SPORTS SPECIFICITY IN THE WORLD OF DOPING

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1. Introduction

The world of sport has certain rules established for purposes of organisation and order. Based on their objectives, these rules might not contravene other international laws and it seems a prerequisite that in order for these rules to be compliant with the said international laws, their anti-competitive effects, if any, must be inherent and proportionate to the objectives pursued.

The so-called "specificity of Sport" is quite a vague concept which nevertheless has a significant impact on the application of both the EU law and international laws to the Sports Associations and to those who are registered with them (clubs, players but also coaches and trainers).

Specificity encompasses all the characteristics that make sport special. It includes, for example:

a) the specificity of sporting activities and rules such as separate competitions for men and women,
b) limits on the number of participants in competitions,
c) the principle of promotion and relegation,
d) the principle of a single federation per sport,
e) a pyramid structure of competitions from amateur to professional level,

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f) the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions.

In sports like football, it has extended to a level whereby:

a) clubs pay transfer fees in order to acquire the services of players under contract,
b) clubs pay training compensation and/or solidarity mechanism during transactions with fellow clubs for the transfer of players; and
c) to playing rules such as the offside rule, yellow cards, etc.

It is this specificity which continues to hold certain sports like football aback in as far as the use of video technology[1] is concerned.

These specificities have indeed been recognized under the EU laws, as evidenced in the ECJ judgments and even more so under the Nice Declaration in 2000 which expressly recognizes the right of sports bodies to organize and promote their respective sports, in particular as regards specifically sporting rules.

The aforementioned aspects are taken into account when assessing whether sporting rules comply with the requirements of EU or other international laws, such as antitrust laws, laws safeguarding individuals against invasion of privacy etc. But of all these peculiarities attributed to the specificity of sport, one stands out – sports' anti doping rules.

Sports' anti doping rules and in particular those enshrined under the World Anti Doping Code have over the years raised controversies and been the subject of discussions in relation to contentious provisions and criticisms in as far as they relate to other international laws.

But despite this, the WADA Code has managed to withstand the storm and continues to reign. How is this? How specific are the provisions of sports' anti doping rules to the extent that they have still remained in force regardless of them having the potential of infringing and/or violating other laws? What is so specific about sports and its anti doping rules? What other features or laws are exclusively applied in doping matters?

The first step towards answering these questions is to remind oneself of why sports claims or wants to remain specific. It is obvious that sports is unique. It is not just any other activity. It is nowadays both a social activity and a profession. It is therefore imperative that legal issues be left best and addressed by experts who have vast knowledge and experience of the intricacies of sports; or else we might end up having a wide range of conflicting sports laws and jurisprudence. It is in light of this that the International Olympic Committee, in collaboration with sports´ international federations established the Court of Arbitration for Sport in Lausanne, Switzerland. Its main task is to adjudicate and arbitrate on sports matters at international level, and it is sports´ highest arbitral tribunal.

[1] Despite calls for the introduction of video technology, some quarters in FIFA still advocate for the maintenance of the status quo, arguing that video evidence would take away the "passion" associated with the rules of the game as it is today.

This article explores sports´ specificity in the realm of its anti doping regulations in as far as they relate to antitrust laws, the international privacy law provisions and the laws applicable to doping disputes.

1.1. The anti doping rules and anti trust

Perhaps the greatest challenge yet made to sports´ anti doping rules took place before the European Court of Justice (ECJ) in the famous 2006 case C-*519/04 P, Meca-Medina & Majcen v. Commission*.

In brief, this was a case filed by two professional swimmers who were on 8 august 1999 banned by world swimming governing body the FINA for four years for using a prohibited substance, nandrolone.

They appealed the ban to the CAS but neverthless lost as the CAS upheld the 4 year ban in February 2000.

Soon thereafter, new scientific evidence emerged which exonerated them from 100% blame and on 23 May 2001 the CAS reduced the ban to 2 years.

The swimmers did not give up and took the matter to the ECJ. They challenged the compatibility of certain regulations adopted by the IOC and implemented by FINA and certain practices related to doping control with the Community rules on competition and freedom to provide services.They argued that the anti doping rules contravened the EC treaty rules on competition, and in particular articles 81 and 82[2] thereof. They also alleged that 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 the rules.

