Bundeskartellamt

2nd Decision Division

B 2 – 26/17

Decision pursuant to Section 32b GWB
Public version

Decision

In the administrative proceeding

1. Deutscher Olympischer Sportbund
   (DOSB) e.V.
   Otto-Fleck-Schneise 12
   60528 Frankfurt a.M.

   - Party under 1. –
   Authorised representative:
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   Hugenottenallee 171a
   63263 Neu-Isenburg

2. International Olympic Committee
   Chateau de Vidy
   1007 Lausanne
   Switzerland

   - Party under 2. –
   Authorised representative:
   Cleary Gottlieb Steen & Hamilton LLP
   RAin Dr. Romina Polley
   RA Dr. Julian Alexander Sanner
   Theodor-Heuss-Ring 9
   50668 Cologne

3. Athleten Deutschland e.V.
   c/o Olympiastützpunkt Rheinland
   Guts-Muths-Weg 1
   50933 Cologne

   – Joined party to 1. –
   Authorised representative:
   Nagel Kauerhof Rechtsanwälte
   RA Dr. Sven Nagel
   Waldstraße 84
   04105 Leipzig

4. Bundesverband der Deutschen Sportartikelindustrie e.V.
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   53113 Bonn

   – Joined party to 2. –
   Authorised representative:
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   RA Eckart Wagner
   Holzdamm 18
   20099 Hamburg

5. Herr Robert Harting
   […]

   – Joined party to 3. –
   Authorised representative:
   RA Mark-E. Orth
   Brienner Straße 11
   80333 München

6. Frau Karla Borger

   – Joined party to 4. –

Authorised representative:
RA Mark-E. Orth
Brienner Straße 11
80333 Munich

for suspected violation of Art. 102 TFEU, Section 19 GWB and Art. 101 TFEU, Section 1 GWB, the 2nd Decision Division of the Bundeskartellamt has decided on 25 February 2019:

1. The commitments offered by the party under 1 by message of 21 February 2019 and the party under 2 by message of 19 February 2019 shall be binding as of 26 February 2019.

2. The proceedings against the parties under 1 and 2 are closed pursuant to Section 32b(1) sentence 2 GWB.

3. This decision shall cease to be in force upon expiry of the third day after the closing ceremony of the Olympic winter games 2026. Until then, the decision can only be repealed or adjusted under the conditions specified in Section 32b(2) GWB.

4. The fee for the proceedings including the decision shall amount to

€ […]

(in words: […]**euros)**

and is imposed on the parties concerned 1 to 2 as joint debtors.

Reasons

A. Statement of facts

(1) The parties under 1 and 2 are part of the Olympic Movement. The party under 2 (hereinafter "IOC") is a non-governmental organisation headquartered in Lausanne (Switzerland) which was founded in 1894 and organised as a non-profit association registered under Swiss law. Its members are exclusively natural persons. The IOC leads the so-called Olympic Movement. The Olympic Movement is based on the Olympic Charter ("OC"), a code of fundamental principles of Olympism on the one hand, and of rules governing the actions and operation of the Olympic Movement and defining the conditions for celebrating the Olympic Games on the other hand. Pursuant to rule 1 no.2 OC, the three main constituents of the Olympic Movement are, besides the IOC, in particular the International Sports Federations ("IFs") and the National Olympic Committees ("NOCs"). In addition to its three main constituents, the Olympic Movement also encompasses the Organising Committees for the Olympic Games (OCOGs), the national associations, clubs and persons belonging to the IFs and NOCs, particularly the athletes (rule 1(3) OC). Any person or organisation belonging to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.

(2) The party under 1 (hereinafter "DOSB") is a registered non-profit association headquartered in Frankfurt am Main, Germany. It is an umbrella organisation of the German sports associations, which was created in May 2006 when the Deutscher Sportbund and the German National Olympic Committee merged. The aim of the merger was to create a more uniform representation of sports and to improve the promotion of the interests of its member associations and confederations. The DOSB is also the German NOC.

(3) In rule 40, bye-law no. 3 (hereinafter "rule 40, bye-law 3 OC"), the Olympic Charter stipulates as follows:

> "Except as permitted by the IOC Executive Board, no competitor, team official or other team personnel 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."

This rule applies during the so-called “frozen period” (starting nine days before the opening of the Olympic Games and continuing until three days after the closing ceremony). It comprises all advertising and social media activities of the athletes and other participants in the Olympic Games and their sponsors.

(4) During the 2016 Olympic Games in Rio de Janeiro the possibility to grant an exceptional permission for such advertising activities during the frozen period was provided for the first time. Pursuant to the relevant rule the authorisation of national advertising activities limited to the territory of a single NOC principally fall within the competence of this NOC, while international advertising activities relating to the territories of more than one NOC are principally subject to authorisation by the IOC. However, a participant in the Olympic Games (hereinafter also referred to as “athlete”) may have to request authorisation from his “home NOC”, i.e. the NOC that nominated him, for advertising activities to be carried out either in one or several countries other than the one whose Olympic team s/he belongs to. The possibility of exceptional permissions was limited to generic advertising activities. These were advertising activities which did not create a link to the Olympic Games within the meaning of the relevant guidelines of the DOSB or the IOC for the Olympic Games 2016. However, the granting of a permission was subject to restrictions in either case.

(5) Applications to the IOC had to be based primarily on the “Rio 2016 Olympic Games – Rule 40 Guidelines“ (“IOC-Guidelines 2016“) and the “IOC Social and Digital Media Guidelines for persons accredited to the Games of the XXXI Olympiad Rio 2016“ (“Social and Digital Media Guidelines 2016“). Pursuant to F. (ii) of the IOC-Guidelines 2016, the NOCs shall monitor the Olympic participants’ compliance with these guidelines. Pursuant to E. of the IOC-Guidelines 2016, however, the NOCs could, subject to applicable laws and regulations, also adopt rules to (further) restrict or prohibit individual advertising practices by participants. Pursuant to this provision individual NOCs thus had the right to set their own rules and deadlines for, or to prohibit altogether, international advertising campaigns of Olympic athletes and their individual sponsors for their territory (hereinafter referred to as “opt-out” option). If such a restriction or prohibition was to be applied during the 2016 Olympic Games, however, the NOC was supposed to inform the IOC no later than by 30 November 2015. On the basis of this opt-out option some NOCs have put in place either stricter rules or full prohibitions of such activities for their territories.

(6) With regard to applications for exceptional permissions to be addressed to the DOSB, the DOSB published guidelines for the German Olympic Team for the 2016 Olympic Games on rule 40, bye-law 3 (“DOSB Guidelines 2016”, available in German only). Moreover, the so-

called rules of the game for handling the media, advertising and social media during the 2016 Olympic Games in Rio ("Games Rules 2016") which were also published by the DOSB contained regulations regarding advertising activities of members of the German olympic team (hereinafter also referred to as "German athletes") during the frozen period, in particular as far as their social media accounts were concerned. In a letter dated 2 December 2015 the DOSB informed the IOC that it fully agreed with the latter's recommendations regarding the application and principles of rule 40 for the 2016 Olympic Games in Rio, particularly with regard to the interpretation of so-called generic advertising.

(7) Pursuant to the 2016 DOSB guidelines, when assessing cases of advertising in the context of a particular German athlete it had to be differentiated whether the sponsor of the athlete was also a sponsor of the German Olympic team ("DOSB sponsor") or a sponsor of the Olympic Games as a whole ("Olympic sponsor") or whether this was not the case ("non-Olympic sponsor").

(8) In case of a sponsoring by a non-Olympic sponsor only advertising activities which had started at least three months prior to the Olympic Games had a chance of being approved. What is more, the advertising activities were not allowed to refer to the Olympic Games or the Olympic Movement by using corresponding wordings, symbols, or pictures. In this respect not only the use of terms like "Olympia" (Olympics), "olympisch" (Olympic), or "Olympionike" (Olympian) was prohibited, but also the use of many "Olympics-related" terms, the list of which was not conclusive, but included e.g. "Medaille" (medal), "Gold" (gold), "Silber" (silver), "Bronze" (bronze), "Sommer" (summer), "Spiele" (games) and "Podest" (podium). The list of terminology was complemented by a catalogue of prohibited Olympic terms in the 2016 IOC guidelines, which included, among other terms, the English terms "effort", "performance", "challenge", "sponsors" and "victory". In addition, neither the Olympic venue ("Rio", "Rio de Janeiro") nor the year in which the Olympic Games took place ("2016") was authorised for use, neither separately nor combined ("Rio 2016"). As the respective combinations and years for previous Olympic Games the IOC had both the combination and the year protected as trademarks by the European Union Intellectual Property Office (EUIPO), in this case by applications of 6 July 2017 ("Rio 2016") and 12 August 2003 ("2016"), respectively. The corresponding EU trademarks were registered on 30 March 2010 ("Rio 2016") and 12 December 2005 ("2016"), respectively, for all 45 goods and services classes of the Nice Classification.

(9) If, however, the sponsor was either a DOSB sponsor or an Olympic sponsor, advertising campaigns which were to be initiated shortly before or during the frozen period could also

be authorised. Further requirements regarding admissible advertising with a member of the German Olympic team by DOSB sponsors were specified in a so-called partner contract concluded between Deutsche Sport-Marketing GmbH ("DSM"), a subsidiary of the DOSB, and the respective sponsor if the sponsor was a DOSB sponsor, and in the IOC's Olympic Brand and Activation Guidelines for TOP partners if the sponsor was a so-called TOP partner.

(10) For all sponsors advertising activities with German athletes during the frozen period and limited to Germany had to be notified (completely) to the DOSB by 6 April 2016 in order to be admissible, i.e. the deadline for notification of advertising activities was four months prior to the start of the Games (5 August 2016).

(11) German athletes wishing to participate in the Olympic Games have to conclude an athlete agreement with the DOSB in which they commit to comply with the World Anti-Doping Code, the nomination criteria and the Olympic Charter and undertake to comply in particular with rule 40, bye-law 3 OC. Any culpable breach of this agreement will give the DOSB, besides further damages claims, the right to impose sanctions, which may include excluding the athlete from the Olympic team, demanding a reimbursement of delegation costs and on-charging contractual penalties from equipment suppliers of the German Olympic team. Athletes also sign a participant declaration with the IOC in which they undertake to comply with the Olympic Charter, so the IOC is generally entitled to impose sanctions in the event of violations of rule 40, bye-law 3 OC. Pursuant to rule 59 (2.1) OC sanctions against individual competitors or teams in such cases can include temporary or permanent ineligibility or exclusion from the Olympic Games as well as disqualification or withdrawal of accreditation. Pursuant to rule 46, bye-law no. 1.6 OC also each IF has to ensure that all competitors comply with the provisions of rule 40, bye-law 3 OC.

(12) Rule 61 bye-law no. 2 OC stipulates that any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration. CAS decisions are normally final. However, they can be appealed to the Federal Supreme Court of Switzerland for various reasons which are stated in conclusion. These include lack of jurisdiction, violations of elementary procedural principles or public order.[1]

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[1] Cf. Art. 190, 191 of Switzerland's Federal Code on Private International Law (CPIL), available (in German, French or Italian) at https://www.admin.ch/opc/de/classified-compilation/19870312/index.html.

(13) Concerning the rights in the Olympic Games rule 7, bye-law no. 1 of the OC stipulates that the IOC is the "leader of the Olympic Movement" and thus responsible for providing material support in the efforts to organise and disseminate the Olympic Games. Furthermore, pursuant to rule 7 the IOC is the owner of all rights in and to the Olympic Games and the so-called Olympic properties which have the potential to generate revenues for such purposes. Pursuant to rule 7, bye-law no. 4 OC, "Olympic properties" include the Olympic symbol, flag, motto, identifications, designations, emblems and the torch.[2]

(14) The IOC has also registered various EU trademarks for all goods and services classes under the Nice Classification, among them the years of the Games (e.g. "2016", "2018" and "2020") and the names of the corresponding venues combined with the year (e.g. "Rio 2016", "PyeongChang 2018" and "Tokyo 2020"). It markets the Olympic Games under these combined designations. The joined party under 2. (hereinafter referred to as "BSI") requested the cancellation of the trademarks "PyeongChang 2018" and "2018" as well as "Tokyo 2020" and "2020" at EUIPO on 12 January 2018 and provided a detailed justification of its request. The IOC withdrew the "PyeongChang 2018" trademark on 12 June 2018 with effects for the future (ex nunc) as a consequence. Nevertheless, the cancellation proceedings are ongoing as EUIPO acknowledged that the applicant has a legitimate interest to have the non-protectability of such trademarks established with ex tunc effect too. On 24 January 2019 EUIPO established the admissibility of the request for cancellation of the "Tokyo 2020" trademark. Following the IOC's statement of 13 June 2018 and the BSI's response of 14 September 2018, the deadline for a renewed statement by the IOC has been extended until 18 March 2019.

