COMPLAINTS (SPORT): THE IOC CASE

Subject: Complaints

Industry: Sport; swimming

Parties: The International Olympic Committee
The Fédération Internationale de Natation Amateur (FINA)

Source: Commission Statement IP/02/1211, dated 9 August 2002

(Note. As the Commissioner for Competition fairly says, it was understandable that the complainants would do whatever they could to contest the ban, which had been imposed under the IOC and FINA anti-doping rules. But they failed to show that there had been a restrictive agreement or an abuse of a dominant position. Even if they had been able to show some form of discriminatory treatment, their case might have stood a chance of success: the IOC is fair game for charges of discrimination.)

The Commission has decided that the complaint brought by two swimmers banned for doping is unfounded and that the anti-doping rules of the International Olympic Committee (IOC) and the Fédération Internationale de Natation Amateur (FINA) and the way in which they are applied do not restrict competition. Mario Monti, the Competition Commissioner, said, "Today's decision shows that rules drawn up by sporting organisations to ensure in a proportionate manner the integrity of sporting events by providing for effective control of doping fall outside the scope of Community competition rules."

The two swimmers who brought the complaint had come first and second in the Marathon Swimming World Cup at Salvador de Bahia, Brazil, on 31 January 1999. They tested positive at the event. Analyses revealed that their bodies contained higher-than-permitted levels of nandrolone, norandrosterone and norethiocholanolone metabolites.

On 8 August 1999 the FINA doping panel banned them for four years for a first-time contravention of the doping rules. An appeal was lodged against the decision at the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland), where it was dismissed in a ruling on 29 February 2000. The CAS subsequently amended the decision on 23 May 2001, reducing the ban to two years. One of the swimmers is a member of the Spanish Swimming Federation, which is a member of FINA. The other is a member of the Slovenian Swimming Federation, which is also a member of FINA, and he was able to exercise the rights and freedoms conferred by the Association Agreement between the European Union and Slovenia.

The swimmers believe that the rules adopted by the IOC and FINA regarding the definition of doping, the threshold for defining the presence of a banned substance

in the body as doping and recourse to the CAS restrict competition within the meaning of Articles 81 and 82 of the EC Treaty and unjustifiably restrict the freedom of swimmers to provide services under Article 49 of the Treaty.

Mr Monti said, "it was understandable that the complainants would do whatever they could to contest the ban, which had been imposed under the IOC and FINA anti-doping rules. But this does not justify the intervention of the Commission, which takes the view that it is not its job to take the place of sporting bodies when it comes to choosing the approach they feel is best suited to combating doping."

The Commission noted that the complaint did not contain sufficient details suggesting the existence of a restrictive agreement between the IOC and third parties or of an abuse of a dominant position on the part of the IOC. Similarly, the complaint did not contain details that could lead to the conclusion that a Member State or associated State had infringed Article 49 of the EC Treaty. (Article 49 governs the freedom to provide services.)

Even if the contested anti-doping rules derive from a restrictive agreement, they are not intended to restrict competition between economic operators but to combat doping. The idea of fixing a threshold to take account of the possible endogenous production of banned substances benefits athletes. The penalty for doping - a ban - has an impact on an athlete's freedom of action. However, a restriction on freedom of action is not automatically a restriction on competition within the meaning of Article 81 since the resulting restrictive effects may be inherent in the pursuit of legitimate objectives that are recognised as positive in a particular context.

The Commission therefore believes that the anti-doping rules in question are closely linked to the smooth functioning of competition in sport, that they are necessary for the fight against doping to be effective and that their restrictive effects do not go beyond what is necessary to achieve this objective. Accordingly, they are not caught by the prohibition under Articles 81 and 82 of the EC Treaty. The complainants have two months in which to challenge the Commission's analysis before the European Court in Luxembourg. ■

A Glossary of Terms used in Competition Policy

Two new publications by the Commission are designed to help consumers, small businesses and other non-specialists understand EU jargon. Not many Danish consumers know what a Carlsberg Notice is, despite it bearing the name of the famous brewer. The Glossary helpfully reminds us that it is simply a summary of an agreement that the Commission publishes in the European Community's Official Journal to warn companies and consumer associations that a deal has been filed for regulatory clearance, giving them the opportunity to voice their concerns. The first such Notice was published on a joint venture in 1992 between Carlsberg and tea company Tetley, hence its name. The other publication explains in layman's terms the European competition rules on distribution and supply agreements, otherwise referred to as vertical restraints.