Introduction

They might not be direct competitors on the track as they race in different disciplines but, as a matter of fact, 1500m Olympic Champion Mark Tuitert and short track World Champion Niels Kerstholt teamed up to file a complaint with the European Commission ("Commission") against the International Skating Union ("ISU") for violation of Arts. 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). Art. 101 TFEU prohibits agreements with the object or the effect to restrict competition, whereas Art. 102 TFEU impedes that a dominant undertaking abuse its market power.

The Dutch speed skating duo, in June 2014, challenged the ISU's Eligibility rules. These rules, like every unsanctioned event rules, provide that the participation in an international competition not sanctioned (*i.e.* not authorized) by the ISU entails penalties. In the case at stake, penalties could amount to a lifetime ban from any competition sanctioned by the ISU. The Winter Olympics, the World and the European Championships are among the latter. After opening a formal antitrust investigation in October 2015, the Commission, on 27 September 2016, sent ISU a Statement of Objections. In short, the Commission has concerns that '*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*'.

Unsanctioned event rules are not rare among international sport federations. Yet, the approach to be followed is fairly unclear. This is why this case is of the utmost interest for jurists and athletes alike. Whenever sport regulation and EU law collide, a careful balance needs to be struck between the legitimate aims to ensure that, on the one hand, athletes' health is duly protected or to preserve the sports' integrity and viability and, on the other hand, the rules governing the internal market and, in particular, competition law.

The remainder of this contribution is dedicated to (i) a brief commentary of the factual background underpinning the saga; (ii) a concise description of the main legal issues arising thereof; (iii) the foreseeable development, in light of selected case law; and (iv) the conclusion to be drawn.

Background

The ISU is the only international skating federation recognized by the International Olympic Committee ("IOC"). Accordingly, only ISU events can affect international ranking and, thus, qualification to the top-tier championships. The ISU's objectives are to regulate, govern and promote skating sports and their organized development. Members of the ISU are national federations, on a one-per-country basis. Its rules affect, directly or through the implementation of the members, every person involved in a skating event, *i.e.* not only skaters, but also coaches, referees, doctors, and so forth, even volunteers.

The subject-matter of the litigation originates from the attempts by a private company ("Icederby") to organize international skating events as of 2011.

First, in 2011, Icederby planned to enter the market by offering an innovative race format that would combine various disciplines next to betting services. The prize-money offered was several times higher than the average prize-money offered in an ISU event. The ISU promptly revised its Code of Ethics warning its members (including every athlete) to refrain from supporting or participating in any betting activities. It stressed that '*violations of the Code shall be brought to the attention of the ISU Disciplinary Commission for consideration and possible action*'. It should be noted at the outset that, although the threat to take legal actions might be considered an abuse of a dominant position under certain circumstances, and although the timing of this amendment (which came into force only a few weeks after the Icederby approval request) is spectacular, integrity is one of the special grounds that might justify the ISU's conduct.

A second attempt to organize a skating event was made in 2014. Icederby was to organize an event as part of the program promoting the World Expo 2020 in Dubai. This time it was clear that no betting was involved (considering that betting is prohibited in Dubai), so that integrity could not eventually serve as a justification. Notwithstanding the impossible involvement of any betting activity, two months before the planned event the ISU reaffirmed its position regarding Icederby's events, deeming them '*possibly being closely connected to betting*'. It also reminded its members that participation could entail losing eligibility and,

quoting the Eligibility rules as they were formulated back then, '*a person specifically declared ineligible by the Council, if the Council so states in its decision, may be also declared to be* persona non grata *within the ISU*'.

The ISU's actions towards Icederby's proposed Dubai program were the last straw for the Dutch skaters, who filed a complaint against the Eligibility rules, prompting the Commission to open a formal antitrust investigation.

Nevertheless, in June 2016 the ISU partly amended its Eligibility rules. *Inter alia*: the regulation of national and non-competitive events is now deferred to ISU members (*i.e.* national federations), whose rules are '*not part of the ISU* [E]*ligibility rules*'; the proceedings leading to the imposition of a penalty are now self-committed to the principle of proportionality; a clear hierarchy between the penalties is established; and reinstatement is now also possible for lifetime bans (albeit only after 15 years since the ineligibility was declared). Furthermore, in July 2016 the ISU approved the request for an Icederby event to take place in March 2017 in the Netherlands, on the condition that there will be no betting on the event.

In sum, the factual landscape changed sharply since its origin. Despite the appreciable effort of the ISU, whether the changes are adequate to remedy the antitrust concerns in the Commission's eyes is beyond dispute: the issuing of a Statement of Objections in September 2016 is unequivocal.

Law

The ISU is an association of associations of undertakings and the Eligibility rules are a decision according to Art. 101(1) TFEU. The ISU enjoys a dominant position (a collective one, if national federations are considered) according to Art. 102 TFEU. The relevant market is the (at least) EEA-wide market for the organization of international skating competitions or events. Intra-Union trade is affected. Under well-established principles of EU law, the sport element does not exclude the application of antitrust provisions, as the case may be, to undertakings engaged in an economic activity. The organization of

international skating events falls within the EU meaning of economic activity.

