

EU Sports Law



1957 Treaty of Rome

- No mention of sport (not until 2009 - Art.165 TFEU).
- Articles establishing free movement of workers and services.
- Articles governing competition policy.
- Do these Treaty Articles apply to sport?
- In exercising its Treaty powers, has the ECJ privileged single market values over sporting values?

Key Cases

- *Case 36/74 Walrave and Koch v Association Union Cycliste Internationale* ECR [1974] 1405
- *Case C-415/93 Union Royale Belge Sociétés de Football Association and others v Bosman and others* [1995] ECR I-4921.
- *Joined Cases C-51/96 and C-191/97 Deliège v. Ligue francophone de Judo et disciplines Associeés Asb* [2000] ECR I-2549.
- *Case C-519/04 P David Meca-Medina and Igor Macjen v Commission* [2006] ECR I-6991.
- Other important cases will be discussed later in the Summer School programme.

Walrave (1974)

- Dispute in motor-paced cycling.
- UCI rule change: 'Pacer' & 'Stayer' must be same nationality. Two pacers complained – nationality discrimination.
- Complaint lodged before District Court in the Netherlands. Court sought guidance from the European Court of Justice.

Four Key Issues:

1. Is sport subject to EU law?
2. If so, do some sporting rules fall outside the scope of EU law?
3. Does EU law bind sports bodies or just Member States (are Treaty Articles horizontally directly effective)?
4. At the time Spain was not a member of the EU. The UCI rule change took effect at an event held in Spain. Does EU law apply?

Walrave: Key ECJ Points

- *'Having regard to the objectives of the Community, 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'* (para. 4).
- The prohibition of discrimination based on nationality *'does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity'* (para. 8).

Paragraphs 4 & 8 combined form the so called 'sporting exception'.

- The prohibition on discrimination contained in the free movement passages of the Treaty ‘...*does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services*’ (para. 17).
- ‘*The rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or the place where they take effect, can be located within the territory of the Community (now EU)*’ (para. 28).

The *Bosman* Case: The Litigant



The Lawyers

For Bosman: Luc Mission & Jean Louis Dupont

For UEFA: Ian Forrester QC



The *Bosman* Case

Belgian footballer (Bosman) challenged two international football rules:

1. Players who are out of contract with their club can only move to another club in another Member State if the acquiring club pays a transfer fee.
2. Teams entering UEFA competitions can only field a maximum of 3 overseas players and two assimilated players (the 3+2 rule).

Bosman Transfer Rules: Justifications

- Belgian League: Only major football leagues (not Belgium) carry out significant economic activity (para.70).
- UEFA: Difficulty distinguishing between the economic and sporting aspects of football (para.71).
- German Government: Sport is non-economic. Sport is analogous with culture (para.72).
- German Government: Freedom of association precludes application of EU law (para.72).
- UEFA: transfer rules are needed to maintain competitive balance between clubs and to incentivise youth development (para. 105).

Transfer System: ECJ View

- *'...in view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate'* (para.106).
- Accepts that transfer fees may encourage clubs to train young players (para.108).
- However, the possibility of receiving a transfer fee is 'uncertain' and transfer fees are 'unrelated' to the cost of training a player (para.109).
- The transfer system does not promote competitive balance – it does not prevent the best teams recruiting the best players (para.107).
- The transfer system goes beyond what is necessary to achieve the aims.

‘Article 48 (now 45 TFEU) of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee’ (para.114).

