

# The application of competition law to sports – 2019 in review and a look at what 2020 might bring

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& STRAWN

It has long been clear that sports are subject to the application of EU law, including EU competition law and 2019 has been a particularly busy year for the application of competition law to sports. In this review we attempt to draw together those cases and matters which have arisen over the course of the year, together with a consideration of the developments 2020 might bring in this area.

## Key Highlights of 2019

The majority of cases and matters which have arisen in 2019 can be drawn into three main themes:

- Sporting rules regarding the rights of athletes to commercialise;
- Sporting rules regarding the rights of athletes to compete; and
- Commercial practices in the sports industry.

The various developments are set out below.

### Sporting rules – rights of athletes to commercialise

In the run up to the 2020 Olympic Games (which open on 24 July 2020) sport-related issues might be expected to assume a higher profile than in a non-Olympic year and athlete profiles will usually be at their highest. For many athletes, the Olympic Games represent a rare – perhaps unique – opportunity to derive revenue from their sporting activities and to help secure their finances. Accordingly, it is perhaps unsurprising that 2019 brought an increased focus on the rights of athletes to commercialise their sporting performance.



- **Rule 40 and Byelaw 3 of the Olympic Charter (“Rule 40”)**

Rule 40 sets out the (very restricted) circumstances in which athletes may allow their person, name, picture or sports performances to be used for advertising purposes during the Olympic Games (i.e. only where permitted by the IOC Executive Board. National Olympic Committees decide on a case-by-case basis whether or not to make exceptions for advertising that uses a participant’s image by a third party that is not an official Olympic sponsor). The scope of Rule 40 has been a running topic throughout 2019.

**February 2019** – In December 2017, the German Bundeskartellamt had provisionally taken the position that the advertising rules of the International Olympic Committee (“IOC”) and German Olympic Sports Confederation (“DOSB”) were “too restrictive” and could constitute an abuse of their dominant position, contrary to competition law. In response to the concerns of the Bundeskartellamt, amendments were proposed to the rules to loosen the restrictions and these were used in respect of the PyeongChang Winter Games. That loosening of the restrictions was, however, subject to the outcome of a market test.

On 27 February 2019, the Bundeskartellamt announced that further investigations and negotiations had taken place and that as a result, the DOSB and the IOC had undertaken to enhance advertising opportunities for German athletes and their sponsors. A new guideline was accordingly put in place, which takes priority over the IOC rules with regard to Germany which defines the conditions under which German athletes and their sponsors can carry out advertising activities.



by the Bundeskartellamt and the greater freedoms afforded to German athletes.

The United States Olympic & Paralympic Committee published revised Rule 40 guidelines<sup>2</sup> which allow, *inter alia*, US athletes to post seven thank you messages to their sponsors throughout the Games Period. In addition, personal (non-

Olympic) sponsors are permitted to post a message of congratulations on social media or a corporate website. Changes were also made to the mechanisms of accountability, with consequences imposed on personal sponsors by way of contract (commitment to certain restrictions being a pre-condition of permission for marketing of an athlete during the Games period). Whereas previously the primary consequence for breach of the guidelines was a ban for the athlete, this places greater responsibility with the sponsor and potentially makes actions for damages or injunctions easier.

The British Olympic Association (“BOA”) published its revised Rule 40 guidelines<sup>3</sup>. So far as the authors are aware, the new guidelines enjoy the unfortunate distinction of being the most restrictive amongst those countries that have revised their guidelines. The one area where there has been a small step forward for British athletes in the Guidelines is in respect of thank you advertising. Athletes are now permitted to post one thank you message per non-Olympic sponsor during the “Games Period” which, in the case of Tokyo 2020, starts ten days prior to the opening of the Games and lasts until two days after the closing ceremony. Each thank you message can be posted across that athlete’s different social media channels and will be counted by the BOA as one post, provided that every instance of the message is identical. This is a departure from the BOA’s previous position, which completely prohibited thank you advertising during the Games Period.

**June 2019** – The IOC announced a relaxation of the wording of Rule 40 so that instead of the original wording:

*“Except as permitted by the IOC Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.”*

it now (more permissively) reads as follows:

*“Competitors, team officials and other team personnel who participate in the Olympic Games may allow their person, name, picture or sports performances to be used for advertising purposes during the Olympic Games in accordance with the principles determined by the IOC Executive Board.”*

**July 2019** – The Australian Olympic Committee published its revised Rule 40 guidelines<sup>1</sup> which relaxed the requirement for approval of advertising plans to only require for notification. In addition, Australian athletes are permitted to thank their sponsors, within certain limits.

