

Article 82 EC and sporting ‘conflict of interest’: The judgment in MOTOE

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1. Introduction

The decision of the Grand Chamber of the European Court of Justice in *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* (hereafter: MOTOE)¹ is striking for its refusal to allow a sporting body that mixes regulatory functions with economic activities to claim immunity from the application of EC law. Article 82 EC prevents the abuse of a dominant position held by a sporting body and this may affect decisions about whether or not to sanction the staging of new events, which was the issue in the litigation in MOTOE. The subjection of such decisions to the requirements of the EC Treaty is not in itself surprising or new. Case law which stretches back some 35 years, from *Walrave and Koch* through *Bosman* to *Meca Medina*², demonstrates the Court’s consistent view that sport, in so far as it constitutes an economic activity, falls within the scope of application of the EC Treaty, albeit that it is open to sport to explain and justify its practices in so far as they are necessary for its proper organisation. In short, EC law accepts that sport is ‘special’ – it has features, such as the need for balanced competition and uncertainty as to outcome, which are not found in typical industries – but it is not so ‘special’ that it can be granted a blanket exemption from the rules of the EC Treaty. MOTOE, which concerns the sport of motorcycling in Greece, follows this well-established approach. However, the ruling in MOTOE is of interest for three reasons in particular. First, it concerns the Treaty competition rules, specifically Article 82, whereas most (though not all) previous sports cases before the Court have involved the free movement provisions in the EC Treaty. Second, the clarity of expression in the judgment is unusually vigorous, in particular in its concern to assert legal control over the consequences of a conflict of interest between a sporting body’s regulatory and commercial motivations. Third, MOTOE, as a decision of the Grand Chamber, carries particular weight, and it confirms that

the Third Chamber’s readiness in *Meca Medina* to subject detailed aspects of sports governance to the scrutiny of EC (competition) law was not simply an oddity created by the five judges who comprised the Third Chamber in *Meca Medina*.

2. The litigation

The decision in MOTOE is a preliminary ruling delivered in response to a reference made by the *Diikitiko Efetio Athinon* in Greece, seeking an interpretation of Articles 82 and 86 EC in the particular context of the sport of motorcycling.³ It arises from proceedings brought before the Greek courts by MOTOE – the Greek Motorcycling Federation, a non-profit-making association governed by private law – against the Greek State seeking compensation for the pecuniary damage which MOTOE claims to have suffered in consequence on the State’s refusal to grant it the authorisation required under Greek law to organise motorcycling competitions.

Greek law provides that such authorisation would be granted only after consent had been secured from the official representative in Greece of the *Fédération Internationale de Motocyclisme* (the International Motorcycling Federation). That official representative was ELPA (Elliniki Leskhi Aftokinitou kai Periigiseon, Automobile and Touring Club of Greece) and it too organises sporting competitions in Greece. ELPA entered into negotiation with MOTOE, providing MOTOE with information about a number of regulations which had to be observed in the planning of competitions and asking for a range of details about MOTOE’s planned events. But ELPA did not give its consent and the Greek State accordingly did not authorise MOTOE to proceed.

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MOTOE claimed it had been treated unlawfully by the Greek State. It sought GRD 5 000 000 as compensation. Its argument based on EC law was that a violation of Articles 82 EC and 86(1) EC had occurred. The Greek law in question conferred on ELPA a position of monopoly power over the organisation of motorcycle events in Greece which, MOTOE claimed, ELPA had abused by withholding consent to MOTOE's plans. Article 82 EC does not forbid the grant or existence of a dominant position or monopoly, but it does forbid abuse of that position and it therefore provides a basis for reviewing the lawfulness of decisions taken by the sports regulator which is typically placed in that position of monopolist. The thematic approach of EC law persists: an extreme approach, whereby the challenged sports rule would be treated as necessarily unlawful because of its economically damaging effect, is excluded, but so too is an approach at the other extreme, whereby the mere fact that the rule arises in the context of sport would immunise it from legal supervision. Instead EC law operates by putting the rule to the test in so far as it has an economic effect. What is it for? Is it necessary for the organisation of sport? In this way, the EC develops a sports law and a sports policy, even in the absence of any concrete depiction of the role of sport in the Treaty itself.⁴ This is characteristic of the expansionist dynamic of EC trade law.

