

Skating on Thin Ice: The European Commission challenges the governance rules of an international sports association as being incompatible with European antitrust rules

By Peter Alexiadis and Pablo Figueroa [1]

The recent announcement by the European Commission (“the Commission”) that it is actively looking into the compatibility of the disciplinary measures exacted by the International Skating Union (“ISU”) with competition rules reminds us yet again of that there are few elements of modern life that are exempt from the scope of EU competition rules. The approach being undertaken by the Commission in the ISU case constitutes a logical extension of the recent interest shown by National Competition Authorities within the EU on the compatibility of governance rules of sports organisations with national and EU competition law.[2]

I. The Facts

Based in Lausanne, Switzerland, the ISU is the only body recognised by the International Olympic Committee (“IOC”) with the responsibility of administering the sports of ice figure skating and speed skating. In turn, its members are the various national ice-skating associations.

The Commission had initiated proceedings in relation to ISU’s eligibility rules in October 2015 following a complaint by two Dutch professional speed skaters, Mark Tuitert (gold medal winner at the 2010 Winter Olympics) and Niels Kerstholt.[3]

After an extremely short formal investigation of less than a year, the Commission has announced that the rules imposed by the ISU might be in contravention of the EU prohibition on anti-competitive agreements under Article 101 TFEU.[4]

More precisely, the Commission has informed the ISU of its preliminary view that its rules, under which athletes face severe penalties if they participate in speed skating events which have not been authorised by ISU, might infringe EU competition rules. Competition Commissioner Margrethe Vestager has indicated that the Commission’s concerns stem from the belief *“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. The ISU now has the opportunity to reply to our concerns”.

These accusations are outlined in a Statement of Objections addressed to the ISU, a document which informs the parties concerned of the competition allegations raised against them and which foresees that investigated entities can reply in writing and also request an Oral Hearing. While the issuance of a Statement of Objections does not prejudice the outcome of the investigation, it is relatively rare that the Commission backs away from its claims.

According to a blog post by the Complainants’ counsel, which includes a twitter exchange between a skate complainant and Commissioner Vestager,[5] the complaint is based on the ISU’s intention to declare skaters as *“persona non grata”* where they participate in events organised by Icederby International, a private entity. Moreover, the Complainants contended that the ISU Eligibility Rules rendered ineligible a person skating or officiating in an event not endorsed by ISU and/or its Members (i.e., the individual national associations) from participating in ISU activities and competitions.[6] According to the Complainant’s counsel, this sanction apparently applies not only to the skaters, but also extends to coaches, trainers, doctors, team attendants, team officials, judges, referees and even volunteers.

By way of rebuttal, the ISU noted in a recent press release that independent organisers can establish international tournaments on the ISU calendar, and that Icederby, an organisation which initiated the complaint that triggered the Commission’s investigation via the two speed skaters in question, recently received ISU authorisation to co-run an event.[7]

The facts of the ISU case are not entirely dissimilar to those of *Fédération Internationale de l'Automobile* (“FIA”) in the late 1990s. In that case, the Commission closed its investigation, apparently after the FIA agreed to refrain from using its regulatory powers in relation to international motor racing in a manner that would mean that competing events were forced out of the market.[8]

II. Legal Basis for Action

Pursuant 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 the *Wouters / Meca-Medina* case-law of the European Courts: (i) sport is subject to competition rules only insofar as it constitutes an “economic activity”; and (ii) sporting rules are compatible with EU competition rules if they pursue a legitimate objective and if the restrictions that they create are “inherent” and “proportionate” to achieving this objective.[9]

In the ISU Case, the Commission has taken the preliminary view that the penalties set forth 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”.

According to the Commission, the ISU Rules prescribe that, if an athlete participates in an unauthorised event, the athlete faces a range of penalties which can lead potentially to a lifetime ban from all key international speed skating competitions. Given 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 such as the Olympic Games, the World Championships or the European Championships, as this would be extremely damaging and possibly even put an end to their speed skating careers. The Commission has thus concluded on a preliminary basis in its Statement of Objections that the system of penalties prescribed under the ISU Eligibility Rules is disproportionately punitive and would prevent non-ISU affiliated players from organizing international speed skating competitions.

III. Conclusions

According to ISU, the approach taken by the Commission in its Statement of Objections reflects a “neoliberal and deregulated

approach to sport that(?) could destroy the Olympic values underpinning sport”.[10] However, as the Court of Justice of the European Union clearly indicated in its *Meca-Medina* Ruling of 2006: “*the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down*”.

