



*CMAS Disciplinary Committee
Case DC 2019-01*

RULING OF THE CMAS DISCIPLINARY COMMITTEE

in the case DC 2019-1

VDST Verband Deutscher Sporttaucher e.V.

vs.

CMAS BALTIC Sporta Biedrība

The ruling is delivered by the CMAS Disciplinary Committee sitting in the following composition

Mr. Stefano Brustia (President),
Attorney-at-Law of the Rome Bar

Ms. Lavinia Di Basilio,
Attorney-at-Law of the Tivoli Bar

Ms. Fiammetta Orsi,
Attorney-at-Law of the Rome Bar

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I. INTRODUCTION

1. VDST Verband Deutscher Sporttaucher e.V. (hereinafter also simply referred to as “**VDST**”) is the German governing body recognized by CMAS for diving and underwater sports.
2. CMAS BALTIC Sporta Biedrība (hereinafter also simply referred to as “**BALTIC**”) is a sports association affiliated to CMAS that oversees underwater activities in Latvia.
3. In November 2017, the Secretariat of CMAS received a complaint from VDST concerning the involvement of BALTIC in some underwater activities in Germany. Notably, VDST claimed that BALTIC was organizing CMAS training courses in

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Germany without the consent of VDST. It is VDST's position that such conduct be a violation of its territorial rights recognized by CMAS. In particular, VDST claimed that BALTIC did violate Article 5(2)(a) of the CMAS Disciplinary Code (hereinafter also simply referred to as "**the Code**"): i.e. the rule prohibiting the national federations from engaging in the direct or indirect sale of CMAS cards outside of their territories (hereinafter "**the contested rule**").

4. The inquiry carried out by CMAS found that BALTIC was operating in Germany through a commercial entity named 'CMAS BALTIC COMMERCIAL', which was actively involved in the promotion and sale of CMAS cards addressed to German nationals.
5. On the basis of these findings, CMAS suspended BALTIC from membership, without initiating any disciplinary proceedings.
6. On 27 March 2019, BALTIC lodged a complaint claiming that the measure adopted by CMAS was taken in violation of the principle of due process and of its right to be heard. In addition, BALTIC argued that the contested rule was in breach of EU competition law.

II. THE PROCEEDINGS

7. In April 2019, BALTIC's complaint as well as the previous complaint of VDST were transmitted to the President of the Disciplinary Committee, who promptly initiated these proceedings *ex officio*, on the basis of Article 13(8) of CMAS Statutes.
8. On 12 April 2019, the President of the Disciplinary Committee specified the structure of the proceedings as well as the procedural timetable (Order of Procedure No. 1).

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9. On the same date, the Order of Procedure No. 1 and the two complaints were delivered to both Parties via email. Then, the hard copy of the Order of Procedure No. 1 and its annexes (i.e. the VDST's complaint and the BALTIC's complaint) were also promptly delivered to both Parties by registered mail.
10. On 6 May 2019 and 9 May 2019, respectively, VDST and BALTIC submitted their Written Observations.
11. No reply brief was timely submitted by the Parties.
12. On 10 June 2019, having also considered that the Parties had not requested to examine any witness or expert, the President of the Disciplinary Committee informed the Parties that he was inclined no to call for the Hearing (Order of Procedure No. 2).
13. By letter of 13 June 2019, however, BALTIC requested the Hearing. In the same letter BALTIC also alleged have not received the VDST's complaint and requested a new deadline for submitting its Reply Brief.
14. On 26 June 2019, the President of the Disciplinary Committee specified the hearing schedule and further particulars for the Hearing (Order of Procedure No. 3).
15. Following consultation with the Parties, on 3 July 2019 the Disciplinary Committee held the Hearing, which was attended by BALTIC and VDST by videoconference.
16. At the Hearing, both Parties had ample opportunity to present their arguments and answer to the questions posed by the Disciplinary Committee. The Disciplinary Committee also heard at length the representative of BALTIC, Mr. Illarion Igorevich Girs, who had requested a new deadline for submitting the Reply Brief.

III. JURISDICTION

17. The jurisdiction of the Disciplinary Committee, which is not disputed, derives from Article 13.8 of the CMAS Statutes which reads as follows:

“The Disciplinary Committee shall have jurisdiction in first instance on any controversy between the CMAS bodies and between CMAS and any of its members and between any of the members. It may pronounce the sanctions described in these Statutes and the CMAS Disciplinary Code on federations, officials (including referees, members of the Board of Directors and of sub-committees), athletes and any other natural or legal person affiliated to or licensed by the CMAS.”

