# Contradictions in the application of EU competition law to sport: a never ending story?

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The decision making practice of the Commission and the case law of the EU regarding the application of EU Competition Law to sport lack consistency, coherence and legal certainty. The contradictions are twofold: (i) Contradictions within EU institutions and EU courts: (ii) Contradictions between EU institutions and EU courts.

**The contradictions within the Commission and the CFI are particularly noteworthy.**

For, while it is true, that the Commission has applied the Wouters judgment and has supported the contention that it applies to sport, in the Mouscron and ENIC cases and at the instance of some legal articles written by officers of the Directorate General of Competition, it is also true that in the Report prepared for the Hearing in the Meca Medina case, the same Commission stressed that the Wouters judgment was cited only residually and only in order to "complete" the argument.

The CFI has, in turn, within a very short space of time, adopted differing approaches with regard to the analysis criteria to be used in the application of EU Competition Law to sport. For whilst, in the Meca-Medina judgment, the non-application of EU Competition Law to sport was based on the case-law established by the Wouters judgment, only a few months later, the criterion applied was the application of 81 (3) EC.

Even the approach adopted in the Piau judgment is to a certain extent contradicted in that same Judgment. For, the CFI commences (§ 100), by acknowledging that the Commission's decision was based on the argument that the restriction inherent in the agents licensing system was necessary for, and proportionate to, the protection of players and clubs. However, a few paragraphs further on (§ 105), the CFI states that the said Commission decision was not based on arguments related to the specificity of sport but rather on purely economic considerations.

**Contradictions between EU institutions and EU courts**

The *Meca-Medina* case is paradigmatic in terms of the discrepancies between the analyses made by the EU institutions and by the EU courts.

The Commission's approach was contradictory and somewhat confused. It hesitated between considering that the issue involved a purely sporting rule, which had indirect economic effects, and considering that the rule in question was economic in nature, but had a sports objective and was therefore subject to EU Competition Law. By hesitating, it ended up by combining these two approaches, for it commenced by considering that the limitation of athletes' freedom of action by the IOC anti-doping rules was not necessarily a restriction of competition in accordance with article 81, to the extent that such a restriction can be inherent in the organisation and proper conduct of the sporting competition (§ 42) only to subsequently consider the said regulation in the light of EU Competition Law, in accordance with the Wouters

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judgment (albeit in a subsidiary manner).

It should be noted that the CFI, unlike the Commission, did not commence by establishing whether the regulatory bodies – FINA and IOC – were undertakings for the purposes of EU Competition Law, thus adopting an approach, which differs from the traditional discussion, i.e. whether the activity in question is economic or not, and immediately focused on the examination of the nature of the antidoping rules at issue. In other words, if the Commission considers that the non-prosecution of an economic objective was a justification for the rules in question, so far as the CFI was concerned this was the initial question to be considered, which resulted in the fact that it was not necessary to consider the applicability of EU Competition Law, or the existence of any justification.

However, while the CFI demonstrated that its conception of competition stresses the promotion of the efficiency and the freedom of action of the parties and showed that the concept of economic activity is not infinite and must sometimes be interpreted restrictively – which almost resulted in a veritable "sports exception" – the ECJ considered, on the contrary, and with less determination than could be expected of a court other than a sports tribunal in the consideration of a matter such as doping, that whether or not it is economic in nature, a sports rule or activity must be subject to EU Competition Law, thus distancing itself from the automatic and abstract manner in which the CFI excluded the regulation in question from the ambit of the application of EU Competition Law.

If the CFI granted a considerable margin for the free consideration by the sports federations, the ECJ, on the contrary, restricted the scope of the application of the sporting specificity, despite the fact that it recognized that the antidoping rules are justified by reason of the objectives of equality of opportunity, health and the protection of the ethical values of sport. The ECJ's position diverges not only from that of the CFI but also from the opinion of advocate general Léger, which was completely ignored. The said opinion proposed that the appeal should be dismissed on the grounds that, notwithstanding the fact that the commercial context of sport creates an economic interest in the antidoping rules, this interest is purely secondary and cannot expunge the purely sporting nature of the said rules (§ 28).

However, the *Meca Medina* judgment does not only reveal contradictions between institutions. We consider that the most serious contradiction is to be found in the ECJ judgement itself, to the extent that it seeks to innovate, by adopting an approach contrary to the preceding case-law, but at the same time defending the case-law which it seeks to overturn. For example: in § 22, the ECJ refers to the entire previous case-law regarding sport and states that *"It is to be remembered that, having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC (...)"*. However, only a few paragraphs later, in § 27, there is a totally contradictory innovation, which reads as follows: *"In light of all of these considerations, 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."*. Which leaves us exactly where?

Continuing, we shall now conduct a brief critical analysis of the EU White Paper on Sport. The Commission, the guardian of the Treaties, proposed the *Meca Medina* judgement as the methodological basis for the application of EU Competition Law to sport. It curtailed the ECJ' s judgment and merely commented that both the CFI and the ECJ have *"reiterated that sport is subject to Community*

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*Law to the extent that it is an economic activity"*... as if to give the impression that the overall approach of both decisions was one and the same.

Moreover, it must be underlined that despite seeking to recognize the *"specificity of sport"*, the European Commission ended up by distinguishing it from *"other economic activities"* (2.1.5, our underlining), i.e. it considered sport itself always to be the expression of an economic activity ...

Furthermore, the Commission also contradicts its own position: on the one hand, in accordance with the *Meca Medina* judgment, the Commission stated that the *"rules of the game"* should be subject to European Competition Law: on the other hand, in the same item (point 2 .2), the Commission, in a *"hidden"* footnote, stated that some *"rules of the game"* are not subject to EU Competition Law, if they do not involve an economic activity.

It is accordingly legitimate to ask what the Commission's position really is. Is there subjection to EU Competition Law in all sport cases, by means of the application of the criteria in articles 81 and/or 82 EC, followed by the conclusion, in some cases, that EU Competition Law is not breached; or, on the contrary, is there only subjection to EU Competition Law when the rules in question involve an economic activity?

However, this is not the extent of the Commission's contradictions. In its attempt to defend the application of EU Competition Law to sport on an "ad hoc basis", the Commission considered, initially, that "it is not possible" to categorise sports rules and to exempt certain types of rules from EU Competition Law (points 2.1.7 and 2.2.1) only to state subsequently (point 2.4.) that it no longer considers the said tasks to be impossible but only "difficult" (although it made no attempt to resolve the said difficulty and insists on an ad hoc approach).

**A never ending story?**

For the reasons stated above, there appears to be no doubt that, as yet, no minimally coherent case law and decision making practice has been developed. The impression gained is that of an ad hoc or casuistic approach, with no pragmatic and scientific criteria, which obviously results in divergent solutions contrary to the principle of the uniformity of EU law.

Unless a new route is followed, we will keep on having a "never ending story" of contradictions, which jeopardises both the "specificity of sport" and the European integration process (through sport).