Contents

Abstract
Introduction
Dealing with rules of 'purely sporting interest': from Walrave to Deliège and Lehtonen
The divergence between Walrave and Bosman
The interaction between rules of purely sporting interest and EC Treaty rules: an everlasting confusion
Conclusions from the case-law of the ECJ
The approach taken by the CFI in Meca Medina and Piau
'Rules of purely sporting interest' and Articles 81 and 82 EC
The confusing reference to Wouters by the Commission in Meca Medina
The Walrave test in practice before the CFI
The confusion of the CFI in Piau
Issues raised by the two judgments
Conclusion
Bibliography
Links

ISSN 1748-944X

The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the *Meca Medina* and *Piau* cases

Pablo Ibáñez Colomo
Teaching Assistant, College of Europe, Bruges[*]

ABSTRACT

In the Meca Medina and Piau cases, the European Court of First Instance had to deal for the first time with the application of EC Treaty provisions to sports bodies' rules. The first of these two cases concerned anti-doping rules adopted by the IOC and the second one concerned FIFA regulations on players' agents. According to case-law of the European Court of Justice, rules 'of purely sporting interest' do not fall within the scope of the EC Treaty. However, an overview of the relevant judgments shows that the test adopted since Walrave to assess the 'purely sporting' nature of such rules is not fully clear and has not always been applied in a consistent way, in particular after Bosman. The Meca Medina case, in which the European Court of First Instance has applied the test in a slightly different manner, opens the door to substantial simplification of future case-law. On the other hand, the European Court of First Instance has also taken the view that the test, which had only been applied up to now by the European Court of Justice to EC Treaty rules on free movement of workers and free provision of services, extends also to the rules on competition. Piau, delivered by the European Court of First Instance some months later, has confirmed the confusion that may derive from traditional case-law and has shown the risks that may derive from the adoption of divergent decisions within the European judicial system.

KEYWORDS

Sport – European Union - Competition Law – 'Purely Sporting Interest' – Doping – Players' Agents

INTRODUCTION

The *URBSFA v Jean-Marc Bosman* judgment (Case C-415/93 [1995] ECR I-4921), by proving that judicial bodies of the European Community (hereinafter, 'the Community') were ready to monitor actively sports associations' activities and regulations, has led to an explosion of cases in the field of sport during the last decade. The European Commission (hereinafter, 'the Commission') has thus had to adjudicate on many different issues regarding rules related directly or indirectly with sporting activities, such as the regulations applicable to the Fédération Internationale de l'Automobile (FIA) or the Union des Associations européennes de football (UEFA) rules on multiple club ownership (see Pons, 2002). In two of these cases, the decisions adopted by the Commission were challenged before the European Court of First Instance (hereinafter, 'the CFI'). The *Meca Medina* case concerned the application of EC Treaty provisions to anti-doping rules laid down by the International Olympic Committee (hereinafter, the 'IOC') and the *Piau* case concerned the Fédération Internationale de Football Association (hereinafter, FIFA) regulations on players' agents. Both judgments were delivered by the Fourth Chamber of the CFI, the first one on 30 September 2004 (Case T-313/02 *David Meca Medina and Igor Majcen v Commission* not yet reported), and the second on 26 January 2005 (Case T-193/02 *Laurent Piau v Commission* not yet reported). 1

This is the first time that the CFI has had to rule on the application of EC Treaty provisions to sports rules. It will be argued that these two cases have shown that the principles set by the European Court of Justice (hereinafter, 'the ECJ') in previous case-law are probably unnecessarily complex and have moreover been applied inconsistently. Therefore, the conditions under which sports rules may fall within the scope of the EC Treaty should be clarified by the ECJ in appeal. 2

DEALING WITH RULES OF 'PURELY SPORTING INTEREST': FROM *WALRAVE* TO *DELIÈGE* AND *LEHTONEN*

THE DIVERGENCE BETWEEN WALRAVE AND BOSMAN

The ECJ, in order to consider whether sporting activities fall within the scope of the EC Treaty, has always had recourse to the same basic principles since the two founding rulings delivered in the mid 1970's, *Walrave v Association Union Cycliste Internationale* (Case 36/74 [1974] ECR 1405) and *Gaetano Donà v Mario Mantero*. (Case 13/76 [1976] ECR 1333). However, as the following summary of the main features of case-law in the field will show, the subsequent application of these principles has led to a departure from the rationale underlying these first two cases. 3