Unsanctioned event rules are inherently anti-competitive. They deter the organization and the participation in non-authorised events. Thus, the anticompetitive effects concern both (potential) competing event organizers and athletes.

From the event organizers' standpoint, the foreclosure is as significant as the position in the market of the federation issuing the unsanctioned event rules. In this case, the ISU enjoys a *de facto* monopoly, by virtue of the (only) recognition by the IOC and of the organization of the top-tier events. Accordingly, event organizers are impeded from entering the market (or they would inevitably be forced out of it), as they are unable to access the raw material for their activity, *i.e.* they cannot attract athletes. Essentially, event organizers have two types of leverage at their disposal to attract athletes: either the prestige of the event, or the money prize offered. As already pointed out, the first option is actually non-existent. In any event, the second option is barred by the unsanctioned event rules, which enable the ISU to impede or significantly restrict effective competition.

From the athletes' standpoint, their commercial freedom is restricted for the same reasons. Even assuming that certain athletes are not interested in the ranking but only in the prize-money, and even assuming – *quod non* – that an unsanctioned event could be organized, the opportunity of winning it would have to be balanced with the prospect of that event being the last in the athlete's career. To put it in another way, the risk of sanctions makes the exercise of athletes' commercial freedom less attractive. If this sounds familiar, it is because there seems to be grounds for the skaters to challenge the Eligibility rules indirectly, by means of a reference for a preliminary ruling to the Court of Justice of the European Union. Few words on this are called for. Indeed, professional athletes have long been recognized as workers within the autonomous meaning of Art. 45 TFEU. It is also clear that, even if they are mainly private entities, sport federations such as the ISU exercise regulatory powers and this is enough for the free movement provisions to apply. The restriction has just been shown and any possible justification seems to collapse before the proportionality requirement. However, by way of conclusion to this cursory glance at the law of free

movement, it shall be added that filing a complaint with the Commission is a much more direct and surer way (a cheaper one, too) to address the problem of unsanctioned event rules.

Be it an agreement under Art. 101 TFEU or an abuse of dominance under Art. 102 TFEU, the Eligibility rules can hardly be justified. From the documents available, it is unclear where the Commission's focus lies. For ease of reference, the two options are analysed in turn.

Should the Commission's focus be on Art. 101 TFEU, then the ISU would have to argue that its rules qualify for an individual exception, by demonstrating that the four conditions of Art. 101(3) TFEU are cumulatively satisfied. It seems highly unlikely. Despite doubt whether unsanctioned event rules allow consumers a fair share of the benefits resulting from the restriction, the latter being indispensable seems out of question. The legitimate objectives pursued by the ISU (integrity, health, *etc.*) could be achieved by means other than the threat of severe sanctions, which fall short of being inherent and proportionate. In this sense, astonishingly, a set of transparent and objective criteria that event organizers are required to meet to obtain an authorization (even after the June 2016 amendment) is lacking.

Even if the Commission analyzed the Eligibility rules through the lens of Art. 102 TFEU, the odds of providing a convincing justification are low. Indeed, again, the ISU would have to convince the Commission that its conduct is indispensable and proportionate to the legitimate objectives pursued (and the Commission is particularly sceptical when dominant undertakings assess by themselves the necessity of a restriction on health or safety reasons). In addition, the ISU would have to provide evidence that the benefits deriving from the foreclosure outweigh the foreclosure itself. For the reasons set out above, both avenues seem impracticable.

Possible development

Where does that leave us? Surely the ISU case did not happen in a legal vacuum.

Unsanctioned event rules could be treated as some sort of exclusive dealing, or as non-compete clauses. However, the presence of a sport element – if it does not impede the application of EU law provisions *tout court* – suggests handling the case with care. The special status that, after all, sport regulation enjoy, advises against the application of general categories.

Yet, unsanctioned event rules are not a novelty in the EU law panorama. To provide an overall idea of how they have been dealt with, the most recent case before the Commission, the most recent judgement of the Court of Justice, and the most similar (and recent) case arisen in a Member State are now represented in turn.

First of all, the last time the Commission directly intervened on a similar issue dates back to 2001. The Commission had concerns that the *Fédération Internationale d'Automobile* ("FIA") had been abusing its dominant position by '*tying up everything that is needed to stage a rival championship*'. The FIA was the sole regulatory body of international motor racing in Europe and it itself organized motor racing events. The FIA rules applied to event organizers, track owners, car manufacturers, racing teams and drivers. The FIA, *inter alia*, (i) had in place a licensing system for the recipients of the above rules, according to which licences could be withdrawn upon organization or participation in unsanctioned events; (ii) issued rules or entered into agreements that subordinated the establishment of international series to the relinquishment, on the part of the organizer, of the broadcasting rights to the benefit of a FIA's subsidiary; (iii) racing teams were required to commit themselves for a 14-year period; and (iv) broadcasters could incur substantial pecuniary penalties if they transmitted events considered by the FIA to compete with its own. It is clear that the mix of unsanctioned event rules and other conducts left potential FIA competitors with nothing. The requests for clearance filed under the regime of Regulation 17/62 triggered a set of discussions that, eventually, led the Commission to close the investigation it had, in the meanwhile, opened. Indeed, the FIA essentially restructured its business to remedy the blatant conflict of interest just depicted, becoming a pure sport regulator with no exploitation rights. It only retained the right to exclude potential competitors when that was justified on grounds of safety and orderly conduct of motor

sport. On top of that, more transparent appeal procedures were established.

