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The EU Commission sends a statement of objections to an international sports association because of the possible incompatibility of its governance rules with competition law *(International Skating Union)*

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Simon Troch, Carmen Mera, e-Competitions | N°82616, www.concurrences.com

International sport governing bodies and competition law - up to a 'ban of banning' for participation in unauthorised events organized by rival governing bodies. European Commission ready to set an example with the International Skaters Union?

After opening a formal investigation into the International Skating Union's ('ISU') eligibility rules in October 2015, the Commission sends a Statement of Objections to the ISU. The Decision that probably will follow can reshape the way in which sport governing bodies have to deal with concurring organisers and could reshape the European sport landscape.

I. Entity under investigation

The ISU, founded in 1892, is the international body governing figure and speed ice-skating throughout the world. It is the only international ice-skating federation recognized by the International Olympic Committee ('IOC'). Consequently, only competitions organized by the ISU affect the international ranking and, thus,

qualification to the top-tier championships (e.g., Olympic Games ('Olympics') and World Championships ('WCs')). The ISU's members are the national federations (one per country), who administer events at the national level.

II. Facts

In June 2014, two skaters [1] filed a complaint with the European Commission ('Commission'). In their complaint, they argue that the ISU's rules banning skaters who participate in unauthorized events - i.e., events organised without the ISU's approval - violate EU competition rules prohibiting anti-competitive agreements between two or more undertakings (Article 101 TFEU) and abuse of market dominance (Article 102 TFEU).

Their complaint followed ISU preventing Icederby - a private company - organizing international skating events in 2011 and 2014. The 2011 block could have been defended on integrity grounds as Icederby planned to offer - next to higher price money and an innovative race formats - betting services. However, in 2014 no betting services were involved and thus no integrity justifications were available.

On October 5th, 2015, the Commission opened a formal investigation into the ISU's rules for a suspected breach of Articles 101 and 102 TFEU. In particular, the Commission noted to closely look into the ISU's rules imposing a lifetime ban on athletes and officials if they were to participate in events not organised or specifically approved by the ISU.

In its **Statement of Objections** of September 27, 2016, the Commission indicates that the ISU's rules which could result in a lifetime ban from any competition organised by the ISU (e.g., Olympics and WCs) "*restrict the commercial freedom of athletes and prevent new organisers of international speed skating events from entering the market because they are unable to attract top athletes*".

III. Comment

Bans from participation in unauthorised events are common measures included in the rules of many international sport governing bodies. However, their treatment under EU competition rules is uttermost unclear. The Commission now has a 'textbook' case to clarify the relationship between EU competition rules and sport regulations. The Commission will have to rule under which circumstances - if at all - the sanction of a ban can be considered inherent and proportionate to the pursuit of a legitimate objective by a sport governing body.

Precedents. In *Fédération Internationale d'Automobile* ('FIA'), the Commission held that the FIA as sole regulatory body of international motor racing in Europe (and at the same time organiser of motor racing events) had abused its dominant position by "tying up everything that is needed to stage a rival

championship”. In the FIA case a ban for participation in unauthorised events [2] was only one of the measures leading to the Commission’s conclusion that “[the FIA] *was using its regulatory powers to block the organisation of races which competed with the events promoted or organised by FIA (i.e. those events from which FIA derived a commercial benefit)*”. After the Statement of Objections, the FIA changed its business model and the investigation was closed without a final decision was issued by the Commission. In its new business model the FIA could only ban new competition provided that it is “*justified on grounds related to the safe, fair or orderly conduct of motor sport*”.

In *MOTOE*, the CJEU ruled that 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 101 and 102 TFEU. The CJEU clarified that these articles preclude national rules conferring on such legal person, the power to authorize applications to organise competitions, without that power being made subject to restrictions, obligations and review [3].

Legal framework and Application *in casu*. According to Article 165(1) TFEU, “*the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function*”. However, according to well established case-law all activities which can be considered as ‘economic activities’ are subject to EU competition rules even if a sport element is involved. Consequently, sporting rules are compatible with EU competition rules only if they pursue a legitimate objective and if the restrictions that they create are “inherent” and “proportionate” to achieving this objective [4].

A ban for participation in unauthorised events is inherently anti-competitive since it restrains the organisation of and the participation in unauthorised events or as the Commission stated: “*the penalties set out in the ISU Eligibility rules restrict the commercial freedom of athletes and prevent new organisers of international speed skating events from entering the market because they are unable to attract top athletes.*”. Therefore, it will be key to ascertain whether there are any possible grounds to justify such ban, *i.e.*, whether the ban pursues a legitimate objective and is “inherent” and “proportionate” to achieving this objective.

