

# British athletes won't be going for gold under the British Olympic Association's revised Rule 40 Guidelines

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## Introduction

In June 2019, the International Olympic Committee ("IOC") announced that it was amending the wording of Rule 40 and byelaw 3 of the Olympic Charter ("Rule 40"). The announcement followed a successful complaint brought before the Federal Cartel Office in Germany, which found that the Rule 40 restrictions on German athletes' advertising activities during the Olympic Games (the "Games") were anti-competitive.

The revised wording now allows for athletes to use their person, name or performance to be used for advertising purposes, in accordance with principles determined by the IOC Executive Board which have been issued to each National Olympic Committee ("NOC"). A similar update by the International Paralympic Committee is anticipated.

The application by NOCs of the IOC's Rule 40 principles will inevitably lead to diverging outcomes, and athletes around the world have waited to find out how their NOC has decided to react to the Rule 40 changes. On 28 October 2019, the British Olympic Association ("BOA") published its new official guidelines on Rule 40 (the "Guidelines") for both athletes and non-Olympic brands and sponsors. Unfortunately, as this article explains, the Guidelines represent little movement forward for Team GB athletes – especially when contrasted with the rights that have been afforded to athletes in other countries.

## What do the BOA Guidelines mean for British athletes participating in the Games?

### Messages from Athletes

The one area where there has been a 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.

Other NOCs have adopted less restrictive approaches than that of the BOA in this respect. For example, under the guidelines issued by the United States Olympic and Paralympic Committee ("USOPC") in October 2019, US athletes are able to post seven thank you advertising messages throughout the Games Period, and are not restricted to one post per sponsor. The USOPC's position arguably better reflects commercial realities (i.e. where athletes are more likely to have a relationship with fewer commercial sponsors in relation to whom they would wish to post multiple messages of thanks). German athletes are not limited at all by the number of thank you messages that they may post, provided such posts do not unlawfully use Olympic trademarks or create confusion by suggesting a commercial association with the German NOC ("DOSB"), Team Germany or the Games. German athletes are also permitted to repost or share IOC/DOSB/Team Germany messages combined with a message of thanks provided that the posts meet the above criteria for advertising use.

### **Messages from Sponsors**

Sponsors of Team GB athletes are still prohibited from congratulating their sponsored athlete during the Games Period. The Guidelines refer to possible exemptions for small local businesses "provided no commercial conflicts exist" but the scope of these exemptions is unclear. In contrast, the USOPC permits congratulatory messages, provided that they do not infringe on Olympic trademarks. A similar approach has been taken in Germany after the Federal Cartel Office ruled that restrictions on congratulatory messages were anti-competitive.

In fact, some of the practices found to be problematic by the German Federal Cartel Office exist in similar form under the latest BOA's Guidelines. One such example is the requirement that non-Olympic sponsors must obtain approval from the BOA for any advertising during the Games period which features an athlete. This approval needs to be sought several months before the Games start, with the planned advertising having been run consistently in the market within that time. The Federal Cartel Office found a similar restriction in Germany to be abusive. As a result, the DOSB now does not have to approve (or even be notified of) advertising activities in advance, provided that the advertising does not infringe Olympic intellectual property or create confusion. In the US, the USOPC has introduced a flexible notification process for advertising campaigns featuring US athletes during the Games Period, and only requires notification via an online registration process at *any time* prior to the date of that advertising appearing in the market. In Australia, the Australian Olympic Committee ("AOC") has removed the requirement of its approval of advertising featuring Australian athletes during the Games.

### **Other Rights**

German athletes have also secured much better rights in terms of the use of photographs taken at the Games provided that they do not contain Olympic intellectual property. In contrast, even in thank you messaging to their sponsors, British athletes are prohibited from including any images from the Games.

## **Special circumstances for British athletes?**

In publishing the Guidelines, the BOA has emphasised its "unique funding model" and said that it is "one of the world's few National Olympic Committees to receive no public or Government funds." The implication is that, due to the BOA's funding structure, more restrictive provisions on the commercial freedoms of British athletes are necessary. However, there is no evidence that the response of the BOA is either proportionate or equitable. Other NOCs, including the USOPC, AOC and the DOSB which receive the majority of their funding from sponsorship, have gone much further than the BOA in granting athletes greater freedoms in the run-up to and during the Games Period.

EU law provides that the protection of the integrity of sport, the protection of health and safety and the organisation and proper conduct of competitive sport may constitute legitimate objectives that justify a restriction of competition. However, the BOA is not seeking to restrict British athletes in respect of these non-economic grounds, but rather on

the basis of financial interests. In this regard, EU case law sets out that the protection of economic and/or financial interests does not constitute a legitimate objective that can justify a restriction of competition.

In light of clear EU law in this area and the decision of the German Federal Cartel Office (which is not binding in the UK but which provides an important indicator as to how a UK court/regulator might approach the issue), it is extraordinary that the BOA has taken the approach that it has by retaining restrictions which have already been found to be abusive. Equally, it is surprising that the BOA has sought to justify doing so by reference to funding (a key concern for the overwhelming majority of athletes), which could have had the effect of disincentivising a challenge.

The Games mark a period where the visibility (and commercial potential) of British athletes is at all-time career highs, so any limitation on their ability to engage in advertising activities and opportunities should be justified, proportionate and defensible. Regrettably, it is clear from the foregoing that under the Guidelines, British athletes will be left far behind other athletes when it comes to freedom to pursue their individual economic interests during Tokyo 2020 and future Games.

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