

IOC Forced to Open Up Athlete Advertising During Olympics

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In a Decision that may have far reaching ramifications for Olympic athletes in Europe and elsewhere, on 27 February 2019, the German competition authority ruled that the restrictions of advertising opportunities by the German Olympic Sports Confederation and the International Olympic Committee (IOC) were too far reaching and thus constituted abusive conduct.

In this brief article we summarise this important development and consider its potential impact.

Background

Rule 40, bye-law paragraph 3 of the Olympic Charter provides that

“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”.

Athletes nominated for the Olympic Games agree to observe this restriction which applies to all marketing and social media activities from the date of the opening of the Olympic village (nine days before the Games) until the third day after the closing ceremony. Sponsors of athletes who are not sponsors of the Olympics Games must not do various things during that period, which include (amongst other things) the use of written/visual allusion to the Olympic Games, any reference to the athlete’s role or participation in the Games, and precludes the use of any “Olympic listed terms or expressions” alongside the participant’s name or image. The effect of this goes so far as to prohibit non-official sponsors from congratulating their sponsored athlete on their winning a medal.

Following the 2016 Summer Olympics, a complaint was made to the German competition regulator (the Bundeskartellamt) by the Federal Association of the German Sports Goods Industry. The association of German athletes and two athletes were further parties to the proceedings. An investigation was carried out and in December 2017, the Bundeskartellamt concluded that the advertising rules of the German Olympic Sports Confederation and the IOC 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 provisionally 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 German Olympic Sports Confederation and the IOC had undertaken to enhance advertising opportunities for German athletes and their sponsors. A new guideline is 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.

Why is this important?

The announcement by the Bundeskartellamt notes that self-marketing during the Games “plays a very important role” and that although athletes are the key figures of the Olympic Games “they cannot benefit directly from the IOC’s high advertising revenue generated with official sponsors”.

From a legal perspective, this is an important reminder that sports associations that pursue economic activities are subject to competition law insofar as they pursue such activities and that they will be subject to the jurisdiction of competition regulators where their behaviour either abuses a dominant position or where they enter into anti-competitive agreements.

How does this impact athletes?

The IOC has issued a short statement that “With its decision, the [Bundeskartellamt] recognized that there are legitimate reasons for restricting individual athletes’ advertising opportunities in order to ensure the ongoing organization of the Olympic Games. At the same time, any implementation of Rule 40 at the national level necessarily has to take all applicable laws and regulations as well as pertinent case law into account, in this instance, particular German case law”. At present, and in line with the IOC’s statement that implementation at a national level must be considered, there is no indication from the IOC that it intends to relax its rules on a basis that is wider than Germany. However, this is an important warning shot to the IOC about its practices and it is possible that a relaxation on a wider basis may be considered in the run up to the 2020 Olympic Games in Tokyo.

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