In paragraph 4 of the *Walrave* ruling, the ECJ made clear that 'the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty'. Then, in paragraph 5, it mentioned the Treaty provisions on the free movement of workers (now Article 39 EC) and on the free provision of services (now Article 49 EC) that apply when such economic activity has 'the character of gainful employment or remunerated service'. Since *Walrave*, the ECJ has always examined, as a first step, whether the practice of sport constitutes an economic activity, and then has gone on to ascertain whether it is caught by either of these Treaty provisions. In *Bosman*, for example, the ECJ had to reject arguments based, *inter alia*, on the freedom of association and on the subsidiarity principle, and then held that Article 39 EC applies to rules dealing with 'the term of which professional sportsmen can engage in gainful employment' (*Bosman*, paragraph 87). In almost all cases brought before the ECJ after *Bosman* it was clear that the activity at stake was economic and therefore caught by either Article 39 EC or Article 49 EC. That was the situation, for instance, in *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v FRBSB* (Case C-176/96 [2000] ECR I-2681), a case concerning a professional basketball player. In fact, only in the *Christelle Deliège v LFJ, LBJ and EJU and Christelle Deliège v LFJ, LBJ and François Pacquée* cases (Joined Cases C-51/96 and C-191/97 [2000] ECR I-2549) was it doubtful whether the activities of the claimant, a judoka, could be qualified as a provision of services within the meaning of Article 49 EC. This case concerned the participation of Ms. Deliège in an international tournament for which she would not receive any remuneration. The ECJ left to the national court the question whether participation in international tournaments is an economic activity within the meaning of Article 2 EC. However, it expressly held that the fact that an association classifies its members as 'amateur athletes' has no consequences on the application of Articles 39 or 49 EC. Moreover, it referred to Case 352/85 *Bond van Adverteerders e.a. v Netherlands* [1988] ECR 2085 to hold that Ms. Deliège's activities may be caught by Article 49 EC even if the services 'are not paid for by those for whom they are performed'. 4

In any event, even if the sporting activity at stake in a given case is deemed 'economic' within the meaning of Article 2 EC, a sporting rule may still fall outside the scope of the EC Treaty. In *Walrave*, for example, the claimant challenged a rule laid down by the Union Cycliste Internationale (UCI) according to which the stayer and the pacemaker taking part in an international competition have to be of the same nationality. Even if this rule constituted a clear discrimination within the meaning of Article 7 EC, the ECJ pointed out in this case that the prohibition arising from this provision does not 'affect' a rule that is of 'purely sporting interest' and thus has 'nothing to do with economic activity' (*Walrave*, paragraph 8). This principle applies as long as the rule 'of purely sporting interest' remains 'limited to its proper objective' (*Walrave*, paragraph 9). According to an 'orthodox' reading of *Walrave*, a rule of 'purely sporting interest' would in principle fall outside the scope of the EC Treaty, unless it is found to be disproportionate, in which case it would be scrutinised pursuant to Articles 39 or 49 EC. 5

The *Donà* case concerned a football player willing to take part in the Italian national championship. At the time of the judgment, the participation in the national championship was exclusively open to Italian nationals. In this case, the ECJ noted that Article 7 EC applies to sporting rules 'unless such rules or practice exclude foreign players for reasons which are not of an economic nature' (*Donà*, paragraph 19). However, the wording of this paragraph was confusing. If in *Walrave* the discrimination at stake fell plainly and clearly outside the scope of the EC Treaty, the ECJ seemed to suggest in *Donà* that the non-economic nature of a sporting rule could be invoked as a justification for a measure otherwise caught by Articles 39 and/or 49 EC (it is important to note that the ECJ refrained from examining the nature of the rules laid down by the Italian association and left the question for the national court). 6

This confusion led in *Bosman* to an alleged shift from the 'orthodox' test laid down in *Walrave* (Weatherill, 2003, p. 56). This former case concerned, *inter alia*, a discriminatory rule against foreign nationals similar to the one challenged in *Donà* (hereinafter, 'the nationality clauses'). The ECJ did not assess whether the nationality clauses were of 'purely sporting interest' but simply held that they gave rise to an 'obstacle' to a fundamental freedom that had to be 'justified' (*Bosman*, paragraph 121). In this sense, it assessed whether a justification was possible on 'non-economic grounds concerning only the sport as such' and came seemingly to the conclusion, in paragraphs 127 and 128 of the judgment, that nationality clauses 7

were not 'limited to [their] proper objective', i.e., they were disproportionate.

THE INTERACTION BETWEEN RULES OF PURELY SPORTING INTEREST AND EC TREATY RULES: AN EVERLASTING CONFUSION

In the two subsequent judgements, *Deliège* and *Lehtonen*, rendered in 2000 within two days, both the *Walrave* and *Bosman* approaches were allegedly upheld (on the *Deliège* judgment see Van den Bogaert, 2000). The first of the cases concerned the rules laid down by the Belgian Judo federation for the selection of judokas to participate in international tournaments. The ECJ, after holding that Article 49 EC might apply to Ms. Deliège's activities, took the view that although selection rules have the effect of 'limiting the number of participants in a tournament, such limitation is inherent in the conduct of an international high-level sports event' (*Deliège*, paragraph 64). In the light of the *Walrave* test, this can be interpreted as meaning that, as rules 'of purely sporting interest', the selection criteria were not caught by Article 49 EC. 8