**October 2019** – October was a busy month:

An English language version of the Bundeskartellamt’s February 2019 decision was published, allowing non-German speaking athletes and other interested bodies a chance to understand in full the issues addressed

**November 2019** – Following the announcement of the publication of the BOA’s Rule 40 Guidelines, a number of high-profile British athletes sent a letter threatening

1 <https://www.olympics.com.au/resources/articles/athlete-guidelines/>

2 <http://www.teamusa.org/team-usa-athlete-services/athlete-marketing/ioc-rule-40-ipc-athlete-image-policy-guidelines>

3 <https://www.teamgb.com/rule-40>

legal action, further details on which are considered below in our look forward at 2020.

**December 2019** – In early December the IOC sent a letter to National Olympic Committees explaining that it had entered into a dialogue with the European Commission, who had invited the IOC to apply the DOSB’s approach across Europe. The IOC has said that it will organise a consultation to take place in 2020 which will allow stakeholders to be heard, taking account of the practical experiences of the Tokyo Games. In other words, the IOC aims to maintain the status quo for at least another Olympic Games.



## Sporting rules – rights to compete

The extent to which sports federations can set rules which limit the ability of athletes to compete in “non-authorised” events, and therefore which limit the ability of third parties to start to organise and commercially exploit events in competition with the sports federation in question, is also an issue which has seen substantial developments in 2019.

- **FINA rule change regarding independent events**  
2019 got off the starting blocks with the announcement in January by FINA (the international federation for administering international competition in water sports) that it “acknowledges that swimmers are free to participate in competitions or events staged by independent organisers, namely entities which are neither members of FINA nor related to it in any way”. This was an important statement by FINA as it came following a protracted dispute in respect of a rival competition series to be introduced by the International Swimming League (“ISL”).

FINA had previously made clear that it did not recognise the ISL, nor was the ISL affiliated to FINA.

FINA rules provided that affiliated members of FINA (including athletes) could not have relationships with non-affiliated bodies, with the rules providing for sanctions for doing so (up to a four-year ban from FINA organised and sanctioned competitions, which include the World Aquatics Championships).

Following the initiation of a challenge in the US by the ISL and certain swimmers on competition law grounds (which included reference to the European Commission’s decision in the International Skating Union case, in respect of which, see below), FINA’s retreat represents an important step forward for athletes in being able to compete in alternative events without risk of being banned from competing in high profile events.

- **Publication of the European Commission’s 2017 decision in the International Skating Union case**  
Although the European Commission made a decision in early December 2017 which found that the International Skating Union’s (“ISU”) eligibility rules had the object of restricting competition on the worldwide market for the organisation and commercial exploitation of international speed skating events, it was only in September 2019 that the full decision was published.

The publication of the final version of the ISU decision allows further insight into the assessment that the European Commission will conduct when reviewing the compatibility of eligibility rules with the competition rules. In particular, it is clear that, in setting their eligibility rules, sporting bodies and event organisers must ensure that their eligibility rules are based only on legitimate objectives (explicitly excluding their own economic interests) and that the eligibility rules are inherent and proportionate to achieve those objectives.

- **Enforcement action in Italy for breach of commitments**  
In October 2019, the Italian competition authority found that the Italian Federation of Equestrian Sports (“FISE”) had failed to comply with commitments which had been made mandatory following a decision issued in June 2011 and that FISE had implemented an abusive strategy aimed at limiting the scope of organisation of amateur equestrian competitions, in particular by:
  - adopting new and more restrictive regulations;
  - sending warning letters - to clubs, sports promotion bodies, associations and, in general, sector operators

- aimed at preventing amateur events from being held, which FISE claimed to be of a competitive nature; and
- failing to enter into agreements with sports promotion bodies and other sporting companies and associations to govern how to carry out amateur and/or competitive activities. This substantially restricted the possibility of carrying out amateur activities, severely limiting the scope of operations of other competitors and expanding FISE's own sphere of activity.

FISE was fined approximately €450,000 as a result.

## Commercial practices in the sports industry

- **Fine imposed on Nike for infringement of competition law in respect of its distribution arrangements**

In March 2019, the European Commission fined Nike €12.5 million for banning traders from selling licensed merchandise to other countries within the EEA. This restriction concerned merchandising products of some of Europe's best-known football clubs and federations, for which Nike held the licence.