Based on this rationale, it would appear that Commissioner Vestager has responded to ISU’s criticisms of the Commission’s investigation by asserting that, while sport is a passion, “*it can also be a business*”; as such, it is subject to EU competition rules. Accordingly, the ISU’s statements do not detract from the fact that the Commission’s powers to subject sporting bodies to competition law obligations has been established for decades, even though sparingly used and subject to significant limitations. What remains to be seen, however, is the Commission’s rationale in its finally adopted Decision and, more precisely, the manner in which the Commission will apply the general principle of EU law of proportionality when holding that the punitive measures adopted by the ISU are so disproportionate as to restrict competition without any other countervailing public policy benefit.

Moreover; as with many other sporting federations, it is important to note that the fact that the ISU is based outside the territory of the EU (namely, Switzerland), is unlikely to limit the applicability of EU Competition rules. Under EU competition rules, the equivalent of the US “effects” doctrine on the extraterritorial application of antitrust rules provides that the application of EU competition rules can similarly occur as long as the practices in question are “implemented” within the territory of the EU.[11] Household names such as UEFA and FIFA will no doubt be watching the progress of the ISU Case with interest, especially given recent bad publicity associated with the governance of both football institutions.

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[2] Recent examples include Sweden (where the Swedish Competition Authority has: (i) challenged certain Swedish Automobile Sports Federation (“SBF”)’s rules, according to which its members were forbidden from participating as drivers and event staff in races not sanctioned by the SBF, which were found to violate Article 101 TFEU; and (ii) closed an investigation into the Swedish Bodybuilding Association (“SKKF”), after SKKF committed no

longer to suspend or fine athletes, coaches, officials or judges for participating in non-sanctioned competitions (See Case A 5/11, *Svenska Bilsportförbundet v Konkurrensverket* of 20 December 2012 and Case 590/2013, of 28 May 2014)). See also Italy, where the Italian Competition Authority, the *Autorità Garante della Concorrenza e del Mercato*, investigated the Equestrian Sports Federation (“FISE”), focused on clauses forbidding FISE members from participating in equestrian events and activities organized by other entities. The investigation was closed after FISE committed itself to removing the anti-competitive clauses from its statutes (See Decision n°18285 of 28 July 2008, Bolletino n° 19/2008, Autorità Garante della Concorrenza e del Mercato, Federitalia/Federazione Italiana Sport Equestri). See also Belgium, where the Belgian Competition Authority (“BCA”) imposed on the Fédération Equestre Internationale (“FEI”) an interim measure consisting in the partial suspension of the Exclusivity Clause found in Articles 113(4)-(6) of its General Regulations (See BCA, Press Release N° 12/2015, 28 July 2015) relating to the Global Champions League. The FEI appealed the Decision, but the Belgian Court dismissed the application for suspension (See Decision 2015/MR/1, Cour d’appel Bruxelles, 22 October 2015).

[3] See European Commission, Press Release IP/15/5771, “Antitrust: Commission opens formal investigation into International Skating Union’s eligibility rules”, 5 October 2015, available at: http://europa.eu/rapid/press-release_IP-16-3201_en.htm.

[4] See European Commission, Press Release IP/16/3201, “Antitrust: Commission sends Statement of Objections to International Skating Union on its eligibility rules”, 27 September 2016, available at: http://europa.eu/rapid/press-release_IP-16-3201_en.htm.

[5] See Ben Van Rompy, “The European Commission’s ISU Antitrust Investigation Explained”, Asser International Sports Law Blog, 5 October 2015, available at: <http://www.asser.nl/SportsLaw/Blog/post/the-european-commission-s-isu-antitrust-investigation-explained-by-ben-van-rompuy>.

[6] See ISU General Regulations (2014), available at <http://static.isu.org/media/165642/constitution-and-general-regulations-version-july-31-2014.pdf>, at Rule 2, para (ii).

[7] See ISU, Press Release, “ISU Believes that the European Commission’s Antitrust Allegations Are Unfounded”, 27 September 2016, available at: <http://www.isu.org/en/news-and-events/news/2016/09/ec-antitrust-allegations-are-unfounded> (“ISU’s Press Release”). See Further Webb, T., “DG Comp Turns Up Heat on Ice Skating Union”, Global Competition Review 27 September 2016, available at: <http://globalcompetitionreview.com/news/article/41908/dg-comp-turns-heat-ice-skating-union>.

[8] See, European Commission, Press Release IP/99/434, “Commission Opens Formal Proceedings into Formula One and Other International Motor Racing Series”, available at: http://europa.eu/rapid/press-release_IP-99-434_en.htm?locale=en.

[9] See Cases C-309/99 *Wouters* and C-519/04 P *Meca-Medina*.

[10] ISU’s Press Release *in fine*.

[11] See Cases 114/85, etc *Woodpulp* in relation to EU law and *United States v. Aluminium Company of America (Alcoa)* 148 F.2d 416 (2d Cir. 1945) for US law.