(15) Pursuant to the rules 7 to 14, bye-law 1.2 OC, each NOC is responsible to the IOC for taking steps to prohibit any use of any olympic properties which would be contrary to such rules (or their bye-laws) of the Olympic Charter. They can use certain Olympic properties as authorised by the IOC themselves (rule 27 no.7.4 OC). Further, a NOC can create and use in its country an Olympic emblem subject to the approval of the IOC (rules 7 to 14, bye-law 4 OC). To finance the tasks the DOSB is responsible for, namely to represent Germany at the Olympic Games (rule 27 no. 3 OC) and send a team to the Olympic Games (rule 27, no. 7.2 OC), it has marketed the German olympic team. For this purpose, the DOSB had various

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[2] All Olympic properties can be exploited either by the IOC or by a person authorised by the IOC in the country of a NOC (bye-law to rules 7 to 14, no. 2.2 OC). For all licensing agreements, the NOC shall receive half of all net income from such exploitation, after deduction of all taxes and out-of-pocket costs relating thereto (rules 7 to 14, bye-law 2.2.2. OC).

trademarks registered, which are protected mostly in Germany, some also EU-wide. Since the beginning of 2017, the German Olympic team has been marketed under the name “Team Deutschland” which is not protected as a registered trademark.

(16) When it comes to splitting potential surpluses from the marketing of the Olympic Games, one has to differentiate between surpluses generated by the OC with the organisation of the Games on the one hand and, on the other hand, surpluses generated by the IOC with so-called Olympic-related programmes, in particular the TOP sponsoring programme for marketing broadcasting rights, and the official equipment and licensing programme. Pursuant to the so-called *Host City Contract*, any surpluses generated by the OC are split between the host NOC (20%), the OC (60%) for use to the general benefit of sports in the host country, and the IOC (20%). According to its own statements, the IOC regularly distributes more than 90% of its revenues to organisations pertaining to the Olympic Movement in fulfilment of the principle of Olympic Solidarity. The IOC distributes its revenue in particular to (1.) the OCs to support the hosts of Olympic Games, (2.) all 206 NOCs worldwide for training and developing new Olympic talents, (3.) the “Olympic Solidarity” programme for developing athletes, which is managed by an autonomous commission, (4.) the IFs to support athletic development at all levels and (5.) recognised organisations and associations like the World Anti-Doping Agency, the Court of Arbitration for Sport and the International Paralympic Committee. The DOSB says that it normally does not have any surplus to distribute after the end of the Olympic Games as it has to pay a share of the delegation costs which is not borne by public financing sources. Its profit and loss account for 2016 does not show a surplus.

(17) During the candidacy phase the IOC enquires about the current national legal framework in candidate countries for hosting the Games as far as the protection of Olympic Properties, especially the Olympic symbols and designations, is concerned in order to find out if further protection measures need to be implemented. Normally, the IOC requires host countries to fully protect the Olympic symbols and designations.[3] For this reason Germany introduced the “Olympiaschutzgesetz” (Act on the Protection of the Olympic Emblem and the Olympic

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[3] Cf. research services of the German Bundestag and the German Olympic applications – Historic overview and current issues (“Historischer Überblick und aktuelle Problemlagen”), WD 10 – 3000 – 058/14, p. 10; IOC, Brand Protection – Olympic Marketing Ambush Protection and Clean Venue Guidelines, p. 16 (Legislation), 20 f., available at: http://www.gamesmonitor.org.uk/files/Technical_Manual_on_Brand_Protection.pdf.

Names, "OlympSchG")[4] in 2004. It protects the Olympic emblem (five intertwined rings) along with the designations "Olympiad", "Olympia", "Olympic", both on their own and in combinations, and the corresponding translations of these words or groups of words in another language (Section 1 OlympSchG). The involved parties are the owners of the property rights. The DOSB is the competent institution for monitoring the use of Olympic designations and symbols in Germany.

(18) Following the BSI's complaint against rule 40, bye-law 3 OC and critical press reports on its implementation during the 2016 Olympic Games, the Bundeskartellamt has initiated an administrative proceeding against the parties involved in its letter dated 3 April 2017. The proceeding is based on the suspicion that the parties concerned could violate Section 19 GWB, Article 102 TFEU and Section 1 GWB, Art. 101 TFEU by imposing excessive advertising restrictions on athletes participating in the Olympic Games during the frozen period on the basis of rule 40, bye-law 3. Upon initiation of the proceeding, the parties concerned were asked to reply to a catalogue of questions in order to further clarify the matter.

(19) The parties concerned replied to the questions in their letters dated 6 June 2017 and commented on the charge. The Bundeskartellamt sent out further questions in a letter dated 14 July 2017, which the IOC replied to by letter of 4 August 2017 and the DOSB by letter of 14 August 2017. A first conversation between the Bundeskartellamt and the parties concerned took place on 4 September 2017, during which changes to the design of the advertising ban pursuant to rule 40, bye-law 3 OC were already discussed.

(20) The joined party under 1. – an association for the promotion of sports, in particular as far as the promotion of athlete's codetermination is concerned (hereinafter: "Athleten Deutschland e.V.") – and the joined party under 2. , the BSI - an association of German sports goods manufacturers, sports goods wholesalers and importers of sports goods – were joined as parties to the proceedings each as per decision of 5 December 2017. Furthermore, the joined party under 3 – a German discus thrower (hereinafter: "Robert Harting") – was joined as a party to the proceedings as per decision of 19 December 2017 and the joined party under 4 – a German beach volleyball player (hereinafter: "Karla Borger") - as per decision of 20 February 2018.

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[4] Act on the Protection of the Olympic Emblem and the Olympic Names (OlympSchG) of 31 March 2004 (Federal Law Gazette I, p. 479).

(21) Based on the negotiations between the Bundeskartellamt and the parties concerned regarding the antitrust requirements on the wording and the application of the guidelines on rule 40, bye-law 3 OC the DOSB revised the “DOSB Guidelines 2016” and a modified version of the document (“modified DOSB Guidelines”) was established. Between December 2017 and February 2018 the modified regulations underwent a so-called market test, which involved the questioning of approx. 500 German athletes and approx. 200 (potential) sponsors in addition to the parties involved in the proceedings with regard to their assessment of competition aspects. Between January and April 2018 the Bundeskartellamt held several talks on the modified DOSB Guidelines, both with the parties involved and with various market participants.

(22) By letter of 16 February 2018, the BSI commented on the modified DOSB Guidelines and rule 40, bye-law 3 OC. Athleten Deutschland e.V. did the same in its letter of 1 March 2018 and Robert Harting commented on said guidelines on 12 March 2018.

(23) By letters of 15 March 2018, the Bundeskartellamt granted access to the file to Athleten Deutschland e.V., BSI and Robert Harting following their respective applications of 21 December. They were all given an opportunity to comment by 12 April 2018. Robert Harting commented in his letter of 12 March 2018 and the BSI commented by letter of 9 July 2018.

(24) Following repeated extensions of the time limit, most recently until 23 May 2018, Athleten Deutschland e.V. objected to a violation of the right to be heard, in particular due to incomplete access to the file, by letter of 23 May 2018. By letter of 29 May 2018 the Bundeskartellamt rejected the objection, i.a. referring to the questioning as part of the market test, the subsequent talks and the fact that access to the file in an ongoing proceeding has to be granted by a certain deadline. Athleten Deutschland e.V. then sent a letter dated 30 May 2018 to the Bundeskartellamt which contained a copy of an open letter to the President of the IOC, Thomas Bach. The open letter refers to the proceedings at hand and demands a share of the IOC’s marketing revenue for the athletes.

(25) An analysis of the market test and talks with the parties and other market players has revealed that there was further need for modification of the regulations contained in the modified version of the DOSB Guidelines. For this reason, the Bundeskartellamt initiated negotiations with the parties again in April 2018. In the course of these proceedings, the German Olympic associations were formally requested on 25 July 2018 to reply to questions regarding their athletes’ opportunities for using pictures taken of them during competitions organised by their respective association for advertising activities with their own sponsors. The

associations were also formally asked to disclose the agreements they have with their athletes. Furthermore, an informal request was sent to some of the press agencies accredited for the Olympic Games in November 2018, asking them whether and to what extent pictures showing athletes in competitions that do not contain any Olympic symbols, logos or designations can be used by the athletes for advertising purposes. These further negotiations have again resulted in considerable modifications to clearly relax the ban on advertising pursuant to rule 40, bye-law 3 OC to the benefit of the members of the German Olympic team. Based on the regulations agreed upon during the negotiations, the Bundeskartellamt has put together a new guideline ("current DOSB Guidelines"), which will be mandatory until the conclusion of the 2026 Olympic Games.

(26) By letter of 20 June 2018 the IOC commented on the Bundeskartellamt's preliminary assessment, on the statements of the parties in the context of the market test and on the evaluation of said test. Irrespective of the commitment the IOC offered, the organisation continues to consider the former application of rule 40, bye-law 3 OC neither an abuse of a dominant position nor a violation of the ban on cartels. The IOC holds that the parties did not commit an abuse of a dominant position because such a position did not exist in the first place as the parties did not have a dominant position on the relevant market for organising and marketing major international sports events.

(27) The IOC also holds that the restrictions to the athletes' individual marketing opportunities resulting from rule 40, bye-law 3 OC are excluded from the application of Article 102 TFEU, Sections 19 and 20 GWB and Article 101 TFEU and Section 1 GWB pursuant to the ECJ's *Meca-Medina* decision as they serve the pursuit of legitimate objectives and are thus proportionate. Said objectives were summarised as follows[5]:

- Preserving the financial stability and sustainability of the Olympic Movement and the Olympic Games: The IOC holds that this is not an economic objective as the IOC is a non-profit organisation and the generation and maximisation of revenues from marketing the Olympic Games is solely intended to ensure that the Olympic Games

[5] As the DOSB agrees with these stipulations in its letter of 22 June 2018, the Bundeskartellamt assumes that they can be deemed a summarising formulation of the objectives which are to be considered from the parties' point of view. In a previous statement dated 6 June 2017 the DOSB said it aimed at ensuring financial stability to fulfil the objectives defined in its statutes and at protecting the athletes from short-term exploitation. In its statement of 6 June 2017 the IOC referred to the idea of amateur sport, which was to be protected against excessive commercialisation, and to financial stability as a cornerstone of the Olympic solidarity model. It also stated that "ambush marketing" had to be prevented to protect the value of Olympic property rights by awarding exclusive marketing rights to Olympic sponsors.

can take place on a regular basis in the first place and that all athletes worldwide who qualify for the Games can be supported so they can actually participate in the Games. In view of the very different financial situations of the individual NOCs, equal opportunities can only be achieved by redistributing the Olympic marketing revenue with the ends to achieve a *level playing field.*

- Preservation of the value of the Olympic brand to finance the Olympic solidarity model: In order to finance the Olympic solidarity model, the IOC holds that the Olympic sponsors have to be given exclusive rights to ensure they have privileged marketing opportunities in the context of the Olympic Games. According to the IOC, free-riding by way of ambush marketing – i.e. unauthorised use of the media attention generated by major sports events like the Olympic Games – threatens the financing opportunities and hence ultimately the existence of the Olympic Games. (Potential) Olympic sponsors might reduce or discontinue their support if there is no more exclusivity and the Olympic Games can be used for advertising purposes free of charge.

- Preventing the excessive commercialisation of the Olympic Games to ensure the focus is on the athletes and their sports competitions.

(28) Moreover, the IOC takes the view that an agreement to use arbitration courts is no abuse of a dominant position because it is the preferred option in sports in view of the special expertise of arbitrators and speedy procedures. It further claims that it is not true that a CAS procedure does not allow for an examination under European competition law.

(29) The DOSB follows the IOC's legal assessment in its statement dated 22 June 2018 on the Bundeskartellamt's preliminary legal assessment and the statements of the joined parties in connection with the market test.

(30) In accordance with their applications the joined parties were granted further access to the file by letter of 10 January 2019. The file also included the 11 December 2018 version of the DOSB Guidelines. They were informed that this version was, from the Bundeskartellamt's point of view, the final result of the negotiations, but that the two parties concerned had not yet made the relevant binding commitments. The joined parties were asked in view of their right to be heard to provide their assessment of this version of the DOSB Guidelines with particular regard to competitive aspects within the deadline specified for further access to the file.

