

Summary of Commission Decision**of 8 December 2017****relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement****(Case AT.40208 — International Skating Union's Eligibility Rules)***(notified under document C(2017) 8240)***(Only the English text is authentic)**

(2018/C 148/06)

On 8 December 2017, the Commission adopted a decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 ⁽¹⁾, the Commission herewith publishes the names of the parties and the main content of the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Introduction

- 1) In the Decision, the Commission takes the view that the International Skating Union ('ISU') infringes Article 101 TFEU and Article 53 of the EEA Agreement by the adoption and enforcement of its Eligibility rules. The ISU's Eligibility Rules restrict the possibilities for athletes to engage in international speed skating events organised by third parties and thereby foreclose access to the market for the organisation and commercial exploitation of international speed skating events by depriving potential competing speed skating event organisers from the necessary services provided by athletes.

Procedure

- 2) The Decision pursuant to Article 7 of Regulation (EC) No. 1/2003 originates from a complaint lodged by two professional speed skaters (the 'Complainants') on 23 June 2014, alleging that the ISU's Eligibility rules are incompatible with Articles 101 and 102 TFEU.
- 3) On 5 October 2015, the Commission decided to initiate proceedings against the ISU with a view to taking a decision under Chapter III of Regulation 1/2003, and adopted a Statement of Objections ('SO') on 27 September 2016.
- 4) The ISU replied to the SO on 16 January 2017. On 1 February 2017, an Oral Hearing took place. On 27 April 2017 and on 30 October 2017, the ISU attempted to address the Commission's competition concerns by offering commitments. The Commission, however, considered that the ISU's commitment proposals were insufficient to solve the identified competition concerns in a timely manner. On 6 October 2017, the Commission sent a Letter of Facts to the ISU, which replied on 25 October 2017.
- 5) On 23 November 2017, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted.

Facts of the case

- 6) The ISU is the international sport federation administering globally figure skating and speed skating on ice; it is comprised of individual national associations ('Members') that administer those sports at the national level. The ISU's Eligibility rules form part of the ISU Statutes and General Regulations, adopted by the ISU Congress. These rules are binding on Members, their affiliated clubs and individual members.
- 7) According to the ISU's 2014 Eligibility rules, in force when the Commission received the complaint and in substance already in place since 1998, a speed skater became ineligible for life to participate in the ISU's international speed skating events (including the European and World Championships and the Winter Olympic Games) if he or she participated in any speed skating events not authorised by the ISU or one of its Members. Under the 2016 Eligibility rules (currently in force) a speed skater participating in non-authorised events is subject to sanctions going from a warning to periods of ineligibility ranging from an unspecified minimum to a maximum of lifetime. Until October 2015, when the ISU adopted Communication No 1974 establishing the procedure for independent organisers of speed skating events to receive authorisation from the ISU Council, no such formal authorisation procedure had been in place.

⁽¹⁾ OJ L 1, 4.1.2003, p.1.

- 8) In the past, there were attempts of potential competitors to set up alternative speed skating events. The Decision describes an unsuccessful entry attempt by Icederby. Icederby sought to organise a series of events ('Icederby Grand Prix') for six consecutive years from 2014-2020. In December 2011, it contacted the ISU to enter into a partnership agreement and to present its action plan. Initially, Icederby intended to allow betting in connection with its planned Grand Prix in host countries where betting is legal. In January 2012, the ISU updated its Code of Ethics which included the obligation to refrain from participating in all forms of betting. Two years later, Icederby informed the ISU that no betting would be organised in connection with the planned Dubai Icederby Grand Prix because betting is illegal in Dubai. Nevertheless, the ISU did not authorise the Dubai Icederby Grand Prix 2014 and informed its Members and all skaters that they would be subject to the lifetime ban established by the Eligibility rules if they took part in this event.
- 9) The Complainants intended to compete in the Dubai Icederby Grand Prix 2014. However, since they did not want to risk the imposition of a lifetime ban pursuant to the Eligibility rules, they refrained from participating in that event. Ultimately, Icederby decided not to organise the Dubai Icederby Grand Prix 2014 due to its difficulty to secure the participation of speed skaters.

Legal assessment

- 10) The Commission takes the view that the ISU's Eligibility rules amount to a decision of an association of undertakings that is incompatible with Article 101(1) TFEU and that does not meet the four cumulative conditions of Article 101(3) TFEU.

a. *Relevant market*

- 11) The Decision finds that the restriction of competition takes place on the worldwide market for the organisation and commercial exploitation of international speed skating events, irrespective of whether the organisation and the commercial exploitation belong to the same relevant product market and irrespective of whether further distinctions exist between (i) individual speed skating events and series of speed skating events; (ii) long-track and short-track speed skating events; and (iii) recurrent yearly speed skating events (such as the World and European Speed Skating Championships) and speed skating events occurring only once every number of years (such as the Winter Olympic Games). The ISU can influence competition on the relevant market because it is the governing body and sole regulator of the sport of speed skating and exclusively decides on the authorisation of international speed skating events. Its substantial market power is shown by the fact that, apart from the ISU and its Members, no other undertaking was able to successfully enter the relevant market.

b. *Decision of an association of undertakings*

- 12) The Commission considers that the ISU is an association of undertakings within the meaning of Article 101 TFEU. It engages in economic activity insofar as it conducts commercial activities related to the organisation and commercial exploitation of international speed skating events. Specifically, the ISU is an association that is composed of individual national associations which administer speed skating and conduct economic activity at the national level. Since the Members themselves qualify as undertakings, the ISU is an association of undertakings within the meaning of Article 101(1) TFEU.
- 13) According to the ISU General Regulations, the Eligibility rules are binding on all Members and their affiliated clubs as far as international matters are concerned. Therefore, the Eligibility rules coordinate the behaviour of the ISU Members and constitute a decision of an association of undertakings within the meaning of Article 101(1) TFEU.