What came out of the resulting judgments issued by various levels of the ECJ courts is what today distinguishes sports´ anti doping rules and makes them specific.

The various instances of the ECJ courts dismissed the swimmer´s case and came up with the following precedents:

- The anti-doping rules were pure "sports rules" falling outside the scope of the EU competition law.
- The free movement provisions of the EC Treaty did not apply to pure sports rules (such as the anti-doping provisions) since this kind of rule had nothing to do with economic activity.

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[2] Article 81.1 EC Treaty: *"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings (…) which have as their object or effect the prevention, restriction or distortion of competition within the internal market (…)."*
Article 82.EC Treaty: *"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."*

- As long as the anti doping rules remained limited to their proper objective of ensuring fair play, and contained no element of discrimination, then it was not for the Court (or the European Commission) to judge whether or not the rules were "excessive" or "disproportionate".
- Since the anti doping rules in question were "sporting" in nature the matter should be dealt with by the relevant sports dispute resolution bodies.
- The anti-doping provisions concerned the ethical aspects of sport and were not subject to the restrictions imposed under the EC Treaty, even if they had some or other ancillary economic consequences. This was because any economic aspect of the rules was clearly secondary to their sporting aspect.[3]

It can hence be concluded from the *Meca – Medina* judgment that it is safe to say that although the anti doping rules might have some economic impact on athletes, this impact is overridden by the need to ensure the maintenance of fair play in sport – a specific and unique feature of sport. Indeed, the anti doping rules ensure that an athlete's right to compete goes hand in hand with the need to do so in a fair and honest manner.

We can also conclude that doping issues can only be heard before sports dispute resolution bodies and no other *fora*.

1.1.1 The anti doping rules and the right to privacy

In further efforts at combating doping, the WADA requires athletes to:

a) Provide information in relation to their whereabouts and be subject to testing 24 hours a day, 7 days a week, 365 days of the year;
b) Identify their location for each day in the following three months and update it should it change; and
c) Specify one hour each day (between 6am and 11pm) during which they can be located at a specified location for testing.

Failure by an athlete to be found at the place he claims to be constitutes a missed test. Moreover, submission by the athlete of incomplete or inaccurate information constitutes a filing failure. Both missed tests and filing failures constitute Whereabouts failures. Under the WADA Code, three Whereabouts failures in 18 months constitute an anti-doping offence, and consequently may lead to a suspension of a minimum of 12 months, and a maximum of two years.[4]

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[3] For further reading, please see "*Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?"* by Gianni Infantino, UEFA Director of legal affairs.

[4] Under Art.2.4 of the WADA Code "Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation."

These provisions have been stipulated under the WADA International Standard for Testing, which states as follows:

11.1.3 "An Athlete in a Registered Testing Pool is required to make a quarterly Whereabouts Filing that provides accurate and complete information about the Athlete's whereabouts during the forthcoming quarter, including identifying where he/she will be living, training and competing during that quarter, so that he/she can be located for Testing at any time during that quarter: see Clause 11.3. A failure to do so amounts to a Filing Failure and therefore a Whereabouts Failure for purposes of Code Article 2.4."

11.1.4 *"An Athlete in a Registered Testing Pool is also required to specify in his/her Whereabouts Filing, for each day in the forthcoming quarter, one specific 60-minute time slot where he/she will be available at a specified location for Testing: see Clause 11.4. This does not limit in any way the Athlete's obligation to be available for Testing at any time and place. Nor does it limit his/her International Standard for Testing, January 2009 42 of 91 obligation to provide the information specified in Clause 11.3 as to his/her whereabouts outside of that 60-minute time slot. However, if the Athlete is not available for Testing at such location during the 60-minute time slot specified for that day in his/her Whereabouts Filing, and has not updated his/her Whereabouts Filing prior to that 60-minute time slot to provide an alternative time slot/location for that day, that failure shall amount to a Missed Test and shall therefore constitute a Whereabouts Failure for purposes of Code Article 2.4*."

11.1.6 *"An Athlete in a Registered Testing Pool shall be deemed to have committed an anti-doping rule violation under Code Article 2.4 if he/she commits a total of three Whereabouts Failures (which may be any combination of Filing Failures and/or Missed Tests adding up to three in total) within any 18 (eighteen) month period, irrespective of which ADO(s) has/have declared the Whereabouts Failures in question*."

