SLAUGHTER AND MAY

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ISU skating on thin ice with its eligibility rules

The European Commission has recently published its **decision** finding that the International Skating Union's (ISU) eligibility rules breached EU competition law. The Commission found that the eligibility rules, which imposed penalties (including potential lifetime bans) on athletes who participated in any non-ISU-sanctioned speed skating competition, constituted a restriction of competition by object in the worldwide market for the organisation and commercial exploitation of international speed skating events.

Background

The ISU is the sole body recognised by the International Olympic Committee to administer figure skating and speed skating on ice. Under the eligibility rules, skaters could receive up to a lifetime ban from international speed skating events (including the Olympic Games and World Championships) if they participated in non-ISU-sanctioned speed skating events. The Commission opened an investigation into the eligibility rules after receiving complaints from two Dutch professional speed skaters.

European case law has made clear that, while the organisation of sports is unique, sporting rules are nonetheless subject to the application of EU law, including EU competition law. The Commission will consider the legitimacy of objectives pursued by sporting organisations in setting rules, whether any restrictive effects of those rules are inherent in the pursuit of those objectives and whether those rules are proportionate to such objectives.

Commission's findings

The Commission found that the eligibility rules restricted competition by object as they were enacted by the ISU in furtherance of its own commercial interests to the detriment of athletes and organisers of competing events. The Commission concluded that the aim of the eligibility rules was inherently to: (i) exclude athletes from participating in non-ISU-sanctioned events, therefore foreclosing competing event organisers; and (ii) exclude competing event organisers (who were consequently unable to attract top athletes to compete). Such a draconian restriction could not be justified by reference to a legitimate sporting objective.

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This was particularly apparent as according to the eligibility rules, sanctions could be imposed on athletes who competed in non-ISU-authorised events even if such events would not endanger the integrity of the sport, athlete well-being or the proper conduct of the sport.

The Commission quickly dismissed the ISU's argument that such a restriction was necessary to ensure that revenue created from speed skating competitions was shared with grassroots speed skaters. This was not a legitimate sporting objective but rather a purely commercial objective.

By object v by effect

The Commission found that the content and objectives of the eligibility rules, the economic and legal context and the ISU's intent to exclude competition from rival organisers constituted a restriction of competition by object.

This case is interesting in the development of the scope of by object infringements, particularly following the *Cartes Bancaires* judgment. In that case, the European Court of Justice (CJ) found that by object anti-competitive behaviour must be interpreted restrictively and may only be applied to certain types of coordination which can be regarded as revealing "*a sufficient degree of harm to competition [such] that it may be found that there is no need to examine their effects*".

The test used by the Commission to assess the eligibility rules could be seen as a lower test than that expressed in *Cartes Bancaires*, potentially broadening the scope of by object infringement. This arguably runs counter to the efforts of the CJ to reign in the Commission's attempts to broaden the scope. The ISU decision is important as it suggests that the Commission remains willing to test the boundaries of competition law should the opportunity present itself. The ISU has appealed the decision to the European General Court and so it remains to be seen whether the Commission's by object reasoning will stand up to judicial scrutiny.

Remedies

The Commission required that the infringements be brought to an end within 90 days and that the ISU refrain from undertaking any measure that had the same or an equivalent object or effect. The Commission suggested that the ISU bring the infringement to an end by introducing:

(i) sanctions and authorisation criteria for alternative speed skating events that are objective, transparent and non-discriminatory and do not go beyond what is necessary to achieve legitimate objectives (excluding the ISU's financial interests); and

(ii) an objective, transparent and non-discriminatory procedure for the adoption and effective review of decisions regarding the ineligibility of skaters and for the authorisation of speed skating events.

The Commission did not impose a fine on the ISU for the following reasons: (i) this is the first decision of the Commission concerning specific rules set by sports governing bodies; (ii) the eligibility rules have been in place and were publicly known upon their adoption in 1998; and (iii) the ISU is a sports body acting to promote the sport of speed skating worldwide including the development of the sport. However, the Commission did impose periodic penalty payments in the event that the ISU fails to implement changes that bring the infringement to an end before the 90-day deadline.

