

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

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The European Court of Justice hit the headlines on the sports pages of the newspapers back in 1995, when it handed down its ruling in the Bosman case.

As nearly every football fan knows, this was the case that changed the face of the player transfer system and changed the make-up of club sides throughout Europe. Effectively, the litigation ended any limits on "foreign" players in clubs in Europe, and the consequences for football have been far reaching.

European law has continued to have a big impact on sports matters in recent years, although the cases are less celebrated than the Bosman issue. At first sight, it is perhaps not obvious that an obscure ruling concerning a couple of professional swimmers involved in a doping dispute would have similar ground-breaking consequences for sport. Nevertheless, this is just what might happen as a result of the judgment handed down by the European Court of Justice in the Meca-Medina case in July earlier this year (notwithstanding the fact that the swimmers actually lost their case).

This is - unlike Bosman - not a case that concerned free movement of workers or any other core principle of the EU legal system. To the contrary, it was a case about two swimmers failing a doping test. The fascinating - some would say bizarre - aspect of this ruling is that the penalty imposed on the swimmers (a two-year ban) was challenged under European competition (or anti-trust) law.

This fact alone tends to show just how inventive lawyers can be. The main purpose of European competition law is to attack cartels and deal with big mergers. Of course, competition law may concern the sports "business" as well: for example, one might think of lucrative television contracts for big events such as the FIFA World Cup or Olympic Games. But anti-doping rules?

In fairness to the European Commission (often cast as a villain trying to extend its reach to sport), the authorities in Brussels wanted nothing to do with the Meca-Medina case. The swimmers had, in fact, already had their case heard (twice) by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, and only complained to the Commission after they did not obtain the result they wanted from CAS. The Commission refused to intervene. Former Commissioner Mario Monti dismissed the complaint, pointing out that it was not the job of Brussels to take the place of sports bodies when it comes to anti-doping matters.

At this point, the swimmers appealed the Commission decision to the lower court in Luxembourg (the European Court of First Instance). That court backed the Commission, saying that EU law had nothing to do with doping, either in swimming or any other sport. It reasoned that anti-doping rules had a

non-economic and ethical sporting objective, and therefore fell outside the scope of EU law altogether. However, on a further appeal to the highest court in Europe (the Court of Justice itself), it has now been held that sports disciplinary rulings (e.g. in relation to doping penalties), do need to be analysed under European competition law, in particular, to determine whether the limits contained in the rules are acceptable and the penalties imposed are "proportionate".

Now, 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? Should judges charged with the application of EU law be the ones to decide whether a ban imposed on a swimmer should be two years or 18 months (especially after two previous hearings by an independent sports tribunal on exactly the same matter!). And what on earth has this all got to do with European competition law? One wonders if the founding fathers of the Treaty of Rome had in mind the impact of anti-doping penalties in sport when they drafted the Treaty articles regarding economic competition.

Moreover, the trouble with open-ended and subjective concepts like "proportionality" is that they can mean almost anything you want (or at least it is always open to argument). In any event, the net result now seems to be that almost any sports disciplinary measure could potentially be attacked under EU competition law. In effect, the issue becomes a lawyers' playground and a nightmare for sports bodies and administrators.

Against this background, perhaps now is the time to reel in the well-meaning judges in Luxembourg, and provide some much needed clarification as to the limits of European law when it comes to core sports rules and practices. Otherwise, the next matter up for challenge will be the size of the ball or the shape of the goalposts. And finally, this is not a call for sport to be "above the law", as we have sometimes heard in the past. It is simply a matter of setting some sensible limits to prevent abuses of the legal system, and to stop playing into the hands of lawyers trying to make a career out of attacking sports rules.