The *Lehtonen* case concerned a rule laid down by the Belgian basketball association that was applicable to transfer deadlines for players coming from other associations. A stricter deadline applied to players coming from a European association than those who came from another association. After considering that Mr. Lehtonen, a professional basketball player, was a worker within the meaning of Article 39 EC, the ECJ held that the rules were contrary to this Treaty provision. When dealing with the justifications, the Court accepted that such rules could be justified on 'non-economic grounds', given that they may be adopted with a view to 'ensuring the regularity of sport competitions' (*Lehtonen*, paragraph 53). However, the ECJ came to the conclusion that the rules were disproportionate. 9

CONCLUSIONS FROM THE CASE-LAW OF THE ECJ

Deliège and *Lehtonen* constitute the perfect example of the current confusion concerning the application of 'rules of purely sporting interest' (and it is worth noting that M. Ragnelman was the reporting judge in both cases). In fact, the ECJ could have taken the view that the rules in *Deliège* entailed not only a 'limitation' but a genuine 'obstacle' to a fundamental freedom that could have been justified on 'non-economic grounds' (as Van den Bogaert rightly pointed out). Conversely, the ECJ could have considered that the rules at issue in *Lehtonen* were 'of purely sporting interest' but were caught by Article 39 EC since they went beyond their 'proper objective'. 10

Thus, it is not yet clear whether 'rules of purely sporting interest' are not caught by Articles 39 and 49 EC or whether their sporting nature can be invoked as a justification for measures infringing these two provisions. In this respect, it is important to note that only an 'orthodox' reading of *Walrave* is consistent with the EC Treaty. If a measure is deemed discriminatory under the provisions on free movement of workers of the free provision of services, it can only be cleared under the justifications expressly provided for in the EC Treaty. Since the non-economic nature of a sporting rule is not referred to in the EC Treaty, it could not be relied upon in cases similar to *Bosman* (Dubey and Dupont, 2002, p. 9). What is more, the fact that a measure is not discriminatory would not suffice to make it fall outside the scope of Articles 39 and 49 EC (Van den Bogaert, 2000, p. 560). 11

In any case, some important conclusions may be drawn from the difference in approach between *Walrave/Deliège* and *Bosman/Lehtonen*. On the one hand, the ECJ seems to be more lenient towards international tournaments involving national teams. In fact, the rules at stake in *Walrave* and *Deliège*, both concerning this kind of tournament, were upheld by the ECJ; conversely, *Bosman* and *Lehtonen* concerned domestic competitions between clubs. One may try to argue that domestic competitions between clubs are clearly for-profit activities, whereas in international tournaments players compete 'for free' against other countries. Such reasoning would not be consistent with the criterion applied by the ECJ itself (the economic nature of the activities) nor with the very economic reality of international tournaments. In fact, the ECJ has implicitly acknowledged in *Deliège* that almost every sport competition will be economic in nature within the meaning of Article 2 EC. 12

On the other hand, whether or not a sporting rule is discriminatory can be considered as an element that determines the difference in the approaches taken by the ECJ, at least after *Bosman*. In *Deliège*, for instance, the ECJ stresses, in paragraphs 61 and 62 of the judgment, that the selection rules were not discriminatory, and compared the rules to the ones at stake in *Bosman*. However, such difference does not justify the application of different tests to both situations. As will be shown below, there is a need to bring some clarification on the different principles set by the ECJ in *Walrave*, and a divergent application of those helps very little to define their scope. For instance, had both *Deliège* and *Lehtonen* followed an 'othodox' reading of *Walrave*, the ECJ would have shown the conditions under which rules of 'purely sporting interest' are acceptable. 13

THE APPROACH TAKEN BY THE CFI IN *MECA MEDINA* AND *PIAU*

'RULES OF PURELY SPORTING INTEREST' AND ARTICLES 81 AND 82 EC

In the abovementioned cases, only Articles 39 and 49 EC were invoked in situations involving sporting rules. Thus, there were some doubts concerning the interaction between EC provisions on competition (in particular, Articles 81 and 82 EC) and sporting rules. 14

In fact, it has to be recalled that the test laid down by the ECJ in *Walrave* was conceived to apply to the fundamental freedoms and thus can not extend as such to Articles 81 and 82 EC. Indeed, the requirement that the activity is economic in nature within the meaning of Article 2 EC is actually a rule applying in general to Articles 39, 43 and 49 EC. For instance, the economic nature of the activity was at stake in the *Udo Steyman v Staassecretaris van Justitie* case (Case 196/87 [1988] ECR 6159), concerning a member of a religious community. The assessment of the ECJ and the Commission under Article 81 and 82 EC is slightly different. It is true that these two provisions require, as much as Articles 39 and 49 EC, the exercise of an economic activity. However, this requirement is deemed fulfilled if a given body can be qualified as an undertaking, as stated by the ECJ in *Klaus Höfner and Fritz Elser* v *Macroton GmbH* (Case 41/90 [1991] ECR I-1979). This last judgment gives the following definition of an undertaking within the meaning of Articles 81 and 82 EC: 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. 15