3. Legal analysis

ELPA's role and functions are clearly important in the legal assessment. Only an 'undertaking' is subject to the Treaty rules on competition. The concept of 'undertaking' goes undefined in the Treaty but it has been consistently interpreted to require engagement in an economic activity, and neither legal form nor the method of financing is of importance. It is, then, a functional test.⁵ The most important and awkward case law on this point has tended to deal with bodies equipped with important public functions and fulfilling (more or less well) defined social tasks which nonetheless also perform activities with economic implications. Consider, for example, institutions responsible for social security⁶ or those dealing with air traffic control.⁷ They fall outwith the category of 'undertakings' for the purposes of EC competition law where the activity is not pursued in the market in actual or potential competition with other economic operators – where the activity lacks an economic nature of the type required to bring it within the scope of the EC Treaty.

It is admittedly not always easy to determine when a body counts as an 'undertaking'. A 'pure' regulator may escape subjection to the Treaty. The Bar of the

Netherlands occupies an influential position of power but it is not an 'undertaking' since it does not carry on an economic activity.⁸ So naturally this is the preferred status for sports bodies – to avoid being classified as an 'undertaking', thereby to avoid subjection to control under the Treaty competition rules. But the key is 'economic activity'. And the reference made by the *Diikitiko Efetio Athinon* stated that ELPA's activities are not limited to purely sporting matters, but that it also engages in activities classified as 'economic', which consist in entering into sponsorship, advertising and insurance contracts. These activities generate income for ELPA. And it organises its own sporting events. This made it rather easy for the Court.

ELPA may be vested with public powers for the purposes of some of its functions but this 'does not, in itself, prevent it from being classified as an undertaking for the purposes of Community competition law in respect of the remainder of its economic activities'.⁹ ELPA is engaged in 'the organisation and commercial exploitation of motorcycling events'.¹⁰ It is an undertaking for these purposes. And non-profit making though its objectives might be, its activities potentially co-exist with those of other operators which do seek to make a profit. There is therefore the necessary commercial aspect to ELPA's activities which brings it within the scope of the EC Treaty.

The Court is not twisting the law to catch a sports federation. Its approach is perfectly consistent with its orthodox approach in EC competition law. For example, an entity responsible for air traffic control has in a similar way been treated as carrying out not only purely administrative activities but also the management and operation of airports subject to remuneration by commercial fees. Providing facilities for which airlines pay constitutes an economic activity.¹¹ So too some, though not all, of ELPA's activities in Greece constitute an economic activity.

So ELPA is an 'undertaking'. But – to proceed with the orthodox analytical structure used in cases arising under Article 82 EC - does it occupy a dominant position within the common market? In the context of an Article 234 preliminary reference the matter ultimately falls for determination by the national court. However, the Court provided relevant interpretative guidance. The relevant market, it appeared to the Court, is the 'functionally complementary'¹² organisation of motorcycling events plus their commercial exploitation by means of sponsorship, advertising and insurance contracts on Greek territory.¹³ A 'dominant position' under Article 82 EC concerns 'a position of economic strength held by

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an undertaking, which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers'¹⁴ and this position of strength may be held as a result of the statutory grant of special or exclusive rights to fix the conditions on which other undertakings may gain access to the relevant market. And although Article 82 applies only on condition that trade between Member States is affected, the Court pointed out that even where the undertaking's conduct relates only to the marketing of products in a single Member State it is perfectly possible that it may 'have the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about'.¹⁵ As Advocate General Kokott put it in her Opinion, following the Commission, 'the business of sport is becoming international'. The Greek rules hinder that evolution and, since their actual or potential effect is not felt solely on Greek territory, they consequently fall within the scope of the EC Treaty.