IV. THE DISPUTE

IV.1 VDST’s claims

18. The claims raised by VDST in its Written Observations may be summarized as follows:
- At first, VDST requests that the Disciplinary Committee exclude BALTIC from CMAS membership because of the following reasons: **(i)** it does not engage in any significant underwater activities in Latvia; **(ii)** it misleadingly claims to represent all Baltic states; **(iii)** it has released defamatory statements against CMAS and VDST.
 - In addition, VDST requests that BALTIC be sanctioned for its violation of Article 5(2)(a) of the Code. In this respect, VDST draws the attention of the Disciplinary Committee to the fact that BALTIC not only violated VDST’s



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territorial rights, but it also improperly exploits the CMAS' logo for promoting its underwater activities in Germany.

IV.2 BALTIC's defenses

19. BALTIC's written observations are developed in a single page brief which was signed by Mr. Anotolijs Koleda, and also by Dr. Elmar Frings (i.e. the person who manages the commercial entity that operates in Germany under the name 'CMAS BALTIC COMMERCIAL').
20. In essence, BALTIC's submissions may be summarized as follows:
 - BALTIC states to be involved exclusively in underwater activities carried out within the Latvian territory. In this regard, BALTIC does not contest the fact that it has issued CMAS cards to German nationals. But it claims that these cards are granted only to German nationals who have completed training courses in Latvia.
 - On a point of law, BALTIC claims that the contested rule infringes EU competition law prohibitions on anti-competitive agreements and abuse of a dominant (Articles 101 and 102 TFEU).
21. In its Written Observations, BALTIC also complains about some alleged unfair conducts of VDST. But no information has been provided by BALTIC to enable this Disciplinary Committee to understand what this supposed unfair competition would consist of.
22. Therefore, because BALTIC's claim is too vague and uncertain, the Disciplinary Committee must reject it as frivolous

