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## PLAYING BY MARKET RULES: ANTI-DOPING POLICY IN THE EUROPEAN UNION

**Kayla McCulley**

In the past two years, the European Union has demonstrated a strong desire to incorporate the regulation of sport into its legal framework. While the responsibility for sports governance has traditionally fallen to non-governmental federations and national Olympic Committees, the development of sport as a hugely profitable, big business market has necessitated the application of internal market provisions to sports-related issues. Previously excluded from any mention in Treaty documents, the term “sport” has been inserted into the Lisbon Treaty as a new area of EU shared competence under the proposed Article 2E, which shall allow the EU to “carry out actions to support, coordinate, or supplement the actions of the Member States.”<sup>1</sup> One such issue that has attracted the attention of the EU is professional sports doping, which is defined as the use by athletes of performance-enhancing drugs and substances banned by their federations, including stimulants, anabolic steroids, and hormone-based drugs (Houlihan 1999). This paper will examine the relatively short history of Community involvement in anti-doping policy, including the *Meca-Medina v. Commission* ruling by the European Court of Justice in 2006 and the European Commission’s White Paper on Sport published in July 2007, both of which directly address doping. It is argued that these actions by the European Union, aimed at formulating a cultural and legal convergence around a common anti-doping framework, will incite a moderate level of political pushback from the related stakeholders, chiefly the International Olympic Committee (IOC) and sports federations.

Sports governance in the EU is characterized by multi-level competencies and overlapping spheres of influence. The vertical organizational structure of each sport, such as football, tennis, or cycling, is largely the same for each activity. At the base level are the athletes, coaches, and medical personnel that together form the Olympic or professional teams, which in turn are administrated by the sports federations, such as cycling’s Union Cycliste Internationale (UCI) or soccer’s Fédération Internationale de Football Association (FIFA), and the National Olympic Committees. The International Olympic Committee based in Lausanne, Switzerland, exercises the greatest oversight over international arbitration of sport. While quadrennial Olympic competitions remain an inherently national domain

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(with participation determined by an athlete's citizenship) the world of professional clubs and tournaments has significant transboundary characteristics that require non-governmental institutions such as the International Olympic Committee (IOC) to regulate its rules and competitions. Issues such as broadcast rights, free movement of labor, and million-dollar acquisition of ownership rights have transformed the face of modern sport into one that mirrors the corporate world of big business. Do the sports federations, thus, still have the capacity to regulate the expanding socio-economic dimensions of sport? The issue of anti-doping in the European Union presents a case study that provides partial answers to this question, and gives insight into the future direction of international sports governance. In the past two years, the European Union has demonstrated a strong desire to incorporate the regulation of sport into its legal framework, achieved both through Commission work and decisions handed down by the European Court of Justice.

In tandem with the unparalleled opportunities for international stardom and lucrative sponsorship and contracts, the use of performance-enhancing drugs among athletes has increased considerably. The IOC has identified doping as the single greatest problem facing the sports community today.<sup>2</sup> Traditionally, responsibility for regulating this problem has fallen to non-governmental actors like the national sports federations and independent organizations such as the World Anti-Doping Association (WADA), created in 1999 under IOC auspices. The catalyzing organization for European-wide consensus on the importance of regulating the doping problem was the Council of Europe, which published the European Anti-Doping Charter in 1984. Without making any comparable declarations on its interest in sports governance, the European Union nevertheless approached the issue circuitously through two sports-related cases before the European Court of Justice in the 1970s. These rulings – first in the *Walrave* judgment in 1974, followed by *Dòna* in 1976 – reined in sport's previously independent status outside of EU market regulation. Yet for the European Union, the specific problem of doping would remain outside the policymaking agenda until just recently, notably in the Meca-Medina decision in July 2006 and the EC White Paper on Sport one year later, both of which concretized the EU's will to legislate in the domain of sport.

