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Spotlight on Sport

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Sportsmen step up pitch battle over bans

The recent European Court of Justice ("ECJ") case of Mecca-Medina and Majcen v EC Commission has challenged the commonly held understanding that "purely sporting" rules (i.e. the "rules of the game") automatically fall outside the ambit of the EC Treaty (the "Treaty") and in particular those provisions relating to competition and freedom to provide services.

As a general principle, sport is subject to EC Law provided it constitutes an economic activity. Previous ECJ case law had held that Treaty provisions relating to freedom of movement and freedom to provide services do not affect rules relating to purely sporting concerns and which are unrelated to economic activity. However, in the Mecca-Medina case, the ECJ clarified that this principle does not mean that the sporting activity in question (and its regulations) necessarily falls outside the scope of the Treaty (including its provisions on competition and freedom to provide services). The ECJ held that it is first necessary to examine whether the "practice of sport" at issue can be considered as an economic activity. If so, the Court should then consider whether its regulations are compliant with the Treaty provisions.

Mecca-Medina and Majcen were two professional swimmers who tested positive for Nandrolone. The world governing body for swimming, the Fédération Internationale de Natation ("FINA") initially suspended the pair for four years (this was subsequently reduced to two years on appeal to the Court of Arbitration for Sport).

However, the swimmers were still not satisfied and filed a complaint with the EC Commission challenging the doping regulations adopted by the International Olympic Committee ("IOC") and implemented by FINA. They argued that: (i) these regulations and procedures were contrary to EC rules on competition as there was a "concerted practice" between the IOC and its accredited laboratories to set arbitrary and unscientific limits for levels of Nandrolone (which may result in the exclusion of innocent or merely negligent athletes); and (ii) that the application of the anti-doping regulations would restrict the athletes' rights to provide services guaranteed under the Treaty. These arguments were rejected both by the Commission and by the Court of First Instance ("CFI"). The CFI determined that as the prohibition of doping was based upon "purely sporting" rather than economic considerations, the anti-doping rules were not caught by the Treaty provisions relating to competition and freedom to provide services. However, the ECJ held, on appeal, that the CFI had erred in law by deciding that "purely sporting" rules automatically fall outside the scope of the EC competition regime. The ECJ held that the primary question to consider was: does the sporting activity constitute an economic activity so as to fall within the scope of the Treaty? If so, the conditions for engaging in it, whether of a sporting nature or otherwise (e.g. compliance with doping regulations) should satisfy the provisions of the Treaty that provide for free movement of persons, freedom to provide services and free and open competition.

In considering whether the doping rules were in breach of the Treaty provisions, the ECJ held that the Commission could rightly take into consideration that the general objective of the rules was to combat doping to allow competitive sports to be conducted fairly to, "safeguard equal chances, athlete's health, and the integrity and objectivity of competitive sport and ethical value in sport. As such, although anti-doping regulations constitute a restriction on competition, this is not necessarily incompatible with the Treaty provisions since they are justified by a legitimate objective".

Whilst the swimmers were unable to prove that the doping regulations of the IOC relating to Nandrolone offences were disproportionate to the legitimate objectives of such rules, the ECJ held that due to the penal nature of the rules in question and the severity of the potential sanctions, doping regulations are inherently capable of resulting in adverse effects on competition if they have been proven to be unjustified. To comply with EC competition rules therefore, such restrictions should be, "limited to what is necessary to ensure the proper conduct of competitive sport".

The ECJ went even further and held 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".

This is a shot across the bow to national governing bodies and international federations who should be acutely aware of the risk of challenge to their own rules (particularly those which impose sporting sanctions on its own participants). This principle extends beyond doping regulations to encompass any regulations that could be construed to be anti-competitive and/or in restraint of trade.

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Brabners Chaffe Street has strengthened its Sports Law team with the recent appointment of Andy Gray as a Sports Regulatory Consultant.

Andy will work with the team on a part-time basis, combining the position with his continuing role as in-house Head of Legal Affairs to the national governing body, British Swimming, a post he has held since 1996. He advises on a broad range of disciplinary, regulatory and governance issues in sport at both a national and international level, with particular expertise in the fields of doping control and child protection.

Andy will be speaking at our conference on Case Management Strategies in Child Protection on 22 November 2006, details of which can be obtained by emailing sport@brabnerscs.com.

Commercial partners prove they are no dope

National governing bodies ("NGBs"), international federations ("IFs"), event organisers and sponsors will no doubt be concerned about the recent doping scandals pervading high profile sports events.