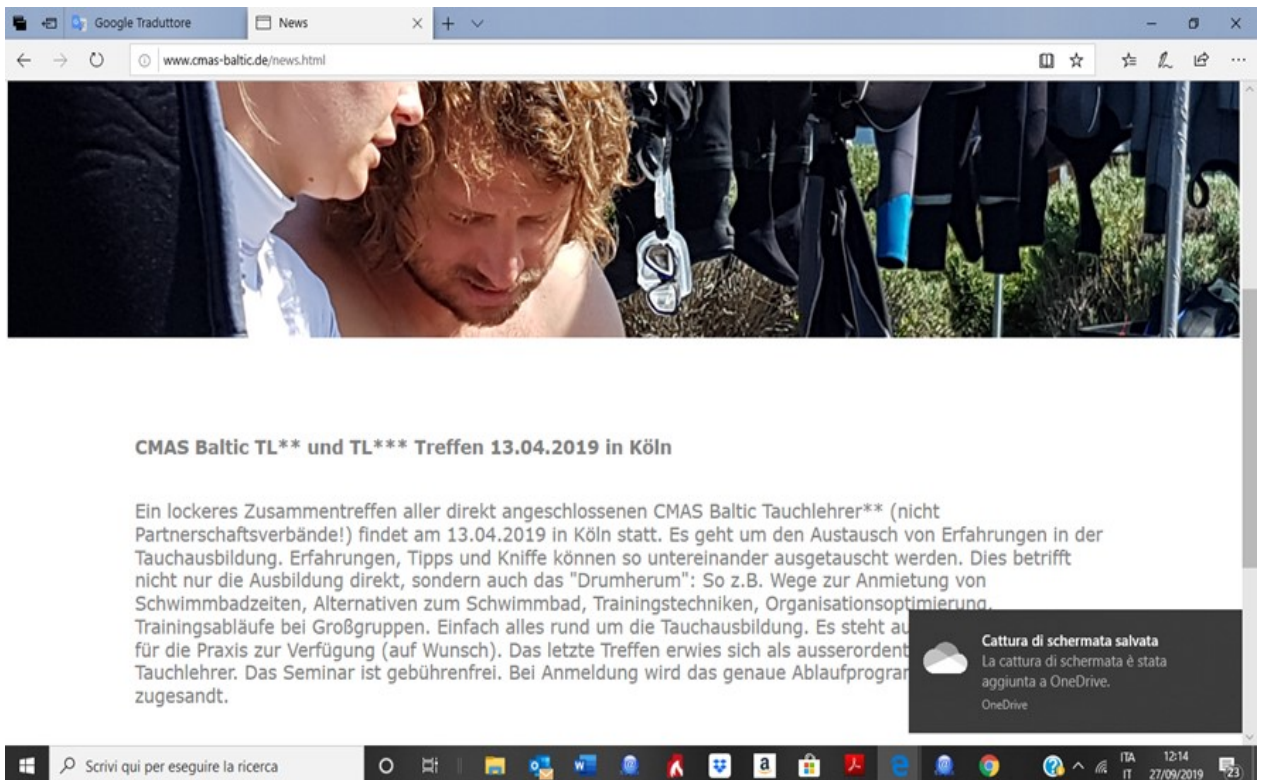
V. PROCEDURAL ISSUES

23. As a preliminary, the Disciplinary Committee wishes to point out that it does not have the authority to decide the exclusion of BALTIC from CMAS membership. Indeed, the provision set forth in Article 3.2(f) of the Code is very clear on this matter (“[...] Exclusion can only be pronounced by the General Assembly upon recommendation of the disciplinary bodies of CMAS in accordance with the Statutes and the provisions of this Disciplinary Code”).
24. In these proceedings, the Disciplinary Committee considers itself competent solely to decide the dispute between the Parties concerning the underwater activities that BALTIC is carrying out in Germany.
25. A further procedural issue which must be considered before proceeding to the merits concerns the alleged violation of BALTIC’s due process rights. Notably, BALTIC claimed that it would not be able to develop an adequate defense in this case because it does not know what evidence is stacked against it.
26. In this regard, the Disciplinary Committee notes that the evidence on record shows that the VDST’s complaint had been delivered to BALTIC on 12 April 2019.
27. In addition, it is worth noting that the Order of Procedure No. 1 contains a brief but detailed summary of the VDST’s complaint which is adequate to enable BALTIC to prepare its defense.
28. In view of the above circumstances, the Disciplinary Committee is persuaded that in the present proceedings the BALTIC has been given ample latitude to be heard and fully plead its defenses.
29. Therefore, this procedural objection must be rejected.

VI. THE EVIDENCE ON RECORD

30. In the present case, the evidence on record shows that:

- BALTIC operates in Germany through a commercial entity named ‘CMAS BALTIC COMMERCIAL’, which is managed by Dr. Elmar Frings (i.e. a founding member of BALTIC who currently holds the position of Training Director);
- BALTIC’s instructors held training courses in Germany at least until April 2019 (as the screenshot below shows).



31. On the contrary, BALTIC failed to provide any evidence in support of its defenses.

32. Therefore, the Disciplinary Committee harbours no doubt that the commercial entity named ‘CMAS BALTIC COMMERCIAL’ is strictly connected to BALTIC. The

Disciplinary Committee is also convinced that BALTIC is well aware of the business activities that this commercial entity is carrying out in Germany.

VII. THE DISCIPLINARY COMMITTEE'S ASSEMENT

- 33.** In the light of the foregoing, the Disciplinary Committee find that BALTIC did violate Article 5(2)(a) of the Code, i.e. the rule prohibiting “*direct or indirect sale of cards by a national federation in a country other than that of establishment*”.
- 34.** However, as explained above, it is BALTIC’s position that the CMAS contested rule infringes EU competition rules prohibiting anti-competitive agreements and abuses of a dominant position (Articles 101- 102 TFEU).
- 35.** This defensive argument has been raised by BALTIC in a very confusing way. But, for the sake of clarity, the Disciplinary Committee deems necessary to assess at least whether the CMAS contested rule may fall within the scope of the prohibition of anti-competitive agreements set out in Article 101(1) of TFEU.
- 36.** As a result of the growing importance of economic activities connected with sport, it is well known that the EU Commission has increasingly focused on the enforcement of competition rules in the sports sector. In particular, the EU Commission has concentrated its enforcement on certain revenue-generating activities connected with sport (e.g. the sale of sports media rights and ticketing arrangements). Nevertheless, the EU Commission has also dealt with matters related to regulatory aspects of sport, such as the rules which concern the organization of a sport on a territorial basis.
- 37.** Furthermore, in the 2006 *Meca-Medina* ruling (judgment of 18 July 2006, C-519/04), the EU Court of Justice has stated that qualifying a rule as “purely sporting” is not sufficient to remove such rule from the scope of EU competition

law. On the contrary, the EU Court of Justice holds that, whenever a sport constitutes an economic activity, the conditions for engaging in it must comply with the obligations resulting from antitrust rules.