(31) On 13 February 2019, the IOC and the DOSB amended their comments on the Bundeskartellamt's preliminary legal assessment as follows:

- They say the limitation of possible authorisations to those concerning ongoing activities which was connected with the period of three months has served as a "preventative measure" for the DOSB to learn, already prior to the Olympic Games, what would happen when on the German market. From the parties' point of view, the deadlines for applications and the market presence are to be assessed as an obstacle only in exceptional cases as advertising campaigns were normally planned very much in advance. In addition, delayed applications or market presence have not necessarily led to a rejection of an exceptional authorisation pursuant to rule 40, bye-law no. 3 OC. Rather, there had normally been direct talks with athletes and their sponsors to find solutions.

- Neither the IOC nor the DOSB, they say, have ever imposed financial or sports-related sanctions on German athletes for non-compliance with rule 40, bye-law 3 OC or the requirements of the DOSB Guidelines 2016.

- IOC and DOSB have a wider product market definition than the Bundeskartellamt. They claim that both athletes, in respect of which the markets must furthermore be defined according to their specific type of sport, and (potential) sponsors have sufficient sporting and marketing alternatives to the Olympic Games, e.g. the FIFA World Cup, the UEFA Champions League, the Formula 1, the ATP World Tour, the Grand Slam, the Tour de France, the Four Hills Tournament, Ironman, or the Volvo Oceans Race, attributed with an equivalent position. Finally, they claim that there are sufficient opportunities for supply-side substitution, as there are actors other than the Olympic Movement who can organise and market major sports events across different sports, as is shown by the Commonwealth Games, the World Games or the X-Games.

(32) In addition, the DOSB says that in its view the agreements with athletes neither transfer marketing rights of individual athletes nor limit their advertising opportunities during the Olympic Games. By signing the athlete agreement, an athlete merely consents to being "transported" by the DOSB as a member of Team Deutschland, to be available for a very limited number of appointments with and without partners of Team Deutschland and to comply with the DOSB's dress code. In addition, the DOSB says it offers its athletes a number

of opportunities to become a testimonial for the partners of Team Deutschland to tap further sources of income.

(33) Robert Harting and Karla Borger commented on the version dated 11 December 2018 of the DOSB Guidelines in a letter dated 13 February 2019 sent by their lawyers. Among other things they say that German athletes' marketing opportunities can be restricted by a so-called "opt-out" requirement if a marketing activity falling within the scope of application of the guidelines also has effects in other German-speaking countries where a corresponding regulation applied.

(34) Athleten Deutschland e.V. commented on the further access to the file and to the DOSB Guidelines of 11 December 2018 in its letter of 15 February 2019. The association welcomes the modifications of the DOSB Guidelines. Athleten Deutschland e.V. holds, however, that the interests of athletes when it comes to marketing their personal rights are not sufficiently considered as they do not receive a share of the IOC's marketing revenue under that guideline.

(35) The BSI commented on the further access to the file and to the DOSB Guidelines of 11 December 2018 in its letter of 15 February 2019. The association holds that the DOSB Guidelines, which are to be included in a commitment, are not sufficient to eliminate all antitrust concerns. Furthermore, it says that the guideline has a prohibitive effect due to its complexity and inconsistency. For this reason the BSI holds that a prohibition decision has to be made, not least in view of the conduct displayed by the parties in the course of the proceedings. Another argument to support its claim, the association says, is that the trademark rights of DOSB and IOC recognised by the guidelines are too wide since they go far beyond the scope of their statutory trademark rights pursuant to the Act on the Protection of the Olympic Emblem and the Olympic Names, the Trade Marks Act, the Copyright Act and the Act Against Unfair Competition, which are the only other laws to be taken into account. The BSI also points out that preventing ambush marketing to ensure that the Olympic Games can take place on a regular basis is an economic objective not deemed legitimate pursuant to the European legislative and decisional practice within the meaning of the Meca-Media decision. What is more, it holds that the term "ambush marketing" is not a legal term. Finally, the BSI holds that the scope of application of the DOSB Guidelines would have to be just as wide as that of German competition law. Accordingly, it would have to comprise all restrictions of advertising activities taking effect in Germany. Contrary to the regulations of the DOSB Guidelines, the same would have to apply to advertising activities by German athletes in non-German-speaking countries.

(36) The European Commission has been informed about the proceedings and the commitment decision via the network of European competition authorities.

(37) On 21 February 2019 the DOSB sent a commitment signed by Veronika Rücker (Chairperson) and Thomas Arnold (Chief Financial Officer), which was received by the Bundeskartellamt on 22 February 2019 and reads as follows:

"1. In a commitment pursuant to Section 32b GWB, the DOSB acknowledges the DOSB's new "RULE 40 Leitfaden - Olympische Spiele" in the enclosed final version ("DOSB Guidelines") as binding for the Olympic Games 2020, 2022, 2024 and 2026. Advertising activities subject to the DOSB Guidelines can be carried out by members of Team Deutschland and their sponsors, provided that they comply with the criteria for admissibility and are not subject to the exemption clause. The DOSB will not sanction Team Deutschland members or their sponsors for developing and implementing such advertising activities. The DOSB Guidelines is the exhaustive regulation with regard to advertising by members of Team Deutschland and their sponsors during the so-called "frozen period" and includes advertising on all of the Team Deutschland members' social media accounts. For the duration of the commitment, the DOSB will not issue any deviating regulations in other contexts.

2. The commitment grants the Bundeskartellamt monitoring competencies regarding

- the number and type of Team Deutschland members' applications to the DOSB for the review of or to the IOC for the permission of advertising activities

- the DOSB's entire practice of reviewing and releasing Team Deutschland members' advertising activities, in particular if the DOSB took up and/or sanctioned these activities

- information and advice given by the DOSB to members of Team Deutschland and their sponsors both with regard to individual advertising activities during the frozen period in general and individual advertising measures.

Based on its monitoring competencies, the Bundeskartellamt can request comprehensive information and documents with regard to the aforementioned aspects, in particular individual advertising measures of members of Team Deutschland. At the latest six

months past the end of the frozen period the DOSB will provide the Bundeskartellamt with an analysis of the following points without being requested:

- the number and type of Team Deutschland members' applications to the DOSB to review or to the IOC to permit advertising activities, respectively, and

- the DOSB's practice of reviewing and releasing these applications, in particular with regard to those taken up and/or sanctioned.

The DOSB will also keep the Bundeskartellamt informed of any statements made to members of Team Deutschland in the context of the stipulations of the DOSB Guidelines (e.g. general statements with public effect).

(38) On 19 February 2019 the IOC sent a commitment that largely concurs with the DOSB's commitment, which the Bundeskartellamt received on 25 February 2019. It is signed by [...] and [...].

B. Legal assessment

(39) The commitments offered are suitable for eliminating the Bundeskartellamt's preliminary concerns with regard to the parties' objected conduct. Using its discretionary powers, the Bundeskartellamt's Decision Division therefore declares the commitment binding and closes the proceedings under reserve of the options it has concerning the parties pursuant to Section 32b(2) GWB.

(40) The Bundeskartellamt is the competent authority for the decision pursuant to Section 32b GWB as the relevant conduct has an effect within the area of application of the Act (Section 185(2) GWB) and extends beyond the territory of a *Land* (Section 48(2) GWB).

(41) According to a preliminary antitrust assessment, the parties violated Article 102 TFEU, Section 19(1) in conjunction with (2) no. 1 GWB by implementing rule 40, bye-law 3 OC with regard to members of the German Olympic team pursuant to the stipulations of the 2016 DOSB Guidelines. A violation against the ban on cartels pursuant to Article 101 TFEU, Section 1 GWB could be considered as well. However, in view of the further investigative effort that would have been required to this end, this matter did not have to be conclusively clarified.

I. Addressee of the provisions

(42) The Bundeskartellamt's preliminary assessment is that the members of the Olympic Movement have a dominant position on the market for the organisation and marketing of the Olympic Games within the meaning of Art. 102 TFEU and Sections 18 and 19 GWB, which the DOSB and the IOC as members of the Olympic Movement abused to unfairly impede German athletes and their (potential) sponsors on a sports sponsoring market.

1. Relevant market

(43) The Bundeskartellamt's current view is that the market for the organisation and marketing of the Olympic Games is the relevant product market. The organisation of the Games comprises in particular the definition of athletic, technological and organisational rules, the selection of venues and dates, the admission of athletes, and the contracting of referees and technical staff. The marketing of the Olympic Games comprises in particular ticket sales and the award of media and advertising rights. There are many elements to suggest that the organisation and marketing of the Olympic Games are complementary segments of a uniform product market rather than separate markets[6]. Both segments are closely linked as the organisation of the Olympic Games largely depends on the marketing opportunities for cost recovery. In addition, the same members of the Olympic Movement, namely the IOC, the NOCs (which includes the DOSB), the OC concerned and the IFs, are in charge of organising and marketing activities in connection with the Olympic Games. However, even if the market was more narrowly defined and separate markets were assumed to exist for the organisation of the Olympic Games on the one hand and marketing the Games on the other hand, the Olympic Movement would be dominant on both markets and hence the norm addressee in the present case.

(44) The product market is defined according to the modified concept of demand-side substitutability. According to this concept, a uniform product market is formed by products and services which are so close to one another in terms of characteristics, economic purpose and price that the consumer considers them interchangeable when it comes to meeting a specific demand. Additional aspects to be considered when defining a product market are the

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[6] Cf. market definition in international speed skating competitions: Commission Decision of 8 December 2017, Case AT.40208 – *International Skating Union's Eligibility Rules* (provisional non-confidential version), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/40208/40208_1384_5.pdf, para. 98 ff.

overall product range and the provider's flexibility in terms of substitution. The product market can then be defined more broadly and according to (groups of) products or services which meet a specified demand and for the development and manufacture or provision of which comparable skills and similar equipment can be used.

(45) According to the Bundeskartellamt's preliminary view on this basis the product market definition cannot include the organisation and marketing of all major international sports events. Rather, the current assessment is that the Olympic Games have a special significance and are probably even unique for the reasons specified in the following. Customers will see limited or no opportunities to substitute the Games with other major international sports events, and providers will see limited or no incentive to switch to sports events other than the ones they previously organised.

(46) Customers of the organisation and marketing of sports events are at first consumers wishing to watch a particular sports event, either live at the venue or via live broadcasting on TV or other media. Given that these customers are normally interested in a particular sport, they are principally unlikely to substitute a competition in their favourite sport with the corresponding competition in a different sport. This assessment could only change if the applicable rules of different sports and the environments in which they are practised were similar, for example if the sport is practised at least in part by the same athletes and under similar conditions. For this reason, the decisional practice of courts and authorities is to define the relevant product market for the organisation (and marketing) of sports events according to the type of sport.[7]

(47) However, the Olympic Games differ from other sports events including major and international competitions like the FIFA World Cup, the UEFA European Championships, the Grand Slams, the Tour de France and the Four Hills Tournament because they are not limited to one or a few similar disciplines but athletes compete against each other in a wide variety of different sports disciplines[8]. Depending on the host country's time zone, the competitions are broadcast live or recorded, and competitions taking place at the same time are

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[7] Cf. ECJ, judgment of 1 July 2008 Rs. C-49/07 – *MOTOE*, para. 33 ff. (organisation and marketing of motor cycle races); Dortmund Higher Regional Court, judgment of 14 May 2014 O 46/13, para.119 ff., available (in German) at https://www.justiz.nrw.de/nrwe/lgs/dortmund/lg_dortmund/j2014/8_O_46_13_Urteil_20140514.html (organisation and marketing of handball competitions); Munich Higher Regional Court, judgment of 15 January 2015 – U 1110/14, para. 61, available at https://openjur.de/u/756385.html (world speed skating championships).

[8] 28 Olympic sports were part of the Summer Games 2016, and 15 Olympic sports were part of the Winter Games 2018.

often alternately broadcast. Key results are also often summarised during prime time. As a consequence, sports that are not very popular in a particular country, e.g. table tennis or canoe racing in Germany, and thus either rarely broadcast on TV and other media or not at all, receive high media attention during the Olympic Games - sometimes only during the Games. A particular sport will be watched by more than just its supporters. Spectators normally preferring a different sports discipline can follow other competitions with alternating broadcasting, which may raise their interest in a sport that is less popular.