### EARLY DEVELOPMENTS IN ANTI-DOPING POLICY

Historically, the Council of Europe, an entirely separate organization from the European Union institutions with its own legal structure, has provided the initiative for framing sport and its economic and cultural significance in a European context. During the late 1960s, the evidence of doping in sport accumulated, most markedly with the deaths of professional cyclists as a result of amphetamine use. These revelations produced a watershed effect in policy development to address the negative health risks of doping (Houlihan 1999). Apart from pure physiological gains, doping was further promulgated throughout the 1970s and 1980s for political interests, since political supremacy came to be associated with a nation's sporting prowess in international competition. Cold War tensions contributed to the ratcheting-up of doping amongst elite athletes. When it became clear that certain Soviet Union athletes were experimenting with anabolic steroid use, American Olympic coaches and doctors justified their own clandestine doping regime on the basis of gaining geopolitical supremacy. Clearly, if the Olympic Committees were subverting their own testing regimes, the impetus for anti-doping laws needed to come from above. The most dynamic actors in the initial policy coordination stage were the sports federations, who

began instituting testing programs at major sporting events such as the 1966 World Cup. This was not simply a move aimed at preserving the ideals of their respective sports; rather, the federations were motivated by a desire to retain control over the anti-doping programs and keep government-imposed solutions at arm's length. At the time, the IOC lacked the necessary resources to maintain an effective umbrella ban on doping, despite their unilateral declaration condemning the practice in 1962.

Involvement at a regional level was gradually initiated by the Council of Europe – a rival organization outside of the European Community – which positioned itself as an intermediate forum between national governments and international sports federations. As Houlihan notes:

The reason for the interest of the CE in sport in general and doping in particular is a product of its broad objective to promote democratic government in Europe and the belief, which can be traced back to the League of Nations, that cooperation in areas such as culture creates a 'spill-over effect' in policy areas more central to the organization's priorities.

The CE produced a recommendation on doping in 1978 which emphasized the need to educate athletes and coordination among federations. In 1984, the most significant step yet in the fight against doping was the adoption of the European Anti-Doping Charter. The theme of the Charter was the familiar European goal of harmonization, stating "Sports organizations should be encouraged to harmonize their anti-doping regulations and procedures, based on those of the International Olympic Committee (IOC) and the International Amateur Athletic Federation..." as well as using a common list of banned substances.<sup>3</sup> While the Charter invoked the goal of European harmonization, it explicitly left the task of administering anti-doping rules to the sports federations rather than national or regional governance. The Charter was welcomed by related stakeholders such as UNESCO, the World Health Organization, and the IOC among others. The document provided a model for the International Doping Charter (later renamed the Olympic Doping Charter) that was to follow in 1988. Beyond the general ideological consensus that doping must be eradicated as much as possible from sports, the complexity of actually implementing a transnational framework tested the strength of the traditional sports model.

Of foremost significance was the realization by international federations of the resource cost of implementing an effective doping control regime. As the debate moved from questions of principle, where the federations felt able to assert a prior right to set behavioral norms for athletes, to matters of implementation the resource capacity of government made a shift in the locus of decision-making inevitable (Houlihan 323).

As noted above, the early catalyst for anti-doping regulation was the non-EU affiliated Council of Europe. However, the transnational aspect of sport and the greater extent to which doping was becoming ingrained in elite-level sporting events created an incentive for EU involvement. For them to be an effective deterrent, anti-doping programs needed to be forceful and comprehensive, which would require outsized budgets beyond the means of the National Olympic Committees or the sports federations. In order to ensure substantive results through comprehensive testing programs, the participation of Member State governments became increasingly important, thus inviting greater EU action to



manage the disparate anti-doping regimes, justifying their actions under the banner of harmonization. Before any anti-doping legislation would appear, however, the EU relied upon ECJ rulings – some as early as the 1970s – to justify interfering in the domain of sport.

### THE APPLICATION OF EU LAW TO SPORT

In Paragraph 1 of the Nice Declaration on Sport in December 2007, the EU recognized that sport possesses certain “special characteristics,” according to its special status under existing EU treaty clauses.

