

EU Commission adopts first-ever antitrust prohibition decision on regulatory aspects of sport

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Ever since the European Court of Justice brought the rule-making activity of sports federations within the scope of EU law, the European competition rules have emerged as a unique instrument to assert control over sports' transnational private regulatory power.

Other than in the area of revenue-generating activities related to sports (e.g. ticket sales arrangements or the commercial exploitation of media rights), however, the body of decisional practice at the EU level dealing with organisational sporting rules remains limited. After some politically difficult uphill antitrust battles around the 2000s against FIFA and FIA, the European Commission has for more than 15 years refrained from intervening in regulatory aspects of sport.

The Commission's recent decision finding that the Eligibility rules of the International Skating Union (ISU), the international federation administering the sports of figure and speed skating, are in breach of EU competition law, therefore comes as a surprise to many. Regrettably, the decision also promptly resurfaced the criticism that EU competition law would not be well-equipped to pay sufficient regard to the distinctive features of sport and its structures.

The Commission's findings

The ISU Eligibility Rules are included in the ISU General Regulations, which have been adopted by the ISU Members (i.e. the individual national skating federations) and coordinate their behaviour for all international matters. Consistent with established case law, the ISU Regulations, and therefore also the Eligibility Rules, constitute a decision by an association of undertakings within the meaning of Article 101(1) TFEU.

The rules stipulate that any person participating or officiating in an event not authorized by the ISU becomes ineligible to participate in ISU activities

and competitions. This sanction applies not only to athletes, but also to coaches, trainers, doctors, team officials, referees, volunteers, and anyone else engaging in a relation with the ISU. Yet the Commission's investigation, which was triggered by a complaint by two prominent Dutch speed skaters Mark Tuitert and Niels Kerstholt, focused on the position of the speed skaters. If they violate this rule, they face up to a lifetime ban from their sport.

In short, the Commission's investigation found that the ISU Eligibility Rules are not purely of a sports nature, but rather serve to secure the ISU's pure monopsony power on the market for the organization and commercialisation of international speed skating events. Professional speed skaters are entirely dependent on engaging in ISU activities and competitions. They cannot take the chance of being banned for life from their sport. Foregoing the possibility to participate in events such as the Olympic Games, the World Championships and the European Championships would put an end to their sporting career. The status of ineligibility further implies that an athlete could not remain active in the speed skating circuit after his or her retirement, e.g. as coach, referee or official. It follows that speed skaters are *de facto* prevented from participating in events not organised or authorised by the ISU, which in turn creates insurmountable entry barriers for independent organisers because they are unable to attract top athletes' services.

In view of the above, the Commission's decision concludes that the ISU Eligibility Rules amount to a restriction of competition by object prohibited by Article 101 TFEU.

Speed skating and car manufacturers

The Commission's antitrust investigation into the ISU Eligibility rules attracted strong criticism from sports governing bodies. At the Council meeting of EU sports ministers in November 2017, Thomas Bach, president of the International Olympic Committee, identified the ISU case as "a major risk for the European model of sport" and criticized the Commission for "treating a social movement like a car manufacturer". The ISU similarly accused the Commission of taking a "neoliberal and deregulated approach to sport" and remarked that the decision "fails to consider the specific nature of sport".

The main concern that can be deduced from these statements is that, as a consequence of the Commission's decision, a sports federation would no longer be able to prevent free-riding from independent event organisers on its efforts to administer and develop its sport.

This concern is misguided, however. EU competition law does not – and should not – demand that the sports sector becomes a deregulated, competitive "free-for-all". In its press release, the Commission makes clear that it would not object to eligibility rules as long as they pursue legitimate objectives in the interest of sport and are inherent and proportionate to those objectives.^[i] The Commission also does not necessarily question a sports federation's right to decide which third party events may take place. It only demands that rules for the authorisation of events are then based on "objective, transparent and non-discriminatory criteria".^[ii]

The problem is that ISU Eligibility Rules manifestly fail to meet these basic requirements.

First, assuming the ISU could demonstrate that it has a robust financial solidarity mechanism in place that might be endangered by free-riding by independent organisers, it is difficult to see how an exclusive supply restriction eliminating all potential competition on the market could be considered proportional for this purpose. The ISU could, for instance, simply demand a solidarity contribution from independent speed skating event organisers and/or from speed skaters that receive appearance fees or prize money in their events.

Second, the rules do not appear to be directly linked to (other) legitimate sporting objectives. The rules would impose severe sanctions (up to a lifetime ban), at the ISU's own discretion, even if an independent speed skating competition would not endanger e.g. the protection of the integrity and conduct of sport or the health and safety of athletes.

In fact, the mere wording of the rules, which explicitly refer to the protection of the ISU's economic interests as their objective, suggests that they were, at least partially, designed to preserve the ISU's monopoly over the organization of international speed skating competitions. The implementation of the Eligibility Rules points in that same direction. In 2014, the ISU invoked the rules to foreclose Icederby International – a potential competitor – from entering the market. After having been contacted by Icederby, the ISU Council deemed it “opportune” to remind all speed skaters in a communication “*that participation in any international ice skating competition not sanctioned by the ISU will result in the loss of eligibility of the participants*”. At that time, the ISU did not have any rules or criteria for the authorisation of third party speed skating competitions. Consequently, Icederby could not secure athletes for its planned event and had to refrain from organising it.

A blind application of the law?

EU competition law has a unique function in subjecting private regulation in sport, which would otherwise be mostly left to the whim of sports associations, to public oversight. It does not, however, question the right and expertise of those associations to do their job of organising their sport and, as the Union courts and the Commission have consistently demonstrated, it is sufficiently flexible to duly take into account the “special” features of sport.

Despite being confronted with a collective exclusive dealing arrangement that is unlimited in time, also applicable outside the scope of the actual supply relationship, and imposed by an undertaking with a 100% market share, the European Commission considered it inappropriate to impose a fine on the ISU in this case. This in itself already signals that the sports sector is getting special treatment. More importantly, EU competition law merely demands that sports associations are able to demonstrate that the restrictions caused by their regulations are reasonably necessary and proportional. If fundamental sporting imperatives are the ISU's genuine

concern, giving up the possibility to put private interests over public interests is not an unreasonable request.

Disclaimer: the author represented the complainants, Mark Tuitert and Niels Kerstholt, in their proceedings before the European Commission.

[i] Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission*, ECLI:EU:C:2006:492.

[ii] See by analogy, Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, ECLI:EU:C:2008:376.