UEFA's Declaration on "Homegrown Players"

by Michael Gerlinger*

UEFA intends to impose specific quotas on top clubs for locally trained players in Champions League and UEFA Cup matches. This is one of the results from UEFA's Ordinary Congress on 21 April 2005 in Tallinn, Estonia.

The declaration agreed upon in Tallin is part of UEFA's plans to enhance training and development of young talents. "The training and development of young players is of crucial importance to the future of football. Every football club in every national football association should play a part in this process," UEFA stated.

From next season on four "homegrown players" must be included in squads for European club games - at least two trained by a club's own academy with a further two developed by other clubs within the same association. Until the season 2008/2009 the minimum number of homegrown players will be raised up to eight.

As the term "homegrown" does not refer to the player's nationality, but means ALL talents trained and educated between the age of 15 and 21, UEFA believes to avoid any conflict with EU law, in particular the freedom of movement.

Several asscociations, however, pointed out that there are not only legal but also practical concerns with respect to such regulations. The German Football League, for example, fears that a „hunt" for talents will break off in Europe. As the clubs will have to secure enough talents at an early age, most of the big clubs will start to attract many young talents.

But also the legal assessment of UEFA's proposal is more difficult than one might think at first glance. The ECJ in standing jurisdiction holds that nationality clauses of sports organisations are a restriction of the freemdom of movement guaranteed under Art. 39 of the EC-Treaty, which is only justified in case there are specific non-commercial needs, e.g. with respect to national team matches (see: ECJ judgement of 8 May 2003, C-438/00 - "Maros Kolpak").

UEFA believes that there would not be a restriction of the freedom of movement within the meaning of Art. 39 of the EC-Treaty, since "homegrown" players may be players of any nationality.

However, Art. 39 of the EC-Treaty does not only prohibit a "direct" discrimination on grounds of nationality, but also an "indirect" or "hidden" discrimination, i.e. when a discrimination is based on other criteria than nationality - here: training in the club and/or national association - and indirectly leads to a discrimination of foreigners (standing jurisdiction since ECJ C-152/73 [1974] ECR 153 - "Sotgiu vs Deutsche Bundespost"). The ECJ holds that applying geographic criteria for a restriction, particularly, bears the risk of indirect or hidden discrimnination (ECJ judgement of 5 March 1998 [1998] ECR I-843 - "Molenaar"; judgement of 12 May 1998 [1998] ECR I-2691 - "Martínez Sala").

Although a regulation restricting the number of players in a squad that were not trained and educated in the club and/or association would not directly discriminate foreign players, it is quite obvious that most of the "homegrown" players would be nationals and not foreigners. Therefore, such regulation would discriminate foreigners indirectly, making it more difficult for foreign players to transfer to a country where they were not trained and educated.

This speaks for the assumption that such regulations would have to be considered as a restriction within the meaning of Art 39 of the EC-Treaty, thus requiring a justification. One might doubt that the ECJ would accept a justification based on the need of enhanced training and education of young players in football, having in mind the previous cases in *Kolpak* and *Bosman* when it denied a general justification on these grounds.

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Doping Is a Sporting, Not an Economic Matter

by Ian Blackshaw*

So the European Court of Justice ruled in the recent and important case of *David Meca-Medina and Igor Majcen v Commission of the European Communities* (Case T-313/02; Judgement 30 September 2004).

This was an appeal brought by two professional swimmers, who had tested positive for nandrolone and banned from competition, against a decision of the Commission (Case COMP/38158 - Mecamedina and Majcen/IOC) rejecting their claim for a declaration that certain rules adopted by the International Olympic Committee (IOC) and implemented by the Federation Internationale de Natation (FINA) - the World Governing Body of Swimming - as well as certain doping control practices were incompatible with the Community Competition Rules and the Freedom to provide Services in the European Union (Articles 81, 82 & 49 of the EC Treaty).

The case was brought by the swashbuckling and pioneering Belgian lawyer, Jean-Louis Dupont, of *Bosman* fame. However, on this occasion, he failed to persuade the Court, which upheld the Commission's decision of 1 August, 2002.

It has been settled law for over thirty years that sport is only subject to EU law "*in so far as it constitutes an economic activity*" (*Walrave and Koch v Association Union Cycliste Internationale*: 36/74 [1974] ECR 1405, [1974] 1 CMLR 320, ECJ). A distinction has been drawn between rules or actions of a sporting nature, which are not subject, and those of an economic nature, which are subject to EU law. In

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practice, it is often difficult to make this distinction - take *Bosman*, for example, which concerned football transfer rules, which have both a sporting and economic purpose. In that case, the rules in question were held to be outside the purely sporting exception and, therefore, in breach of rules on freedom of movement - one of the fundamental freedoms of the single EU market. On the other hand, in the earlier leading case of *Dona v Mantero* [1976] ECR 1333, [1976] 2 CMLR 578, ECJ, the Court held that a rule restricting places in a national team to nationals of the country concerned was imposed for purely sporting reasons and did not, therefore, breach EU law. In borderline cases, a proportionality rule applies - in other words, the restriction must not go beyond what is reasonably necessary to achieve the particular sporting objective.

