership of more than one club and, like *Meca-Medina*, had been heard by the competition authorities after CAS had disposed it). It is curious that the CFI ever felt it necessary to depart from the *Wouters* formula given its previous use of this judgment in sports/competition cases, but the ground-breaking aspect of *Meca-Medina* lay not so much in its application of *Wouters* but in the implications of its application to doping rules specifically.

Wouters did not concern sport at all, but as Weatherill (2006, p.650) argues, it is “of profound importance to the future treatment of sport under EC competition law” because its broad analysis of what is now Article 101 TFEU is capable of application to any future disputes between the sporting field and the competition regime. While it definitively rejects the idea that the ‘purely sporting interest’ approach could be applicable in the competition law context, *Wouters* is not a panacea because it introduces to the sports cases a concept of ‘inherency’ which has the potential to simply be a ‘rule of purely sporting interest’ in a different guise. The case concerned the compatibility with the European competition law regime of a Dutch law which prohibited multi-disciplinary partnerships between barristers and accountants. The Dutch legal profession had adopted and endorsed the law (which came within the ambit of Article 81(1) because it had the effect of restricting or distorting competition) and the legal profession fell within the definition of an ‘undertaking’ for the purposes of an orthodox competition law analysis – hence the *prima facie* breach of competition law. By prohibiting multi-disciplinary partnerships the undertaking had implemented a rule which was contrary to competition law, and had clearly done so in the context of economic activity. However, this did not necessarily mean the undertaking had used its powers unlawfully because the ECJ was required to have regard to “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” (*Wouters v ARNOA* [2002] ECR I-1577, para 97). The ECJ thus took what may be regarded as a ‘rule of reason’ approach (although defining it as such carries a health warning because “in Community competition law, the Court of Justice has rejected attempts to introduce (a ‘rule of reason’ test) since *Consten and Grundig* [1966 E.C.R. 429]” (Parrish and

Miettinen, 2008, p.121)). But however one might define it, the *Wouters* approach requires a considered “evaluation” (to quote *Bosman* at p. 268) of the provision – with the effect that even if a measure was unlawful on its face, it might be ‘rescued’ if consideration of the justifications offered for its existence revealed it to be a proportionate and considered response to a legitimate concern.

After evaluating the impact of the Dutch law and considering the legitimacy of the legal profession’s rationale for introducing it (namely, to help ensure the independence of the legal profession for the benefit of its clients), the European Court advised that the Regulation was justifiable because that outcome was in the wider interest. Similarly, the operation of sporting rules which can impact adversely on the interests of individuals can still have a justifiable objective when they are viewed in the broader context. Doping rules’ detrimental effect on the interests of athletes who fall foul of anti-doping regimes are clearly significant, but on this occasion they were countermanded by the governing bodies’ pursuit of what the Court accepted as the legitimate objective of ensuring drug-free competition. This analysis facilitates a move away from the sporting rule/economic rule distinction that was spawned by the ECJ in its earlier sports-related jurisprudence and embraced by the CFI in *Meca-Medina*, and because once one gets beyond the ‘jumpers for goalposts’ level of participation almost all sporting rules will also have an economic impact it will be almost impossible to argue that there is no economic element to any dispute which is deemed so significant as to merit an application to the courts.

This does not mean that all doping rules will be automatically acceptable, however. They could be condemned either because the ‘cut-off point’ in respect of particular substances is unjustifiable or because the penalties for a breach are inappropriate, and a straightforward application of *Wouters* would have involved a consideration of whether the rules were appropriate and proportionate bearing in mind the wider context. However, in an attempt to give effect to the *Wouters* concept of ‘inherency’ in the sporting context the ECJ in *Meca-Medina* advised (at para 45) that “even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants’ freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective. Such a limitation is *inherent* in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry

between athletes” (paras 49-55). It has been suggested that through this approach “the Court transposed the ‘inherency’ criterion from *Deliege* (a free movement case) to EC competition law, despite formally rejecting any convergence” (Parrish and Miettinen, 2008, p. 234) and facilitating the transposition of the inherency principle in this way would be an immensely significant development because it seems rules which were regarded as ‘inherent’ would not then need to be objectively examined.

If that state of affairs were to hold sway ‘inherency’ would indeed be the new ‘purely sporting’ rule (Parrish and Miettinen, 2008, p. 237). The Court opined that doping rules had as their *primary* purpose the preservation of competition and the protection of athletes’ health and it is upon those grounds that their existence can be justified notwithstanding the competition concerns, but it is difficult to discern a rationale for the argument that doping rules are somehow ‘inherent’ in sports practices: sports were organised and practised without doping rules for hundreds of years and there are plenty of sports, and plenty of countries, that do little more than pay lip service (if that) to the doping rules now in existence.