According to the preliminary analysis of the Commission (Statement of Objections), the ISU Eligibility Rules (102(2)), banning athletes from all key international speed skating competitions if they participate in unauthorised events, are disproportionately punitive. In addition, these rules would prevent non-ISU affiliated organisers from organising international speed skating competitions as they would not be able to attract any athletes to participate in their events. Especially, when taking into account that the career of a professional athlete is considerably limited in time, the Commission takes the view that athletes cannot risk

the possibility of being unable to participate in events for which the ISU has a ‘*de facto*’ monopoly (only body recognised by the IOC) such as the Olympics, WCs and ECs. Such suspension would be extremely damaging and potentially end their speed skating careers.

Potential impact Decision. Given that the number of competition law cases dealing with organisational sporting rules is very limited at the EU level, the decision of the Commission will have a significant precedent-setting value.

The Commission’s interpretation of the justifications brought forward by the ISU (protection of the athletes’ health or preservation of the sports’ integrity and viability) and whether the measures the ISU adopts to achieve these goals are proportionate, are decisive in weighing the overall impact of the Decision.

Given that several international sport federations have similar sanctioning clauses included within their respective rules [5], the Decision can significantly reshape the European sport landscape. Not only could the Decision lead to a change in the eligibility rules of sport governing bodies but also the way in which sport governing bodies have to deal with concurring organisers. This all depends on the Commission’s interpretation of what can be considered as proportionate to maintain the legitimate aims pursued by international sport governing bodies.

A ‘ban of banning’ for participation in unauthorised events will give the necessary legal arguments to competing organisers and athletes to fight the rules of sport governing bodies before competition authorities or courts when confronted with a non-transparent/discriminatory system of authorisation and where a non-authorisation decision leaves athletes open to the threat of bans. Especially, in these cases where competing organisers or athletes consider that the rules (or specific non-authorisation) are designed for commercial purposes of the main governing body rather than to protect any legitimate objective.

Simon Troch | Liège University (ULG) | simon.troch@ulg.ac.be

Carmen Mera | Liège University (ULG) | carmen.merafuentes@student.ulg.ac.be

[1] Olympic champion Mark Tuitert and World Champion Niels Kerstholt.

[2] A license holder would have its licence withdrawn and thus would be excluded from any event authorised by FIA, if he participated in any international Formula One event not listed on the FIA calendar.

[3] Recent national examples include: *Fédération Equestre Internationale* (FEI): the Belgian Competition Authority (‘BCA’) granted interim relief to allow riders and horses to participate in the Global Champions League series without possibility to be a suspended by the FEI (partially suspending the Exclusivity Clause found in Articles 113(4)-(6) of the

FEI's General Regulations). The FEI appealed the Decision, but the Brussels Court of Appeal ('Court') upheld the decision of the BCA. The Court (April 28, 2016) found that the BCA correctly held that the exclusivity clause, *prima facie*, has anticompetitive effects as it excludes horse riders from FEI competitions for a duration of at least six months (sometimes even longer in practice).; see also Swedish investigations in similar rules related to the *Swedish Automobile Sports Federation (SBF)* and the *Swedish Bodybuilding Association (SKKF)* ; an Italian investigation into the Equestrian Sports Federation (FISE); and an Irish investigation into Show Jumping Ireland (SJI).

[4] Since the *Meca-Medina* Judgment of the CJEU (2006), rules of sport governing bodies related to the 'good' organisation of a sport are no longer automatically being considered immune to the application of EU competition rules. These rules now need to be analysed on a case-by-case basis taking into account the context in which the rule or decision is adopted, more particularly the pursued objectives (*e.g.*, athletes health, protecting of the integrity and viability of the sport, *etc.*), and whether any restrictive effects on competition are inherent to the pursuit of those objectives and, if so, whether they are proportionate.

[5] **Limited / defined bans** : amongst others Fédération Internationale de Natation (FINA); Federation Internationale de Volleyball (FIVB); Union Cycliste Federation (UCI); Badminton World Federation (BWF); International Powerlifting Federation (IPF). **Unlimited / open bans**: amongst others International Boxing Association (AIBA); Federation International de Ski (FIS); Federation Internationale d'Escrime (FIE); International Hockey Federation (FIH); International Shooting Sport Federation (ISSF); International Cricket Council (ICC); Fédération International de Gymnastique (FIG); International Sailing Federation (ISAF).