Back now to the *Meca-Medina* Case. The appellants' claim that, just because the anti-doping rules at issue have economic repercussions for elite athletes, did not, in the view of the Court, prevent the rules from being purely sporting ones. That proposition was, the Court said, "*..at odds with the Court's case-law*." Indeed, it may be noted, *en passant*, that in the earlier English case of *Edwards v BAF and IAAF* [1998] 2 CMLR 363, the Judge held that a rule prohibiting athletes from taking drugs was a rule of a purely sporting nature and did not cease to be so simply because it had economic consequences.

Furthermore, the appellants' claim that the anti-doping rules at issue had been imposed not only for "*altruistic and health considerations*" but also to protect the economic interests of the IOC in having 'clean' Games, not tainted by scandals linked to doping which tend to devalue them (a particular concern of the multi national commercial companies who sponsor of the Games and who pay millions of US$ for the privilege of doing so!), did not cut any ice either with the Court. "*The fact that the IOC might possibly have had in mind when adopting the anti-doping legislation at issue the concern, legitimate according to the applicants themselves, of safeguarding the economic potential of the Olympic Games is not sufficient to alter the purely sporting nature of the legislation*." Another IOC myth exploded!

The Court also made the further point: "*...even were it proved, quod non, that the IOC acted exclusively on the basis of its purely economic interests, there is every reason to believe that it fixed the limit at the level best supported by the scientific evidence. The IOC's economic interest is to have the most scientifically exact anti-doping regulations, in order both to ensure the highest level of sporting competition, and therefore of media interest, and to avoid the scandals which the systematic exclusion of innocent athletes can provoke*."

Not only did the IOC come in for praise, but so also did the Court of Arbitration for Sport (CAS), to which the athletes' doping bans had previously been appealed, but without success. The European Court recognised the CAS as being financially and administratively "*independent of the IOC*." And also supported the efforts of the IOC and the members of the Olympic movement to stamp out doping in sport: "*...the Court... cannot uphold this action without weakening the international system of the campaign against doping, which will, in turn, weaken the values which the organisation of sport is intended to promote*."

The Court also rejected the appellants' plea that the Commission wrongly applied the criteria established in paragraph 97 of the judgement in Case C-309/99 Wouters and Others [2002] ECR I'1577 holding: "It must be pointed out that this case differs from that which gave rise to the Wouters judgment. The legislation at issue in Wouters concerned market conduct - the establishment of networks between lawyers and accountants - and applied to an essentially economic activity, that of lawyers. By contrast, the legislation at issue in this case concerns conduct - doping - which cannot, without distorting the nature of sport, be likened to market conduct..." And the Court added: "*The Court considers thus that the reference to the method of analysis in Wouters cannot, in any event, bring into question the conclusion adopted by the Commission in the disputed decision that the anti-doping legislation at issue falls outside the scope of Articles 81* EC and *82*EC, since that conclusion is based, ultimately, on the finding that the legislation is purely sporting legislation."

The Court also had something very interesting to say on the matter of the application of Articles 81 & 82 of the EC Treaty to sporting cases. It is well known that *Bosman*,

Although the point was pleaded and discussed, was not explicitly decided on EU Competition law, but purely on the basis of freedom of movement of persons. But, in the *Meca-Medina* Case, the Court had this to say: "It must be observed that the Court has not, in the abovementioned judgments, had to rule on whether the sporting rules in question are subject to the Treaty provisions on competition (see, in that regard, Bosman, paragraph 138). However, the principles extracted from the case-law, as regards the application to sporting regulations of the Community provisions in respect of the freedom of movement of persons and services, are equally valid as regards the Treaty provisions relating to competition. The fact that purely sporting legislation may have nothing to do with economic activity, with the result, according to the Court, that it does not fall within the scope of Articles 39 EC and 49 EC, means, also, that it has nothing to do with the economic relationships of competition, with the result that it also does not fall within the scope of Articles 81 EC and 82 EC. Conversely, legislation which, although adopted in the field of sport, is not purely sporting but concerns the economic activity which sport may represent falls within the scope of the provisions both of Articles 39 EC and 49 EC and of Articles 81 EC and 82 EC and is capable, in an appropriate case, of constituting an infringement of the liberties guaranteed by those provisions (see, in that regard, the Opinion of Advocate General Lenz in Bosman at I-4930, paragraphs 253 to 286, and particularly paragraphs 262, 277 and 278) and of being the subject of a proceeding pursuant to Articles 81 EC and 82 EC."

In other words, *Bosman* was also decided on EU Competition law grounds, because, if freedom of movement of persons rules apply, so also to do anti competition rules.

In *Meca-Medina*, anti-doping rules were held to be purely sporting rules with no economic purpose and, therefore, outside the scope of Articles 49 EC, 81 EC and 82 EC. And also held not to be discriminatory - applying a 'level playing field' to all athletes subject to them. As far as the Court was concerned, anti-doping regulations fulfilled two important social functions: fair play in sport and safeguarding the health of athletes and these were worth upholding. All will say 'amen' to that. Furthermore, these regulations did not restrict the economic freedoms of athletes, as claimed by the appellants.

A nice try, Jean-Louis, but one that did not come off! Which sporting windmill, I wonder, will he be tilting at next?