For all the due deference to the role of the referring national court in disposing of the case, the Court's judgment in MOTOE is designed to leave little room to doubt that ELPA's conduct is subject to the control of Article 82. Its dominant position is however the consequence of State regulation. This, then, invites consideration of Article 86 EC, which in its first paragraph provides that, in the case of undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor maintain in force any measure contrary, in particular, to the rules contained in the Treaty with regard to competition. This plainly fits the situation into which ELPA has been placed by Greek law. And though Article 86(2) EC allows Member States to confer exclusive rights which may be damaging to the competitive process in so far as they promote the operation of services of general economic interest, the Court noted that as regards the organisation and commercial exploitation of motorcycling events it had not been claimed that ELPA's functions derived from an act of public authority; whereas, approving the approach of Advocate General Kokott, it added curtly that the Greek State's allocation to ELPA of an exclusive right to give consent to applications to organise events does not count as an 'economic activity'. So the protection afforded by Article 86(2) EC did not fit the case.

Reaching the final stage of orthodox analysis under Articles 82 and 86 EC, and assuming the existence of a

dominant position held by ELPA, the question is whether there has been an abuse of the type forbidden by Articles 82 and 86(1).

The referring Greek court pointed out that while ELPA is named under Greek law as the only legal person entitled to give consent to any application for authorisation to organise a motorcycling event, ELPA is also itself directly involved in the organising of events and the determination of prizes as well as the associated economic activities such as sponsorship and advertising. And focus on this conflict of interest provided the cutting-edge of the Court's judgment in MOTOE.

A Member State violates the Treaty, specifically Articles 82 and 86(1) EC, where the undertaking exercises the special or exclusive rights conferred upon it and thereby is led to abuse its dominant position. But not only that. A violation occurs where such rights are liable to create a situation in which that undertaking is led to commit such abuses; or where they give rise to a risk of an abuse of a dominant position.¹⁶ This approach seems fatal to the possibility that the Greek arrangements governing the organisation of motorcycle events could be permitted under EC law. For the Court went on to insist that a 'system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators'.¹⁷ ELPA organises and commercially exploits motorcycling events; ELPA also decides whether to give consent to applications to organise competing events, while itself needing no consent from any other body. It therefore has 'an obvious advantage over its competitors'; its right may lead it 'to deny other operators access to the relevant market'.¹⁸ It could 'distort competition by favouring events which it organises or those in whose organisation it participates'.¹⁹

This is stark and it is quite brutal! The judgment comes very close to an approach that can be termed 'inevitable abuse'. In principle the identification of a dominant position is distinct from a determination whether that dominant position has been abused, for Article 82 prohibits only the abuse of a dominant position, not its acquisition nor its existence. However, where it has been found that in practice the creation of a dominant position carries with it an inevitable stench of abuse, then the separation in principle between the finding of a dominant position and the finding of abuse is conflated. The one leads to the other. This seems to lie at the heart of the Court's approach in MOTOE. It should again be appreciated that this is not a twist in the law

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designed to catch sporting practices. Admittedly the Court's approach represents a remarkably vigorous reading of the scope of control exercised by Articles 82 and 86 EC, but it is not inconsistent with orthodox practice under EC competition law. Instances of 'conflict of interest' remote from the sports sector dot the Court's decision-making record pursuant to these Treaty provisions.²⁰ However, sporting bodies may be especially vulnerable to findings of acute conflict of interest. And MOTOE's message holds that an acquisition of exclusive power to determine which events are to be permitted in circumstances where the commercial interests of the holder of that exclusive power are directly affected seems to bring with it an inevitable finding of at least a risk of abuse, which is sufficient to trigger a finding of violation of Article 82 EC (and, in so far as State regulation is also involved, Article 86 EC).