Implications for professional sport

In a **statement** made on 8 December 2017, Competition Commissioner Vestager noted that the Commission was not questioning the pyramid structure of governance in ice skating or sports with a similar governance structure and made clear that the Commission was not questioning the rights of federations to organise sport, protect athletes and protect the integrity and proper conduct of the sport.

However, Commissioner Vestager explained that penalties used by such federations must be necessary and proportionate to achieve legitimate objectives and "*shouldn't be used to unfairly favour the federation's own commercial interests, at the expense of athletes and other organisers*." The Commissioner went on to note that sport is a business, and a livelihood for professional athletes, and that the decision was "*about making it clear to sporting federations that the business of sport also has to comply with competition rules*."

Comment

This case is striking for two reasons. First, although the Commission is not questioning the governance structure of sport, sporting organisations need to be careful that they comply with competition law where decisions are based on commercial and not legitimate sporting objectives. Second, despite the CJ narrowing the category of by object infringements recently, the Commission has shown that it is willing to push the boundaries of the category where the opportunity arises.

Other developments

Antitrust

Beijing High Court upholds China's first SEP injunction

On 28 March 2018 the Beijing High People's Court **upheld** a decision made by the Beijing Intellectual Property Court in March 2017 that Sony Mobile Communications (China) had infringed a standard-essential patent (SEP) owned by Xi'an Iwncomm, a technology firm based in China. Importantly, the Beijing High People's Court upheld the lower Court's decision to grant an injunction and to award damages of RMB 9.1 million (approximately £1 million) in favour of Iwncomm.

Iwncomm filed the case at the lower Court in 2015, claiming that Sony had infringed its SEP that was included in the Wired Authentication and Privacy Infrastructure (WAPI) standard, a Chinese national standard for wireless connections, in 35 models of WAPI-compliant mobile phones manufactured and sold by Sony. In order to comply with the WAPI standard, phones have to use Iwncomm's SEP at issue. Since Sony had not licensed the SEP from Iwncomm, the lower Court ruled that Sony had infringed Iwncomm's SEP and issued the first SEP injunction in China.

On appeal, the Beijing High People's Court found that Sony used Iwncomm's SEP during the research and development stages of the 35 models, but not during the production and post-production testing stages. Nonetheless, the Court concluded that, for a mobile phone manufacturer, the use of an SEP in any stage of the manufacturing process (without due licensing) would constitute a patent infringement.

The Beijing High People's Court further pointed out that SEP infringement cases should be handled differently from regular patent infringement cases, since SEP holders are obliged to license their SEPs on fair, reasonable and non-discriminatory (FRAND) terms. In particular, the judge noted that when an SEP is part of a national technical standard and the standard is widely used in China, the SEP has a 'lock-in' effect and is of public interest. Noting that Iwncomm complied with its obligation in negotiating with Sony for six years on FRAND terms regarding the licensing of the SEP at issue, and that Sony was "at obvious fault" for "intentionally delaying" the negotiation process, the Beijing High People's Court affirmed the lower Court's decision in issuing an injunction and awarding RMB 9.1 million of damages to Iwncomm, which was triple the licensing fees involved.

This decision comes two months after the Shenzhen Intermediate People's Court Intellectual Property Court's **decision** in *Huawei v. Samsung*, which marked the first time a Chinese court issued an injunction in relation to international SEPs.

General competition

CMA publishes its annual plan for 2018/19

On 29 March 2018 the Competition and Markets Authority (CMA) published its **annual plan 2018/2019** which sets out its agenda and priorities for the coming year. The plan places a clear emphasis on the needs of vulnerable customers, building consumer trust in markets, analysing online and digital markets and supporting productivity and wider economic growth. Also, there will be a focus on building its understanding of the digital economy and improving forensic tools available in this sector.

