

September 2016

Practice Group(s):

*Antitrust,
Competition & Trade
Regulation*

Sports

European Commission Challenges Sports Governing Body's Non-Compete Rules

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The European Commission (“**Commission**”) this week sent a statement of objections to the International Skating Union (“**ISU**”) alleging that its rules, which impose severe penalties on skaters who participate in events not authorised by the ISU, infringe EU competition law.

The ISU now has a right to respond to the formal charges. However, if its defence is deemed unsatisfactory it will almost certainly be ordered to modify its rules and could face other sanctions.

Although there have been numerous cases and investigations at the national level in Europe (and elsewhere) condemning these types of rules in a range of sports, this is the Commission’s first statement of objections sent to a sports governing body for such rules in over 15 years. The last one resulted in the formal split of the commercial and regulatory roles of the FIA, the international regulator of four-wheel motor sports, and an overhaul of the rules concerning hosting of and participation in rival events. This latest development will therefore be welcomed by many sports stakeholders concerned with the restrictive non-competes of many sports governing bodies and will come as a warning to those bodies that they may now be subject to the Commission’s renewed scrutiny and potential investigation.

Background to the ISU statement of objections

Last October the Commission opened a formal investigation into the ISU’s eligibility rules. This was prompted by a complaint filed by two Dutch ice speed skaters who were threatened with a life-long ban from ISU events if they agreed to participate in a competing start-up event in Dubai, which had not been approved by the ISU.

Under the ISU’s eligibility rules, any person participating in an event that is not sanctioned by the ISU and/or its Members (the individual national ice-skating associations) will be ineligible to participate in ISU competitions or activities, such as the Olympic Games, the World Championships or the European Championships. This rule applies to skaters, attendants, officials, coaches, trainers, referees, doctors, volunteers or anyone else involved in ISU competitions or regulated activities.

The complainants alleged that the ISU’s rules, which prohibit skaters from participating in events that compete with those organised and promoted by the ISU, infringe Article 101 of the Treaty on the Functioning of the European Union (“**TFEU**”). Article 101 TFEU prohibits agreements between undertakings and decisions of associations which may prevent, restrict or distort competition in the EU. In addition, the complainants alleged the rules infringe Article 102 TFEU, which prohibits the abuse of a dominant market position.

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In particular, the skaters complained that:

- There is a conflict of interest between the ISU's regulatory power to authorise the organisation of events by others on the one hand and its commercial interests in protecting and promoting its own events on the other. As a result, the ISU's rules are applied in such a way as to foreclose the ISU's competitors from the market; and
- The sanction prescribed on skaters (and others) under the eligibility rules for participating in a non-ISU or non-sanctioned event – namely an irreversible lifelong ban – may effectively end their professional careers and cannot be considered inherent and proportionate to the pursuit of any legitimate sporting objective.

The Commission decided to pursue the investigation because *“it raise[d] specific allegations of breaches of competition law at the international level rather than wider issues of internal governance or rule-making in a sport federation”*.

European Commissioner Margrethe Vestager has explained that *“international sports governing bodies play a unique role in setting the rules of the game and ensuring standards of conduct. They are responsible for both the health and safety of athletes and for the integrity of competitions.”* The Commission recognises that many disputes about sporting rules raise primarily issues related to governance of the sport (namely the relations between different stakeholders belonging or being closely connected to the structure headed by sports federations), and that such disputes are usually best handled by national courts. The same goes for disputes resulting from the application of sporting rules to individuals (e.g. anti-doping or match-fixing regulations), which can be handled by relevant arbitration bodies or national courts.

However, as this case demonstrates, and consistent with EU case law, sporting rules are subject to EU competition rules when the body setting the rules or the companies and persons affected by the rules are engaged in an economic activity. To be compatible with competition law, they must pursue a legitimate objective and any restrictions that they create must be inherent and proportionate to reaching this objective. In this case, the Commission has come to the preliminary view that the penalties the ISU imposes on skaters through its eligibility rules are not aimed at preserving high standards in sport but rather serve to maintain the ISU's control over speed skating.

Agreeing with the complainants, the Commission has expressed the concern that the rules restrict athletes' commercial freedom and result in a situation where they are not willing to participate in speed skating events other than those organised by the ISU or its members. It is also concerned the rules could prevent competing event organisers from entering the market or drive them out of business because they would be unable to attract top athletes. As a result, its preliminary view is that the rules constitute anti-competitive agreements under Article 101 TFEU.

Past cases

There have been over a dozen cases before the national competition authorities and courts of the EU Member States which have led to sports governing bodies' non-competete rules being removed or modified. In addition, the EU's highest court ruled in 2008 that such rules raise competition concerns where the governing body's powers are unlimited.

However, there has been no formal Commission action taken regarding such rules - including no statement of objections - since the conclusion of the FIA case in 2001.

Whilst the Commission has since received complaints regarding similar non-competete rules of sports governing bodies, including notably a complaint against the International Handball Federation (“IHF”) and European Handball Federation (“EHF”) in 2009, to date

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its preliminary investigations have all been closed (in the handball case following a negotiated solution among the relevant stakeholders).

Accordingly, the issuance of the statement of objections this week is significant.

Implications for sports governing bodies and stakeholders

Based on past examples, it seems likely that if the ISU is unable to provide a sufficiently compelling response to the statement of objections, the Commission will issue an infringement decision or demand a settlement involving changes to the non-competite rules. The sports world will no doubt be interested in the final sanctions and measures imposed or agreed.

The case presents a helpful precedent to and may well motivate further complaints from stakeholders, such as sports clubs, rival competition organisers or individual athletes, who find their activities and opportunities constrained by the restrictive non-competite rules and practices of national and international sports governing bodies.

Conversely, depending on the outcome of the case, those governing bodies might find it prudent to examine their rules and practices to assess the extent to which they might infringe EU competition law and may need to be amended, given the no-doubt increased risk of complaint.

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