(48) Most of all, however, consumers often perceive the Olympic Games as an overall event precisely because of the wide variety of sports that are represented at the Games. An argument to support this view is the fact that the Olympic medal table is very significant. Consumers are kept informed of the number of medals obtained by athletes from their own country and their ranking compared to other countries. The media often claim that the medal table is a decisive indicator of an Olympic team's success.[9] The German government, for instance, congratulated the German Olympic team on a "great success and finishing second in the medal table".[10] Sports betting services offer their customers a chance to predict the "most successful nation" according to the medal table.[11] There are even all-time Olympic Games medal tables of the Games as a whole as well as separate ones for the summer and winter games, which have been kept since the beginning of the (modern) games. They list the medals and nations that participated and rank the countries accordingly.[12] Consumers often understand the Olympic Games as a kind of comparison of nations across all sports, although, pursuant to rule 6, number 1 OC, they are supposed to be competitions between athletes in individual or team events and not between countries. Due to this understanding, consumers often follow Olympic competitions in sports they are normally not

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9 Cf. e.g. German newspaper Die Welt, "Deutschland von Norwegen noch im Medaillenspiegel überholt", available (in German) at https://www.welt.de/newsticker/dpa_nt/infoline_nt/sport_nt/article173928974/Deutschland-von-Norwegen-noch-im-Medaillenspiegel-ueberholt.html; German newspaper Der Westen, "Der Medaillenspiegel ist nicht Olympias größtes Problem", available (in German) at https://www.derwesten.de/meinung/der-medaillenspiegel-ist-nicht-olympias-groesstes-problem-id12087476.html

10 Cf. German Federal Government, "Olympische Winterspiele 2018 – Glänzende Bilanz des deutschen Teams", available (in German) at https://www.bundesregierung.de/Content/DE/Artikel/2018/02/2018-02-09-olympische-winterspiele-pyeongchang.html

11 Cf. German sporting bets comparison "Sportwettentest, Olympia Wetten – Die besten Quoten 2018", available (in German) at https://www.sportwettentest.net/wettarten-olympia-wetten/#medaillenspiegel.

12 Cf. e.g. Wikipedia, All-time Olympic Games medal table, available at https://en.wikipedia.org/wiki/All-time_Olympic_Games_medal_table

interested in. Furthermore, for this reason there is demand for an international sports event with the participation of the largest possible number of nations.

(49) Considering that, according to the Bundeskartellamt's preliminary assessment, as far as the Olympic Games are concerned, consumers are attracted by an international sports event comprising the widest possible variety of sports disciplines rather than by the organisation and marketing of competitions in a particular discipline. This is not the case for the FIFA World Cup, the UEFA Champions League, the Grand Slams, the Tour de France or the Four Hills Tournament, which the IOC cited, so from the consumer's perspective, there is no substitutability.

(50) Media companies, in particular TV and radio stations, as well as sponsors and other advertisers are also customers of the organisation and marketing of sports events. The demand from such companies is primarily determined by a sports event's attractiveness for consumers. For sponsors and other advertisers consider this to be decisive for the number of potential addressees which could be reached by their advertisements. For media companies in turn this is relevant for the prices they can charge for advertising space during their broadcasts. Demand by media companies, sponsors and other advertisers is also determined by image of the relevant sports event and the opportunities it offers to position brands. Based on these criteria, the Olympic Games stand out in terms of significance compared to other sports events, even major and international ones.

(51) As outlined above, many consumers follow the Olympic Games in the media because of the wide variety of sports competitions. They are either originally interested in the sporting disciplines or comprehensive media reporting has drawn their attention to the sports and to their relevance for the overall result of their respective nation. Advertising placed during the Olympic Games or corresponding media broadcasts thus reaches a very large group of addressees and is very effective as a result.[13] The costs for acquiring Olympic Games broadcasting rights reflect this fact. According to press reports, Discovery paid the IOC approx. 1.3bn euros for the European broadcasting rights of four Olympic Games between 2018 and 2024. ARD and ZDF, the German public broadcasting corporations, are estimated to have paid Discovery approx. 200m euros for Germany-wide broadcasting rights, which

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[13] Karola Wille, then chairperson of ARD and manager of the leading broadcasting corporation within ARD for the Winter Games 2018 said: "Olympic Games are a special social event. We are delighted to be able to offer our users the Games via radio, TV and online broadcasting in view of the wide variety of sports which unite people all over the world and attract so many spectators." (cf. (in German): https://www.br.de/themen/sport/inhalt/olympia/ard-und-zdf-berichten-live-ueber-olympia-2018-100.html).

are restricted by certain remaining exclusivity rights for Discovery.[14] Only the FIFA World Cup is likely to receive similarly high media attention. However, this event sees considerably fewer participating nations than the Olympic Games.

(52) Brand placement opportunities for media companies, sponsors and other advertisers at the venues or in other contexts of the Olympic Games are also different from other international sports events. In rule 50 no. 1 OC the IOC stipulates the terms and conditions under which advertising can be authorised. Only certain Olympic sponsors, the so-called TOP partners, are authorised to advertise around the venues and thus in geographic proximity to the Olympic Games. It is true that during other major sports events, e.g. the FIFA World Cup, advertising by non-sponsors near the stadia was also to be ruled out by defining an exclusive advertising radius around each venue. However, in the case of the Olympic Games, advertising in and above the stadia, venues and other competition areas which are considered part of the Olympic sites is not authorised, not even for TOP partners (so-called "clean venue guideline"). Commercial installations and advertising signs are not allowed in the venues and other areas either (rule 50 no. 1 OC). As the IOC always considerably restricts the number of TOP partners, the exclusive advertising rights around the venues are particularly valuable.[15] Against this background, the Bundeskartellamt currently assumes that media companies, sponsors and other advertisers might possibly consider organisation and marketing of the Olympic Games as substitutable with the FIFA World Cup, but not with other international sports events.

(53) And finally, athletes offering their athletic performance for the competitions are also customers of the organisation and marketing of sports events. From a sporting perspective,

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[14] Cf. German newspaper Die Welt, Eurosport zahlt – ARD und ZDF kassieren Quoten, available (in German) at https://www.welt.de/sport/article173508457/Olympische-Winterspiele-2018-Eurosport-zahlt-ARD-und-ZDF-kassieren-Quoten.html; German newspaper Handelsblatt, Teures Olympia für ARD und ZDF, available (in German)at https://www.handelsblatt.com/unternehmen/it-medien/medienkommissar/der-medien-kommissar-teures-olympia-fuer-ard-und-zdf/20186300.html?ticket=ST-852622-fVYGuPYjvuY5W1BPc49d-ap1. The German Zeit Online newspaper says in this context: "...Anyway, the Olympics have never been more present on TV. ARD and ZDF alone will have a team of approx. 350 staff in place to broadcast approx. 230 hours of the Olympics. Discovery sends more than 1,000 staff and is planning to fill approx. 4,000 programme hours with the altogether 102 decisions in 15 sports disciplines of the Olympics, 900 of which live..." (German article Olympische Winterspiele - Geld wie Schnee available at https://www.zeit.de/2018/05/olympische-winterspiele-uebertragung-lizenz-fernsehen).

[15] One example is that Visa cards are the only accepted credit cards at the venues during the Olympic Games as Visa is a TOP partner (cf. "Sponsors at the Olympics: The Multi-Billion Dollar Business of the IOC", article dated 28 July 2016, available at https://www.ispo.com/en/markets/id_78544462/2-billion-what-the-sponsors-are-paying-at-the-olympics.html).

athletes will aim at competing with the international elite of their sports. From an entrepreneurial perspective, however, the athletes will also focus on whether and to what extent the degree of their fame increases as a result of their participation in a particular sports event and whether their advertising revenue is likely to increase. Athletes are thus likely to prefer events with high attendance figures and the highest possible media presence. However, in order to qualify for these well-known events, they normally have to take part in other, lesser known events. What is more, professional athletes normally specialise in their particular discipline as they developed their performance over years of targeted training. It is therefore only possible to switch to another sport in exceptional cases.

(54) Taking this into account, other international sports events are an alternative to the Olympic Games only for those athletes practicing sports disciplines for which there are other well-known competitions which are broadcast by the standard media, especially on TV and the radio. Even if one were to lower the requirements regarding the substitutability of the Olympic Games compared to those of media companies, sponsors and other advertisers, the degree of substitutability would still depend on the particular sports' popularity in the different countries and on the sport as such (popular sports in Germany are, for instance, football, tennis, athletics, ski jumping or equestrian sports). However, for most athletes, the Olympic Games are by far the most important event, and even the only event in some cases, that gives them high media attention and allows them to increase their degree of fame. According to the Bundeskartellamt's preliminary assessment, the substitutability of the organisation and marketing of the Olympic Games with the organisation and marketing of other major international sports events is very limited and only available to some athletes depending on their sports.

(55) The Bundeskartellamt currently assesses that a wider market definition comprising the marketing of other major international sports events in addition to the Olympic Games cannot be considered in this case, even if the aspect of supply-side substitution is taken into account. While it is conceivable that the Olympic Movement, which the parties are part of, could organise other international sports events for individual sports or have them organised under its auspices as, with the IFs being part of the Olympic Movement, it has the necessary expertise in terms of rules and organisational and technical requirements, it is hardly conceivable that the suppliers of other international sports events could organise an event like the Olympic Games comprising competitions in a large number of sports for athletes from all over the world. Other organisers lack the expertise outlined above and would have to acquire support from the IFs or the national associations in a large number of countries. In addition, the Olympic Games have a particular historic significance and are particularly well-

known and attractive as a result, which would be hard for other potential organisers to substitute, if they could substitute it at all. According to the Bundeskartellamt's preliminary assessment, the alternative sports events which the parties stated cannot prove supply-side substitution. The X-Games, for example, are the largest extreme sports event and comprise only a few so-called extreme sports[16], i.e. the media attention they generate results from the particular risks associated with the sports for the athletes rather than an interest in a national comparison across different sports disciplines. The World Games are an international competition for athletes whose sports disciplines, despite being widely established worldwide, are not part of the Olympic competition programme. They are organised by the International World Games Association under IOC auspices and take place in the year after the Olympic Summer Games.[17] Under this aspect, they appear as a supplement to the Olympic Games which can be attributed to the Olympic Movement rather than as a competing offer. Unlike the Olympic Games, the Commonwealth Games are not an international sports events, but restricted to athletes from Commonwealth countries.[18]

(56) The geographic market definition for the organisation and marketing of the Olympic Games is worldwide.

2. Market dominance

(57) The Bundeskartellamt preliminarily assesses that the members of the Olympic Movement, which the parties are part of, have a dominant position on the market for the organisation and marketing of the Olympic Games.

(58) "One or several undertakings" can be addressees of the provisions on the prohibited conduct of dominant undertakings in Article 102 TFEU and Section 19 GWB. The functional understanding of the term "undertaking", which both the German Competition Act and EU antitrust law are based on, refers, in the broadest sense, to entities carrying out economic activities on their own account. The legal form or the type of financing of the entity carrying out the activity is not important in this context. The entity does not necessarily have to have

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16 Cf. Wikipedia, X-Games, available at https://en.wikipedia.org/wiki/X_Games

17 Cf. Wikipedia, International World Games Association, available at https://en.wikipedia.org/wiki/International_World_Games_Association.

18 Cf. Wikipedia, Commonwealth Games, available at https://en.wikipedia.org/wiki/Commonwealth_Games

the intention to realise a profit either.[19] The Olympic Movement organises and markets the Olympic Games based on the Olympic Charter which has to be acknowledged as binding by all members. However, the Olympic Movement itself is not actively involved in the organisation and marketing of the Olympic Games. Rather, the members of the Olympic Movement, namely the IOC, the OCs, the NOCs and the IFs, organise and market the Olympic Games under IOC leadership and according to the tasks and competences defined in the Olympic Charter. Consequently, not the Olympic Movement as such, but those of its members that act in the context of the organisation and marketing of the Olympic Games are an undertaking. Even if these members are legally independent undertakings none of which has itself a dominant position on the market, they can, as is suggested by the use of the term "several undertakings" in Article 102 TFEU and Section 19 GWB, hold a dominant position together.

(59) With this wording, the German law was harmonised with the corresponding European law.[20] Principles of European law can therefore be applied when analysing the preconditions under which "several undertakings" are addressees of abuse provisions. Pursuant to ECJ case law, "several undertakings" can be the addressees of Article 102 TFEU if they appear or act as a collective entity in an economic context on a particular market. A collective entity within the meaning of ECJ case law exists where the undertakings concerned are linked economically in a way that allows them to act together independently from their competitors, their customers and the consumers.[21] However, the mere fact that the undertakings are linked by an agreement or concerted practices within the meaning of Article 101 TFEU alone is no sufficient basis to assume that the undertakings are indeed a collective entity. Such a basis can, however, result from the nature and the wording of an agreement, the way it is implemented and thus from the resulting links or linking factors between the undertakings. The undertakings concerned may especially appear as a collective entity facing their competitors, customers and consumers if they implement an agreement in such a way that they are closely linked by their conduct on a particular market.[22]

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[19] Cf. Hengst in Langen/Bunte, Kartellrecht – vol. 2 Europäisches Kartellrecht, 13th ed. Art. 101 TFEU, para. 8 with further references; Krauß in Langen/Bunte, Kartellrecht – vol. 1 Deutsches Kartellrecht, 13th ed., Section 1 GWB, para. 37 with further references

[20] Cf. Government reasoning to the 6th amendment to the German Competition Act, Bundestag printed paper 13/9720, p. 51.