The Commission found that Nike's licensing and distribution agreements breached competition rules by:

- Imposing direct measures restricting out-of-territory sales by licensees;
  - Enforcing indirect measures to implement the out-of-territory restrictions;
  - Imposing direct and indirect measures on master licensees to compel them to stay within their territories and to enforce restrictions on their sub-licensees; and
  - Including clauses which explicitly prohibited licensees from supplying to customers who could be selling outside the allocated territory, in addition to obliging licensees to pass on the prohibitions in their contracts.
- **Complaint in respect of World Sailing's specification of single manufacturer one-design sailing craft**
- It is understood that in 2019 the European Commission has been considering a complaint concerning World Sailing's move away racing classes which allowed for construction of boats by any manufacturer (subject to strict technical specifications) towards racing classes which can only be sourced from a single manufacturer.

- **Complaint regarding Genius Sports' deal with Football DataCo regarding data collection and licensing rights**

In May 2019, Genius Sports entered into a multi-year deal with Football DataCo (who own the data rights to the English Premier League, the English Football League and the Scottish Professional Football League) to become the exclusive supplier of live data to the betting sector and also the party responsible for making sub-licenses available.

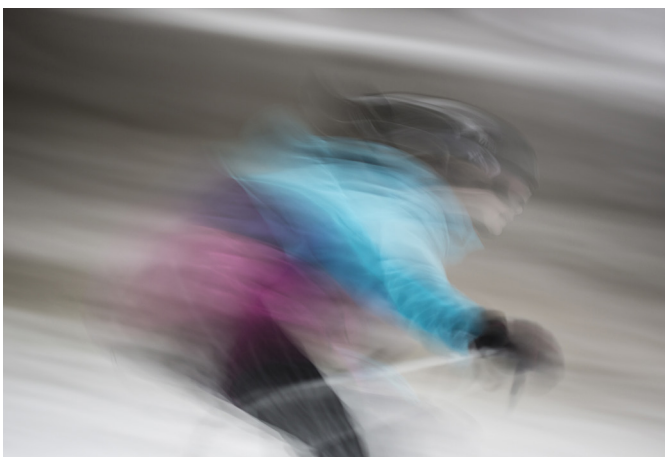
This (along with activities taken to enforce the arrangement) are understood to have prompted Sportradar to send a letter threatening legal action, allegedly claiming that the exclusive arrangement is in breach of competition law (as an agreement distorting competition and/or an abuse of a dominant position).



## What to expect in 2020

- **Further relaxation of national Rule 40 guidelines**  
Within the first few days of 2020, Canada had already announced that they had relaxed their Rule 40 guidelines<sup>4</sup>. Over the course of 2020, it is expected that other nations will follow suit.
- **Potential action by UK athletes against the BOA in respect of the BOA's stance on Rule 40**  
Following the publication of the BOA's revised Rule 40 guidelines, a letter threatening litigation was sent to the BOA on behalf of a number of UK athletes alleging, *inter alia*, that the restrictions imposed by the BOA were in breach of EU competition law. The letter before action requested a substantive response from the BOA by 6 December 2019.

<sup>4</sup> <https://olympic.ca/brand-use/>



The BOA has since confirmed that it has responded “fully and robustly” to the legal challenge, although it remains open to dialogue with the athletes to try and find “a positive solution for the benefit of all athletes”. Accordingly, the ball seems to firmly be in the athletes’ court as to whether or not they decide to proceed to court action.

- **Complaint submitted to the European Commission by Velon**

On 20 September 2019, Velon, which is owned by 11 WorldTour cycling teams and which operates the Hammer Series of races, submitted a competition law complaint against the Union Cycliste Internationale (“UCI”) to the European Commission. UCI is the worldwide governing body for cycling and promotes cycling’s various disciplines, the UCI also manages and promotes its own events.

The complaint by Velon alleges that UCI breached Article 101 and 102 of the TFEU (which concern anti-competitive agreements and abuse of a dominant position, respectively) through implementation of its existing regulations and the introduction of new ones which are designed to favour the UCI’s interests to the detriment of the various teams. Since then, Velon has amended its complaint to include a complaint on discriminatory grounds, following a refusal by UCI to approve an application for a women’s Hammer race.

Whether or not the European Commission picks up the complaint and decides to investigate remains to be seen, however, by putting the matter into the public domain, Velon will be seeking to put pressure on UCI to change their practices.

- **Appeal by the ISU against the European Commission’s infringement decision**

In February 2018, the ISU lodged an appeal with the General Court against the European Commission’s decision claiming that, *inter alia*, the ISU’s eligibility rules do not have as their object or effect the restriction of competition. We expect to see the General Court’s judgment during 2020.

## Conclusion

With the groundwork laid in 2019 for a number of challenges to sporting rules against a variety of sporting bodies, 2020 looks to be an important year for sports and, in coincidence with the prominence afforded to athletes by the Olympic Games, a greater emphasis on athlete rights.

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