Bosman Nationality Quotas: Justifications

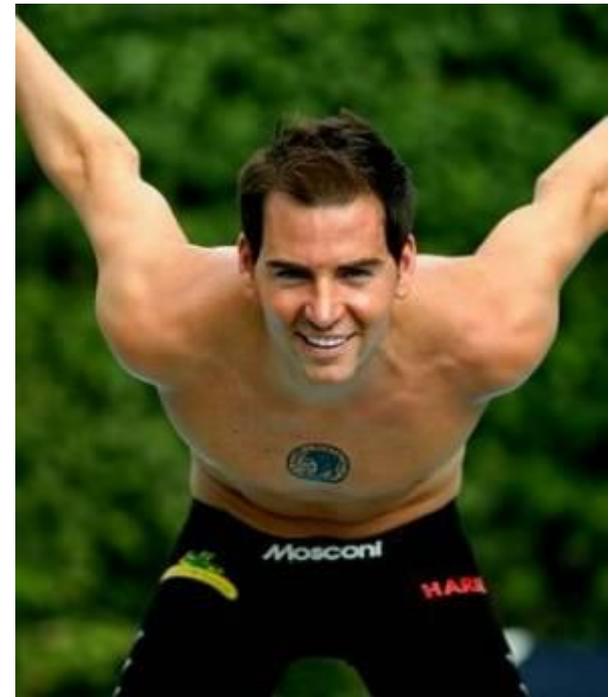
- UEFA: The 3+2 rule is a purely sporting rule (para.122).
- Nationality quotas maintain a link between the club and its country (para.123).
- Nationality quotas maintain a pool of talent eligible to represent a national team. Protecting national teams is legitimate interest (para.124).
- Nationality quotas maintain competitive balance, preventing the best teams recruiting all the best players (para.125).
- The 3+2 rule was drawn up in co-operation with the European Commission (para.126).

Nationality Quotas: ECJ View

'Article 48 (now 45) of the Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States' (para.137).

Key Cases Since *Bosman*

- *Deliège* 2000



- *Meca-Medina* 2006

Delière (2000)

- Re: selection criteria in judo and compatibility with freedom to provide services.
- The ECJ considered two points:
 1. *What constitutes economic activity?*
 2. *What constitutes a restriction?*

Deliège & Economic Activity

- Ms Deliège was an amateur (not remunerated) but she was sponsored.
- Relevance of *Walrave* para.4: The Treaty only regulates economic activity.
- *'As a result of recent developments in the way sports operate, the distinction between amateur and professional athletes had become less clear. Leading sports personalities could receive, in addition to grants and other assistance, higher levels of income because of their celebrity status, with the result that they provided services of an economic nature'* (para.13).
- *'...the mere fact that a sports association or federation unilaterally classifies its members as amateur athletes does not in itself mean that those members do not engage in economic activities within the meaning of Article 2 of the Treaty'* (para.46).

Delière & What Constitutes a Restriction

- The contested selection rules were *non-discriminatory* but they did restrict the number of contestants entered into competitions.
- Non-discriminatory ‘restrictions’ require objective justification.
- But the ECJ argued that selection criteria didn’t even amount to a restriction.

- Selection rules are ‘...*inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted. Such rules may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services prohibited by Article 49 (now 56) of the Treaty*’ (para. 64).
- *Deliège* therefore introduced a new test – inherency.
- Rules can now fall outside the reach of the Treaty if they are ‘non-economic’ (para.4 *Walrave*), ‘purely sporting’ (para.8 *Walrave*) or ‘inherent’ (para.64 *Deliège*).

Meca-Medina (2006)

- Re: doping sanctions imposed on two swimmers.
- Three stages in the litigation:
 1. Complaint to European Commission
 2. Appeal to CFI (General Court)
 3. Appeal to European Court of Justice.

1. Complaint to European Commission

- The swimmers alleged that the doping ban restricted competition (under Article 101 & 102).
- *'The fixing of the limit at 2 ng/ml is a concerted practice between the IOC and the 27 laboratories accredited by it... That limit is scientifically unfounded and can lead to the exclusion of innocent or merely negligent athletes... The IOC's adoption of a mechanism of strict liability and the establishment of tribunals responsible for the settlement of sports disputes by arbitration (the CAS and the ICAS) which are insufficiently independent of the IOC strengthens the anti-competitive nature of that limit'*
- The Commission rejected the complaint. Anti-doping rules do not fall under the Treaty prohibitions because they are 'inherent in the organisation and proper conduct of sporting competition'.

2. Appeal to General Court (ex CFI)

'It is appropriate to point out 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, without which sport, be it amateur or professional, is no longer sport. That purely social objective is sufficient to justify the campaign against doping. Secondly, since doping products are not without their negative physiological effects, that campaign is intended to safeguard the health of athletes. Thus, the prohibition of doping, as a particular expression of the requirement of fair play, forms part of the cardinal rule of sport'.