The 2006 Tour de France was blighted by doping controversy before it even began when 17 of the riders were implicated in doping allegations and some considered to be favourites, such as Jan Ullrich and Ivan Basso were banned from competing by their own teams. Then days after winning the Tour, Floyd Landis was found guilty of a Testosterone related offence, for which he was subsequently stripped of his title. However, the repercussions did not end there. According to organisers, the 2006 Vuelta a España (Tour of Spain) lost its title sponsorship deal in the wake of the doping scandals of the Tour de France. It has also been reported that following a drop in television figures for the Tour de France in Germany, which forced broadcasters to reduce the cost of advertising slots, German public service networks ARD and ZDF are to seek to include "doping clauses" in their new broadcasting deals with all NGBs and IFs. Such clauses would enable the broadcasters to terminate the broadcasting agreement and/or reduce the broadcast fees in the event that the sport in question was affected by a doping scandal.

Analogous "death and disgrace" clauses are commonplace in individual endorsement deals, granting the sponsor a right of termination if the sponsored individual dies or is deemed to bring the sponsor and its brand(s) into disrepute. The recent doping infraction of the 100 metres world record holder, world and Olympic champion Justin Gatlin is a case in point: shortly afterwards, Nike suspended its contract with the athlete (faced with a ban of up to eight years) until further notice.

However, doping clauses that apply in individual endorsement deals are a far cry from the same clauses in a NGB/IF commercial contract. The NGBs/IFs will undoubtedly try to distance themselves from the misdemeanours of their individual competitors, arguing that whilst an individual and his/her actions are inextricably linked, if a NGB/IF has taken all reasonable steps to prevent doping in its sport (e.g. the "Big Four" sports in the UK: football, cricket, rugby union and tennis having recently agreed to comply with UK Sport's National Anti-Doping Policy), it should not then be penalised for the infractions of individual sportspersons. The detail of such clauses will depend on the bargaining strength of the respective parties, but issues to be addressed will include: (i) will the clause immediately be enforceable when one or more participants test positive (sponsors will be reticent to endure what may be a lengthy appeal process, whilst the NGB/IF seeks a definitive decision on the matter)?; (ii) should the clause be dependent on the number of doping infractions and/or the profile of the individuals implicated?; (iii) how should doping allegations such as the BALCO affair (where the San Francisco laboratory admitted supplying drugs to high profile athletes) rather than positive tests be dealt with?; and (iv) how should the financial penalties, if any, be calculated (the parties may agree to defer this determination to an independent arbitrator)?

Doping scandals are increasingly undermining the credibility and public attraction of those sports tainted by drugs. It follows that sponsors will be less likely to seek to associate themselves with NGBs/IFs, event organisers and individual sportspersons in these "high risk" sports. However, if NGBs/IFs accede to the inclusion of doping clauses, they may be left financially exposed, given that it will be very difficult to secure insurance for such risks.

It will be interesting to see how NGBs/IFs will balance the importance of fighting the drugs cheats with the concern to secure the respective sport's own commercial funding.

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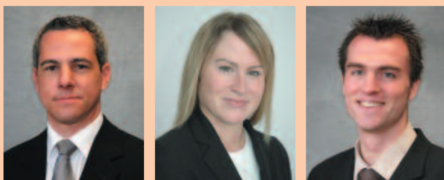
Meanwhile, in athletics, the world governing body, the International Association of Athletics Federations ("IAAF") is currently lobbying for a return to a mandatory four year ban for those athletes found guilty of a doping offence (rather than the current two year ban for first time offenders). Lord Sebastian Coe has also proposed that those athletes that are found guilty of doping should be banned from all world championships organised by the IAAF, thereby preventing them from winning any major championship medals. Lord Coe's proposal, which would effectively constitute a lifetime ban, is supported by many in sport who would welcome the introduction of anti-doping regulations with real teeth. However, given recent legal developments, it is unlikely that this could be introduced without the risk of legal challenge.

From a UK perspective, the recent High Court case of Kieron Fallon v The Horseracing Regulatory Authority illustrates the increasing willingness of sporting professionals to challenge the disciplinary rules of their respective governing bodies. In light of the race fixing allegations against Fallon and the Crown Prosecution Service's ("CPS") decision to prosecute him, the Horseracing Regulatory Authority ("HRA") banned Fallon from racing in the UK until after the determination of the trial. Two HRA appeal boards upheld this decision. Fallon then sought declaratory relief at the High Court that the appeal boards should have reviewed the CPS evidence to consider the merits of the case against Fallon (which Fallon considered to be weak). Furthermore, the jockey argued that the indefinite length of the ban was disproportionate and unjustified.

The High Court held that the appeal boards had been correct not to consider the merits of the criminal case against Fallon. The Court found that both appeal boards had correctly balanced the presumption of innocence against the HRA's duty to maintain the integrity and public confidence in the sport. The Court further held that the ban from racing was a proportionate one in view of the circumstances. One can only speculate what the ECJ would have decided had this case come before it.

Edited by:



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Our team of over 11 Sports Law specialists has expertise in:

- Sponsorship and Merchandising
- Event Organisation and Exploitation
- Broadcasting and New Media
- Athlete / Celebrity Representation
- National and International Regulatory Issues
- Disciplinary Proceedings
- Anti-Doping
- Defamation

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