

## Current Intelligence

# *International Skating Union v Commission:* Pre-authorisation Rules and Competition Law

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Judgment of 16 December 2020, *International Skating Union v Commission*, T-93/18, ECLI:EU:T:2020:610.

Sports Governing bodies can employ a pre-authorisation system for events, provided this is proportionate to the pursuit of a legitimate objective.

### I. Legal Context

On 16 December 2020, the EU General Court (GC) partially rejected the appeal of the International Skating Union (ISU) against the decision of the Commission (C (2017) 8230 final), holding that rules that severely penalise athletes for taking parts in unsanctioned events are contrary to EU competition law.

### II. Facts

In 2014, two international speed skaters filed a complaint with the EU Commission about the eligibility rules of the ISU. The ISU is the sole international governing body responsible for regulating and administering speed skating and figure skating. As well as being the regulator, the ISU organises the most important international competitions in the discipline, including the European and the World Cup speed skating championships.

The two skaters wanted to take part in an international competition organised by Icederby International, a third-party event organiser which was promising athletes prize money higher than the average offered in ISU events.

Under the ISU Constitution and General Regulations, individuals may become ineligible if they take part in competitions that are not authorised by the governing body. The rule applies to any participant, including coaching staff and referees, and provides for sanctions ranging from a warning, to a life ban in the event of breach.

In their complaint, the skaters claimed that the ISU rules had the effect of deterring athletes from taking part in competitions not officially sanctioned, in the fear of

being banned from events that are the pinnacle of their sport. Consequently, the ISU was accused of using its regulatory power to prevent competitors from successfully organising speed skating event.

Despite a series of amendments made by the ISU in 2016, the Commission found in 2017 that the eligibility rules were in breach of Article 101 TFEU (Case AT.40208—International Skating Union's Eligibility Rules). The Commission held that the rules adopted by the ISU and its members constituted a decision of an association of undertakings that had as its object the restriction of competition in the market for the organisation and commercialisation of speed skating events. The rules prevented third-party competitors from organising international speed skating events, by threatening to impose severe sanctions on the athletes that would participate. The rules also restricted the freedom of athletes to engage in economic activities. Finally, the restrictive effects were further strengthened by the Appeals Arbitration Rules. Under the exclusive jurisdiction granted to the Court of Arbitration for Sport (CAS), athletes have no choice but to submit disputes to the CAS, an arbitral body that tends to adjudicate on the basis of Swiss Law and not EU law.

The counterclaims made by the ISU were not successful. The ISU referred to a number of objectives that the authorisation system was pursuing, including the protection of health and safety of participants, the protection of the integrity of the competition and the good functioning of the sport (Case AT.40208—International Skating Union's Eligibility Rules, paragraph 213).

In February 2018, the ISU filed an appeal against the Decision to the GC, putting forward, among other pleas, that the Commission was wrong in its classification of the rules as restriction by object, in its assessment of the inherency and the proportionality of the eligibility rules and, finally, in its conclusion that the arbitration rules reinforced the restrictive effects of the system.

In the judgment of 16 December 2020, the GC dismissed the action of the ISU, while annulling the Commission Decision in the Articles referring to the ISU arbitration rules and their role in reinforcing the restrictive effects of the authorisation system.

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### III. Analysis

In addressing the pleas submitted by the ISU, the Court referred to the CJEU's case law (Judgment of 16 July 2015, *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 33), holding that to determine whether an agreement is restrictive by object, account must be taken of its objectives and the context of which it forms part (Judgment of 16 December 2020, *International Skating Union v Commission*, T-93/18, ECLI:EU:T:2020:610, paragraph 67).

The general context is one in which Sports Governing Bodies (SGBs) can exercise a monopolistic power over the regulation of their sector, which necessarily spills over to the economic activity of those that engage within it. SGBs employ authorisation rules to ensure control over the organisational structure of the sector they oversee.

The CJEU assessed the legitimacy of similar rules in *MOTOE* (Judgment of 1 July 2008, C-49/07, EU:C:2008:376), when a third-party organiser failed to obtain authorisation to stage a competition from the Greek Motorcycling Federation, which itself organised such events. *MOTOE* claimed that this constituted an abuse of a dominant position under Article 102 TFEU. The Court held that undistorted competition must be protected when rules “[e]ntrust a legal person which itself organises and commercially operates competitions, with the task of designating the persons authorised to organise those competitions and to determine the conditions under which they are organised.” (*MOTOE* C-49/07, EU:C:2008:376, paragraph 51). This inherently creates conflicts of interest (AG Kokott's Opinion in *MOTOE* C-49/07, EU:C:2008:376, paragraph 98): as it grants the regulator the possibility to prevent access by competitors to the market, it may lead to “inevitable abuse” (Stephen Weatherill, *Principles and Practice in EU Sports Law* (OUP 2017) 253).

While *MOTOE* was argued under Article 102 TFEU, the Court rejected the claim of the ISU that this prevented its application to the case at hand. By citing the judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, EU:C:2013:127, paragraphs 88 and 92), the Court held that the same principles can be employed in cases concerning the application of Article 101 TFEU.