[21] Cf. ECJ, judgment of 16 February 2000, cases C-395/96 P and C-396/96 P – *Compagnie maritime belge*, para. 42 ff.

[22] Cf. ECJ, loc.cit. para. 44.

(60) The Bundeskartellamt therefore preliminarily assesses the members of the Olympic Movement, namely the OCs, NOCs and IFs as well as the IOC as a collective entity on the market for the organisation and marketing of the Olympic Games. Any marketing revenue generated by individual members of the Olympic Movement is shared with other members. The OC for example distributes part of its potential surplus to the IOC, which in turn shares a considerable part of its marketing revenue with the OC, the NOCs, the IFs and other organisations. The necessary economic ties enabling them to act jointly and independently from other market participants in this market are also a result of the implementation of the Olympic Charter, which all members acknowledged as binding and which grants them specific competencies in this respect. The IOC can sanction any non-compliance with the Olympic Charter. As far as marketing is concerned, for example, the OCs are in charge of marketing the respective host city as a venue[23], the NOCs are in charge of marketing their country's Olympic team[24], and the IOC is in charge of, among other things, marketing the broadcasting rights for the Games[25]. Any marketing measures referring to the Olympic Games are subject to the IOC's consent, which also applies to, e.g. an NOC or an OC creating an Olympic emblem.[26] The IOC as the highest authority of the Olympic Movement can sanction non-compliance with the stipulations on competencies regarding the organisation of the Olympic Games. For instance, the IOC can suspend NOCs or withdraw its recognition, and OCs can be deprived of the right to organise the Olympic Games.

(61) What is more, athletes have to comply with any stricter rules regarding advertising within the meaning of rule 40, bye-law 3 OC that may apply within the territory of a particular NOC. Such advertising activities can even be prohibited altogether. Since athletes who want to carry out advertising activities during the frozen period in a country other than the one that nominated them for the Games are required to ask for their "home NOC's" consent, it is ensured that any stricter rules or prohibitions regarding advertising activities that may exist are complied with not only in the territory of the "home NOC" but also in the territory of other NOCs. As the decision by some NOCs to "opt out" of international advertising campaigns extending to their territories during the frozen period is respected, athletes from other coun-

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[23] Cf. rule 50 bye-law no. 4 OC.

[24] Cf. rule 27 no. 7.2 OC.

[25] Cf. rule 48 OC.

[26] Cf. rules 7 to 14 bye-law no. 4.1 OC and rule 50 bye-law no. 3 OC.

tries can carry out advertising activities with the individual sponsors on these NOCs' territories only subject to their stricter rules or, in case of a prohibition, not at all. The members of the Olympic Movement are thus required to comply with a standard procedure.

(62) Against this background the Bundeskartellamt preliminarily considers the members of the Olympic Movement also as a competitive entity which can be the addressee of Section 19 GWB[27].

(63) The Bundeskartellamt currently assesses the members of the Olympic Movement, of which the parties are part, as a collective or competitive entity on the assumed worldwide market for the organisation and marketing of the Olympic Games that has a collective dominant position on that market. Jointly the members are the addressees of Article 102 TFEU and Section 19(1) combined with (2) no. 1 GWB.

II. Abusive practices

(64) As addressees of abuse control, dominant companies must not abuse their dominant position if and to the extent that such conduct can impede effective competition (Article 102 TFEU) or directly or indirectly impede another undertaking in an unfair manner (Section 19(1) in conjunction with (2) no. 2 GWB).

1. Conduct

(65) For advertising activities that would only be carried out in Germany, the DOSB Guidelines 2016 stipulate that the DOSB decides on exceptions from the general ban on advertising pursuant to rule 40, bye-law 3 OC.[28] Upon signing the athlete agreement, which is a prerequisite for their nomination for the Olympic Games, athletes undertake towards the DOSB to comply with the Olympic Charter and especially the IOC advertising guidelines. The ban on advertising pursuant to rule 40, bye-law 3 OC and the authorisation requirement for advertising campaigns with non-Olympic sponsors during the frozen period are explicitly pointed out (no. 3 lit. k).[29] By stipulating under no. 4 of the athlete agreement that culpable breaches of the agreement, which include the implementation of unauthorised advertising

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[27] Cf. Federal Court of Justice, judgment of 19 December 1995, WRP 1996, 702 (Raiffeisen).

[28] Athletes of other nations are sometimes required to obtain their "home NOC's" consent.

[29] Cf. Athlete agreement for athletes of the German Olympic team participating in the XXXI Olympic Games in Rio 2016, p. 87 of the file.

activities, can be sanctioned by suspending athletes from the German Olympic team irrespective of potential IOC sanctions, the DOSB ensured that German athletes could not carry out advertising activities with their individual sponsors in its territory that did not meet the criteria set forth in the DOSB Guidelines 2016. What is more, the IOC could also sanction violations of the DOSB Guidelines 2016 and thus of rule 40, bye-law no. 3 OC pursuant to rule 59 no. 2.1 OC, e.g. by temporarily or permanently suspending an athlete from the Olympic Games. In this context, it can be left open whether, as held by the IOC and the DOSB, no German athlete has ever been sanctioned for a violation of rule 40, bye-law 3 OC.

(66) According to the Bundeskartellamt's preliminary assessment the stipulations of the DOSB Guidelines 2016 concerning advertising activities during the frozen period by members of the German Olympic team and their (potential) individual sponsors are, however, problematic both under procedural and substantive aspects. In the context of the 2016 Olympic Games the following issues arose in particular:

(67) The German athletes were obliged to register with the DOSB any advertising and social media activities to be conducted with their own sponsors during the frozen period, which started on 27 July 2016, by 6 April 2016 at the latest and wait for an authorisation. Athletes had to complete and sign a registration form enclosing the advertising materials and social media contents to be used as well as the schedule for implementation and publication, i.e. the sponsors had to develop the concepts for the advertising and social media activities before that date. However, by early April 2016, the DOSB had not yet nominated any athletes for the 2016 Olympic Games, i.e. athletes whose achievements in competitions did not sufficiently clearly qualify them for a nomination did not know whether they would be participating in the games at all. The Bundeskartellamt preliminarily assesses that on this basis individual sponsors, especially small and medium-sized companies that do not have their own marketing department, were not willing to plan advertising and social media activities with these athletes by 6 April 2016, which means that in many cases it was not possible at all to hand in a complete and timely registration.

(68) Currently the Bundeskartellamt further assesses that irrespective of the stipulated periods, the mere registration and authorisation requirement alone has had a prohibitive effect in certain case constellations, as the last nominations both for summer and winter games are normally made no sooner than approx. 3 weeks prior to the beginning of the Games. Many advertising activities, e.g. messages of motivation or congratulations from the sponsors to their athletes or messages of thanks from the athletes to their sponsors after they won a

medal, can only be considered after a particular event has occurred in the course of the games. However, at this particular point in time, it was no longer possible to register these activities and wait for their authorisation.

(69) Furthermore, the Bundeskartellamt preliminarily also assesses the different competencies for national and international applications as problematic under procedural aspects. Especially when it comes to online advertising activities, it is unclear to which NOCs applications were to be addressed and what criteria this was to be based on. It is also obvious that due to the different rules and deadlines that applied the consideration of opt-out countries for international applications and the requirement to obtain the "home NOC's" consent for applications by athletes from other countries affecting the territory of the NOC that opted out resulted in the necessity of multiple registering of one and the same advertising activity with various NOCs and probably also the IOC. It is doubtful whether the (potential) sponsors, especially small and medium-sized companies that do not have their own marketing department, were ready to shoulder this administrative burden.

(70) Under material aspects, German athletes and their (potential) sponsors may have found it difficult to carry out individual advertising activities during the frozen period, because the DOSB Guidelines 2016 stipulated that only so-called "ongoing" advertising activities could be authorised, i.e. activities that had started at least three months prior to the beginning of the frozen period. For the 2016 Olympic Games (opening ceremony on 5 August 2016), this meant that advertising activities that were to be carried out during the frozen period had to have started by 27 April 2016 at the latest. However, by this date the DOSB had not nominated any athletes, so it was not possible to plan with a sufficient degree of certainty any campaigns including an athlete's participation in the Olympic Games. It is therefore obvious that many sponsors were unwilling to undertake the effort of planning an advertising campaign. Even if the mere possibility of a nomination had been enough for them to be willing to plan a campaign, it was not guaranteed that the DOSB would respond in time for them to start the campaign before 27 April 2016. There was no defined time limit within which the DOSB had to respond.

(71) The DOSB Guidelines 2016 contained further restrictions, even for ongoing advertising activities. They referred to the use of designations and symbols as well as images and videos and made it even more difficult to market an athlete's participation in the Olympic Games.

(72) It was not only prohibited to use the Olympic designations and symbols protected by the Act on the Protection of the Olympic Emblem and the Olympic Names, but also further

terminology referring to the Olympic Games. This terminology partly comprised EU trademarks which the IOC registered in (almost) all categories of goods and services. These trademarks include in particular “Rio 2016”, i.e. the (short) designation of the Olympic host city combined with the year in which the games took place. The year “2016” was also a registered EU trademark which German athletes and their sponsors were prohibited from using. What is more, a large number of further general language terms which can frequently be used in the context of advertising for athletes and sports events, particularly the Olympic Games, were prohibited. Pursuant to the DOSB Guidelines 2016, these terms referring to the Olympic Games included the words “Sommer” (summer), “Spiele” (games), “Podest” (podium), “Medaille” (medal), “Gold” (gold), “Silber” (silver), “Bronze” (bronze). The term “Team Deutschland” could not be used either. Pursuant to their athlete agreements, the members of the German Olympic team also had to observe the 2016 IOC Guidelines, which in addition to the aforementioned terms (with the exception of “Team Deutschland”) contained a list of English terms like “effort”, “performance” and “victory”. As this list was a mere collection of examples (“...include the following...”), the German athletes and their sponsors could not safely assume that terms which were not included in the list were admissible in the context of individual advertising activities.

(73) For individual advertising activities with their own sponsors, German athletes were not allowed to use images or videos of themselves at Olympic sites, especially not at the competition venues and the Olympic Village. This rule applied regardless of whether Olympic symbols, logos or designations were in the photo.

(74) In addition, it was hardly possible to use social media for individual advertising activities, because posts and messages on social media normally refer to the current course and most recent developments of the Olympic Games or are responses to corresponding posts and messages by others, i.e. they are not an ongoing measure within the meaning of the DOSB Guidelines 2016. Prior registration was, at best, only possible on a hypothetical basis, for specific events that might occur. Like the Social and Digital Media Guidelines 2016, the Game Rules 2016 prohibited the commercial use of athletes’ own social media accounts.

As this included any posting or message with which athletes referred to their individual sponsors, social media advertising was generally prohibited for athletes.[30]

(75) The Bundeskartellamt currently assesses that the aforementioned restrictions were reinforced by the very far-reaching sanctions that could be imposed on athletes if they violated rule 40, bye-law 3 OC or the DOSB Guidelines 2016. Besides purely financial sanctions like contractual penalties and damages, both pursuant to the athlete agreement which athletes had to sign to be admitted to the Olympic Games and Article 59 no. 2.1 OC which athletes had to acknowledge as applicable in this context athletes potentially faced sports-related sanctions with regard to their professional athleticism and hence their profession as such in the event of such violations. Besides the annulment of scores and the return of medals, such sanctions included in particular an exclusion from the Olympic Games or the German Olympic team and bans from competitions.

(76) Neither the relevant clause in the athlete agreement nor Article 59 no. 2.1 OC expressly stipulated that sanctions had to be proportionate to the gravity of the violation, and there was no ranking of individual sanctions either. Athletes and sponsors thus could not rule out the possibility of far-reaching sanctions also for (minor) violations of rule 40, bye-law 3 OC. As a consequence athletes and their sponsors may have renounced a campaign or legal representation in borderline cases where individual advertising activities which should have been admissible even under the strict regulations described above were not authorised by the parties, so as not to risk an athlete's participation in the Olympic Games which was prepared over a long period of time and which often marked the height of a sports career. German athletes and their individual sponsors also often perceive the exclusive competence of the Court of Arbitration for Sport (CAS) as an additional impediment in this context. They hold that a CAS procedure is (considerably) more expensive and involves more effort than a proceeding before a German state court.

