

# e-Competitions

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The EU General Court judges that the rules of sport federations banning athletes for participation in unauthorized events can – in certain circumstances – constitute a by object infringement of Article 101 TFEU (*International Skating Union*)

**ANTICOMPETITIVE PRACTICES, PROFESSIONAL ASSOCIATION, SPORTS, ARBITRATION, JUDICIAL REVIEW, EUROPEAN UNION, NON-COMPETITION CLAUSE, ANTICOMPETITIVE OBJECT / EFFECT, PRINCIPLE OF PROPORTIONALITY**

EU General Court, *International Skating Union*, Case T-93/18, 16 December 2020

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By its Judgment of 16 December 2020, the General Court ('GC') confirms the European Commission's ('Commission') Decision finding that the International Skating Union's ('ISU') governance rules violate competition law. The Judgment backs the Commission's conclusion that the ISU's rules banning athletes for participation in unauthorized events organized by third parties constitute a by object infringement of Article 101 TFEU.

The Judgment explicitly recognizes that authorization rules for events organized by third parties – and an associated ban for participation in unauthorized events – may be legal if they "*pursue legitimate objectives*" and their restrictive effects on competition are "*inherent*" to the pursuit of those objectives and "*proportional*". However, *in casu* the GC ruled that the sanction to ban included in the ISU's eligibility rules was not "*proportional*".

The GC's Judgment can potentially further reshape the European sports landscape as sport governing bodies will have to rethink the way in which they deal with concurring organizers.

## I. The parties

The ISU, founded in 1892 and established in Switzerland, is the international body governing figure and speed ice-skating throughout the world. Its members are the national federations (one per country). The ISU 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 organization of these competitions is carried out by the ISU as a commercial activity.

Being the international body governing figure and speed ice-skating throughout the world, the ISU is responsible to determine various aspects of the sport. The contested Commission Decision concerned the ISU's eligibility rules [1]. The eligibility rules prescribe that third-party event organizers, as well as athletes participating in these events, need to apply for a pre-authorization with the ISU (or its members). This **'pre-authorization system'** ensures compliance with the standards set by the ISU's regulations. One of the key aspects of the pre-authorization system is that non-compliance with the pre-authorization requirements can lead to various sanctions. Athletes can for example be banned from any future competition organized by the ISU. In the 2014 eligibility rules, this sanction concerned a lifetime ban. In the 2016 eligibility rules, the sanction was limited to a ban of up to 10 years depending on the seriousness of the infringement (with a possible lifetime ban in exceptional circumstances) [2]. The pre-authorization system further foresees that a requester may appeal the ISU's decision before the Court of Arbitration for Sport (**'CAS'**) in case a request for authorization is rejected. The CAS has exclusive jurisdiction provided that an arbitration agreement has been signed.

## II. Facts

On 23 June 2014, the Commission received a complaint filed by two professional speed skating athletes. They argued that the ISU's rules banning skaters who participate in unauthorized events - *i.e.*, events organized without the ISU's approval - violate Articles 101 and 102 TFEU.

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

On 5 October 2015, the Commission initiated proceedings against the ISU focusing on the ISU's rules imposing a lifetime ban on athletes and officials participating in events not organized or specifically approved by the ISU. On 8 December 2017, the Commission adopted the attacked Decision which holds in essence that the ISU's rules which can potentially result in a lifetime ban from any competition organized by the ISU (*e.g.*, Olympics and WCs) restrict the commercial freedom of athletes and prevent new organizers of international speed skating events from entering the market because they are unable to attract top athletes [3].

## III. Legal framework and relevant CJEU case law

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. Since the CJEU's *Meca-Medina* Judgment (2006) [4], rules of sport governing bodies related to the 'good' organization of a sport are no longer automatically being considered immune to the application of EU competition rules. These rules now need to be analyzed on a case-by-case basis. This analysis needs to take into account the context in which the rule or decision is adopted. In particular, 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*".

In *MOTOE* (2007) [5], the CJEU further clarified that a legal person whose activities consist not only in taking part in administrative decisions authorizing the organisation of events but also in organising such events itself – and in that connection also enters 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 organize competitions, without that power being made subject to restrictions, obligations, and review.

Bans from participation in unauthorized events are common measures included in the rules of many international sport governing bodies. However, their treatment under EU competition rules has been unclear for a long time. The GC now had a ‘textbook’ case to clarify the relationship between EU competition rules and sport regulations. The GC needed to judge under which circumstances – if at all – a ban (and associated sanctions) can be considered “*inherent*” and “*proportionate*” to the pursuit of a “*legitimate objective*” by a sport governing body.