Even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured.<sup>4</sup>

The so-called “specificity of sport” is a term established by early European Union case law that declares sports rules of a “purely sporting interest” to fall outside the scope of EU jurisdiction. Conversely, then, European law only applies to “economic activities.” The Community courts and the Commission have also acknowledged the freedom of internal organization according to the European sports model, characterized by a monopolistic structure. (Typically, there is a single national sport association per sport and Member State operating under the umbrella of a single European association and one international association.<sup>5</sup>) The “specificity” principle was upheld in the rulings of the *Walrave*<sup>6</sup> and *Dona*<sup>7</sup> cases, which were the first cases involving sports rules to come before the Community courts during the 1970s. More recently, however, the *Bosman* decision in 1995 was a significant step in the direction of applying the Treaty on European Union’s market law to the sport sector.<sup>8</sup> *Bosman* struck down football association rules that limited international transfers and foreign membership of players on European clubs as violating Treaty of Rome and TEU free movement of labor laws. Thus, the commercialization of sport and its mirroring of the “big business” corporate model have indisputably changed the nature of sport to where sport raises substantial economic concerns.

Doping presents a clear violation of free and fair competition, but does the specificity principle in this case preclude EC law? In 2006, the European Court of Justice deviated from its previous stance in the *Walrave* and *Dona* cases when it established a new test for considering sporting rules as economic in nature, and thus subject to single market regulation. The case of *David Meca-Medina and Igor Majcen v. Commission* (2006) was the first judgment by the Community Courts that applied competition law as outlined in Articles 81 and 82 EC to a sporting rule by a sports association relating to a sporting activity. Article 81 prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market...” (Treaty of Nice, 2000). In conjunction, Article 82 outlaws “any abuse by one or more undertakings of a dominant position within the common market...” (Treaty of Nice, 2000). Whereas *Bosman* and the preceding case law had applied Treaty provisions to other areas of economic freedoms, such as the free movement of labor and services, the *Meca-Medina* ruling called into question the “specificity of sport” and developed a test for determining whether or not a sporting rule falls within the boundary of Articles 81 and 82

on anti-trust laws.

The plaintiffs in the case were two swimmers, David Meca-Medina and Igor Majcen, who had tested positive for the steroid nandrolone and received a four-year ban from the swimming governing body, Fédération Internationale de Natation Amateur (FINA) in 1999. After their case was rejected by the Court of Arbitration for Sport (CAS), an arm of the IOC in Lausanne, the swimmers challenged the compatibility of the anti-doping rules with Articles 81 and 82, arguing that they restricted competition. In 2004, the Court of First Instance rejected the case, citing the “purely sporting” interest of the IOC anti-doping rules. The objective of anti-doping rules, it was argued, was the preservation of fair play rather than any economic activity; thus, the CFI upheld the existing jurisprudence in the *Walrave*, *Dòna*, and *Bosman* decisions that subjected sporting rules to Community law only insofar as they constituted an economic activity.

Angered and unsatisfied with the CFI’s judgment, Meca-Medina and Majcen played their final card: an appeal before the Community’s highest court, the Court of Justice (ECJ) in 2006. While the ECJ’s final conclusion was in line with its lower court’s previous ruling, it altered course from the CFI by calling into question the “specificity of sport” and establishing a test to decide whether the sporting rule represents either an “undertaking” or an “association of undertakings,” in which case it would be subject to anti-trust law. In Paragraph 27, the Court concludes 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.<sup>9</sup>

The judgment effectively established a case-by-case methodology to determine the nature of a sporting rule. No longer would “purely sporting” rules enjoy immediate exemption from Community law. Although the ECJ reiterated the findings by the Court of First Instance that anti-doping rules *do*, in fact, fall into the category of purely sporting rules, it nevertheless held that these rules must still be subjected to a novel test to determine their 1) *objectives*, 2) whether the anti-competitive effects are *inherent* in pursuing said objectives, and 3) if the effects are *proportionate* to the objectives.

...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.<sup>10</sup>

The Court now has the same tools for assessing rules of a sporting nature as it does to regulate the internal market. While not explicitly revoking the special status of sport, the *Meca-Medina* case will allow for greater European scope when it comes to sporting activities that could potentially disrupt the proper functioning of the internal market.