The qualification of these rules as abusive or unlawful restrictions depends on the objectives pursued. In this regard, the Court made reference to Article 165 TFEU, which states that the Union shall take account “[O]f the specific nature of sport, its structures based on voluntary activity and its social and educational function’ and that its action is ‘[A]imed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and ethical integrity of sportsmen and sportswome[n]’

(paragraph 78). Framing a rule as pursuing the objective of protecting the integrity of sport has therefore clear merits under the assessment of the CJEU. This is confirmed in established case law (judgment of 18 July 2006, *Meca-Medina and Majcen v Commission*, C-519/04 P, EU:C:2006:492, paragraph 43). Other objectives subsumed in Article 165 TFEU are the protection of the health and safety of participants (AG Kokott's Opinion in *MOTOE* C-49/07, EU:C:2008:376, paragraph 90), and the protection of the structure and functioning of the system (judgment of 13 April 2000, *Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball C-176/96 (FRBSB)* [2000] ECR I-02681, paragraph 54).

SGBs can therefore legitimately refer to a range of objectives to justify conducts that have restrictive effects on the market. However, in the context of the analysis under Article 101(1) TFEU, the Court has to consider whether the effects caused by the restrictions are inherent and proportionate to the pursuit of the objectives (Judgments of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 97, and of 18 July 2006, *Meca-Medina and Majcen v Commission*, C-519/04 P, EU:C:2006:492, paragraph 42). Even when authorisation rules are inherent (Judgment of 16 December 2020, *International Skating Union v Commission*, T-93/18, ECLI:EU:T:2020:610, paragraph 102), these effects must still be proportionate to the objectives pursued. In *ISU*, the GC held that the regulatory power of the SGBs should ‘[b]e made subject to restrictions, obligations and review’, to ensure that such power is not exercised to distort the competition on the market (Judgment of 16 December 2020, *International Skating Union v Commission*, T-93/18, ECLI:EU:T:2020:610, paragraph 70). Authorisation criteria must therefore be clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring third-party organisers effective access to the relevant market (*ibid.* paragraph 88). The Court highlighted that the criteria used by ISU left the SGBs a broad discretion to reject the application and this could give rise to arbitrary treatment (*ibid.* paragraph 110).

In its sixth plea, the ISU contested the decision of the Commission which considered that the ISU arbitration rules, mandating participants to refer disputes to arbitration, reinforced the restrictive effects of the eligibility rules, albeit not constituting an infringement in their own right. Mandatory arbitration clauses are very common in sport, and often considered necessary to maintain its smooth functioning. Even when challenged in their own rights, arbitration clauses have been considered legitimate, although SGBs were required to define them clearly and to ensure the transparency of the procedure

(Brussels Court of Appeal, Judgment of 18 August 2018). In its assessment, the GC drew on the Judgment of the European Court of Human Rights (ECtHR, 2 October 2018, *Mutu and Pechstein v Switzerland*, CE:ECHR:2018:1002JUD004057510, paragraph 98) holding that rules granting exclusive jurisdiction to an arbitral body may be justified in light of the specific nature of the sporting sector and the benefits of having disputes heard by a specialised court capable of adjudicating quickly and economically (Judgment of 16 December 2020, *International Skating Union v Commission*, T-93/18, ECLI:EU:T:2020:610, paragraph 156). Furthermore, while athletes are bound by these mandatory arbitration rules, they are still entitled to seek damages arising from an infringement of Article 101 TFEU before a national court of a Member State (*ibid.* paragraph 159). The Court also noted that athletes and third parties may file complaints with the Commission or with national competition authorities, thereby concluding that the arbitration system does not compromise the full effectiveness of EU competition law (*ibid.* paragraph 161). As such, arbitration clauses do not reinforce the restrictive effects of eligibility rules.

#### IV. Practical Significance

While the Court upheld the decision of the Commission, it is not all bad news for the ISU and other SGBs. The Court has confirmed that the use of eligibility rules by an entity engaged in commercial activities in the very same sector inherently raises conflicts of interest. In this regard, the case fits well within the case law of the CJEU and follows the line tracked by *MOTOE*, *OTOC*, and the decision-practice of the Commission in *FIA* (COMP 36.638, Notification by FIA/FOA of agreements relating to the FIA Formula One World Championships). *FIA* in particular could be interpreted as suggesting that the way

to resolve this conflict is by separating the SGBs' commercial function from the regulatory function. However, it must be noted that in the case this solution was proposed by the party under investigation. While SGBs may see this as a viable solution, it is not demanded in any way by the CJEU. The combination of the regulatory and commercial functions is not, *per se*, an unlawful barrier to entry for competitors on the market.

Following the footprint of *Meca-Medina*, the Judgment in *ISU* confirms the freedom of SGBs to adopt and implement authorisation rules which pursue legitimate objectives. Even more importantly, SGBs maintain a margin of discretion in identifying their objectives, which can also include the protection of their own economic interests (Judgment of 16 December 2020, *International Skating Union v Commission*, T-93/18, ECLI:EU:T:2020:610, paragraph 109). However, SGBs have an obligation to ensure that these rules are framed in an objective, transparent and non-discriminatory way and stay clear from any attempts to foreclose the market and advance the commercial interests to the detriment of competitors (Andrea Cattaneo and Richard Parrish, *Sports Law in the European Union* (Wolters Kluwer, 2020) 72).

This discussion may be of great interest for those considering breakaway leagues scenario. Under the CJEU's case law, there is nothing inherently unlawful in adopting authorisation rules, and in the attempt to circumvent them for the breakaway league organisers. The matter of contention would be whether these conducts pursue legitimate sporting objectives, and they do so in a way that mitigates any existing conflicts of interest.

The GC's judgment can be further appealed to the Court of Justice.

doi:10.1093/jeclap/lpab011

Advance Access Publication 26 March 2021