38. In the light of *Meca-Medina* ruling, this means that the specificity of sport cannot exclude straightaway sporting rules from the scope of EU competition law.
39. Given that CMAS may be considered as an association of undertakings, because its national federations engage in economic activities (e.g. with regard to the organization of certified diving courses), it is therefore necessary to assess whether the contested rule (i.e. Article 5(2)(a) of the Code) would constitute a restriction of competition under Article 101(1) of TFEU.
40. This means that one needs to consider whether the contested rule have the “object or effect” of restricting competition.
41. In the case at hand, the Disciplinary Committee finds to its comfortable satisfaction that it should be possible to develop several arguments to affirm that the contested rule does not infringe Article 101(1) of TFEU.
42. At first, it is worth noting that the contested rule has not an anticompetitive object.
43. Indeed, the purpose of the contested rule is clearly to organize and manage CMAS underwater activities in coherence with the so-called “European Sport Model”: i.e. a pyramid organizational structure that provides a single national sport association per sport, which operates under the umbrella of a single European association and/or a single worldwide association.
44. Nothing else. So, the object of the CMAS contested rule cannot be deemed as anti-competitive in an antitrust sense. Otherwise, all international sports associations

would have to be considered as having an anti-competitive object, which is manifestly absurd. That there is no anti-competitive object is so obvious that it need not be dealt with. that it need not be dealt with any further.

45. Secondly, it should be underlined that Article 101.1 TFEU is not applicable where the impact of the agreement/decision on economic competition is not “restrictive” or the restriction is not “appreciable”.
46. According to case law, in order to ascertain whether competition is in fact restricted to an appreciable extent, one must use an *a contrario* test and look at the competition which would occur in the relevant market in the absence of the allegedly ‘anticompetitive’ agreement/decision.
47. Well, considering that there are many other different bodies around the world which award diving qualification (PADI, SSI, etc.) it is hard to imagine how the CMAS contested rule could appreciably restrict the competition in the relevant markets.
48. In this perspective, is also worth noting that BALTIC did not provide any data which could demonstrate that the CMAS contested rule would appreciably restrict the competition in the market of certified diving courses.
49. Furthermore, BALTIC failed to provide evidence of CMAS’ alleged dominant position in this market. As is obvious, if there is no dominant position, there cannot be a claim under Article 102 of TFEU.

VIII. THE DISCIPLINARY COMMITTEE’S CONCLUSIONS

50. In the light of all the above considerations and findings, the Disciplinary Committee finds BALTIC guilty of breaching the CMAS rule prohibiting “*direct or*

indirect sale of cards by a national federation in a country other than that of establishment”.

51. Having established that BALTIC did violate Article 5(2)(a) of the Code, the Disciplinary Committee also notes that the paragraph 1 of the same Article 5 leaves no margin of discretion in determining the sanction (“*Any CMAS member [...] acting or attempting to act in such a way as to hinder or harm the interests of CMAS or of another CMAS member shall be subject to a fine of Euro Ten Thousand (10,000) and a suspension of one (1) year*”).
52. Therefore, with regard to the sanction to be imposed on BALTIC, the Disciplinary Committee does not have any discretion in deciding the amount of fine to be applied.

IX. DISPOSITIVE PART

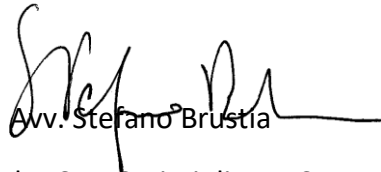
53. For the reasons set forth above, the Disciplinary Committee decides as follows:
 - a) CMAS BALTIC Sporta Biedrība is found guilty of infringement of article 5(2)(a) of the Code;
 - b) CMAS BALTIC Sporta Biedrība is suspended from taking part in any activities organized under CMAS for 1 (one) year and it is ordered to pay a fine in the amount of EUR 10,000.00 (ten thousand euros).
 - c) The costs of the present proceedings are fixed in the amount of EUR 3,000.00 (three thousand euros) and shall be borne by CMAS BALTIC Sporta Biedrība, without prejudice of the joint liability upon both Parties in respect thereof.

X. RIGHT OF APPEAL

- 54.** This decision may be appealed before the CMAS Appeal Committee according to the procedure rules set out in Article 9 of the CMAS Disciplinary Code.

Rome, 2 October 2019

Yours faithfully,



Avv. Stefano Brustia

President of the CMAS Disciplinary Committee



Avv. Lavinia Di Basilio



Avv. Fiammetta Orsi