### THE EU TAKES UP THE FIGHT AGAINST DOPING

Following the promulgation of the European Anti-Doping Charter in 1984, momentum was gathering for further government involvement in addressing the problem

of anti-doping. The 1992 Olympics in Barcelona provided a fertile testing ground for the implementation of an EU-backed code of conduct, which was followed by a Community Support Plan presented in 1999 in light of the doping scandals that had marred the 1998 Tour de France.<sup>11</sup> In that document, the Commission recommended to the other EU institutions a three-part action plan: 1) the assembly of a relevant epistemic community to draw upon the ethical, legal, and scientific knowledge of experts; 2) assist in the creating of the World Anti-Doping Agency (WADA) along with the Olympic Movement; and 3) generally increase the use of Community tools to integrate anti-doping policy into the supranational capacity. The reason for the Commission's decision was primarily one of concern for public health. In the introduction, the Commission states:

Doping has always been at variance with the basic principles of sports ethics. Today, in view of the proliferation of cases, the phenomenon of doping in sport no longer belongs within the strict framework of sports ethics but has also become a public health problem. In principle physical and sporting activity should contribute to improving the citizen's quality of life. However, the use of prohibited substances or medicaments abuse has adverse health effects and hence vitiates the very goal of sport. In the context of competitive sport, doping symbolizes the contrast between sport and the values it has traditionally stood for, namely fair play and the idea of surpassing oneself through physical effort."<sup>12</sup>

The themes addressed in the Community Support Plan established a precedent for even more direct action by the EU. The Nice Declaration of December 2000 articulated by the European Council emphasized Europe's special relationship to sport as the region that gave birth to the Olympic movement and also the site of the majority of large sporting competitions. The Commission acted most recently with the publication of the July 2007 White Paper on Sport, which moved the EU closer to establishing a sports-related clause under treaty law.

The White Paper on Sport in July 2007 marked the first time the European Commission had comprehensively addressed issues in the arena of sport, including a specific section entitled "The Fight against Doping" (Article 2.2.). Nevertheless, as the document points out, the recognition that sport plays an important role in European society is not new, given the existing case law (as previously discussed) that already had come to frame sport as part of the *acquis communautaire*. Like the Community Support Plan that preceded it, the White Paper on Sport recognized the negative "health and prevention dimension" of doping, explicitly adding the need for a law-enforcement component at EU level. The exchange of best practices between WADA, UNESCO, INTERPOL<sup>13</sup>, and other stakeholders factors as a key goal of the Commission. The White Paper floats the idea of "a network of national anti-doping organizations of Member States," which would theoretically gain a large degree of autonomy from the international sports federations in formulating broad anti-doping policy measures.

Despite the conciliatory "Euro-jargon" contained in the language of the White Paper, its endorsement by the Union represents a clear direction for European collaboration. The tactics of cooperation outlined in the White Paper reflect a particular policymaking approach aimed at greater EU involvement in sports governance. Wallace, Wallace, and Pollack define policy coordination as a "technique to develop light forms of cooperation

and coordination in fields adjacent to core EU economic competences in order to make the case for direct policy powers...the approach rests a great deal on expertise, and the accumulation of technical arguments in favor of developing a shared approach and to promote modernization and innovation” (Wallace 85). Action by the Commission is typically the primary engine for setting the direction and pace of policy making in the coordination mode of policymaking. Most importantly, the Lisbon Treaty developed during 2007 makes a direct acknowledgement of sport under Article 2E, stating that the EU shall “carry out actions to support, coordinate, or supplement the actions of the Member States.”<sup>14</sup> Indeed, it would appear that the EU desires a greater degree of regulatory power to control anti-doping programs within its jurisdiction. Thus, pending ratification of the treaty by all 27 member states, sport and its attendant sub-issues will gain a legal basis under treaty law in addition to the existing juridical precedents for subjecting sport to internal market rules.

