European Law: two swimmers drown the "sporting exception"

On 18 July 2006, the Court of Justice of the European Communities (ECJ) rendered a leading judgement clarifying the relationship between European law and national and in particular international sports federations. As such judgement was rendered in a dispute concerning a sport less followed by the media, long-distance swimming, it has not attracted the attention of the media.

The dispute concerned the legality of certain of the International Olympic Committee's (IOC) rules on doping control. Two swimmers, David Meca-Medina and Igor Majcen, represented by attorney at law Jean-Louis Dupont, who already used to represent Mr Bosman, alleged that such rules violated the Community rules on competition.

Applying the case law of the ECJ of the seventies (judgements Walrave and Donna), the IOC (followed by the European Commission) held that the rules on doping control were "purely sporting rules" as they pursued an entirely non-economic purpose (equity of sports competitions, health of the athletes) and that, therefore, such rules were not subject to Community law.

According to the IOC and the European Commission, these rules being of a purely sporting character, were not subject to Community law, even if they restrained the economic freedom of certain professional or semi-professional athletes. As a consequence, it was not for the ECJ to assess whether or not such rules (and the sanctions resulting therefrom) were disproportionate with regard to the objectives pursued.

In its landmark judgement, the ECJ reversed the position of the IOC and the European Commission (like it did with the one rendered by the Court of First Instance, which concurred with their position).

The ECJ considered that even anti-doping rules (which could well be considered to be the most emblematic "purely sporting rules") are subject to Community law and that it must be shown on a case by case basis that the restrictions they cause are inherent and proportionate with regard to the sporting objectives pursued, which is revolutionary for the relationship between sport and Community law.

Thus, these rules, even if they pursue an objective of a purely sporting interest, are subject to European law and, therefore, to European competition law, the moment they affect the transnational economic activities of third parties (e.g. of the athletes or clubs).

In other words, by its judgement Meca-Majcen, the ECJ rejected the international federations' pretences to avoid Community law. One will recall that the federations used to present such pretences under the title "sporting exception", "specificity of sport" or "purely sporting rules".

It is of course a very important change which will finally force the sports federations to demonstrate self-restraint and moderation both as regards the adoption of their regulations and as regards the implementation of such rules.

This will in particular be the case for the fight against doping, but not only.

In order to illustrate this, we may look at certain applications of this judgement to the number 1 sport, i.e. football.

A major dispute currently opposes the clubs of the European football elite, unified in the G-14, to FIFA and UEFA. The clubs take the view that it is excessive for the international federations to "recruit" their employees, the players, in accordance with an international calendar unilaterally imposed on the clubs, without insuring them and without compensating their employers, so that they can organise events such as the EURO or the World Cup, which generate billions of Euros in revenues for the sports federations.

In this matter, the Commercial Court of Charleroi recently referred preliminary question to the ECJ, requesting a preliminary ruling; a judgement should be rendered within the year.

On the basis of the judgement Meca-Majcen, it should henceforth be established that the FIFA and UEFA regulations governing the release of players and the fixing of the international calendar fall within the application of EC Treaty rules and that it is basically for the federations to prove to the ECJ that their rules (as they are currently in force) are absolutely necessary and proportionate with regard to the sporting objectives they pursue. In fact, FIFA's and UEFA's main thesis in the Charleroi case, which consisted in maintaining that their rules are of a purely sporting interest and, therefore, not subject to the EC Treaty, has been radically "placed offside" by the judgement Meca-Majcen, which now accepts nothing but the debate on the proportionality of the contested rules within the scope of the European treaties.

Further, the Meca-Majcen judgement will doubtlessly affect the currently pending proceedings initiated by the Italian sports authorities against certain football clubs.

It is in fact henceforth established that the rules applied by such sports authorities and the sanctions resulting therefrom are subject to European competition law and must mandatorily be proportionate with regard to the sports objectives they pursue (fight against fraud in sport).

In this new legal context, the sports authorities would be well advised to ask themselves the right questions and find the right answers thereto.

Is the proof furnished sufficient to conclude that serious violations have been committed? Do the investigations led allow for the conclusion that only the clubs pursued committed violations? Are the clubs as such responsible (owners, members of the board of directors) or have their employees (directors, managers) taken personal decisions?

If so, is it justified to severely sanction the undertakings, the clubs, because some of their employees have violated rules, while other rules provide for the sanctioning of these individuals?

In the affirmative, would it not be excessive to relegate these clubs to the second league, knowing that such a sanction could be tantamount to a bankruptcy or at least to a damage amounting to hundreds of millions of Euro?

Failing to demonstrate moderation (and continuing the "judicial show" instead), these sports authorities risk that one day their decision will be reversed by the ordinary courts on the basis of the Meca-Majcen judgement and that they might be ordered to compensate the clubs for the economic and sporting damage caused. In this respect, we recall that European competition law has a direct effect, i.e. it can be directly invoked by individuals and undertakings before the national courts, which have the duty to ensure that such law is complied with the way it is interpreted by the ECJ in its judgement Meca-Majcen, in particular by awarding to the aggrieved parties adequate damages.

Meca and Majcen are worthy successors of Bosman. From a case-law perspective one could say that the sons have excelled the father.

Juan de Dios Crespo
Attorney at law specialised in sports law