

# Anonymised version

Translation

C-428/23 – 1

Case C-428/23

## Request for a preliminary ruling

### Date lodged:

11 July 2023

### Referring court:

Bundesgerichtshof (Germany)

### Date of the decision to refer:

13 June 2023

### Applicant, appellant on a point of law and respondent in the appeal on a point of law:

ROGON GmbH & Co. KG

MVI Management GmbH

DC

### Defendant, respondent in the appeal on a point of law and appellant on a point of law:

Deutscher Fußballbund e. V. (DFB)

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[...]

BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE, GERMANY)

ORDER

[...]

In the case of

1. ROGON GmbH & Co. KG, [...] Frankenthal,

EN

2. MVI Management GmbH, [...] Mondsee (Austria),

3. DC, [...],

Applicant, appellant on a point of law and respondent in the appeal on a point of  
law,

[...]

v

Deutscher Fußballbund e. V. (DFB), [...] Frankfurt am Main,

Defendant, respondent in the appeal on a point of law and appellant on a point of  
law

[...]

Following the hearing held on 28 February 2023, the Cartel Panel of the  
Bundesgerichtshof (Federal Court of Justice) [...]

ordered:

The proceedings are stayed.

The following questions on the interpretation of Article 101(1) TFEU are  
referred to the Court of Justice of the European Union for a preliminary  
ruling:

1. Do the principles developed by the Court of Justice of the European  
Union in the judgments in ‘*Wouters*’ (of 19 February 2002 –  
C-309/99) and ‘*Meca Medina*’ (of 18 July 2006 – C-519/04 P),  
according to which, when applying the rule prohibiting cartels,
  - account must be taken of the overall context in which the decision in  
question was taken or produces its effects and, more specifically, of its  
objectives,
  - and according to which it has then to be considered whether the  
decision’s consequential effects restrictive of competition are inherent  
in the pursuit of those objectives,
  - and whether they are proportionate to those objectives (‘the *Meca  
Medina* test’),

apply to the regulations of a sports association, which are addressed to  
members of the association and regulate the use of services of  
undertakings outside the association on a market upstream of the  
association’s activities?

2. If question 1 is answered in the affirmative: in that case, must the *Meca Medina* test be applied to all the provisions of those regulations, or does its application depend on substantive criteria, such as the proximity or remoteness of the individual rule to the sporting activity of the association?

Grounds:

- 1 I. The parties disagree over claims for injunctive relief under cartel law in connection with a set of regulations issued by the defendant governing the activities of players' agents (Reglement für die Spielervermittlung; 'the RfSV').
- 2 The first applicant is one of the leading consultancy firms for young talents and professional footballers in Germany. Its activities include, among other things, providing advice in connection with transfers and contract extensions of professional football players. Its founder and managing director is the third applicant. The second applicant is a legal person under Austrian law whose business activities are also aimed at the activities of players' agents. Players' agents can be engaged both by players who are looking for a club and by clubs wishing to let a player go (outward transfer) or to recruit a player (inward transfer).
- 3 The defendant is the umbrella organisation of 27 German football associations with approximately 25 000 clubs and more than 7 million members. In organisational terms, it is integrated into a pyramid of associations under the umbrella of the International Federation of Association Football (FIFA).
- 4 Pursuant to Paragraph 16a of the defendant's statutes, matches in the top two professional leagues (Bundesliga (Federal Football League) and 2. Bundesliga (2nd Federal Football League)) are operated by the Deutsche Fußball Liga (German Football League; 'DFL e. V.'). DFL e. V. is an association of the clubs of the top two German professional leagues. Matches in the 3rd league, which is also a professional league, are operated by the defendant itself. Other leagues are organised by the regional football associations. As ordinary members of DFL e. V., clubs participating in Bundesliga or 2nd Bundesliga matches are bound by the defendant's statutes and the binding regulations. In order to be eligible to play in the Bundesliga or 2nd Bundesliga, players must sign a licence agreement with DFL e. V., which also obliges them to comply with association rules. As a member of FIFA, the defendant is subject to its regulations and is under an obligation to implement FIFA's decisions.
- 5 In the wake of FIFA's adoption of regulations on working with players' agents, the defendant adopted the RfSV, which entered into force on 1 April 2015. It is addressed to clubs and players who are obliged to comply with the defendant's regulations. It governs the use by players and clubs of the services of an agent for the conclusion of professional player contracts and transfer agreements. Among other things, it