4. Comment

The identification of a conflict of interest from which ELPA suffers lies at the heart of the Court's disapproval. ELPA has a 'dual role', in the phrase employed by Advocate General Kokott, and this leads to legal consequences under Article 82. So does MOTOE imply that sporting federations must ruthlessly separate their regulatory functions from any whiff of commercial advantage in order to avoid condemnation under Article 82 – and that the State too must withdraw special rights granted to such sporting bodies in order to escape condemnation under Article 86? It certainly pushes in that direction. There is, moreover, existing practice of the Commission in this vein. In FIA (Formula One) part of the Commission's objections related to rules that provided a financial disincentive for contracted broadcasters to show motor sports events that competed with Formula One.²¹ This was also a case of sporting 'conflict of interest' to which the Treaty competition rules were applied, albeit that there was no State involvement. The Commission was satisfied with a solution according to which the FIA retreated to a regulatory role, thereby releasing broadcasters to make their own commercial choices about which events to show. And commitments were made that objective and transparent criteria would govern the FIA's decisions on the number of events to be authorised.

Nonetheless there is some room for manoeuvre for sports bodies wishing jealously to cling on to the bundle of regulatory and commercial functions they typically discharge. In fact, MOTOE, as a ruling requiring adaptation in but not abandonment of established patterns of sports governance, stands with other

judgments concerning sport such as Bosman, Lehtonen, and Meca-Medina. In Bosman the whole notion of a transfer system was not ruled incompatible with EC law, only that transfer system was condemned.²² In Lehtonen the whole notion of transfer 'windows' was not ruled incompatible with EC law, only that (discriminatory) window was impugned.²³ In Meca-Medina the whole notion of doping controls was not ruled incompatible with EC law, only rules that are excessive judged with reference to a finding of doping or with regard to the severity of penalties would infringe the Treaty competition rules.²⁴

So in MOTOE the whole notion of regulated access to the market for staging sports events was not ruled incompatible with EC law, only that system which generated such plain and profound conflict of interest was condemned.

Accordingly MOTOE does not imply that EC law expects that organisation of sports events should become a free-for-all. A system involving prior consent is not of itself objectionable: acting as a 'gatekeeper' is an obvious task of a sports federation. The Opinion of Advocate General Kokott in MOTOE is helpful on this point. She observed that as a matter of EC law:

'there can be no objection if the national legislature provides in certain cases that the relevant authorities should obtain expert advice before granting authorisation for an activity. Generally, it may therefore be appropriate to involve the sports associations concerned in decisions relating to sport. The particular characteristics of sport and of the sport in question can best be taken into account in this way.'

And accordingly sport can certainly be regulated. Structures for checking matters such as the safety of planned events, based on prior licensing, are capable of complying with EC law despite their restraining effect on would-be organisers. But beyond safety there is a more general and proper regulatory role to be performed by sports federations. Advocate General Kokott accepted that there is typically a need for overarching control, involving the setting of a timetable for events and the fixing of uniform rules for a sport. There is not necessarily an objection per se to the 'pyramid' system of governance which is common in sport²⁵ (though detailed decisions made under its auspices may be vulnerable to challenge²⁶). Advocate General Kokott is rightly anxious to declare the lawful nature of practices that serve an 'objective justification in the interests of sport'.²⁷ The objection in MOTOE is not to regulation of sport but rather to this system of which MOTOE fell foul.

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The Court does not directly address the issue of the admitted special expertise of sports federations with the care helpfully demonstrated by its Advocate General, but nothing in the Court's ruling is inconsistent with her approach. Sports federations do have special expertise (in rooting out doping, in planning a calendar of events, in fixing the 'rules of the game', and so on) and EC law does not require that they be dislodged from their position of authority. But the detailed manner in which the sports regulator performs its task must be checked for compliance with EC law. Acceptance of the special role of a sports federation as regulator does not carry with it an uncritical acceptance of all its chosen practices. And it is the mixing of regulatory functions and economic incentives which leads sports regulators into difficulties under EC law.