### POLITICAL PUSHBACK FROM THE IOC AND SPORTS FEDERATIONS

These developments within the last two years – first the Meca-Medina ruling in 2006, followed by the White Paper on Sport in 2007 – elicited serious criticism from the IOC and the two largest governing bodies for football, FIFA and the Union Européenne de Football Association (UEFA). These non-governmental organizations have traditionally held substantial authority for sport regulation, and saw the European Union’s legal and legislative forays into the sporting domain as an attack on their dominion. What was it about these two occurrences that differed from the consensus-building spirit of the 1980s and 1990s? The application of single market rules to sport in *Meca-Medina*, argued Gianni Infantino, UEFA’s Director of Legal Affairs, represents:

...a potential Pandora’s box of potential legal problems. For a start, almost any sports disciplinary measure for almost any offense (e.g. doping, match-fixing, gambling, bad conduct, etc.) might be described as representing a condition ‘for engaging in’ sporting activity.<sup>15</sup>

Similarly, current IOC president Jacques Rogge noted in an interview with the *Financial Times* on October 17, 2007 – days before the Lisbon summit would hammer out a new reform treaty – the critical need to establish a more well-defined legal basis for sport in European law, and hoped for a Treaty provision recognizing the specificity of sport. “The judgment of the Meca-Medina case is a bit frightening for us,” said Rogge. “It puts doping under the competition rules of the EU. We have had established doping rules for a long time. We know proportionality of sentences is an issue, and we accept that. But we don’t know why the EU should come in”.<sup>16</sup>

With regard to the White Paper on Sport, the IOC and UEFA teamed up to present a joint press statement that articulated their reservations over the expanding EU competency in their sphere of governance.

The White Paper is structured in full contradiction with the actual architecture of the Olympic movement, ignoring in particular the regulatory competences of the International Federations, the division of responsibilities between the latter and their European Confederations, the global nature of the issues and challenges currently affecting sport as well as the solutions which are today necessary.<sup>17</sup>

The non-governmental stakeholders like the IOC and the federations had also hoped for a more clear expression of the Nice Declaration to preserve the specificity of sport, and thereby their own powers in setting anti-doping and other sporting activity measures.

## CONCLUSION

Relations between the sports governing bodies and the EU have often proved contentious; indeed, it took more than 30 years after the establishment of the European Community in 1957 before the Union set up formal dialogue and liaisons with the IOC and the sports federations. The proposed Reform Treaty will perhaps allay some of the controversy over the management of sport within Europe. Just days after Rogge's disparaging comments about the Meca-Medina decision and his doubtfulness that the EU would continue to respect the specificity of sport, the Lisbon Reform Treaty, signed in December 2007, introduced the first mention of sport ever included in a treaty document:

...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.<sup>18</sup>

Naturally, the IOC welcomed this turn of events that they had been pushing for all along, and could count on retaining their traditional standing as the foremost regulatory body in the fight against anti-doping. However, more cases involving the test for determining whether or not a sporting activity contravenes Community law are certainly on the horizon, and the potential for more concrete policymaking in the European Commission does not appear to be impossibility. While the European Union has come to an agreement over the fundamental values of sport and in particular the need for anti-doping regulation, the problems of overlapping authority in setting policy and resolving disputes will ensure that the doping issue remains a source of friction.

The *Meca-Medina* decision and the EC White Paper on Sport were not the first instances of a European interest in anti-doping, yet they were significant for what they represented: the establishment of a legal basis for EU governance in sport. As explained above, during the 1990s the EU set itself in opposition to the Council of Europe whose initiatives had began the fight against anti-doping in the first place. By establishing its own legal regime separate from that of the CE and IOC, the European Union was essentially poaching a subject of law that had traditionally remained outside of the *acquis communautaire*. Brussels' actions in the sphere of sport indicate an astonishing trend: the single market and economic competition are being used to justify a cultural and legal convergence across what many Europeans consider to be the domain of extra-EU organizations, exemplified by anti-doping programs. Single market principles are spilling over into areas of EU competency that were wholly unintended by the original founders of the European Community in 1957. As sporting events such as the Tour de France and the Olympics accrue even more international prominence through broadcasting and marketing rights, the stakes of athletic success – and the temptation to achieve that success by drug doping – are growing exponentially. Balancing the competing sovereignties of non-governmental actors with EU legislative powers in the future will be critical if the health of athletes and society's respect of sporting competition is to endure.

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