As a consequence, in the realm of Articles 81 and 82 EC, the ECJ should examine in the first place whether the body adopting the rules can be qualified as an undertaking or an association of undertakings. 16

There is another important difference between these two sets of provisions. The 'economic activity' under Articles 39 and 49 EC refers to the practice of sport by the athlete alleging the infringement of EC law. On the contrary, the question whether the athlete's activity is of an economic nature bears no consequences for the application of Articles 81 and 82 EC. Indeed, the economic nature of the activity is only important to the extent that it relates to the association of undertakings and/or the undertakings taking part in an agreement. 17

How could the *Walrave* test be transposed to Articles 81 and 82 EC? Advocate General Lenz showed the possibilities of doing so in his conclusions in the *Bosman* case (Case C-415/93 [1995] ECR I-4921). He first held that the rules at stake were most likely a decision of an association of undertakings, having an effect on trade between Member States. Not surprisingly, Advocate General Lenz went on directly to hold in paragraph 262 of his opinion that 'it is also perfectly clear that the effect of the rules at issue in this case is a restriction of competition within the meaning of Article 85(1)'. Therefore, he did not follow a decisive element of the *Walrave* test (paragraph 8), since he avoided questioning whether the rules at issue were of 'purely sporting interest' falling outside the scope of Article 81 EC. In his opinion in *Deliège*, Advocate General Cosmas did not take into consideration paragraph 8 of the *Walrave* judgment either and examined directly whether the rules at stake entailed a restriction of competition (Joined Cases C-51/96 and C-191/97 [2000] ECR I-2549). 18

In neither of these two judgments, nor in *Lehtonen*, did the ECJ examine the questions raised by national courts under Articles 81 and 82 EC. As a consequence, the question concerning the application of the *Walrave* test to these two provisions remained open. 19

THE CONFUSING REFERENCE TO WOUTERS BY THE COMMISSION IN MECA MEDINA

In 1999, the best long-distance swimmers in the world, David Meca Medina and Igor Majcen, were tested positive for nandrolone and suspended for four years by the Fédération Internationale de Natation (hereinafter, the 'FINA') and for two years, after appeal, by the Court of Arbitration for Sport. 20

On 31 May 2001, the two sportsmen lodged a complaint before the Commission for an alleged breach by the IOC of Articles 81, 82 and 49 EC. More precisely, the complainants contended, first of all, that the anti-doping rules adopted by the IOC were restrictive within the meaning of Article 81 EC. Secondly, they considered that the fixation of a limit for nandrolone at 2 ng./ml. was constitutive of a concerted practice between the IOC, the FINA and the accredited network of laboratories. Finally, the swimmers relied on the restrictive nature of the dispute settlement system created by the IOC. 21

By decision of 1 August 2002, the Commission rejected the complaint (Case COMP/38.158. The text of the decision is available in French at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/38158/fr.pdf>). The alleged behaviours were examined almost exclusively in the light of Article 81 EC. In this respect, it must be noted that the Commission did not mention the *Walrave* judgment but started by stating that the IOC may be considered both as an undertaking and an association of undertakings within the meaning of Article 81 EC. However, the Commission immediately pointed out in paragraph 38 of the decision that the 22

rules and alleged concerted practices at stake did not seem to come within the scope of 'CIO's and FINA's economic activities'. The decision did not follow a *Deliège* or *Lehtonen* approach, but chose instead to rely on the *JCJ Wouters, JV Savelbergh and PWC BV v Algemene Raad van de Nederlandse Orde van Advocaten* case (Case C-309/99 [2002] ECR I-1577). More precisely, the Commission stated that anti-doping rules at issue may limit the athlete's freedom of action but are 'intimately linked to the proper conduct of sporting competition'. As to Articles 82 and 49 EC, the Commission simply rejected the pleas in paragraphs 70 and 71 of the decision.