But it remains the case that prior approval is a potentially proper and lawful feature of a regime governing the staging of sports events. Would-be event organisers should not read the ruling in MOTOE and assume the gate has been flung open. Sports federations will continue to arrange the calendar and to decide how many events should be permitted. They will doubtless periodically refuse to give prior approval to new events. That is not of itself abusive, even if plainly frustrating to would-be new organisers. The key issue is the conduct of the prior approval system. A sports regulator can clearly be centrally involved, indeed exclusively responsible, but the procedure must be adapted to reflect its incentives. In MOTOE both the referring Greek court and the European Court make some play of the absence of any procedural restraints on the way that ELPA exercises its powers. There are no restrictions, obligations or opportunities for review laid down by Greek law.²⁸ And indeed the operative part of the judgment concludes with reference to this feature which maximises ELPA's autonomy and power:

'A legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC. Those articles preclude a national rule which confers on a legal person, which organises motorcycling competitions and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review.'

So it is possible and, in my view, correct to interpret the judgment as envisaging that a sporting federation may

be given exclusive rights to decide which competitions may take place, even where it has a direct commercial interest in the matter itself, provided that its procedures and criteria for selection are transparent, objectively justified and non-discriminatory and provided also that they are followed faithfully and openly. There should moreover be a right to a hearing afforded to the applicant promoter and a there should be duty to give reasons for decisions taken, which should be subject to the possibility of review by an independent body. As a matter of EC law one would argue that such safeguards eliminate the risk of abuse and therefore shelter the arrangements from condemnation pursuant to Article 82. This approach is visible elsewhere in the case law dealing with Articles 82 and 86²⁹ and, in fact, it is consistent with the Court's approach to the law of free movement, where systems requiring prior approval before a product or service may be marketed can be justified only if the restriction on trade is proportionate to the objective pursued and provided applicable criteria are objective, non-discriminatory and known in advance.³⁰ The concern is to define as tightly as possible the basis of the decision-making process in order to prevent arbitrary or self-motivated choices. Clearly, however, the safeguards attached to the authorisation procedure must be genuine and effective. They must be sufficiently robust to provide a convincing counter-balance to the risk that the sports federation's commercial interests will influence its attitude to the authorisation of competing events. As mentioned above, the core of the Court's concern in MOTOE is to require 'equality of opportunity' between the various economic operators'.³¹ Any preference for the authorising federation's own commercial interests in choosing whether or not to grant consent irredeemably taints the system. That may well suggest a need for structural change within federations so that the regulatory arm is kept organisationally scrupulously separate from the commercial arm. A sports regulator which went so far as completely to surrender its commercial activities would be in the safest position – it might not even constitute an 'undertaking' within the meaning of EC law³² and, even if it does, the risk of abuse would be minimised. But EC law does not go so far as to demand that surrender of commercial activities by a sports regulator. It is the conflict of interest under which sports regulators may labour – and of which ELPA was egregiously guilty – which raises concerns, and they may be met by structural separation of regulatory and commercial activities within a sports regulator combined with effective procedural safeguards to ensure fairness in the decision-making process.

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5. Conclusion

Meca-Medina was a landmark judgment.³³ It was one of the first rulings of the Court applying the Treaty's competition rules to sport.³⁴ But more broadly it provided a clear and (in my view) intellectually satisfying framework for understanding how and why EC trade law applies to sport. It insists that the legally central questions surround the identification of which sporting rules are truly necessary for the organisation of a particular sport. Such rules are not incompatible with EC law even though they may have economic implications that are detrimental to individuals.³⁵ Naturally the ruling in Meca Medina did not offer answers to the many detailed questions raised about the scope of intervention of EC law into sporting practices. Instead it assumes that those questions need to be resolved on a case-by-case basis. As Advocate General Kokott put it in MOTOE, citing Meca Medina, 'each individual activity that exhibits a connection with sport must on each occasion be examined to ascertain whether it is economic in nature or not'. And if it is, its compatibility with EC law needs to be checked.³⁶ For this reason the judgment in Meca Medina has attracted criticism from those engaged in sports governance for its perceived contribution to uncertainty.³⁷ But the alternative – finding bright lines that limit the reach of EC law, beyond which sporting autonomy reigns supreme – is inconsistent with the very nature of EC trade law, a broad functionally-driven system, and in any event lacks any demonstrated intellectually robust justification for the exclusion of legal supervision from an economically significant sector.³⁸ Meca-Medina in short accepts that sport may be special – but invites sporting bodies to show how and why this so, and thereby to show that practices that have economic effects are nevertheless necessary elements in sporting competition and therefore compatible with EC law.