- imposes a registration obligation on agents, Paragraphs 2(3) and 3(2) and (3) of the RfSV (‘registration obligation’);
  - requires the production of an agent’s declaration, which provides for the agent’s submission to various statutes, regulations and rules of FIFA, the defendant and DFL e. V., including submission to the association’s jurisdiction, Paragraph 2(2) and Paragraph 3(2) and (3) of the RfSV and Annexes 1 and 2 (‘submission obligation’);
  - imposes the additional obligation of a natural person when registering legal persons, Annex 2 of the RfSV (‘additional obligation for legal persons’);
  - prohibits the agent, in the case of an inward transfer, from sharing in future transfer proceeds of the club, Paragraph 7(3) of the RfSV (‘prohibition of commission for subsequent transfers’);
  - prohibits commission for agent services in respect of minors, Paragraph 7(7) of the RfSV;
  - imposes an obligation to disclose fees paid and payments made to agents, Paragraph 6(1) of the RfSV (‘disclosure obligation’).
- 6 Breaches of the regulations can be sanctioned as unsportsmanlike conduct (Paragraph 9 of the RfSV). The annex to the regulations contains standard forms for the required agent’s declaration.
- 7 DFL GmbH, a wholly owned subsidiary of DFL e. V., sent Circular No 62 to the managers of the clubs and companies of the Bundesliga and the 2nd Bundesliga on 12 January 2018 to inform them, inter alia, about outward transfer agreements. The Circular stated that a one-off lump-sum payment or a fee in instalments could be agreed in relation to the transfer fee achieved for the outward transfer service with the proviso, however, that it should not amount to a percentage share (‘fee calculation in accordance with Circular No 62’).
- 8 By their requests for injunctive relief, the applicants object to the registration obligation (application 1), the submission obligation (application 2), the additional obligation for legal persons (application 3), the prohibition of commission for subsequent transfers (application 4), the fee calculation in accordance with Circular No 62 (applications 5 and 5a), the prohibition of commission for agent services in respect of minors (application 6) and the disclosure obligation (application 7). They primarily invoke the prohibition of cartels.
- 9 The Landgericht (Regional Court, Germany) allowed the claims in part. It ordered the defendant to cease and desist in accordance with application 2, to the extent that the agents are required to submit to the association jurisdiction of FIFA and the DFB for the punishment of infringements, and in accordance with application 3. It dismissed the other claims.

- 10 On appeal by the applicants, the Oberlandesgericht (Higher Regional Court, Germany) allowed other claims on the merits. It ordered the defendant to refrain from registering agents only if they submit to the regulations of FIFA, the defendant and DFL e. V. relating to the exercise of the agent's activity (application 2). It also ordered the defendant to refrain from instructing DFL e. V. or another contractor to operate matches in a football league and thereby to allow the contractor to restrict clubs in their ability to agree on formulae for the calculation of commission on the basis of a percentage of the proceeds of subsequent transfers (application 5a). It dismissed the defendant's appeal in other respects and the defendant's cross-appeal.
- 11 By the appeals on points of law, for which leave was granted by the Oberlandesgericht (Higher Regional Court), the applicants continue to pursue their further applications for injunctive relief and the defendant continues to pursue its application for dismissal of the action.
- 12 II. The decision on the appeal on points of law is determined by provisions of the Gesetz gegen Wettbewerbsbeschränkungen (German Law against restrictions of competition; 'GWB'), which read as follows:
- Paragraph 33 Claim for injunctive relief and rectification
- (1) Whoever infringes a provision of this Part or Article 101 or Article 102 of the Treaty on the Functioning of the European Union (infringer) or whoever infringes a decision issued by the competition authority shall be obliged to the person affected to rectify the harm caused by the infringement and, where there is a risk of recurrence, to desist from further infringements.
- (2) (...)
- (3) Affected persons are competitors or other market participants impaired by the infringement.
- (4) (...)
- 13 III. The success of the appeal on points of law depends on the questions referred. For that reason, prior to a decision, the proceedings must be stayed and a preliminary ruling obtained from the Court of Justice of the European Union pursuant to point (b) of the first paragraph, and the third paragraph, of Article 267 TFEU (see, on the FIFA Football Agent Regulations: Landgericht Mainz (Regional Court Mainz, Germany), order for reference of 30 March 2023 – 9 O 129/21).
- 14 The court of appeal (Oberlandesgericht Frankfurt a.M. [(Higher Regional Court, Frankfurt am Main, Germany)] WuW 2022, 99) stated that the regulations should be measured against Article 101(1) TFEU, citing the following reasons. They led to a restriction of competition on the market for players' agent services that was