Even if all precedents related to the application of EC Law to sport concerned the application of Articles 39 and 49 EC, it is difficult to understand why the Commission did not choose to rely on *Walrave*. This case provided the Commission with a tool to conclude easily that anti-doping rules did not have as their object or their effect the restriction of competition on the basis of their 'purely sporting' nature. The Commission had even issued in 1999 the Helsinki Report on Sport (COM(1999) 644 final), in which it seemingly endorsed the *Walrave* approach by taking the view that the 'rules of the game' are not caught by Article 81 EC. At first glance, it seems that anti-doping rules are without discussion among the 'rules of the game'. On the other hand, the application of the *Walrave* test to Articles 81 and 82 EC seemed also logical, since it would have ensured uniformity between the different provisions of the EC Treaty. 23

Why did the Commission rely on *Wouters*? This case concerned a rather different situation, i.e. the application of Article 81 EC to liberal professionals' regulations. More importantly, the ECJ developed in this case a *sui generis* interpretation of Article 81 EC, which has been subject to strong criticism (Whish, 2003, p. 120). Indeed, it has been claimed by prominent authors that the ECJ introduced elements from Article 81(3) EC in its analysis under Article 81(1) EC, thereby contorting the nature of this provision. More precisely, it has been claimed that this 'rule of reason' kind of analysis seems to be at odds with the structure of Article 81 EC. If the Commission based its reasoning on an 'anomalous' case, it is probably because it was obliged by the alleged anomalous nature of the 'rules of the game' (Weatherill, 2003, pp. 52-57). It is interesting to note that before *Wouters* was delivered, Advocate General Cosmas in *Deliège* and Advocate General Alber in *Lehtonen*, in examining the nature of the sporting rules under Article 81 EC, relied on *Gottrup-Klim e.a. Grovvareforeninger v Dans Landbrugs Grovvareselskab AmbA* (Case C-250/92 [1994] ECR I-5641), a 'rule of reason' judgment that is considered as the predecessor of *Wouters*. As can be seen, it is difficult both for the Commission and the ECJ to protect the alleged 'particularity' of sports rules without distorting the legal reasoning. In this sense, the reference to rules of 'purely sporting interest', as the ECJ did in *Walrave*, seemed more effective in circumventing the logical consequences of applying EC law, since it constituted a 'tailor-made' test. 24

THE WALRAVE TEST IN PRACTICE BEFORE THE CFI

David Meca Medina and Igor Majcen brought an action for annulment before the CFI against the Commission decision on 11 October 2002. They claimed, firstly, that the criteria laid down by the ECJ in *Wouters* were wrongly applied and, secondly, that the Commission made a manifest error of assessment when dealing with Article 49 EC. 25

Contrary to what the Commission did, the CFI starts by recalling the *Walrave* test in paragraph 37 of the judgment (according to which EC law applies to the practice of sport 'in so far as it constitutes an economic activity'). The CFI then goes on to hold in paragraph 39 that Articles 39 and 49 EC may apply when the activity 'takes the form of paid employment of a provision of remunerated service'. The CFI then enumerates in paragraph 40 all those sporting rules that have been found to be incompatible with the EC Treaty: transfer clauses in *Bosman* and transfer deadlines in *Lehtonen*. In paragraph 41, the CFI states, 'on the other hand', that the Treaty does not affect 'purely sporting rules' and refers, first of all, to those at stake in *Walrave*, *Donà* and *Deliège* and secondly to the 'rules of the game' in the strict sense, such as, for example, the rules fixing the length of matches […]'. More importantly, the CFI acknowledges in the next paragraph that the ECJ has not 'had to rule on whether the sporting rules in question are subject to the Treaty provisions on competition'. It then departs from the Commission analysis and declares that the principles deriving from the abovementioned cases 'are equally valid' when applied to Articles 81 and 82 EC. 26

In paragraphs 44 to 69 the CFI examines the 'nature of the anti-doping rules at issue'. The analysis is however different from that undertaken by Advocates General Lenz and Cosmas in *Bosman* and *Deliège*. Indeed, it does not ascertain whether the FINA and/or the IOC can be qualified as undertakings within the meaning of Article 81 EC. The CFI goes straight to assess the 'purely sporting' nature of the anti-doping regulations. It holds that 'the prohibition of doping, as a particular expression of the requirement of fair play, forms part of the cardinal rule of sport' and then refers to the 'Helsinki Report on Sport', a document that was not mentioned by the Commission. As a consequence, the CFI concludes that the prohibition of doping, in general, 'is based on purely sporting considerations' that have 'nothing to do with any economic consideration'. The CFI states secondly that this general conclusion applies to the anti-doping rules laid down by the IOC. On the one hand, it is noted in paragraph 49 of the judgment that the rules at stake 27

have no 'discriminatory aim', since the limit of 2 ng./ml. is not applied 'selectively to certain athletes'. The CFI even points out that if this was the case, 'such legislation would thus not escape the Treaty provisions on economic freedoms and those freedoms might thereby be infringed'. On the other hand, the CFI refutes two arguments raised by the parties, one based on the economic repercussions they have and the other one based on the alleged economic motivations behind the adoption by the IOC of anti-doping rules.

