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CJEU's Decision in International Skating Union v. European Commission: Its Manageable Consequences for International Arbitration

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On 21 December 2023 the Court of Justice of the European Union ("CJEU") handed down its decision in Case C-124/21 P, *International Skating Union* v. *European Commission*.

The CJEU agreed with the 16 December 2020 judgment of the General Court of the EU ("GCEU"), and with the European Commission in CASE AT. 40208 *International Skating Union's Eligibility rules*, that the rules in the International Skating Union ("ISU") regulations ("Eligibility Rules") punishing skater members for competing in unauthorized events offended against EU competition law (Art. 101 TFEU).

But, contrary to the GCEU, the CJEU sided with the European Commission that the dispute resolution mechanism available to punished skaters "reinforced" this violation of EU competition law. That dispute resolution mechanism is Court of Arbitration for Sport ("CAS**"**) arbitration in Lausanne, Switzerland, with the exclusive challenge to the CAS award lying to the Swiss Supreme Court.

The reinforcement of the EU competition law violation, so the CJEU, consisted in the lack of public policy review of competition law by the Swiss Supreme Court (see for example Phillip Landolt, "Judgment of the Swiss Supreme Court of 8 March 2006 – A Commentary" in [2008] EBLR 131), in addition to the unavailability of the EU preliminary ruling mechanism under Art. 267 TFEU whereby the CJEU provides authoritative advisory opinions on EU law.

Numerous commentators have concluded that this decision may lead EU Member State courts to disregard CAS arbitration clauses (see for example a statement of 21 December 2023 by Antoine Duval, head of the T.C.M. Asser Institute's Sports Law Centre, who was one of the two persons at the origin of the original complaint to the European Commission on behalf of Dutch speed skaters Mark Tuitert and Niels Kerstholt). Other commentators consider that the decision may force CAS to provide arbitration located in an EU Member State (see for example the post by Niklas Luft, "Sports Arbitration and EU Competition Law: No Escape to Switzerland!" published on this blog).

There is in reality no risk of the courts of European Union Member States taking jurisdiction alongside the CAS to determine disputes subjected under the ISU's regulation to CAS arbitration. Secondly, it would also appear open to come to an arrangement with the European Commission

which has no or minimal effect on the CAS arbitration clause. Lastly, the effect of this decision on international arbitration beyond its specific facts will be extremely limited.

No Risk of Parallel Jurisdiction of EU Member State Courts

An EU Member State's courts taking such parallel jurisdiction would be a frontal violation of Art. II(3) of the New York Convention ("NYC"). It is unarguable that an arbitration agreement "null and void, inoperative or incapable of being performed" if seated in Lausanne is not so if seated in Paris, Vienna, or Bucharest. Every EU Member State is a contracting party to the NYC. In face of a CAS arbitration clause their courts "shall at the request of one of the parties refer the matter to arbitration."

If such parallel jurisdiction of an EU Member State had been a requirement – or an expectation – of the CJEU, it would have grappled in its decision with the important set of issues extending from the relation between the international obligations of EU Member States under the NYC and their (essentially) international obligations under EU law. This is far more complex than mere *Achmea*. First, there is no violation of the NYC in the *Achmea* prohibition on EU Member States exercising what are their own rights (in favour of their nationals) to agree to arbitration agreements flowing from inter-EU BITs while there would be one in failing to recognise an arbitration agreement others have entered into. Secondly, the NYC is in operation amongst scores of non-EU Members too to whom treaty obligations are owed. With them there is no reciprocal restriction redefining the scope of application of the international obligation.

Minimising the Effect of This Decision

It is essential to note that the CJEU found that the concerns about CAS arbitration are simply *accessory* to a principal violation of EU competition law identified by the CJEU under the current ISU Eligibility Rules. This principal violation is that even after iterated amendments of its Eligibility Rules the ISU has gatekeeper power (vis-à-vis other market participants including horizontal ones) to determine who runs sporting events for ice skating. Therefore it must use that power in accordance with substantive criteria which are transparent, clear, and precise, and published in readily accessible form (para. 131), and applied in a non-discriminatory fashion, and sanctions must be objective and proportionate (para. 133).

Once the obvious competition violation in the Eligibility Rules is removed, there is nothing for CAS arbitration in Lausanne to be accessory to. One can therefore conclude that there is no need to change the CAS arbitration agreement.