appreciable and relevant to the internal market. As a set of sporting rules, however, the regulations had to be examined for compatibility with the prohibition of cartels in accordance with the requirements of the Court of Justice of the European Union (judgment of 18 July 2006 – C-519/04 P, [...] *Meca Medina*). To determine the applicability of those principles restricting the prohibition of cartels, it was necessary to ascertain whether the restrictions of competition associated with the rules of the RfSV were connected with the sporting objective claimed by the defendant. That was the position in the present case. The RfSV was a set of sporting rules within the meaning of that case-law. According to its statutes, the defendant was tasked with ensuring sporting competition in football; the rules of the RfSV also served that purpose. In order to ensure fair sporting competition, the RfSV was intended to lay down the conditions for the recruitment and engagement of athletes. The activity of players' agents significantly influenced the composition of the teams, their continuity and their sporting strength; it was thus directly linked to sporting competition. The activities of players' agents had an influence on fair competitions and the performance and health of the athletes. The regulations were intended to avoid dependencies between players' agents, players and clubs. Such dependencies could jeopardise the integrity and fairness of competitions and the sport. In the past, players and clubs had in some cases been harmed financially and professionally by practices of players' agents that might have consequences under criminal law.

- 15 The contested rules would therefore have to be examined in detail on the basis of the principles established in the '*Meca Medina*' decision. Irrespective of the general objective, it was necessary to examine with regard to each of the regulations at issue whether it related to the legitimate objective, whether there was an inseparable link between the pursuit of the legitimate objective and the restriction of competition and whether the measure was proportionate.
- 16 On that basis, the regulations which were challenged in applications 1, 4, 6 and 7 for injunctive relief, concerning the registration obligation, the prohibition of a share in subsequent transfer proceeds, the prohibition of commission for agent services in respect of minors and the disclosure of all payments to the defendant did not infringe Article 101 TFEU. By contrast, the submission obligation challenged by application 2 for injunctive relief and the provision challenged by application 3 for injunctive relief, according to which legal persons must, when submitting the agent's declaration, simultaneously submit a further agent's declaration by a private person, did fall under the prohibition of Article 101 TFEU. Application 5 for injunctive relief was unfounded. The contested circulars were not attributable to the defendant. Subsidiary application 5a, however, was well founded. The defendant had a monitoring obligation vis-à-vis DFL GmbH.
- 17 2. The applicants' appeal against that decision will be successful if the applicants are entitled to injunctive relief against the defendant under Paragraph 33(1) of the GWB) and Article 101(1) TFEU in respect of the provisions of the RfSV challenged by applications 1, 4, 6 and 7. The requirements of Article 101(1) TFEU are met (see (a) below). On the basis of the first-instance court's findings of

fact, the conditions for exemption under Article 101(3) TFEU are not satisfied (see (b) below). The question arises whether, taking into account the overall context in which the regulations produce their effects and their objective, a restriction of the requirements of Article 101(1) TFEU is possible. That cannot be answered conclusively on the basis of the previous case-law of the Court of Justice of the European Union (see (c) below). The decision therefore depends on the answer to the questions referred for a preliminary ruling (see (d) below).