The CFI examines the reference to *Wouters* by the Commission in paragraphs 61 to 67. The Commission itself stated during the hearing that such a reference was made 'for the sake of completeness', since the decision was based on *Walrave*, *Donà* and *Deliège*. The judgment, despite stressing the difference between the case at hand and *Wouters*, does not find any justification to annul the Commission decision on this ground. The same conclusions extend, according to the Court, to Article 49 EC. 28

THE CONFUSION OF THE CFI IN PIAU

In 1998, Laurent Piau brought a complaint before the Commission alleging that FIFA rules on players' agents were contrary to Article 49 EC, in that they banned the possibility for players and clubs to have recourse to agents not licensed by the FIFA. Furthermore, the complainant held that the conditions imposed by the FIFA to become a 'licensed agent' such as, in particular, the obligation to deposit a bank guarantee or to take an exam were unfounded as well as disproportionate. Following a complaint brought by a Danish undertaking, Multiplayers International Denmark, on the grounds that such regulations were contrary to EC Treaty rules on competition, the Commission opened proceedings against FIFA pursuant to Articles 81 and 82 EC. In a statement of objections sent to the Association, it held that the regulations concerning players' agents might be contrary to Article 81 EC. However, after the adoption in 2000 by the FIFA of new Players' Agents Regulations (the last version of the Regulation on players' agents is available at <http://www.fifa.com/en/regulations/regulationlegal/0,1577,3,00.html>) which took into consideration the Commission's concerns, the institution considered that the new rules could qualify for an exemption decision in accordance with Article 81(3) EC; the investigation was therefore closed after its last modification in April 2002 ("Comisión closes investigations into FIFA rules on players' agents", IP/02/585, 18 April 2002). 29

The Commission adopted a rejection decision on 16 April 2002 considering that Mr. Piau's complaint lacked Community interest (Case COMP/37.124 <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37124/fr.pdf>). It considered in particular that the new rules on players' agents no longer include the most restrictive features of the previous regulations. Concerning the compulsory nature of the license, the Commission contended that in case the different requirements laid down by the FIFA were deemed contrary to Article 81, they would easily qualify for an exemption pursuant to Article 81(3). More precisely, the new regulations required, *inter alia*, that to become a 'licensed-agent' one had to pass a multiple-choice test and also to take an insurance policy. They also set the remuneration for the agents in those cases where there is a dispute between a player and an agent. According to the Commission, Article 82 EC was not infringed by the FIFA given that this association is not active 'on the market for the provision of advice to players'. 30

Mr. Piau then brought an action before the CFI for annulment against the Commission decision on 14 June 2002. The judgment dismissed the annulment action, but it is interesting in several respects. Concerning in general the application of Article 81 EC to the present judgment, the CFI considers that the Commission did not commit any 'manifest error of assessment' (*Piau*, paragraphs 83-99). As to the application of Article 81(3), the CFI holds that the regulations on players' agents could indeed qualify for an exemption. It holds in particular that the regulations at stake do not eliminate competition in that they apply a 'qualitative selection' rather than a quantitative one (*Piau*, paragraphs 100-106). Concerning the application of Article 82 EC the CFI comes to the same conclusion through the same reasoning, despite the fact that it holds that the Commission was wrong when it excluded the application of Article 82 EC to the present case. In what probably constitutes a controversial conclusion, the CFI considers in the judgment that football clubs hold a collective dominant position on the relevant market (*Piau*, paragraphs 107-121). 31

However, for the purposes of the present article, the interest of the judgment lies elsewhere. When examining the nature of the regulations on players' agents, the Fourth Chamber of the CFI first asserts, contrary to what it said in *Meca Medina*, that national football associations that are members of FIFA may be considered as undertakings as well as associations of undertakings within the meaning of Article 81 EC. It even refers to the *Deliège* case to hold that the fact that a national association gathers both amateur and professional clubs is of no importance as far as the legal classification is concerned. As a consequence, FIFA is classified as an association of undertakings. Regarding the services provided by players' agents, the CFI considers in paragraph 73 that this activity is of an economic nature 'involving the provision of services' - something that does not 'fall within the scope of the specific nature of sport'. As to the regulations adopted by the FIFA, the CFI holds in paragraph 74 that they do not 'fall within the 32

scope of the freedom of internal organisation enjoyed by sports associations'.

As can be easily seen, there are important divergences between the reasoning of the Fourth Chamber of the CFI in *Piau* and in *Meca Medina*. Moreover, the former case showed in two ways that previous case-law in the field may mislead both the CFI and the Commission. 33

First, the fact that there is a reference to an 'economic activity' both in paragraphs 4 and 8 of the *Walrave* judgment may be a source of confusion. As it is stated that rules 'of purely sporting interest' have 'nothing to do with an economic activity', it can be inferred that both paragraphs refer to the activities of the entities at stake in a given case. For instance, when in paragraph 73 of *Piau* the CFI concludes that the services provided by players' agents 'do not fall within the scope of the specific nature of sport' it is probably mixing up both paragraphs of the judgment. Indeed, the CFI does not seem to hold that Mr. Piau's activities fall within the scope of Article 2 EC. It rather refers, *inter alia*, to paragraphs 64 to 69 of the *Deliège* judgment, where the ECJ considered whether the selection rules laid down by the Belgian federation (and not Ms. Deliège's activities) could be deemed 'of purely sporting interest'. The CFI also refers to paragraphs 14 and 15 in *Donà*, paragraph 127 in *Bosman*, and to paragraph 53 to 60 in *Lehtonen*. 34