Second, the last preliminary ruling delivered by the Court of Justice was in 2008. The proceedings concerned the Greek Motorcycling Federation ("MOTOE"), a private entity, and the Greek representative for the *Fédération Internationale de Motocyclisme* ("ELPA"). The activities of the ELPA consisted in organising motorcycling competitions and in entering, in that connection, into sponsorship, advertising and insurance contracts designed to exploit those competitions commercially. Under Greek law, the ELPA was the sole body entrusted with the power to approve applications for authorisation to organise competitions submitted to the public authorities. ELPA's refusal to sanction MOTOE's events triggered the litigation, based on a claim for compensation. Notwithstanding the problems under State Aid law – which lie outside the scope of this contribution –, it took the Court some 50 paragraphs to address the issue. Most interestingly the Court found that (i) the ELPA was in a position of conflict of interest; and that (ii) the power to approve applications for authorisation to organise motorcycling events amounted to an abuse of dominance, without that power being made subject to restrictions, obligations and review.

Lastly, another case that did not make it to the EU level but nevertheless deserves attention is the *Fédération Equestre Internationale* ("FEI") case. It began in 2015 before the Belgian Competition Authority ("BCA"), when two equestrian event organizers lodged a complaint against the FEI's unsanctioned event rules. The FEI is the international governing body for all Olympic equestrian disciplines. Accordingly, the FEI events are the only ones affecting international ranking and qualification for the Olympics. Its rules provided that any athletes, horses, and officials that participated in unsanctioned events in the previous six months would be ineligible to compete in an FEI or national event. In July 2015, the BCA granted interim relief to the applicants, suspending the unsanctioned event rules and, thus, providing other event organizers with an outlet on the market for participants. The FEI appeal lodged before the Brussels Court of Appeal seeking the annulment and suspension of the BCA decision was dismissed in October 2015. Before that happened, it is worth noting that the FEI was '*to put in a request to the* [Commission] *to be an interested party in the ISU case*'. With hindsight, it seems better that the FEI decided not do so.

What is missing from (not only) this selected case law is an infringement decision from the Commission. This might be due to a variety of reasons, *e.g.* the observation that, apparently, no unsanctioned event rule is unlawful. However, for more than one reason, the ISU case seems to be headed towards an infringement decision.

First of all, the Commission has lacked a clear stance for the past 15 years, since it issued a Statement of Objections against the FIA, and even then no precedent was established. Second, the cases described above are just a few of many examples, considering the vast amount of sports played (and regulated) in the Union and worldwide. The fact that the (substantial) improvements undertaken by the ISU in June 2016 have been plainly discarded is a third indicator. In this scenario, an infringement decision is the only solution that would guide practictioners and enforcers, considering its binding nature *vis-à-vis* national competition authorities and courts.

It is not submitted that there are strong reasons to find an infringement (rather than to accept commitments or to settle, as the case may be), but it is suggested that the Commission has already reached its conclusion and will grasp this opportunity to send a clear message to sport federations.

Conclusion

The Commission's issuance of a Statement of Objections in the ISU case sounded like a wake up call for many. The messages that were passed, however, are different.

From a more general point of view, it is recalled that sport is special, but not that special. Sport is special insofar as specific justifications can apply. However, the ISU case seems to restate that (i) proportionality is a general principle of EU law and, as such, knows no borders and grants no special statuses; and that (ii) if an economic activity really can be severed from the special activity (as it also happens, for instance, in the case of services of general economic interest), then the Commission will go down that road, with every consequence stemming therefrom. However, it should be acknowledged that opening sport federations to competition might seriously undermine the European model of sport and its

autonomy. Accordingly, caution is of the essence.

From the ISU-specific point of view, the impression is that it will end up being the Commission's scapegoat, sacrificed at the altar of legal certainty. Indeed, the amendments of June 2016 may be incomplete, but follow the direction indicated by the (few) case law available at EU level. It is true that the Commission can impose fines for past conduct, but the lack of precedent in its decisional practice should also be considered. For this reason, a balanced outcome would be for the Commission to find an infringement without imposing any fine. This solution would fill the existing gap in the Commission's decisional practice, providing guidance for enforcers across the Union. It would remedy the antitrust concerns, without punishing too severely an undertaking that perhaps too late and incompletely, but largely, remedied its wrongdoings.

In conclusion, the Commission has opened the way to the finding of an infringement, and this is to be welcomed. However, also considering the special nature of sport regulation, the guardian of the treaties should try not to repeat the errors of the ISU itself: *i.e.* imposing disproportionate sanctions.