- 18 a) Article 101(1) TFEU prohibits as incompatible with the internal market inter alia decisions by associations of undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. It is an unwritten requirement that both the restriction of competition and the effect on interstate trade must be appreciable. Whoever infringes the prohibition is obliged to cease and desist pursuant to Paragraph 33(1) of the GWB.
- 19 aa) The defendant, as an association of undertakings, is an addressee of Article 101(1) TFEU. Among other things, the defendant groups together the football clubs belonging to the German professional leagues. For them, football is first and foremost an economic activity. The fact that that economic activity is connected with sport does not change the status of the defendant as an undertaking (see CJEU, judgment of 1 July 2008, C-49/07, [...] paragraph 22 – *MOTOE*). The fact that the defendant is a grouping of amateur clubs, alongside professional clubs, is not capable of calling that assessment into question (see, in relation to FIFA: General Court, judgment of 26 January 2005 – T-193/02, [...], paragraphs 69 to 72 – *Piau*). The rules of the defendant at issue here, which concern the use of a regularly paid upstream service, that of arranging the transfer and placement of athletes, also constitute an economic activity. The RfSV must be regarded as a decision of an association of undertakings (see, in that regard, the fundamental principles in: CJEU, judgment of 27 January 1987 – 45/85, [...] paragraphs 29 to 32 – *Feuerversicherung*; General Court, [...] paragraph 75 – *Piau*). As is clear from Paragraph 1(1) of the RfSV, by laying down those regulations, the defendant wishes to coordinate the conduct of its members in a specific market, namely with regard to the activities of players' agents in concluding professional players' contracts and in transfer agreements.
- 20 bb) The rules of the RfSV challenged here also lead to an appreciable restriction of competition on the market for players' agent services.
- 21 (1) While the rules are not directly aimed at players' agents but at clubs and players who, as users of the agent's services, belong to the opposite side of the market, they do, however, have the effect of restricting the freedom of choice of the players, clubs and undertakings involved, which at the same time affects the players' agents' economic freedom to act.

The latter must align their conduct with the provisions laid down in the regulations in order to be able to operate on the market for agents' services.

Otherwise, they run the risk that – under the pressure of being sanctioned by the defendant (Paragraph 9 of the RfSV) – players and clubs will stop using them as players’ agents.

- 22 (2) The restriction of competition is also appreciable. As has been set out above, all clubs and players that operate in Germany and use players’ agent services are bound by the regulations. Realistic market opportunities in Germany therefore exist only for agents who comply with the contested regulations on the registration obligation (Paragraph 2(3), Paragraph 3(2) and (3)), on the fee structure (Paragraph 7(3) and (7)) and on the disclosure of payments (Paragraph 6(1)). That is not precluded by the clarification under Paragraph 1(4) of the RfSV, according to which professional player contracts and transfer agreements remain valid even in the event of non-compliance with the provisions of the regulations.
- 23 (3) The rules of the RfSV are also capable of impairing trade between the Member States. As has been set out above, all clubs and players operating in Germany are bound by the regulations in their capacity as users of players’ agent services, which means that all players’ agents operating in Germany are also restricted by the regulations. Although they only apply to the entire German market, the rules constitute a barrier to market entry for foreign players’ agents who are not subject to the same restrictions in their home countries. In addition, a large number of brokered player transfers have a foreign connection in cases that concern a transfer to or from the Bundesliga. The relevance for the internal market is therefore beyond question.
- 24 b) The court of appeal did not examine whether the contested rules fulfil the exemption requirements of Article 101(3) TFEU. On the basis of the findings of the appeal judgment, that cannot be assumed.
- 25 c) It is therefore crucial for the outcome of the case to determine whether the requirements of Article 101(1) TFEU are restricted in accordance with the principles of the ‘*Meca Medina*’ decision of the Court of Justice of the European Union, as the court of appeal has assumed.
- 26 aa) According to the case-law of the Court of Justice of the European Union, restrictions of the prohibition under Article 101(1) TFEU have only been recognised for specific types of cases (see CJEU, judgments of 19 February 2002 – C-309/99, [...] paragraph 97 et seq. – *Wouters*; of 28 February 2013 – C-1/12, [...] paragraph 93 – *OTOOC*; of 18 July 2013 – C-136/12, [...] paragraphs 53 and 54 – *Consiglio nazionale dei geologi*; of 23 November 2017 – C-427/16 and C-428/16, [...] paragraph 54 – *CHEZ Elektro Bulgaria*). According to those cases, not every decision of an association of undertakings which limits the parties’ freedom of action necessarily falls within the prohibition laid down in Article 101(1) TFEU. The compatibility of such a decision with the EU rules on competition cannot be assessed in the abstract. Rather, when applying the prohibition of cartels, account must first of all be taken of the overall context in which the decision in question was taken or produces its effects and, more