2. An impediment to effective competition on a secondary market

(77) The Bundeskartellamt preliminarily assesses that the aforementioned rules for exceptional authorisations of German athletes' individual advertising activities during the frozen period

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[30] Cf. "Spielregeln zum Umgang mit Medien, Werbung und Social Media – Olympische Spiele Rio 2016" by the DOSB, p. 15 available (in German only) at https://cdn.dosb.de/alter_Datenbestand/Bilder_allgemein/Veranstaltungen/Rio_2016/Spielregeln_zum_Umgang_mit_Medien__Werbung_und_Social_Media.pdf.

and their application by the DOSB impede competition from other companies on a sports sponsoring market (or a sponsoring market that may have to be more narrowly defined).

(78) There are many reasons to assume that the stipulations of the DOSB Guidelines 2016 impede German athletes' opportunities to find new sponsors and thus to market their sports performance, the value of which normally increases considerably once they participate in the Olympic Games. One of the reasons is the DOSB's analysis of the authorisation procedure during the 2016 Olympic Games.[31] According to this analysis, 42% of the approx. 600 national applications had become void as the athletes in question had not qualified for a participation in the Games. This means that 252 applications did not have to be decided on at all because the athletes who had handed them in were not nominated. 49% of the national applications referred to advertising activities with non-Olympic sponsors. Of these 295 applications, 31% contained insufficient information, another 25% were rejected and 44% were authorised. A total of around 165 applications for national advertising activities with individual (non-Olympic) sponsors were thus rejected, and only approx. 130 applications were authorised.

(79) Another reason to assume an impediment to competition is the market test carried out by the Bundeskartellamt with regard to the modified DOSB Guidelines. It revealed that approx. 40% of the athletes who responded to the corresponding question were contacted by potential sponsors concerning their potential participation in a major sports event which was one of the reasons why a sponsoring contract was to be concluded.[32] That this plays a role in particular with regard to a potential participation in the Olympic Games which in many sports marks the height of his career is confirmed by the fact that the question whether any (potential) sponsor had ever refrained from concluding an advertising contract due to the advertising restrictions during the Olympic Games, has been answered by approx. 63% of the responding athletes in the affirmative.[33] In the survey among sponsors, 77% of the sponsors said that sponsoring an athlete during the Olympic Games, as compared to sponsoring

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[31] Cf. enclosure 8 to DOSB's letter of 6 June 2017 "REGEL 40 – Ergebnisse und Auswertung"(RULE 40 - Results and Analysis), p. 373 ff. of the file.

[32] Cf. p. 2 f. of the memorandum on the evaluation of the athlete survey of 21 December 2017 (non-confidential version) of 28 February 2018, p. 3322 f. of the file. Approx. 30% of the athletes who responded to question 3 said they had three or more such contacts.

[33] Cf. p. 4 of the memorandum on the evaluation of the athlete survey of 21 December 2017 (non-confidential version) of 28 February 2018, p. 3324 of the file.

them outside this period, was very important (41%) or important (36%).[34] Even if athletes manage to find one or several sponsors despite the advertising restrictions pursuant to rule 40, bye-law 3 OC, it cannot be ruled out that they will not be able to comply with existing sponsorship contracts during the frozen period as they either cannot carry out the agreed advertising activities at all or cannot carry them out in the agreed form.

(80) What is more, (potential) sponsors of athletes can be restricted in their advertising opportunities if only official Olympic sponsors are authorised to implement sports-related advertising measures in the context of the Olympic Games during the frozen period. Thus they cannot sponsor individual athletes participating in the games alternatively.

(81) By marketing their sports performance, e.g. through sponsoring, German athletes carry out an economic activity on their own accounts and are thus undertakings within the meaning of competition law. The same applies to (potential) sponsors wishing to advertise their products or services who (want to) conclude sponsoring contracts with athletes to carry out advertising measures for that purpose.

(82) The Bundeskartellamt currently assesses that the market affected by this impediment to effective competition is a sports sponsoring market. Separate markets have to be assumed for other forms of sponsorship, e.g. the sponsoring of arts and culture events or eco-sponsorship, as they are no substitutes for sports sponsoring which has different objectives and target groups. On the one hand, the product market could be more narrowly defined if it was defined according to the types of sport rather than as a sponsoring market for all sports disciplines. This definition depends on whether the marketing concepts implemented in the context of a sponsoring relationship can be realised for more than one particular type of sport, e.g. because the products to be marketed are similarly close to various types of sports and their target groups that can all transfer the brand image in a positive way. In addition, a further differentiation could be made depending on whether associations, clubs, teams or individual athletes are sponsored, especially if the sponsoring markets are defined by sports discipline. On the other hand, the sport sponsoring market could also be defined more widely, if other forms of sports-related advertising could be a substitute, as e.g. advertising space in stadiums. Notwithstanding that, the Bundeskartellamt preliminarily considers the sponsoring of specific sports events like the Olympic Games to be separate markets due to

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[34] Cf. p. 2 f. of the memorandum on the evaluation of the sponsor survey of 21 December 2017 (non-confidential version) of 8 March 2018, p. 3379 f. of the file.

their unique characteristics which seem to exclude substitutability with other sports events[35]. The geographic market could be defined as regional, national or international, depending on whether the product market for sports sponsoring is defined more narrowly or more widely.

(83) Ultimately, a precise definition of the secondary market affected for the purpose of abuse control can be left open in this case as it is not necessary to prove negative effects on the market for the assumption of exclusionary abuse since it has been included as a standard examples of a prohibited abuse scenarios in Section 19 GWB. For the assessment of appreciable effects which have to be taken into account in the balancing of interests, it is sufficient to consider potential effects on the market[36], which under the aforementioned aspects[37] can be confirmed regardless of the exact market definition. Article 102 TFEU does not require an assessment of appreciable effects or a de minimis threshold value either. It is sufficient to assess the conduct as potentially detrimental to competition.[38]

(84) In this context, it is not relevant that the sports sponsoring market affected is a secondary market rather than the market dominated by the members of the Olympic Movement. The prohibition contained in Section 19(1) in conjunction with (2) GWB also covers such conduct. The question whether Section 19(4) no.1 GWB (old version) can be applied has always been answered in the affirmative in the corresponding case-law, which refers to the general clause in Section 19(1) GWB stating that abusive conduct should also be assessed under this section if the undertakings do not have a dominant position.[39] It is true that, temporarily, there was a contrary view regarding Section 20(1) GWB (old version). However, since the norm has been included in Section 19 GWB as a standard example, it can be assumed to be applicable to secondary market cases (again).[40]

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35 Cf. para. 45 ff.

36 Cf. Nothdurft in Langen/Bunte, Kartellrecht – vol. 1 Deutsches Kartellrecht, 13th ed., Section 19, para. 293 with further references.

37 Cf. para. 78 ff.

38 Cf. ECJ, judgment of 17 February 2011 – C-52/09, *"Telia Sonera Sveridge"*, para. 64; judgment of 6 December 2012 – C-457/10 P, *"Astra Zeneca"*, para. 112; judgment of 6 October 2015 – C-23714, *"Post Danmark II*", paras. 66, 69, 73.

39 Cf. Federal Court of Justice, judgment of 4 November 2003 – KZR 38/02, *"Strom und Telefon I und II*", para. 20 (available in German at lexetius.com/2003, 3296); judgment of 30 March 2004 – KZR 1/03, *"Der Oberhammer"*, para. 13 (available in German at lexetius.com/2004, 1368).

40 Cf. Nothdurft, loc.cit. Section 19, para. 284.

(85) Abuse of a dominant position can also be prohibited by Article 102 TFEU if its effects are appreciable on a market separate from the dominated market, i.e. a market on which the relevant undertaking does not hold a dominant position. However, the precondition for this Article to apply is that the separate market is sufficiently connected to the dominated market[41] or "linked" to it.[42] The sports sponsoring market is such a market. It is linked to the market for the organisation and marketing of the Olympic Games. Athletes (potentially) participating in the Olympic Games offer their sports performance in the context of a sponsoring campaign on the sports sponsoring market. Part of the sponsors are attracted to their offer precisely because of their (potential) participation in the Olympic Games. Undertakings sponsoring the Olympic Games or the German Olympic team often also have sponsoring contracts with individual athletes.

(86) However, if Section 19(2) no. 1 GWB is to be applied to the norm addressee's conduct on the secondary market on which he does not hold a dominant position, it has to be positively confirmed that there is indeed a causality between market dominance on one market and the disapproved conduct's effect on another market.[43] Normative causality between the norm addressee's position and the violation cannot be substantiated if the norm addressee does not have a special responsibility for the market structure on the secondary market. Such (positive) causality can be confirmed in cases where norm addressees use their dominant positions on a particular market as leverage to improve their market position in a secondary market.[44] Article 102 TFEU also requires particular circumstances justifying its application in cases where a dominant undertaking's conduct affects a related market it does not dominate.[45]

(87) The Bundeskartellamt currently assesses that such a positive causality and circumstances justifying the application of the definition of abusive conduct exist in this case. The parties are likely to be abusing their dominant position on the market for the organisation and marketing of the Olympic Games to strengthen their positions on the sports sponsoring market.

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41 Cf. EGC, judgment of 17 December 2003 – T 219/99, *"British Airways"*, para. 127 (available at lexetius.com/2003, 2851).

42 Cf. ECJ, judgment of 14 November 1996, - C-333/94 P, "Tetra Pak", para. 27 (available in German at https://www.jurion.de/urteile/eugh/1996-11-14/c-333_94-p/).

43 BGH, judgment of 4 November 2003 – KZR 38/02, *"British Airways"*, para. 20 (available at lexetius.com/2003, 3296).

44 Cf. Nothdurft, loc.cit. Section 19, para. 285.

45 Cf. ECJ, judgment of 14 November 1996, - C-333/94 P, "Tetra Pak", para. 27 (available in German at https://www.jurion.de/urteile/eugh/1996-11-14/c-333_94-p/).

Specifically, they use their dominant position regarding access to the Olympic Games to enforce athletes' and their sponsors' compliance with rule 40, bye-law 3 OC and the corresponding advertising guidelines by the DOSB on the sports sponsoring market.

(88) Athletes have to conclude an athlete agreement with the DOSB and make a declaration to the IOC in order to be admitted to the Olympic Games as a member of the German Olympic team. In both documents athletes undertake to comply not only with sports-related rules like the nomination procedures and the Anti-Doping Code but also with rule 40, bye-law 3 OC and the parties' advertising rules. With this procedure, the parties strengthen in particular the market position of Olympic sponsors on the sponsoring market rather than (just) their own, as the sponsors obtain far-reaching advertising opportunities in the context of the Olympic Games and can market an athlete's participation in the Olympic Games during the frozen period. However, this leads to a (further) strengthening of the parties' market position on the dominated market when it comes to their negotiation position regarding sponsorship contracts. It can be assumed that sponsors are rather willing to pay high prices for sponsorship rights with a view to the advertising restrictions of rule 40, bye-law 3 OC.

3. Abuse of a dominant position

(89) The fact that the DOSB and the IOC are the only members of the Olympic Movement to enforce the advertising restrictions of rule 40, bye-law 3 OC among German athletes, and that thus not all members of the Olympic Movement are involved in the conduct in question, does not rule out the possibility that it may constitute a violation of Article 102 TFEU and Section 19 (1) in conjunction with (2) no. 1 GWB. To apply Article 102 TFEU it is sufficient that the individual conduct of one member of a collective entity appears as an expression of the collective dominant position, i.e. that the member's conduct results from this dominant position.[46] The conduct of a single undertaking belonging to an oligopoly can be subject to the prohibition of unfair hindrance pursuant to Section 19 GWB if, for example due to its particular position within the oligopoly, its conduct affects the oligopoly's overall line of action.[47] The Bundeskartellamt currently assesses that this applies also to actions of individual members of a dominant competitive entity which is i.a. marked by a uniform corporate strategy and contract clauses streamlining the competitive conduct.

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[46] Cf. EGC, judgment of 7 October 1999, Rs. T-228/97, *"Irish Sugar"*, para. 66; judgment of 30 September 2003, Rs. T-191/98, T 212/98 to T-214/98, *"Atlantic Container"*, para. 633.

[47] Cf. Federal Court of Justice, judgment of 10 December 1985 – KZR 22/85, *"Abwehrblatt II"*, para. 25.

(90) Based on the Bundeskartellamt's preliminary assessment these preconditions are fulfilled. By the requirement of consent by the "home NOC's", other NOCs that apply different rules with regard to rule 40, bye-law 3 OC or that prohibit individual advertising during the frozen period altogether, safeguard that the DOSB complies with their rules when deciding on the authorisation of advertising activities in Germany by athletes nominated abroad. When German athletes apply for the authorisation of international advertising activities, the IOC does not make a decision affecting the territories of NOCs that "opted out" and grants them the right to carry out an individual assessment in order to ensure that any deviating rules or prohibitions by NOCs that chose to "opt out" are observed. For this reason, the individual conduct by the DOSB and the IOC toward German athletes and their (potential) sponsors with regard to the authorisation of individual advertising activities during the frozen period, which is the subject of this decision, has the same effect as a concerted conduct of all members of the Olympic Movement. Said conduct is underpinned by the parties' position within the Olympic Movement, in particular by the process of mutual coordination, and thus constitutes an abuse of the collective or competitive entity's dominant position.