Doping rules are thus a reflection of sports’ responses to changing sporting landscapes and the availability of new technology. They facilitate WADA’s, national anti-doping agencies’ and sports bodies’ carrying out of the functions they have accrued unto themselves, so in that sense they are an invaluable tool in what is widely regarded as the legitimate aim of ensuring drug-free competition. But they are not ‘inherent’ in the sense of (for instance) the offside rule in football or the LBW rule in cricket. It would be regrettable if ‘inherency’ did indeed become the new ‘purely sporting’ rule, and it would be particularly dangerous if sports bodies, seduced by the ‘inherency’ concept, were to proceed on the assumption that their doping rules would be regarded as ‘inherent’ and thus immune from scrutiny. A sporting rule can only be ‘inherent’ if it has withstood the test of time and is fundamental to the sport, and by definition any rule which has an economic element will have been a comparatively recent response to the changing economic landscape. The *Wouters* approach, without ‘inherency’ would be perfectly appropriate for reconciling sports’ legitimate interests with their legal obligations and needs no embellishment because competition law will not render an appropriate, proportionate doping regime unlawful. Anti-doping rules can impose a burden on the athletes’ opportunities to compete, but one cannot discern from the *Meca-Medina* judgment any indication that the court was ever minded to hold that these particular rules went beyond what was necessary

to advance the legitimate goal of drug-free sport. Weatherill (2006, p.651) points out that “the ECJ did not seek to attribute special magic to sporting rules” in *Meca-Medina* and it would be regrettable if sports bodies sought to hide their rules behind [the](#) cloak of ‘inherency’ rather than engage in a proper, considered scrutiny of their rules and the rationale for them. It is clear from *Meca-Medina* that the courts will not look too hard for opportunities to substitute their understanding of the scientific and technical aspects for those of the experts: “the approach adopted in *Meca-Medina* is to accept 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” (op cit). But in respect of rules that have the potential to be so important that an athlete (or other stakeholder) whose interests are ill-served by it might initiate legal proceedings, the governing body needs to think carefully about how it would be able show how it contributed the proper regulation of its sport and that any sanctions were proportionate to those legitimate aims.

Meca-Medina extinguishes the argument used by sporting bodies in previous cases that certain rules are exempt from Community law because they have a ‘purely sporting’ nature, but because the focus was on the application of competition law “the original exception (in the context of the free movement provisions, as in *Walrave*) has yet to be *expressly* overruled” (Parrish and Miettinen, 2008, p.105). Accordingly, this case does not have the competence to extinguish the existing exception in the free movement field - “in this sense, *Meca-Medina* is not in itself sufficient authority for the proposition that the *Walrave* sporting exception has also ceased to exist in the context of free movement” (Parrish and Miettinen, 2008, p.99). But it is now for sporting bodies to explain that although their rules may seem restrictive or unfair, they are nonetheless necessary. Weatherill (2006, p.657) argues that “as *Meca-Medina* 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*.”

Is *Meca-Medina* ‘bad for sport’?

Weatherill's comments serve as an endorsement of the ECJ's approach to *Meca-Medina* and they are reflected in wider academic opinion. However, there has been considerable criticism from within the sporting community and many stakeholders would have much preferred the approach of the CFI, which would have given sporting organisations far more autonomy over their anti-doping regimes than the ECJ has done, even allowing for the 'inherency' argument which has the potential to lure European sporting organisations into a false sense of security.

These concerns have been most prominently articulated by Gianni Infantino, now UEFA's General Secretary and previously its much-respected Director of Legal Affairs. Infantino (2006, p.2) considers *Meca-Medina* to be "a major step backwards" which will inevitably open a "Pandora's box" of highly undesirable legal and political ramifications. For sports bodies, the most problematic aspect of the case's legacy is the confusion which surrounded the nature of the anti-doping rules; it is regrettable that the CFI's approach was one that could not ever be reconciled with the *Wouters* formula and the ECJ was right to correct it; but this necessarily meant that the CFI and ECJ had reached conflicting decisions and the one which would have garnered most support within sporting organisations was not the one to ultimately hold sway. Infantino, recognising (as both the CFI and ECJ did) that the primary nature of the rules was sporting, contended that "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." His analysis reflects the view of the CFI but, with respect, this is flawed reasoning. Whilst the economic nature of the doping rules is clearly secondary to their sporting context, one must nevertheless have due regard to the commercial realities of sport at the elite level. Manville (2008, p.21) reasons that "it would be incomprehensible that rules laid down by undertakings in a sector where billions upon billions of Euros are generated each year should be exempt from the scope of the Treaty" and it is the very fact of sport's significance in so many social, economic, political and other ways that militates against arguments that it should be afforded special treatment. Clearly it has properties that render it 'special', but so do most other economic sectors and competition law is no less able to take them into account than it is able to accommodate the unique features of sports.