specifically, of its objectives. It then has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them. The Court of Justice of the European Union has also applied those principles – taking into account the specific nature of sporting competition – in the field of rule-making by sports associations. It has ruled that a legitimate objective in the aforementioned sense can also be pursued by a set of sporting rules in so far as – like doping control rules – they are inherent in the organisation and proper conduct of competitive sport and their very purpose is to ensure healthy rivalry between athletes (*‘Meca Medina test’*: CJEU, [...] paragraphs 43, 45 – *Meca Medina*).

- 27 bb) The facts of the present case differ from previous cases in which the Court of Justice of the European Union has considered a restriction of the prohibition in respect of decisions of associations of undertakings. The decisions in *‘Wouters’*, *‘OTOC’*, *‘CHEZ Elektro Bulgaria’* and *‘Consiglio nazionale dei geologi’* each concerned professional regulations of professional representative bodies formed on a statutory basis, which had rule-making competence for their field (see CJEU, [...] paragraphs 44, 62 – *Wouters*; [...] paragraphs 48 and 49 – *OTOC*; [...] paragraphs 5, 43 and 44 – *Consiglio nazionale dei geologi*; [...] paragraphs 21, 48 – *CHEZ Elektro Bulgaria*). The decision in *‘Meca Medina’* was based on anti-doping regulations of the International Olympic Committee and a swimming federation (see CJEU, [...] paragraphs 27 and 28 – *Meca Medina*). Those regulations directly concerned the sporting activities of the athletes and the fair conduct of competitions, i.e. the market for the organisation of sporting competitions. They thus fell within the ambit of the autonomy of associations, which allows associations to self-regulate their internal affairs (Article 12(1) of the Charter, Article 11(1) of the ECHR, Article 9(1) of the Grundgesetz (German Basic Law)). Although the regulations at issue here are also addressed to clubs and players, namely to the defendant’s association members, they also concern players’ agents who are not members of the defendant. The regulations therefore have an effect on a third market upstream of the sporting activity, in which the clubs and players are only involved as users of the players’ agent service. Restrictions of third parties in competition cannot be justified solely on the basis of the association’s autonomy. The private-law relationships of an association or its members with other private-law entities must be assessed in the same way as corresponding relationships of non-associated persons (see, in that regard, BVerfG, decision of 12 October 1995 -1 BvR 1938/93, NJW 1996, 1203 paragraph 9).
- 28 cc) Whether, in cases such as those, a regulation that appreciably restricts the economic freedom of action of non-associated market participants can be exempted from the prohibition of Article 101(1) TFEU by applying the *Meca Medina* test cannot be clearly inferred from the case-law of the Court of Justice of the European Union. Different views are expressed in that regard.
- 29 (1) According to one view, the principles developed by the Court of Justice *inter alia* in the *‘Wouters’* and *‘Meca Medina’* decisions are not applicable in cases