One could possibly argue that these provisions are contrary to international laws, and in particular the Universal Declaration of Human Rights and the European Convention on Human Rights which safeguard an individual against the invasion into the privacy of his life.

Under Article 12 of the Universal Declaration of Human Rights, "*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

Furthermore, article 8 of the European Convention on Human Rights provides that:

"1. Everyone has the right for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a

democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

It is also obvious that the above rights include the right to make decisions about one's own body.

Notwithstanding these provisions, it is evident that the athletes' whereabouts information continues to be enforced and the anti doping provisions prohibiting athletes from taking certain substances do indeed amount to the taking away by WADA, of an individual´s right to make decisions about his/her own body.

These provisions have indeed received support from the CAS advisory opinion in *FIFA v WADA*, which not only offers practical guidance but also identifies the following non-exhaustive obligations on athletes:

a) An obligation to be aware of the actual list of Prohibited Substances;
b) An obligation to closely follow the guidelines and instructions with respect to healthcare and nutrition of the National and International Sports Federations, the NOC's and the National Anti-Doping Organization;
c) An obligation not to take any drugs;
d) An obligation not to take any medication or nutritional supplements without consulting with a competent medical professional;
e) An obligation not to accept any medication or even food from unreliable sources (including online orders by internet);
f) An obligation not to go to places where there is an increased risk of contamination (even unintentional) with prohibited substances (e.g. passive smoking of marijuana).

2. Doping disputes and the law applicable

It is also interesting to observe that doping is another area of sports wherein judicial bodies have advocated for the application of certain regulations in light of the specific nature of sports. This is more prominent in appeals against doping decisions rendered by sports federations which have their domicile outside Switzerland.

In accordance with article R58 of the CAS Code,[5] the CAS is required to apply the sports regulations of the federation which rendered the appealed decision supplemented by the law of the country where the said federation is domiciled.

However, the CAS strives to achieve a consistent and uniform application of the WADA Code despite the different governing laws of the federations.

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[5] Article R58 of the CAS Code "*The panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the Parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

A case in example would be an appeal against a doping decision rendered by the International Tennis Federation (ITF), which is based in London, UK. In such situations, the CAS has acknowledged that the dispute would be governed by and construed in accordance with English law. However, since the ITF regulations require the ITF to interpret its programme in compliance with the WADA Code, the CAS would be obliged to apply the WADA Code. And since WADA is based in Switzerland, the CAS would ultimately construe the WADA code in a manner which is consistent with Swiss law as the law which the WADA must comply with. CAS/2006/A/1025 Mariano Puerta v ITF.

To be specific, the Panel which decided the above-mentioned case accepted that "(…) *the ITF programme provides that it is to be governed by and construed in accordance with English law, but that provision in the ITF programme is expressly stated to be subject to the requirement to interpret the programme in a manner that is consistent with the applicable provisions of the code (WADC). The panel interprets those provisions as requiring it to construe the WADC in a manner which is consistent with Swiss law as the law which the WADC must comply…"* para 10.8.

The diversion from the law chosen by the parties however seems to be an exception rather than the norm. Nevertheless, Swiss law has generally been applied in supplementation to the law chosen by the parties or in order to ensure that the awards comply with Swiss public policy.

Conclusion

It seems apparent that the specificity associated with sports means that the anti doping rules are here to stay. True, there will always be critics to these rules but what these critics ultimately need to do perhaps with a view to having the anti doping rules softened is to turn their attention to the root cause of these rules – the athletes.

Campaigns should be aimed at encouraging athletes to believe in their natural talents and abilities. Sports seminars and educational tours should be conducted by the international federations and national federations to endow athletes with good morals – morals which say that sport is merely a competition in which the participants should strive to win fairly and squarely with utmost respect to their fellow professionals, the viewers and to the integrity of the sport itself.

Efforts should also be concerted at finding youngsters of great sporting talent through a planned selection programme.

Thereafter, the athletes should be introduced to rigorous yet intense training to verify their real potential.

Finally, stakeholders should pursue the need to identify "winners" from a psychological point of view, thanks to their resistance to stress, their control of anxiety and very strong motivation.