Further criticism concerns the competence of the court itself, the allegation being that it has involved itself too deeply in anti-doping matters. As Infantino reasons, "with the greatest of respect to the judges in Luxembourg, do they really

have the knowledge or expertise to decide whether it is one or two milligrams of nandrolone that should be permissible in the body tissue of a professional swimmer? And what on earth has this all got to do with European competition law?" Clearly Infantino has a point, but the only solution to that conundrum is to give sports the blanket exemption from all aspects of European law which Infantino seeks, and that has simply not been on the EU's agenda in the fifteen years since *Bosman*. One does not doubt that the judges of the CFI and ECJ would have wondered why on earth they were being burdened with the issues that arose in *Meca-Medina*, but the matter clearly fell within the courts' jurisdiction and they had no choice but to deal with the issues raised. Judges are often required to consider issues which fall outside their areas of expertise – and, indeed, upon dismissing the complaint the Commission took 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 combating doping" (Commission Press Release, 2002) - but that is what judges are paid to do and they are intelligent people. The courts in *Meca-Medina* were quite capable of understanding the justifications for doping control that the sports bodies advanced and evaluating their arguments as to why the permissible level of nandrolone was what it was. Thereafter, the questions of whether that benchmark was appropriate, and whether the sanctions for exceeding it were proportionate, were questions that judges are eminently capable of answering. The courts cannot refuse jurisdiction simply because they have no knowledge of, or no interest in, the subject-matter of the dispute, but on this occasion they were sensitive to the peculiarities of the case and willing to defer to scientific opinion. It is for the anti-doping authorities to explain to a court why the permissible levels are where they are and why the length of ban is what it is, secure in the knowledge that the courts will not be keen to substitute their views for those of the experts.

One can be more sympathetic towards Infantino's argument that if the purpose of the Courts is to apply the law so as to create judgments suitable for application at national level and thereby ensure legal certainty, then this principle was departed from in *Meca-Medina*. He contends that "the Court of Justice has shown little interest in defining more clearly the scope of the sporting exception and has 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.” Likewise, FIFA was quick to express its disappointment at the incorporation of *Meca-Medina* in the White Paper on Sport

(<http://www.fifa.com/aboutfifa/federation/releases/newsid=550327.html>), but why should a case-by-case approach be detrimental to the interests of sports at all? By analysing each case in turn, the courts are acknowledging and respecting the inherent peculiarities of each sport and, indeed, responding to the unique factors of each individual dispute. Sports organisations should be able to show that they carry out their role fairly, transparently, in accordance with lawful rules and without bias; it is right that doping rules - imposed by bodies which have wide-ranging monopoly powers and which receive massive sums from the public purse while being accountable to no-one but WADA - should be subject to the scrutiny of the courts, but those bodies also need the flexibility to respond appropriately to each new challenge as it arises. A legitimate response to the use of nandrolone will be different to that which is legitimate in respect of (say) blood doping (McArdle, 2011) or the whereabouts rule (Pendlebury and McGarry, 2010), but neither the European courts nor the wider European Union is hostile to anti-doping regimes and if the anti-doping community can explain the merits of what it does and why, it will have nothing to fear. *Meca-Medina* strikes the balance between legal certainty and the need for flexibility. It is good for sport in general and for anti-doping in particular.

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Concluding thoughts

Meca-Medina, as the ECJ's first examination of the relationship between competition law and sport, is significant for its departure from the classic sporting jurisprudence in favour of the *Wouters* framework. This structure, by its very nature, demands analysis on a purely case-by-case basis but reflects the truism that most of the rules which Europe's sporting bodies implement *do* have economic effects and are thus amenable to scrutiny by the competition authorities. But although they will be subject to scrutiny, they will not be subject to condemnation if sporting bodies can illustrate that the objectives pursued by its rules are legitimate and proportionate in their effects. As Weatherill (2008, Special Addendum, p.9) recognises, this accordingly means that the ECJ “did not offer answers to the many *detailed* questions raised about the scope of intervention of EC law into sporting practices,” but the courts can

only dispose of the case before it; to offer detailed answers to hypothetical scenarios or questions which are not germane to the case (as it was invited to do in *Olympique Lyonnaise v Bernard* [2010] All ER (EC) 615) would attract the criticism that they have overstepped their remit. Clearly the *Meca-Medina* approach does not facilitate the solid legal certainty which sporting bodies understandably seek; but European sports can afford able counsel who are qualified to provide guidance on whether particular rules are compatible with their Treaty obligations. Assistance on such matters could also be sought from the Commission in the form of the guidance letters that may be issued to facilitate compliance with Articles 101, 102 TFEU, subject to the caveat that it is ultimately for the courts, not the Commission, to rule on whether a particular course of action is compatible with European law.