such as the present one. On that view, those principles should apply only if the regulations pursue purely sporting or at least ‘sport-specific’ objectives [...] [references]. That is said to be supported by the fact that in ‘*Meca Medina*’ the Court of Justice pointed out that the limitation of possible actions through anti-doping rules was ‘inherent’ in the proper conduct of competitive sport (CJEU, [...] paragraph 45 – *Meca Medina*). Furthermore, a power of sports associations to set rules with regard to commercial activity could indeed result from the specific characteristics of competitive sport (see in that regard: Opinion of the Advocate General of 15 December 2022 – C-333/21, [...] point 91 – *European Super League*), the submission of the members to the associations’ statutes under private law and the legally recognised autonomy of the association. However, it is a different matter if conditions for markets are imposed that do not directly concern the competitive sport itself and if the regulated activity concerns undertakings that are not members of the sports association and are therefore unable to influence the content of those regulations. In that case, neither the specific characteristics of competitive sport nor the rule-making power conferred on associations by their members under private law justify refraining from applying Article 101(1) TFEU in accordance with the *Meca Medina* test of the Court of Justice [...]. Otherwise, the prohibition of agreements restrictive of competition under Article 101(1) TFEU could cease to be enforceable. The second sentence of Article 165(2) TFEU does not change that conclusion. That provision would only allow the European Union to make recommendations and take legislative incentive measures in order to achieve its sport-related objective under Article 165(4) TFEU, but not to relax any cartel-related obligations [...] [references]. Furthermore, it should be taken into account that only the democratically legitimised legislature is authorised to legitimately define overriding interests which are in conflict with Article 101(1) TFEU [references].

- 30 (2) According to another view, the applicability of the principles developed inter alia in ‘*Wouters*’ and ‘*Meca Medina*’ does not depend on whether the regulations of a sports association only concern the purely sports-related field of the association’s activities – in particular the markets for the organisation of sports competitions – or whether they have a direct impact on third markets. Rather, the principles apply if there is any factual connection at all between the association’s rules and the organisation and the proper conduct of a sporting competition. The only instance in which the *Meca Medina* principles do not apply is if the disputed rules pursue solely commercial goals (of the association) and no sport-related objectives whatsoever with regard to the specific sporting competition [references]. The autonomy of the association is not decisive in that context. Notwithstanding the above, a legitimate objective, which rules out the mandatory consequence of the prohibition under Article 101 TFEU, may be seen in the specific characteristics of sport, the ethical values of which are also among the declared objectives of the European Union under the second sentence of Article 165(2) TFEU [references]. That is also supported by the fact that in ‘*Meca Medina*’ the Court of Justice did not expressly refer to the autonomy of associations but made a general reference to the principles mentioned in ‘*Wouters*’. It assumed that the compatibility of rules with the EU rules on

competition could not be assessed in the abstract, but that account had to be taken of the overall context in which the decision in question was taken or produced its effects (see CJEU, [...] paragraph 42 – *Meca Medina*). The overall sporting context could also include regulations which are not of a purely sporting nature but concern the use of a service by members of the association which only indirectly affects the sporting activity. Moreover, the market for players' agent services could not even exist without the organisation of professional football by the defendant, so that it is directly connected to the sporting activity, at least in that respect.

- 31 dd) If the rules set by a sports association relating to a third market can be exempted from the application of Article 101(1) TFEU after an examination of their necessity and proportionality with regard to the regulatory objectives and if, therefore, question 1 should be answered in the affirmative, consideration would have to be given to not carrying out the assessment uniformly for the entire set of regulations issued by a sports association, but necessarily only for those regulations that are sufficiently closely related to the sporting activity of the association (question 2). An assessment as to whether there is a legitimate objective, whether the restrictive effects on competition are necessarily related to the pursuit of the stated objectives and whether they are proportionate with regard to those objectives would then only be possible and necessary with regard to those individual regulations.
- 32 d) If it is assumed, in line with the court of appeal, that a legitimate objective within the meaning of '*Meca Medina*' arises from the overall context of the regulations, the individual regulations challenged would have to be assessed as to whether they correspond to that general objective. As a second step of the assessment, it would be necessary to examine whether there is a necessary connection between the pursuit of the legitimate objective and the restriction of competition. In a third step, it would be necessary to examine whether the particular measure restrictive of competition is proportionate, i.e. capable of achieving the legitimate objective and necessary and appropriate for that purpose. When applying the *Meca Medina* test, at least part of the contested regulations could prove to be compatible with Article 101(1) TFEU.
- 33 If, on the other hand, the *Meca Medina* test is not applicable to sets of rules of the type at issue, which are connected only in a wider sense with the operation of matches organised by a sports association, a finding of infringement of Article 101(1) TFEU would have to be made in respect of all the contested regulations.

[...]