## IV. The Judgment

### a. The ISU’s eligibility rules constitute a by object infringement of Article 101(1) TFEU

The GC starts with a reminder that for a practice to be qualified as a *by object* restriction it should “*reveal a sufficient degree of harm*” taking into account “*the content of its provisions, its objectives, and the economic and legal context of which it forms part*”.

- *The ISU’s dual role of being both regulator and organizer*

In line with *MOTOE*, the GC takes into account the ISU’s role as the sole regulator of figure and speed ice-skating to assess the degree of harm of the ISU’s eligibility rules. In particular, taking into account its dual role as being both (i) the organizer and controller of the most important events in which skaters must take part in order to make their living, and (ii) the authority controlling the pre-authorization system. Given this potentially conflicting role, the GC recalls that the ISU must respect the *MOTOE* principle requiring that in such situation the controller of the pre-authorization systems “*must ensure, when examining applications for authorisation, that those third parties are not unduly deprived of market access to the point that competition on that market is distorted*”.

- *The content and objectives of the eligibility rules*

**Content – lack of direct link with legitimate objective.** In this regard, the GC makes two observations to rule that the eligibility rules “*by their content, had no direct link to the legitimate objectives invoked by the applicant during the administrative procedure*.” First, the GC points out that the eligibility rules do not explicitly state the legitimate objective they pursue. Second, the GC refers to the lack of authorization criteria. The publication of a communication listing certain requirements that need to be respected to obtain authorization was not sufficient as the requirements were not exhaustive. The lack of exhaustive criteria allowed the ISU to adopt refusal decisions on grounds which are not legitimate. As such the requirements cannot be qualified as “*authorisation criteria that are clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring the organisers of events effective access to the relevant market*”.

**Content – severity of the penalties.** The GC holds that the severity of the foreseen penalties is a particular relevant factor. The GC held that the severity of the penalties included in the ISU’s rules – a lifetime ban and afterwards a ban up to 10 years – were clearly disproportionate, in particular taking into account the average length of athlete’s career (*circa* 8 years). The severity of such penalties – in combination with the unclear manner in

which the penalty system was drafted leading to unpredictability and arbitrary applications – can “*dissuade athletes from participating in events not authorised by the [ISU], even where there are no legitimate objectives that can justify such a refusal, and, consequently, is likely to prevent market access to potential competitors who are deprived of the participation of athletes that is necessary in order to organise their sporting event*” [6].

**Objectives – protecting the integrity of speed skating from the risks associated with betting.** In line with *Meca-Medina*, the GC confirms that the protection of the integrity of the sport is a legitimate objective. However, the pursuit of a legitimate objective in itself is not sufficient to preclude a finding of a restriction of competition by object. To exclude the finding of a restriction by object, the restrictions needs to be “*inherent in the pursuit of those objectives and proportionate to those objectives*” (emphasis added). While the restrictions *in casu* are inherent in the pursuit to protect the integrity of skating from the risk associated with sports betting, they are not proportionate. In particular taking into account the severity of the penalties, the GC rules that the restrictions “*go beyond what is necessary to achieve such an objective*”.

**Objectives – protecting the ISU’s economic interests.** The GC holds that irrespective of the legitimate objective pursued by the eligibility rules, the restrictions are disproportionate. Of interest is that the GC notes between the lines “*that the fact that a federation seeks to protect its own economic interests is not in itself anticompetitive.*” In addition, the GC holds that sports federation with limited revenues can legitimately ask third-party organizers to pay a solidarity contribution. However, when doing so sports federations cannot exclusively use this solidarity contribution to finance its own events.

#### **b. ISU arbitration rules – non reinforcement of by object infringement.**

The GC found that the ISU’s arbitration rules conferring exclusive jurisdiction to the CAS do not reinforce the by object infringement included in the ISU’s eligibility rules. *In casu*, the arbitration rules only prevented ineligibility decisions from being brought before national courts for annulment. However, they do not prevent parties to bring an action for damages before national courts or lodge a complaint with national competition authorities or the Commission. As such, full effectiveness of EU competition law is ensured since national courts or competition authorities are not bound by the CAS’s assessment of the compatibility with EU competition law.