Market investigations and mergers: The CMA is targeting a more streamlined process with regard to market investigations and mergers. It aims to make the merger control process more efficient by continuing to fast-track appropriate mergers to Phase II as soon as possible. It is seeking to complete 70 per cent of Phase II merger cases without an extension of the statutory deadline; as well as seeking to implement Phase II merger and market investigation remedies without the need for an extension to the statutory deadline in at least 80 per cent of cases (increased from 70 per cent last year). The CMA also plans to launch two to four new market study projects, in addition to the ongoing market investigation on investment consultancy (in which it is utilising an improved, more streamlined process) and the recently launched market study into heat networks.

Enforcement: The CMA is building itself up to meet a higher volume of cases and investigations. It has increased its annual target for new enforcement investigations from six to 10, whilst aiming to resolve investigations more efficiently and rapidly, pursuing interim measures, and seeking to secure commitments from the parties where appropriate. The CMA has also committed to maintain its target launches of consumer protection cases or projects at a minimum of four for the year.

UK exit from EU: The CMA is preparing for an increased role in the review of UK aspects of global merger and international competition enforcement investigations. The CMA notes the total resource budget for 2018/19 is £68.74 million and this could rise up to £91.44 million to enable EU exit preparations. Additionally, on 28 March 2018 a **letter** from the Department for Business, Energy and Industrial Strategy suggested that the CMA is best placed to take on the role of State aid regulator at the point when an independent UK State aid authority is required. This would further increase the scope and workload for the CMA going forward.

Digitisation high on EU and UK competition authorities' agendas

On 28 March 2018 the European Commission **announced** the appointment of three Special Advisers to European Commissioner for Competition, Margrethe Vestager, to assist in responding to the future challenges for competition policy arising from digitisation. The Special Advisers, who take up their role for the period 1 April 2018 to 31 March 2019, are Professor Heike Schweitzer, Professor Jacques Crémer and Assistant Professor Yves-Alexandre de Montjoye. As market and consumer behaviour adapts to key digital changes, the Commission is gathering input on what the implications are likely to be for competition policy. The new team (which will act independently of business interests and will neither have access to confidential information concerning competition cases, nor advise on individual decisions, legal initiatives or concrete policy objectives), will be delivering a report on the future digitisation challenges by 31 March 2019. The Commission will also be holding an open conference on 17 January 2019 to discuss this topic further.

Professor Heike Schweitzer teaches Law at Humboldt University of Berlin, specialising in European economic law and competition law. Professor Jacques Crémer teaches Economics at the Toulouse School of Economics. His research interests include the economics of the internet and of software industries. Yves-Alexandre de Montjoye is an Assistant Professor of Data Science at Imperial College London. His research interests focus on human behavioural impacts on the privacy of individuals in large-scale datasets as well as computational privacy and the implications of artificial intelligence.

These new appointments were announced the day after the Commission's in-house think tank – the European Political Strategy Centre (EPSC) - published a 'Strategic Notes' **report** on how Commission policy may have to be altered to respond to developments in artificial intelligence (AI). The EPSC[1] noted that strong competition "*reduces the ability of suppliers to glean value from customers through algorithmic-empowered discrimination*". According to the think tank there is a need for antitrust enforcement to accelerate, while "*antitrust tools must be refined to stop AI from being used by companies to break the law, for example by coordinating prices*". In relation to merger control, the EPSC considers that the implications of a reduction in market competition should be taken into account, which "*might allow merged companies to use AI technologies to discriminate against their users or elicit them to hand over more personal data to access their services*". Further, the EPSC considers it important that merger control be fine-tuned to capture those acquisitions which today escape the authorities' review because they are below notification thresholds but may have a significant impact on competition in the future.

At the UK national level, the CMA has also announced in its annual plan (see above) that it is expanding its digital analysis capabilities and establishing a new digital, data and technology team to ensure it can respond rapidly to developments including the use of algorithms and AI.

[1] Views expressed in the report are those of the authors and do not necessarily reflect those of the European Commission.

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