It is interesting to note that paragraphs 64 to 69 from *Deliège* would have born some interest when examining whether the FIFA regulations could be deemed 'of purely sporting interest'. Surprisingly, when examining the 'purely sporting' nature of such rules the CFI refers to an obscure concept, i.e., the 'freedom of internal organisation enjoyed by sports associations'. The relevant paragraphs from *Deliège* and *Bosman* that are mentioned to support the existence of this concept relate to the fact that Articles 39 and 49 EC apply not only 'to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner' (*Deliège*, paragraph 47). 35

Second, the CFI probably failed in adapting the *Walrave* test to Article 81 EC. It is in particular difficult to understand why the CFI refers to the nature of the services provided by the agents. When a given case concerns the application of Article 81 EC, whether or not the agent can be classified as a service provider bears no consequences on the application of Article 81 EC. The rejection decision, for example, did not refer to the nature of Mr. Piau's activities. 36

ISSUES RAISED BY THE TWO JUDGMENTS

Has the CFI proposed a new test in Meca Medina?

As has already been stated above, the CFI in *Meca Medina* does not apply the *Walrave* test in a manner consistent with previous case-law. Indeed, the ECJ had always examined whether the 'practice of sport' at issue in a case can be qualified as an economic activity within the meaning of Article 2 EC and then considered that either Articles 39 or 49 EC were applicable. In Meca Medina, the CFI does not proceed in the same way, since it goes directly to examine whether the anti-doping rules adopted by the IOC are based on 'purely sporting considerations'. 37

One may ask the reason why the CFI takes such an approach. First, it can be argued, as stated above, that the *Walrave* test is confusing when using the term 'economic activitiy'. On the other hand, it must be born in mind that the *Walrave* test can only apply as such to Articles 39 and 49 EC. 38

However important these two questions are, the CFI, by not following the *Walrave* test, has opened a very interesting possibility for future case-law in the field. Under this 'new approach', the Courts or the Commission would first of all examine whether or not the rule in question is of 'purely sporting interest' and, if so, whether it 'remains limited to its proper objective'. Only after this first step would the Commission and the European Courts ascertain either whether the sporting activity in question is an 'economic activity' within the meaning of Article 2 EC, or whether the body adopting the rules can be classified as an undertaking or an association of undertakings within the meaning of Articles 81 and 82 EC. 39

It is submitted that this new test may have several advantages in case the European judiciary is still willing to keep rules 'of purely sporting interest' outside the scope of the EC Treaty. First of all, it would avoid the confusion raised by the double reference to the term 'economic activity' in *Walrave*. Second, the application of the EC Treaty would follow uniform rules irrespective of the provisions invoked. Third, it would arguably contribute to understand the scope of the 'rules of purely sporting interest'. In fact, it is difficult to see in cases such as *Bosman* why the rules were deemed of 'purely sporting interest'. In that case the ECJ seemingly held that nationality clauses were indeed of 'purely sporting interest' but were considered disproportionate. It is difficult to see where the 'sporting interest' lies in such clauses (it must be recalled that they were introduced in the 1960s and they are not applied in some countries). 40

Fourth, this new approach would be more coherent with the alleged non-economic nature of rules of 'purely sporting interest' (or the 'rules of the game', to which reference is made in the Helsinki Report on Sport). It has been emphasised above that sporting rules, even those that are not discriminatory and of 'purely sporting interest', could easily be regarded as contrary to Articles 39 or 49 EC. If the European Courts, in order to assess the nature of the rules at stake in a given case, avoid assessing whether or not the activity of an sportsman is economic in nature within the meaning of Article 2 EC (or qualifying a sporting body as an undertaking within the meaning of Article 81 EC), they would not need to have recourse to controversial judgments such as *Wouters* and would probably eliminate the current divergence between *Walrave/Deliège* and *Bosman/Lehtonen*. Finally, the test would be more realistic. It can be presumed that in this kind of cases, the true issue will almost always be whether or not the rule is 'of purely sporting interest'. 41

On the other hand, the *Meca Medina* judgment has also undermined the argument that the 'purely sporting' nature of a rule is a justification for a measure infringing Articles 39 and 49 EC. In two paragraphs of the judgment, the CFI clearly states that rules of 'purely sporting interest' do not come in principle within the scope of the EC Treaty. More precisely, in paragraph 49, the CFI expressly holds that when these rules are not limited to their 'proper scope', they 'would thus not escape the Treaty provisions on economic freedoms and those freedoms might therefore be infringed'. Such an interpretation would mean that the analysis undertaken by the ECJ in *Bosman* and *Lehtonen* is erroneous, as stated above. This approach is in line with the 'new test' the CFI has allegedly proposed in *Meca Medina*. 42