### **V. Commentary**

Most essentially, the GC’s Judgment confirms that sport federations can maintain *authorization rules including bans for participation in unauthorized events* as long as such rules: (i) pursue a “*legitimate objective*”, (ii) their restrictive effects are “*inherent*” to the pursuit of those objectives, and (iii) the restrictions are “*proportionate*”. The Judgment further provides guidance on how to interpret “*legitimate objective*” and “*proportionate*”. As such, it is key for sport federations wanting to maintain (or adopt) authorization rules – including bans for participation in unauthorized events – to ensure that the guidance of the GC’s Judgment is followed when substantiating that their rules clearly pursue a “*legitimate objective*” and any restriction is “*proportionate*”.

In relation to the pursued *legitimate objectives*, it is of interest that the GC recognizes – although not invoked by the ISU – that economic interests could be considered as a legitimate objective. Further, the GC’s Judgment provides useful clarification on two points: (i) legitimate objectives should be *included in the rules to ensure a direct link* between the measure and the pursued objectives, and (ii) the rules should set-out the “*authorisation criteria*” – the criteria third party organizers have to meet to demonstrate that they respect the pursued legitimate objective – in a “*clearly defined, transparent, non-discriminatory, reviewable*” manner ensuring that third party organizers have effective access to the relevant market.

In relation to the *proportionality* assessment, a key element to take into account is the *severity of the ban* included in the rules. The GC holds that the severity of the foreseen penalty is a particular relevant factor as it “*may dissuade athletes from participating in [none authorised events] even where there are no legitimate objectives that can justify such a refusal*” and as such will “*likely[...] prevent market access to potential competitors who are deprived of the participation of athletes that is necessary in order to organise their sporting event*” [7].

Finally, the GC dispelled any doubts on the arbitrability of competition law disputes in the sports sector. The GC approved the compulsory arbitration rules that automatically bring disputes to the CAS referring to the case-law of the European Court of Human Rights in *Mutu* and *Pechstein* [8], which upheld the independence and impartiality of the CAS. In this regard, the GC also took into account that there are still sufficient possibilities for athletes and organizers to invoke EU law, including EU competition law, in national courts. As such, compulsory arbitration rules do not undermine the effectiveness of EU law.

Although the ISU appealed the GC’s Judgment, the Judgment has already significant precedent-setting value. Given that the rules of several sport federations include similar sanctions, it will be interesting to see whether the Judgment will effectively lead to a “ban of banning” in practice [9]. Currently, competition authorities and national courts are already referring to the GC’s Judgment to justify “bans of banning” [10]. In addition, the GC’s Judgment will most likely also be invoked by the football clubs wanting to participate in the European Super League as these clubs already publicly stated that the FIFA and UEFA unfairly attributed themselves the discretionary power of prohibiting participation in alternative competitions despite the existence of a conflict of interest [11].

We are looking forward to see whether the ECJ will confirm the GC’s ISU Judgment and to the additional guidance the ECJ will provide on whether a ban can be considered “*inherent*” and “*proportionate*” to protect the legitimate objectives invoked by the FIFA and UEFA (such as preserving the principles of open competitions and sporting merit).

[1] The Decision concerns Rules 102 and 103 of the 2014 and 2016 versions of the ISU General Regulations.

[2] It should be noted that the average career of a speed skater lasts 8 years.

[3] Decision C(2017) 8239, Case AT. 40208 – International Skating Union’s Eligibility rules.

[4] Judgment of 18 July 2006, *Meca-Medina and Majcen v Commission*, C-519/04 P.

[5] Judgment of 1 July 2008, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Greek State*, C-49/07.

[6] This is in line with the *Meca-Medina* judgment, where the CJEU had stated that “*the repressive nature of rules and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition, since they could, if the penalties are not limited to what is necessary to ensure the proper conduct of the sporting competition and if they were ultimately to prove unjustified, result in an athlete’s unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the sporting activity at issue is engaged in.*”

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[8] European Court of Human Rights Judgment of 2 October 2018, *Mutu and Pechstein v Switzerland*, Nos. 40575/10 and 67474/10.

[9] See also *Simon Troch, Carmen Mera, “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), e-Competitions Bulletin January 2017, Art. No. 82616.*

[10] See for example the January 2021 judgment of the Higher Regional Court of Nuremberg upholding a lower court’s ruling that the German Wrestling Association cannot ban its members from participating in competitions organized by a rival league referring the GC’s Judgment.

[11] The Madrid commercial court referred a preliminary reference to the ECJ in this regard, currently pending before the ECJ under case number C-333/21.