But, somewhat incongruously, at para. 229 of its judgment, the CJEU, upon the most cursory of reasoning, appears to approve "the Commission's findings relating to the need for the corrective measures imposed by that institution with regard to the arbitration rules."

The Commission says in paragraph 339 of its decision that if the ISU wants to retain its pre-authorisation system, it "would appear" that it will need to change its "Appeals Arbitration rules", by (para. 342) providing for "effective review of decisions regarding the ineligibility of skaters and for the authorisation of speed skating events."

Yet there is ambiguity in whether in these particular statements the Commission and the CJEU are actually requiring full EU competition law compliance review, which effectively means arbitration or court proceedings within the EU.

The ambiguity stems from the fact that the Commission's decision contains an entirely separate review requirement, which is independent review of the discretionary decisions of the ISU as a *quasi-regulator*, inasmuch as it wields discretionary powers, analogous to those contemplated under Art. 106 TFEU, as a gatekeeper to a market it itself is active on. This is unmistakably seen in para. 173 of the Commission decision, exclusively supported with a reference to para. 109 of the opinion of Advocate General Kokott in the MOTOE case. This is a separation of powers concern, not directly a competition law concern.

In negotiating with the Commission the ISU should be anxious only to satisfy the former, not the latter.

Additionally, although the EU is not a signatory of the NYC, EU Member States, all of whom are, cannot evade their liability under the NYC by delegating powers to the EU. For the purposes of the NYC, the EU's actions are attributable to the EU Member States. Although Art. II(3) of the NYC is addressed to signatory state courts, at least on its face Art. II(1) of the NYC imposes an obligation on the entire state to recognize qualifying arbitration agreements.

By consequence, even if, which may be doubted, the notion of "court" in Art. II(3) of the NYC does not apply to the Commission, there remains an obligation to recognize arbitration agreements. It is a violation of this obligation for the Commission to impose daily penalties and fines on the ISU to force it to change its arbitration agreement.

Additionally, it would be a rather unseemly affront to comity for the EU to be so crassly preferring its home fora, within the EU Member States, above others.

As the Commission acknowledges at para. 339 of its decision, "[a]s there is more than one way of bringing that infringement effectively to an end in conformity with the Treaty, it is for the ISU to choose between these various ways."

To avoid a violation of the NYC and offending against international comity, this ambiguity in the CJEU's and the Commission's requirements should be resolved in favour of the one minimally impairing the arbitration agreement, that is, addressing only the separation of powers concern.

Finally, there are ways of increasing the effectiveness of the review of ISU decisions as far as compliance with EU competition law is concerned which interfere less with the ISU's chosen arbitration clause, and such a fundamental aspect as its uniform seat. This is a requirement of proportionality.

First, a particular concern of the CJEU was that skaters' rights under EU competition law were not protected inasmuch as there was no ability to seek provisional measures from EU Member State courts to oppose an ineligibility decision. The availability of damages years down the line was not sufficient to repair ineligibility during their brief careers. Therefore, a limited and it is suggested sufficient adjustment to the CAS rules is to remove the prohibition in R 37 that, "the parties expressly waive their rights to request any such measures from state authorities or tribunals." Nothing in Swiss law or the law of most other major legal systems prevents parties to an arbitration clause from seeking provisional measures from courts.

But in attending to the concerns of the CJEU the focus should be on improving the application of the law by the arbitrators. It is recalled that Swiss arbitration law requires arbitrators to apply EU competition law if it is invoked by a party (ATF 111 II 193, consid. 5c).

International arbitration, including CAS arbitration, can indeed do better in how it treats the application of public interest norms (such as competition law). It can do so by ensuring that the applicable law provisions in arbitration rules lay down a clear, imperative and appropriate requirement on arbitrators to apply public interest norms.

This Decision Does Not Apply to Arbitration More Broadly

The special concerns of the CJEU in this case were that i) CAS arbitration for skaters is imposed as a condition of participation in the sport as organized by the ISU, and also, as seen in the preceding section, ii) the insufficiency of arbitral remedies. The first does not apply to commercial and investment arbitration. The second only applies to ineligibility decisions in sports arbitration. This decision must therefore be confined to these particular facts.

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