Finally, it is also interesting to note the importance attached by the CFI to the discriminatory nature of sports rules. The judgment even points out that anti-doping legislation would have been deemed disproportionate if it were applied 'selectively'. This view somehow confirms the position taken by the ECJ in previous cases, where the discriminatory nature of sporting rules had even determined the application either of the *Walrave* or the *Bosman* tests, as stated above. However, and contrary to what may be inferred from the judgment, discriminatory rules may fall plainly outside the scope of the EC Treaty. *Walrave* constitutes in this respect the perfect example. 43

An enigmatic passage in Piau

Probably paragraphs 76 to 79 constitute one of the most enigmatic parts of the judgment, in that they contest FIFA's legitimacy to adopt the regulations at issue. The CFI first holds that the ability to adopt rules of such nature 'cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties'. More precisely, such regulations fall, according to the CFI 'within the competence of the public authorities'. It is difficult to interpret the meaning and the scope of this statement. Furthermore, one may infer from the practice of both the ECJ and the Commission that regulations adopted independently by professional associations may be acceptable as long as they are enacted in accordance with Article 81 EC. For example, in the *Wouters* judgment, the ECJ has drawn a distinction between those cases where regulations adopted by professional regulations fall within the scope, respectively, of Articles 81 and Article 49 EC. More precisely,this judgement has distinguished between a 'first approach', in which the rules adopted by professional associations 'remain State measures' and a second one, in which 'rules adopted by professional association are attributable to it alone' (See also the Commission Report on Liberal Professions, Brussels 9 February 2004, COM(2004) 83 final). In paragraph 75 of Piau, the CFI acknowledges that according to the regulations members of the FIFA 'are required to draw up similar rules that are subsequently approved by FIFA'. Furthermore, this assertion seems to forget that FIFA regulations are promoted and subsequently endorsed by national associations. 44

CONCLUSION

Within less than six months the same chamber of the CFI has delivered two judgments, each following a different reasoning and using different expressions. Both cases are under appeal before the ECJ (Case C-519/04 *David Meca Medina and Igor Majcen v Commission* and Case C-171/05 *Laurent Piau v Commission*). This situation will provide the Court with an excellent opportunity to simplify and unify previous case-law. An overview of the relevant cases first shows a need to simplify the *Walrave* test by examining in the first place whether the rules at issue in a given case can be deemed 'of purely sporting interest'. Secondly, the ECJ should clarify the scope of this concept and give some guidance to the CFI and the Commission. 45

There is undoubtedly a need to unify previous case-law in the field. For instance, it can be noted that case-law in the field does not even use the same terms when they refer to the same concepts, and this could lead in the future to further confusion. If in *Walrave* the ECJ referred to rules 'of purely sporting interest', in *Bosman* it referred to 'non-economic grounds, concerning the sport as such'. In the last two cases brought by the CFI, reference was made to the 'scope of the specific nature of sport' (in *Piau*) and to 'purely sporting considerations' (in *Meca Medina*). 46

BIBLIOGRAPHY

Dubey J-P and Dupont J-L (2002) 'Droit européen et sport: portrait d'une cohabitation' 85 Journal des Tribunaux – Droit européen 1.

Pons J-F (2002) 'La politique européenne de concurrence et le sport' 2 Revue du Droit de l'Union Européenne 241.

Van deu Bogaert (2000) 'The Court of Justice on the Tatami: Ippon, Waza-Ari or Koka?' 25 European Law Review 554.

Weatherill S (2003) ''Fair Play Please!': Recent Developments in the Application of EC Law to Sport' 40 Common Market Law Review 51.

Whish R (2003) Competition Law (London: Butterworths).

LINKS

ORGANISATIONS

Case COMP/38.158, Meca Medina and Majcen: <http://europa.eu.int/comm/competition/antitrust/cases/decisions/38158/fr.pdf>

Case COMP/37.124, Piau: <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37124/fr.pdf>

FIFA Regulation on players' agents: <http://www.fifa.com/en/regulations/regulationlegal/0,1577,3,00.html>

* **E-mail: pibanez@coleurop.be.** **The author thanks Borja García, David McArdle and the anonymous referees for helpful comments on a previous draft of this article. All mistakes remain obviously mine**

Colomo, Pablo Ibáñez, "The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the *Meca Medina* and *Piau* cases", Entertainment and Sports Law Journal, ISSN 1748-944X, January 2006, <http://go.warwick.ac.uk/eslj/issues/volume3/number2/colomo/>