CFI para.44.

'It must also be made clear that sport is essentially a gratuitous and not an economic act, even when the athlete performs it in the course of professional sport. In other words, the prohibition of doping and anti-doping rules concern exclusively, even when the sporting action is performed by a professional, a non-economic aspect of that sporting action, which constitutes its very essence'

CFI para.45.

‘In view of the foregoing, it must be held that the prohibition of doping is based on purely sporting considerations and therefore has nothing to do with any economic consideration. That means, in the light of the case-law and the considerations set out in paragraphs 37 to 42 above, that the rules to combat doping cannot, any more than the rules considered by the Court of Justice in Walrave, Dona and Deliège, come within the scope of the Treaty provisions on the economic freedoms and, in particular, of Articles 49 EC, 81 EC and 82 EC (now 56, 101 & 102 TFEU). The anti-doping rules are intimately linked to sport as such’

CFI para.47.

3. Appeal to the ECJ

- *'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'* (para.27).
- *'If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty'* (para.28).
- *Anti-doping rules do not 'necessarily constitute a restriction of competition ... 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'* (para.45).

Conclusion on *Meca-Medina*

- *Meca-Medina* therefore significantly adjusts the sporting exception.
- Rules of purely sporting interest are now very limited in nature (restricted to the rules of the game).
- A combined reading of *Deliège* and *Meca-Medina* leads us to a new test for assessing the compatibility of sporting rules in free movement and competition law.

Applying Competition Law to Sport

- Is the sports association carrying out economic activity?
- Does the disputed rule restrict competition (Art. 101) or amount to an abuse of a dominant position (Art.102)?
 - Account must be taken of the overall context in which the disputed rule was taken or produces its effects.
 - Need to assess the objectives of the rule.
 - Are the restrictive effects inherent in the pursuit of those objectives?
 - Is the rule proportionate?
- Does the Art.101(3) exemption criteria apply?

Applying Free Movement Law to Sport

- Is there a restriction on free movement?
- Rules of purely sporting interest (national eligibility criteria) and rules inherent in the operation and proper functioning of sport (selection criteria) are not restrictions.
- Directly discriminatory restrictions: only justified on the grounds of public policy, public security and public health.
- Indirectly discriminatory restrictions: open ended objective justification (competitive balance, training of young players, protection of national team...)
- Non-discriminatory restrictions: may render less attractive the exercise of free movement rights but capable of open ended objective justification.
- Is the restriction proportionate?

The Impact of Article 165

TFEU

Article 165 Lisbon Treaty: 'Education, Vocational Training, Youth and Sport'.

1. *'The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function'.*
2. *Union action is aimed at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen'.*
3. *The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.*
4. *In order to contribute to the achievement of the objectives referred to in this Article: the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States; the Council, on a proposal from the Commission, shall adopt recommendations.*

Article 165: Issues

- Establishes a more formal rolling political agenda on the subject of sports law and policy. New Council of Sports Ministers meets. Three work plans for sport have been agreed.
- Promotes dialogue between the sports movement and the EU: structured dialogue and social dialogue.
- Resolves the consequences of the *UK v. Commission* litigation on the legality of budgetary appropriations for measures with no legal base: Erasmus + Programme now includes sport.

- Article 165 excludes any harmonisation of the laws and regulations of the member states thus safeguarding sporting autonomy.
- Article 165 mentions the ‘specific nature of sport’: does this bind the Commission and the CJEU in the exercise of other Treaty powers such as free movement and competition law? Two views on this (the horizontal obligation question).
- What is meant by “fairness” and “openness” in European competitions? Can be read two ways: (1) to protect traditional sporting rules and practices or (2) as a means of challenging them.

Conclusion: A Settled Legal Environment?

- 1. Rules incapable of being considered restrictive of competition or free movement (purely sporting & inherent rules)**
- 2. Restrictive rules capable of justification / exemption**
- 3. Rules prohibited by the EU Treaty**