III. Consideration of the specific nature of sports (Meca-Medina criteria)

(91) Bye-law 3 to rule 40 of the OC and the rules provided by the DOSB Guidelines 2016 fall under the scope of application of Art. 102 TFEU and Section 19 GWB. The question of whether, due to its specific nature, the sports sector or at least rules that are "purely sporting in nature" are excluded from the scope of competition law has meanwhile been clarified by the case-law which came to the conclusion that this was not the case.

(92) In its *Meca-Medina* judgment the ECJ made it clear that rules laid down by a sports association are generally subject to Community law, including competition law, as far as they are to be classified as an economic activity.[48] The qualification of a rule as "purely sporting" is therefore not an adequate reason for excluding from the scope of EU competition law the athlete exercising the sport subject to this rule or the sports association applying the rule.[49] Even if those rules solely concern questions of purely sporting interest and as such have nothing to do with economic activity, it cannot necessarily be concluded that the sporting activity in question does not come under the scope of EU competition law provisions or

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[48] Cf. ECJ, judgment of 18 July 2006, case C-514/04 P, *"Meca-Medina"*, para. 22 ff., 27.

[49] Cf. ECJ, loc.cit., para. 33.

does not satisfy the specific requirements of these provisions.[50] In the application of the law, account must be taken of the specific nature of sports *on a case-by-case basis* and by considering the overall context of the rules, their effects and, in particular, their objectives.[51] According to the case-law, a specific rule can be excluded from the scope of application of Articles 101, 102 TFEU, if (1) it serves legitimate objectives, (2) the restriction of or impediment to competition is inherent and (3) proportionate to the legitimate objectives pursued.[52]

(93) Since the abolition of Section 31 GWB (old version) there has been no exemption rule for sports under German competition law either.[53] The Federal Court of Justice thus based its *Pechstein* judgment on the assumption that German competition law, specifically Section 19 GWB (old version), was generally applicable. As to the question whether the parties could have recourse to the jurisdiction of the ordinary courts, the Federal Court of Justice held that the effectiveness of the arbitration clause at issue was to be assessed under German competition law, irrespective of the governing law to be applied, as this represented mandatory law within the meaning of Art. 34 of the German Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB).[54] The specific nature of sports, e.g. the safeguarding of a uniform procedure with regard to sports-related rules by a court of arbitration for sport or the creation of fair conditions for sporting competitions by means of anti-doping rules, were taken into account in the balancing of interests to be undertaken pursuant to Section 19 GWB (old version).[55]

(94) The preconditions for a case-related non-applicability of European competition law as postulated by the ECJ in *Meca-Medina* are to be taken into account in the balancing of interests pursuant to Section 19(1) GWB or the objective justification pursuant to Section 19(2) no 1 GWB, respectively, at least if, as in the present case, the behaviour objected to is likely to affect trade between the Member States. Assessments under European and German competition law therefore lead to the same results.

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50 Cf. ECJ, loc.cit., para. 31.

51 Cf. ECJ, loc.cit., para. 42.

52 Cf. ECJ, loc.cit., para. 43 ff. The criteria mentioned were established within the context of examining the applicability of Art. 81 EC (old version). As paras. 31 ff. of the judgment repeatedly mention Art. 81 EC and Art. 82 EC, it is to be assumed that the criteria are also meant to apply with regard to the applicability of Art. 82 EC (old version).

53 Cf. Schneider in Langen/Bunte, Kartellrecht – Volume 2 Europäisches Kartellrecht, 13th ed., systematic representation IV Sport, para. 22 ff.

54 Cf. Federal Court of Justice, judgment of 7 June 2016 – file KZR 6/15, *"Pechstein"*, para. 44.

55 Cf. Federal Court of Justice, loc.cit., para. 58 ff.

1. Pursuit of legitimate objectives

(95) Legitimate objectives that can be pursued by the rules set by sports associations are generally those relating to the organisation and proper conduct of competitive sport while aiming to ensure healthy rivalry between athletes.[56] The latter objective includes safeguarding equal opportunities for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.[57] According to the ECJ's case-law on the fundamental freedoms of the Treaty only non-economic objectives can justify a restriction of competition.[58] The protection of economic or financial interests is thus generally not a legitimate objective within the meaning of *Meca-Medina*.

(96) The parties have stated that rule 40, bye-law 3 OC and the stipulations of the DOSB Guidelines 2016 pursued the following objectives: (1.) Preserving the financial stability and sustainability of the Olympic Movement and the Olympic Games; (2.) Preserving the value of the Olympic brand to finance the Olympic solidarity model, and (3.) Preventing the excessive commercialisation of the Olympic Games to ensure that the focus is on the athletes and their competitions. The Bundeskartellamt preliminarily assesses that insofar as the statements of the parties on this subject[59] can be interpreted to mean that these stipulations are intended to prevent so-called ambush marketing during the frozen period in order to safeguard the funding of the Olympic Games, facilitated in part by Olympic sponsorship programmes, and thus to ensure that the Games can be held on a regular basis, this objective is legitimate.

(97) However, it requires a correct understanding of the term ambush marketing. Many of the definitions that can be found in the economic literature are too broad. Ambush marketing is basically seen as the planned endeavour of a company, which is not an official sponsor of a major (sports) event, to attract public attention to its own business by means of marketing activities related to the event, and thus to profit from the communication performance of the event (e.g. high profile, image) without making a financial contribution.[60] However, this also

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[56] Cf. ECJ, judgment of 18 July 2006, case C-514/04 P, *"Meca-Medina"*, para. 45.

[57] Cf. ECJ, loc.cit., para. 43.

[58] Cf. Commission decision of 8 December 2017, Case AT.40208 – *International Skating Union's Eligibility Rules*, para. 220 with further references.

[59] Cf. para. 27.

[60] On the different definitions cf. https://de.wikipedia.org/wiki/Ambush_Marketing (in German only) with further references.

includes advertising activities which neither include the use of logos, symbols, trademarks or other intellectual property rights of the event organiser in violation of legal provisions, in particular trademark, copyright and fair trading laws, nor any incorrect references to the advertiser's sponsorship status. The definition thus also covers advertising activities which merely take place within the (geographic or media) context of the event or evoke a connection with the event. In general, organisers of major (sports) events, such as the Olympic Games in Germany, must tolerate such advertising activities, apart from exceptional cases where there is an obligation regarding consideration and cooperation under the law of obligations.

(98) Under German law, the organisation of a large sports event as such is not protected by any intellectual property rights whatsoever. Organisers cannot prevent third parties or non-sponsors from benefiting from the public attention connected with the event by preventing any type of reference to the event in a promotional context. For the purposes of the case under review, the term ambush marketing does not cover marketing activities which do not violate trademark, copyright or fair trading laws and, if the advertiser or the brand ambassador are participants of the event, which are not in violation of any obligations regarding consideration and cooperation under contract law/the law of obligations. Neither can such activities be described as admissible or indirect ambush marketing. The BSI is right in pointing out that as the ambivalent meaning of the term 'ambush marketing' suggests an insidious approach, it includes a judgement which anticipates the legal assessment and which is therefore incorrect.

(99) According to the Bundeskartellamt's current view and based on the German law, ambush marketing describes advertising measures which violate legal provisions by using logos, symbols, trademarks or other characteristics of the event organiser or misleading information regarding the advertiser's sponsoring status. Furthermore, as the athletes are members of the German Olympic team and participants in the Olympic Games, this case also covers marketing activities that constitute a violation of obligations regarding consideration and cooperation under contract law towards the DOSB or the IOC. Ultimately these advertising measures represent free-riding by the athletes and their sponsors on the high esteem for the Olympic Games and the marketing potential resulting from this. However, in its ISU decision the EU Commission rightly explained that the prevention of free-riding was not a

legitimate objective that would justify the non-application of Art. 101(1) TFEU, but an efficiency defence within the meaning of Art. 101(3) TFEU.[61] In an assessment under Art. 102 TFEU this defence would thus only have to be taken into account as part of the objective justification.

(100) When transferring this view to the present case, the fact that the prevention of ambush marketing is not only carried out with regard to the economic misallocation this involves, is not taken into consideration. As a matter of fact, the legitimate protection of Olympic sponsors, based on the definition of ambush marketing that is relevant in this case, serves to ensure that the Olympic Games, which are also funded by the Olympic sponsoring programmes, can take place on a regular basis. Due to their special format as a competition involving many sports across the world and the high level of media attention they attract, the Olympic Games have a unique position.[62] In many sports disciplines, an athlete's participation in the Olympic Games has a very special significance which cannot be replaced by participating in other competitions. Given that there are no other (potential) suppliers of similar competitions due to the existing entry barriers, the efforts undertaken by the members of the Olympic Movement to safeguard the regular organisation of the Games are set out to achieve, at least among other things, a sports-related objective.

(101) This cannot be called into question by the fact that each city that organises the Olympic Games bears a substantial part of the organisation costs pursuant to the so-called *Host City Contract* to be concluded with the IOC and the OC. Nevertheless it must be possible for the members of the Olympic Movement to generate revenue in order to cover the costs they have to bear. It cannot be pointed out to them that sufficient revenue can be generated from marketing the broadcasting and TV rights. Such revenue is subject to fluctuations. It must be taken into account that the media companies' willingness to pay fees for the acquisition of these rights depends, among other factors, on the question of how much advertising is possible in the context of the Olympic Games. If the amount of other Olympics-related advertisement is low, the companies can achieve higher prices for advertising blocks sold to third parties to be broadcast during the Olympic Games. The present decision will provide German athletes and their sponsors with more opportunities for advertising.

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[61] Cf. Commission decision 8 December 2017, case AT-40208 – *International Skating Union's Eligibility Rules*, para 224.

[62] Cf. para. 45 ff.

(102) The parties have also claimed that equal opportunities had to be ensured in order to safeguard the financial stability and sustainability of the Olympic Movement and the Olympic Games. All athletes worldwide who qualified for the event should be able to participate, and an athlete's participation should not fail because each NOC had a different financial situation and athletes could not, or not sufficiently, be supported. From the Bundeskartellamt's view, this cannot be acknowledged as a legitimate objective within the meaning of the *Meca-Medina* case-law.

(103) In light of the recent decisions of the European Commission ("International Skating Union's Eligibility Rules") and the EFTA Court ("Kristoffersen"), it is generally conceivable that the protection or safeguarding of the existence of a solidarity model where revenues are either distributed horizontally (e.g. between all clubs participating in a competition) or vertically (e.g. between professional and amateur athletes), can represent a legitimate objective justifying the non-applicability of competition law.[63] However, the Bundeskartellamt's preliminary view is that, as the EFTA Court noted in the "Kristoffersen" case, this only applies if the financial support granted by the system is sufficiently transparent for the participants who contributed their performance. They should not only be in a position to understand and assess the volume of income generated, but also whether this income, or at least most of it, has in fact been spent to the benefit of those athletes who are disadvantaged in terms of opportunities to participate in the Olympic Games.[64] In the Bundeskartellamt's current view, there is no such transparency as the Olympic solidarity plan only provides aggregate or general statements on the volume and use of marketing income generated by the Olympic Games. Another aggravating factor is that support is provided indirectly, i.e. payments are first made to the NOCs or the Committee which then decide on the specific support measures in a second step.

(104) For the same reasons it is the Bundeskartellamt's current view that the parties' statements on the preservation of the value of the Olympic brand for the purpose of financing the Olympic solidarity plan do not constitute a legitimate objective within the meaning of the Meca-

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[63] Cf. Commission decision of 8 December 2017, Case AT-40208 – *International Skating Union's Eligibility Rules*, para 222.

[64] Cf. EFTA Court judgment of 16 November 2018, Case E-8/17 – *Henrik Kristoffersen./. Norwegian Ski Federatio*n, para. 118 ff. Background: Advertising restrictions which are imposed for the purpose of funding a solidarity system and which result in the exclusion of self-marketing and the obligation to accept collective marketing can only be considered proportionate, if athletes receive a fair share of the revenues from marketing activities which, due to the restriction, they are unable to conduct individually (cf. EFTA Court, loc. cit., para 124).

Medina decision. Furthermore, there is no “Olympic brand” which ensures that the marketing potential of the Olympic Games is absolutely and comprehensively protected vis-a-vis third parties. As the BSI rightly points out, there is no such ancillary copyright under German law for an organiser of (sports) events. As far as intellectual property rights exist as a protection against practices by third-parties, these will be taken into account within the framework of the acknowledged aim to prevent ambush marketing in order to ensure that the Olympic Games can take place on a regular basis.