MOTOE is a decision of the Grand Chamber. It mentions Meca Medina, a ruling of the Third Chamber, but does not explicitly follow its reasoning. But it has in common with it the ready acceptance that regulatory decisions taken by sports bodies frequently have significant economic consequences and that accordingly legal supervision pursuant to the EC Treaty is required. Most of all, the Grand Chamber in MOTOE has shown no interest in resuscitating the extraordinarily profound deference shown to the autonomy of sport by the Court of First Instance in Meca-Medina.³⁹ Nor has it been tempted by the partisan case in favour of maximising the autonomy of sports governing bodies made in the 'Arnaut Report' – the so-called Independent European Sport Review published in October 2006 which is deeply flawed in its legal analysis as a result of its

reliance on the CFI ruling in Meca Medina to the almost complete exclusion of the ECJ's.⁴⁰ Few rules are purely sporting in nature: and, following this key insight, the Court's ruling in MOTOE adheres to that in Meca Medina by excluding the very broad claims to autonomy strategically made by sports bodies. Instead the European Court, in Meca Medina and now in MOTOE, has treated sport realistically: as a sector with economic weight which is therefore within the scope of the EC Treaty, albeit that EC law must be sensitive to the special characteristics of sport.⁴¹ That too is the message of the European Commission's White Paper on Sport issued in July 2007.⁴² Its legal analysis is heavily and properly dependent on the ECJ ruling in Meca-Medina, and concludes that the judgment reveals an interpretation of Articles 81 and 82 which 'provides sufficient flexibility to take account of the specificity of sport and does not impede sporting rules that pursue a legitimate objective (such as the organisation and proper conduct of sport), are indispensable (inherent) to achieve the objective and proportionate in light of the objective pursued'.⁴³ Case-by-case inquiry into sporting practices is required. Quite so. Were the Commission's White Paper to be re-drafted today, the ruling in MOTOE would certainly need to be absorbed into the discussion on matters such as the licensing of clubs and in particular into the legal analysis pertaining to competition law but nothing in MOTOE contradicts the essential features of the sober and careful analysis prepared by the Commission in its White Paper.

In conclusion, there is room in EC law to defer to the special expertise possessed by sports regulators. MOTOE does not demolish the legitimate claim of sports regulators to set a calendar of events, just as Meca Medina does not outlaw doping controls. But the details of the procedures involved are not immune from the application of EC law in so far as they exert economic effects. The structuring of the decision making process in sport must ensure that priority is not given to the economic interests of the sports federation. The frequently endemic 'conflict of interest' must be recognised and avoided so that regulatory power is not used to promote commercial advantage. Ultimately EC trade law puts public and private practices that fall within the scope of the Treaty to the test and frequently requires their adaptation, but it always leaves room for the relevant public and private actors to show justification for the cherished status quo. BASL