In keeping with the theme set by *Meca-Medina* and entrenched in the Lisbon Treaty, the Court in *MOTOE v Greece* [2008] 5 CMLR 11 confirmed that future questions regarding the growing relationship between sport and competition will be deliberated one case at a time: to quote the Advocate General's Opinion (at para 38) "sport nowadays has a not insignificant economic dimension.¹ Consequently, when it comes to the application of the competition rules, *each individual activity* that exhibits a connection with sport must *on each occasion* be examined to ascertain whether it is economic in nature or not." Just as *Meca-Medina* provided clarification on the former Article 81's connection with sport, *MOTOE* offers corresponding analysis in terms of what used to be Article 82 and Article 86 (and are now Articles 102, 106 TFEU). In line with the ECJ's reasoning in *Meca-Medina*, *MOTOE* treats sport not as a completely isolated, wholly-special sector where 'purely sporting' rules run rampant; rather, sport's economic impact demands that it be treated in a manner similar to any other sector where economic activity brings it within the ambit of the competition law provisions, albeit while taking into account those factors that do indeed make sport 'different'. Assessment on a case-by-case basis along the lines laid down in *Wouters* and subsequently developed in *Meca-Medina* and now *MOTOE* provides the Court with the opportunity to recognise the inherent peculiarities of particular sports; and particular sports are likewise provided with an opportunity to show how specific provisions or courses of conduct that may not have been appropriate in other circumstances are perfectly proper in theirs – as evinced by the fact that in *MOTOE* the monopoly undertaking had to change its activities to ensure compliance with competition law, while in *Meca-Medina* there had been no

need to do so. In the latter, the anti-doping rules were deemed to be *necessary* and (more problematically) *inherent* in the proper functioning of swimming competitions, whereas the motorsport rules in *MOTOE* carried a strong potential for abuse, and it was that mere potential for abuse which rendered them contrary to competition law. None of this is straightforward, and sporting bodies could be forgiven for trying just to satisfy themselves that their doping (and other) rules could be regarded as ‘inherent’ in the organising and running of their sports and hope that no further scrutiny is required of them. That would be a risky game to play. A far better approach would be to not place all one’s eggs in the ‘inherency’ basket and to engage with *Wouters*, *Meca-Medina* and now *MOTOE* and consider whether the rules are necessary and proportionate – in effect, to partake in what Michael Beloff calls a “competition law compatibility audit” and thus have a strategy which can be offered as an alternative to the ‘inherency’ defence, should it fall on stony ground. Sports bodies which take those steps now, both in relation to their anti-doping provisions and to others with which competition law appears to arise, will have procedures that are far more likely to withstand legal scrutiny. Finally, it should also be mentioned in passing that the sporting provisions of the new Treaty on the Functioning of the European Union further reflect the *Meca-Medina* approach: although sporting bodies had championed the inclusion of a legal base of sport on the ground that it provide increased autonomy and a greater degree of certainty, the Community institutions’ obligation in Article 124 TFEU only to “tak[e] account of the specific nature of sport” enshrines the *Meca-Medina* approach rather than heralding anything more adventurous.

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¹ In *MOTOE* the Greek court asked the European Court of Justice for a preliminary ruling on whether both the commercial and administrative activities of ELPA (a not-for-profit body which organised motor-racing events in Greece) fell within the scope of European competition law. If that question were answered in the affirmative, the Greek court also wished to know whether European competition laws rendered unlawful national measures which had given ELPA decision-making powers, given that ELPA organised and hosted its own events which might be in competition with those organised by

MOTOE or any other rival motorsport organisation. The ECJ held that although ELPA's powers to regulate Greek motorsport had been granted to it by the state, it was still subject to European competition law in respect of its *economic* activities such as the organisation and commercial exploitation of motorcycling events, even though it was not motivated by profit. The monopoly right conferred upon ELPA allowed it to grant or deny consent to others who wished to organise motorsport events, but it was also at liberty to organise and commercially exploit such events itself and it had the potential power to deny other organisers access to the motorsport 'market' without being subject to any restrictions, obligations or internal review mechanisms. ELPA's commercial activities thus fell within the scope of European competition law even though those powers had been granted to it by the state.