c. *Restriction by object*

- 14) In the Decision, the Commission takes the view that the Eligibility rules have as their object the restriction of competition within the meaning of Article 101(1) TFEU, having regard to their content, objectives and the legal and economic context.
- 15) The 2014 Eligibility rules prescribed that an athlete becomes ineligible to participate in the ISU competitions by skating in an event not authorised by the ISU. In particular, if an athlete became ineligible as a consequence of participating in an unauthorised event, the athlete could not apply for reinstatement. Hence, a breach of the 2014 Eligibility rules resulted in a lifetime ban. The sanction applied irrespective of whether the unauthorised event endangered the athlete's health and safety or the integrity of the sport. The ISU Constitution itself revealed that the 2014 Eligibility rules aim to protect the 'economic and other interests of the ISU'. The 2014 Eligibility rules restricted the possibilities for professional speed skaters to freely engage in international speed skating events organised by third parties, and thereby foreclosed (potential) competing speed skating events organisers from the athletes' services which are necessary to organise those events.

16) The ISU has revised its Eligibility rules in 2016, but the 2016 Eligibility rules do not alter the Commission's conclusion that they restrict competition by object. While the automatic imposition of a lifetime ban has been removed in the 2016 Eligibility rules, the revised sanctions are still disproportionately punitive in the light of the relatively short career of speed skaters, and therefore do not substantially differ in their object of preventing athletes from participating in alternative speed skating events, and of foreclosing competing speed skating event organisers.

d. *Restriction by effect*

17) Although it is not necessary to analyse the effects of the Eligibility rules, the Commission nonetheless finds that they also have the effect of restricting competition. In the absence of the Eligibility rules, athletes would be able to offer their services to speed skating event organisers other than the ISU or its Members and there would be no other insurmountable barrier and, in fact, concrete possibilities for potential competitors to become active in the organisation and commercial exploitation of international speed skating events.

18) The Eligibility rules serve to maintain the market power of the ISU and its Members. Effectively, no third parties are active in the organisation and commercial exploitation of international speed skating events. Icederby's entry would have likely been successful but for the deterrent effect of the Eligibility rules and thus its inability to secure athletes. Icederby would have organised its events during the ISU's off-season, offering additional speed skating events to consumers and additional revenue streams for athletes.

19) This demonstrates that the Eligibility rules have a negative impact on several parameters of competition, in particular: (i) output, and (ii) consumer choice and innovation. First, output is restricted since potential entrants are hindered in acquiring athletes' services and are unable to organise additional speed skating events without ISU's authorisation. Second, the Eligibility rules adversely affect consumer choice and innovation because potential competitors could offer different and innovative formats of speed skating events. For instance, Icederby sought to introduce a new format of speed skating, where short track and long track speed skaters compete side-by-side.

e. *The 'Meca-Medina' criteria are not met*

20) The Eligibility rules relate to the organisation of competitive sport. In Meca-Medina, the Court of Justice ruled that such rules are generally subject to EU competition law. They may fall outside the application of Article 101 TFEU in certain circumstances, taking into account (i) the overall context in which the rules were taken or produce their effects and notably their objectives, (ii) whether the consequential effects restrictive of competition are inherent in the pursuit of the objectives and (iii) whether they are proportionate to them.

21) The Commission considers that the Eligibility rules do not serve purely legitimate objectives but also other interests of the ISU including its economic interests. Moreover, the Commission considers that the Eligibility rules are neither inherent in the pursuit of legitimate objectives nor proportionate to achieve legitimate objectives, in particular in view of the disproportionate nature of the ISU's ineligibility sanctions (going up to a lifetime ban) and the fact that athletes are sanctioned for participating in unauthorised events, without the authorisation of third party events being based on clear, objective, transparent and non-discriminatory criteria. The Eligibility rules therefore do not fall outside the application of Article 101 TFEU.

f. *No exemption under Article 101(3) TFEU*

22) The ISU has not been able to demonstrate that the cumulative conditions of Article 101(3) TFEU have been met. In particular, the Eligibility rules are neither indispensable nor proportionate. There are less restrictive means to achieve the claimed efficiencies. Moreover, the rules eliminate competition entirely by creating an insurmountable entry barrier for third parties that want to organise and commercially exploit international speed skating events.

g. *The ISU's Appeals Arbitration Rules reinforce the restriction of competition*

23) According to the Appeals Arbitration rules, appeals against the implementation of the Eligibility rules are subject to the exclusive jurisdiction of the Court of Arbitration for Sport (CAS) based in Lausanne, Switzerland. The Commission does not conclude that the Appeals Arbitration rules constitute a breach of athletes' right to a fair hearing. However, the Commission considers that in case of anti-competitive ineligibility decisions of the ISU, the Appeals Arbitration rules reinforce the restriction of their commercial freedom and the foreclosure of potential competitors.

Fines

- 24) In the specific context of the Decision, the Commission does not impose a fine on the ISU for the following cumulative reasons: (i) this is the first decision pursuant to Article 7 of Regulation (EC) No 1/2003 adopted by the Commission concerning rules set by sports governing bodies, whereas the specific nature of sport is recognised in Article 165 TFEU; (ii) the ISU Eligibility rules have been in place and were publicly known upon their adoption in 1998; and (iii) the ISU is an international sports federation that, besides being involved in commercial activities, acts to promote the sport of speed skating worldwide including by devolving part of its revenues to the development of the sport.
 - 25) However, the Commission is of the view that periodic penalty payments should be imposed on the ISU in case it does not bring the infringement to an end within 90 days from the date of notification of the Decision.
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