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- 1 Case C-49/07 Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio judgment of 1 July 2008.
- 2 Case 36/74 Walrave and Koch [1974] ECR 1405, Case C-415/93 Bosman [1995] ECR I-4921, Case C-519/04 P Meca-Medina and Majcen v Commission [2006] ECR I-6991, all cited at para 22 of the judgment in MOTOE.
- 3 Case C-49/07 Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio judgment of 1 July 2008.
- 4 See e.g. R Parrish, *Sports law and policy in the European Union* (2003) Manchester, Manchester University Press; R Parrish and S Miettinen, *The Sporting Exception in European Law* (2007) Den Haag, T M C Asser Press; S Weatherill, *European Sports Law* (2007) Den Haag, T M C Asser Press; L Barani, 'The Role of the European Court of Justice as a Political Actor in the Integration Process: The Case of Sport Regulation after the Bosman Ruling' (2005) 1 *Journal of Contemporary European Research* 42; S Van den Bogaert and A Vermeersch, 'Sport and the European Treaty: a Tale of Uneasy Bedfellows' (2006) 31 *ELRev* 821; D Dimitrakopoulos, 'More than a Market? The Regulation of Sports in the EU' (2006) 41 *Government and Opposition* 561; E Szyszczak, 'Is Sport special?', Ch 1 in Bogusz B, Cygan A, and Szyszczak E (eds), *The Regulation of Sport in the European Union* (2007), Cheltenham, Edward Elgar Publishing.
- 5 E.g. Case C-41/90 Höfner and Elser [1991] ECR I-1979; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 ADK Bundesverband and Others [2004] ECR I-2493, all cited in para 21 of the judgment in MOTOE. Also helpful is Case C-55/96 Job Centre [1997] ECR I-7119 and for discussion from the perspective of general EC competition law see W-H Roth, Annotation, (2007) 44 *CMLRev* 1131.
- 6 Eg Joined Cases C-159/91 and C-160/91 Poucet and Pistre [1993] ECR I-637.
- 7 Eg Case C-364/92 SAT Fluggesellschaft [1994] ECR I-43, Case C-82/01 P Aéroports de Paris v Commission [2002] ECR I-9297, both cited at para 24 of MOTOE.
- 8 Case C-309/99 Wouters [2002] ECR I-1577, paras 111-115.
- 9 Para 25 of the judgment in MOTOE.
- 10 Para 26 of the judgment.
- 11 Case C-82/01 P Aéroports de Paris v Commission [2002] ECR I-9297, paras 68-83.
- 12 Para 33 of the judgment.
- 13 At para 60 of her Opinion AG Kokott raises the (perfectly logical) possibility that the market may extend beyond motorcycling, but the Court does not pursue this. The national court might.
- 14 Eg Case 27/76 United Brands and United Brands Continentaal v Commission [1978] ECR 207, Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461, all cited at para 37 of MOTOE.
- 15 Para 42 of the judgment.
- 16 Eg Case C-41/90 Höfner and Elser [1991] ECR I-1979, Case C-260/89 ERT [1991] ECR I-2925, Case C-179/90 Merzi convenzionali porto di Genova [1991] ECR I-5889, Case C-323/93 Centre d'insémination de la Crespelle [1994] ECR I-5077, Case C-380/05 Centro Europa 7 [2008] ECR I-0000, all cited in paras 49 and 50 of the judgment in MOTOE. Also helpful is Case C-320/91 Corbeau [1993] ECR I-2533.
- 17 Para 51 of the judgment.
- 18 Para 51 of the judgment. The Court cites, as analogies, Case C-202/88 France v Commission [1991] ECR I-1223 and Case C-18/88 Gb Inno BM [1991] ECR I-5941.
- 19 Para 52 of the judgment.
- 20 See the decisions mentioned in n 16 above. For examination see R Whish, *Competition Law* (Lexis Nexis Butterworths, 5th ed, 2003), Chapter 6, dealing in particular with cases on 'conflict of interest' at p.228.
- 21 COMP 35.163, Notice published at OJ 2001 C169/5.
- 22 Case C-415/93 note 2 above. Cf S Gardiner and R Welch, 'The Contractual Dynamics of Team Stability versus Player Mobility: who rules the 'The Beautiful Game'', (2007) 5/1 *Entertainment and Sports Law Journal*, available via <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj>.
- 23 Case C-176/96 Lehtonen v FRBSB [2000] ECR I-2681.
- 24 Case C-519/04 P note 2 above, para 48 of the judgment.
- 25 Para 96 of AG Kokott's Opinion.
- 26 See S Weatherill, 'Is the Pyramid Compatible with EC Law?' 2005/3-4 *International Sports Law Journal* 3.
- 27 Para 96.
- 28 Paras 18, 19, 48 and 52 of the judgment.
- 29 See eg Case C-67/96 Albany International BV [1999] ECR I-5751 paras 88-122, esp para 120 on respect for the expertise of the decision-making body and para 121 on safeguards attached to its decision-making process. In Albany the Court expressly finds differences from the situation at stake in Case C-18/88 n 18 above.
- 30 Eg Case C-390/99 Canal Satellite Digital SL [2002] ECR I-000 esp para 35; Case C-432/03 Commission v Portugal [2005] ECR I-9665, esp para 50; Case C-219/07 Nationale Raad van Dierenkwekers en Liefhebbers judgment of 19 June 2008, esp paras 33-37.
- 31 Para 51 of the judgment.
- 32 Cf n 8 above.
- 33 Case C-519/04 P n 2 above.
- 34 See also, considering Art 82 in the case of agents, Case T-193/02 Piau v Commission [2005] ECR II-209, upheld in Case C-171/05 P Piau v Commission [2006] ECR I-37.
- 35 For comment see S Weatherill, 'Anti-doping revisited – the demise of the rule of 'purely sporting interest'' (2006) *European Competition Law Review* 645; E Szyszczak, 'Competition and sport' (2007) 32 *ELRev* 95; M Wathelet, 'L'arrêt Meca-Medina et Majcen: plus qu'un coup dans l'eau' 2006/41 *Revue de Jurisprudence de Liège, Mon et Bruxelles* 1799; A Rincon, 'EC Competition and Internal Market Law: on the existence of a Sporting Exemption and its withdrawal' (2007) 3 *Journal of Contemporary European Research* 224. For exploration of the evolution of the Court's case law see R Parrish and S Miettinen, *The Sporting Exception in European Law* (2007) Den Haag, T M C Asser Press.
- 36 For a good example of how the approach of the Court in Meca Medina now provides the starting point for assessing the compatibility of particular sporting rules with EC law see A Klees, 'Die sogenannte 50+1 Regel im deutschen Profifussball im Lichte des europäischen Wettbewerbsrechts' 13/2008 *EuZW* 391.
- 37 See eg G Infantino G [Director of Legal Affairs at UEFA], Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport? UEFA paper 02/10/06, available at http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf; J Zylberstein, 'Collision entre idéaux sportifs et contingences économiques dans l'arrêt Meca-Medina' 2007/1-2 *Cahiers de Droit Européen* 218.
- 38 For a particularly incisive critique of the pretensions of the lex sportiva see K Foster, 'Is there a Global Sports Law?' (2003) 2 *Entertainment Law* 1, available via <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number1/foster.pdf>.
- 39 Case T-313/02 Meca-Medina and Majcen v Commission [2004] ECR II-3291, set aside by the ECJ in Case C-519/04 P Meca-Medina and Majcen v Commission n 2 above. For criticism of the CFI judgment see S Weatherill, 'Anti-doping rules and EC Law' [2005] *European Competition Law Review* 416.
- 40 *Independent European Sport Review*, available at www.independentfootballreview.com.
- 41 S Weatherill, 'On overlapping legal orders: what is the 'purely sporting rule''?, Ch. 3, pp.48-73, in Bogusz B, Cygan A, and Szyszczak E (eds), *The Regulation of Sport in the European Union* (2007) Cheltenham, Edward Elgar Publishing.
- 42 White Paper on Sport, COM (2007) 391, 11 July 2007, available via http://ec.europa.eu/sport/index_en.html. For comment see S Weatherill, 'The White Paper on Sport as an Exercise in Better Regulation' [2008] 1-2 *International Sports Law Journal* 3.
- 43 Page 69, Annex I of the Staff Working Document n 42 above.