(105) In the preliminary view of the Bundeskartellamt, it is not convincing either that the advertising restrictions under rule 40, bye-law 3 OC or the DOSB Guidelines 2016 should intend to avoid an over-commercialisation in the interests of placing a focus on the athletes’ sports performance. The Olympic Movement itself has intensified and expanded its own commercialisation of the Olympic Games. For example, Recommendation 19 of the “Olympic Agenda 2020”[65] includes the launch of an Olympic TV Channel, Recommendation 33 suggests to further involve TOP sponsors in “Olympism in Action” programmes, and Recommendation 35 recommends to foster TOP sponsors’ engagement with NOCs. The self-restraint mentioned above with regard to advertising in the stadia will not necessarily result in less commercialisation as the official sponsors might be willing to pay higher fees for their sponsorship rights.

2. Inherence and proportionality

(106) Provisions to prevent ambush marketing during the frozen period inherently restrict the advertising options of athletes and their (potential) sponsors. As to their proportionality with regard to the pursuit of this objective the following points can be noted on the basis of a preliminary assessment:

a) Formal aspects

(107) The provision of specific rules for the German athletes in a guidance paper is necessary and appropriate. The rules serve to avoid legal disputes with the athletes during the games as they have been informed in advance of the provisions to be observed. As a precondition, however, ambush marketing must be understood in the sense described above; the term

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[65] Available for download at https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Olympic-Agenda-2020/Olympic-Agenda-2020-20-20-Recommendations.pdf#_ga=2.36325024.1441801916.1537622749-833440572.1537622749

must not be used to prohibit any type of reference to the event by joined parties in a promotional context. Only this will fulfil the requirements of an admissible stipulation of rules within the autonomy of associations.

(108) However, the obligation imposed on the athletes to notify individual advertising measures within certain time limits and not to carry out these measures unless approval has been granted, is disproportionate. In the current view of the Bundeskartellamt the time limit stipulated in the DOSB Guidelines 2016 is likely to have had a prohibitive effect as athletes had to notify long before they knew whether they would be nominated to participate in the Olympic Games. Olympics-related activities could therefore not be finally planned before the end of the notification period. Even if a notification was made within the time limit, athletes could not be sure they would be granted approval early enough to be able to activate the advertising measure during the course of the Olympic Games. Another aggravating factor was that, due to the different competencies for international and national applications and the NOC's “opt out” option, it was often not clear at all where the application had to be submitted in the first place. These disadvantages for the athletes and their (potential) sponsors outweigh the interests of the DOSB in being able to examine planned advertising measures in advance. Also, the DOSB is entitled to seek interim and retroactive legal protection.

b) Substantive aspects

(109) The assessment of whether the provisions of the DOSB Guidelines 2016 are proportionate in terms of substance, is determined by the term ‘ambush marketing’ and the review standard this involves. On this basis only individual advertising measures can be prohibited which violate legal provisions, in particular the trademark, copyright or fair trading laws, or which are, where applicable, in violation of any obligations regarding consideration and cooperation under contract law. In Germany, the Act on the Protection of the Olympic Emblem and the Olympic Names (Olympiaschutzgesetz, OlympSchG) must also be taken into account. In its “Olympia-Rabatt”[66] judgment, the Federal Court of Justice included some fundamental statements on the admissibility of Olympics-related advertising, which set clear limits to an excessively broad interpretation of the property rights under the Act on the Protection of the Olympic Emblem and the Olympic Names.

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[66] Cf. Federal Court of Justice, judgment of 15 May 2014 – I ZR 131/13, *Olympia-Rabatt* (available at https://lexetius.com/2014,3770).

(110) According to the court, an association and thus the likelihood of confusion within the meaning of Section 3(2) no.1 OlympSchG only exist in cases where the public perception is that there are economic and organisational relations between the owner of the property rights and the company which uses Olympic designations in its advertising. This will only be the case under special circumstances, and not in cases where merely associations with the Olympic Games or the Olympic Movement are evoked. A reasonably well-informed consumer distinguishes between a sponsor's advertising and a reference to the Olympic Games in a promotional context. The court also held that the effect of an advertisement on consumers was decisive in assessing the likelihood of confusion.[67]

(111) Furthermore, according to the "Olympia-Rabatt" judgment, not every use which can have an adverse effect on the optimisation of the commercial use of the Olympic designations by the owners of the property rights constitutes an unfair abuse of the high regard for the Olympic Games or the Olympic Movement within the meaning of Section 3(2) no.2 OlympSchG. According to the intent of the German legislator, this requires the transfer of a brand image resulting from specific circumstances established in an overall assessment of the advertisement objected to. It is therefore not sufficient if the advertisement merely evokes positive associations with the Olympic Games and the Olympic Movement and, in particular, merely creates a temporal connection with the Olympic Games.[68]

(112) The subject matter of the case to be decided on by the Federal Court of Justice was advertising including Olympic designations during the Olympics carried out by a company that otherwise had no connection with the Olympic Games. The case scenario was thus different than the one under review here. However, in the Bundeskartellamt's preliminary view, the very fundamental statements made by the Federal Court of Justice are also applicable to cases where a non-Olympic sponsor includes a participant of the Olympics in its advertising. However, it must be noted that a connection already exists due to the fact that the brand ambassador, i.e. the athlete, participates in the Olympics. The contractual cooperation and consideration obligations resulting to a certain extent from the athletes' membership in the German Olympic team and their participation in the Olympic Games could also justify restrictions.

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[67] Cf. Federal Court of Justice, loc.cit., para. 43f. Recall studies, which focus on an abstract association with sponsors based on memory, are thus not suitable to prove the likelihood of confusion (Federal Court of Justice, loc.cit., para 45).

[68] Cf. Federal Court of Justice, loc.cit., para. 21 ff., 32.

(113) On this basis, the following shall apply in relation to the proportionality of the DOSB Guidelines 2016 after preliminary substantive assessment of the Bundeskartellamt:

(114) The restriction of possible authorisation to so-called ongoing advertising activities is disproportionate. No objective reason can be found why athletes should not be able to also launch individual advertising activities with their sponsors during the frozen period, and in particular why it should not, depending on the course of the games for the athlete, be possible to send messages of greeting and congratulations. The purpose of the restriction is rather to avoid a temporal context with the Olympic Games which, according to the "Olympia-Rabatt" judgment, is not a sufficient basis to establish any unfair abuse of the high regard for the Olympics.

(115) In the Bundeskartellamt's preliminary view, the prohibition of the use of Olympics-related terms specified in the DOSB Guidelines 2016 and further terms indicated in the IOC Guidelines 2016, except for the term "Team Deutschland", is disproportionate. These terms are commonly used in everyday language; they are not covered by any intellectual property rights of the parties which would not be possible anyway because their availability must be preserved. For example, there is no reason why advertisements should not include a reference to the respective location of the Games.

(116) The prohibition of using the term "Team Deutschland" limited to the duration of the Olympic Games, is, however, proportionate. In that respect it must be taken into account that the DOSB, which organises the participation of the German Olympic team and thus the participation of the individual athletes, markets the German Olympic team under this term in order to secure its part of the funding required for this purpose. In view of the contractual situation based on the athlete agreement it appears reasonable in terms of mutual cooperation and consideration that the German athletes refrain from using this term to advertise their sports performances during the games, i.e. during the peak phase of the DOSB's marketing of the German Olympic team.

(117) In the preliminary view of the Bundeskartellamt, the prohibition of isolated use of the respective year in which the Olympic Games are held is disproportionate. The indication of specific years is still generally protected by trademark rights in favour of the IOC, and the appeal filed by the BSI against some of these trademarks has not yet been decided on. In view of the obvious fact that the availability of such names/figures must be preserved, it appears to be doubtful whether the trademark rights can be enforced by the parties as norm

addressees. It is incomprehensible that only the IOC can use the reference to a specific year, such as “2016”, even in all goods and services classes, while third parties cannot.

(118) However, the prohibition on athletes from using a combination of the respective location and the year should be proportionate, at least during the frozen period. Such combinations very clearly refer to a specific event, i.e. the Olympic Games held in a specific year at a specific location. This reference is used to market the Olympic Games which are organised under the leadership of the IOC within the Olympic Movement. Irrespective of the question of whether such “event designations” can be protected by trademark rights it must be taken into account that it is the IOC which enables the German athletes to take part in such a sports event in the first place. In the Bundeskartellamt’s preliminary view it is therefore in line with the need for mutual cooperation and consideration if athletes do not advertise their sports performance by using this designation, at least not during the frozen period.

(119) It is disproportionate in the authority’s preliminary view that members of the German Olympic team were generally prohibited from using their own photos taken at Olympic locations, e.g. during competitions or in other situations, for individual advertising measures, if these photos were taken during the course of the Olympic Games. This applies in particular to photos which do not picture any Olympic symbols, logos or designations protected by trademarks or where these could be rendered unrecognisable. The same applies to the prohibition on the use of videos in a promotional context which show athletes during the Olympic Games outside the competition venues. Here, too, a prohibition that also extends to recordings on which no Olympic symbols, logos or designations are to be seen or where these could possibly be made unrecognisable, is likely to be too far-reaching.

(120) In the preliminary view of the Bundeskartellamt the prohibition on individual advertising measures carried out via the Germany athletes’ social media accounts is disproportionate in so far as it also covers advertising measures which do not show any designations or symbols protected in favour of the parties or any pictures or videos which have not been released for use in advertising. This prohibition is likely to prevent in particular individual advertising measures by German athletes closely linked to the Olympic Games in terms of time. However, following the “Olympia-Rabatt” judgment, such a temporal connection is not sufficient grounds for considering Olympics-related advertising to be inadmissible.

c) Sanction regime

(121) In the Bundeskartellamt's preliminary view, the sanction regime provided for violations committed by athletes or their sponsors will even further increase the impediment to competition involved in the restrictions that are considered disproportionate.

(122) The option to also impose sports-related sanctions appears to be disproportionate in the case scenarios at issue. Such sanctions could have significant effects on the athletes' sports careers and the exercise of their professions. Sanctions could, for example, give rise to the extraordinary termination of existing sponsorship contracts or the exclusion of athletes from promotion programmes, which would threaten the continued funding of their sports activities. A ban from competitions leads to athletes being expelled from their national teams and losing their training opportunities. Depending on the duration of the ban and the athlete's age, this can mean the end of a sporting career. In the preliminary view of the Bundeskartellamt, the mere possibility that such a sanction might be imposed can have a deterrent effect on athletes and even make them refrain from using the option of individual advertising activities which is already a very much restricted option under the DOSB Guidelines 2016.

(123) On the other hand, a violation of rule 40, bye-law 3 OC will not directly threaten the guarantee of a fair sporting competition. Although violations of rules could lead to individual athletes achieving higher incomes, it is not evident from the point of view of the Bundeskartellamt that such an increase would translate in any measurable way into an individual athlete's improved athletic performance that could lead to a more than theoretical distortion of equal opportunity in sports. Rule 40, bye-law 3 OC thus cannot be associated with such a "financial fair play". Also, financial sanctions are likely to be able to sufficiently remedy the remaining damage potentially caused by a violation, e.g. the threat to the parties' own marketing activities and the unfair abuse of the high regard for the Olympic Games. Even though penalties must not be prohibitive, the calculation of damages and/or contractual penalties can adequately take into account the gravity of the violation and the gain achieved by the respective athlete and sponsor.

(124) Disputes on the admissibility of an individual advertising activity of a German athlete pursuant to the DOSB Guidelines 2016 as well as disputes on nominations or anti-doping violations were to be submitted exclusively to the Court of Arbitration for Sport. For the German athletes, however, CAS proceedings generally involve more time and financial effort than proceedings before the German courts. Also, if sports-related sanctions are imposed on

account of a violation of rule 40, bye-law 3 OC, there is no guarantee that the parties' specific action against an athlete will also be subject to judicial review under European antitrust law. According to a recent judgment by the Swiss Federal Tribunal, the European antitrust rules are not part of the (substantive) ordre public; the respective violations are therefore not reviewed in appeal proceedings against CAS decisions[69]. Neither will a review under competition law be carried out by German courts within the framework of legal protection against enforcement measures. Although the abuse control rules under competition law are part of the national rules the court will have to observe, i.e. the ordre public, such legal protection is normally not possible as sports-related sanctions are self-executing and can be carried out by the parties themselves, without the assistance of state institutions/bodies.

(125) The clarification of whether, in individual cases, the advertising activity of a German athlete is in violation of rule 40, bye-law 3 OC and the relevant provisions of the DOSB, has no connection to sports-related rules. The reasons underlying the system of sports arbitration, in particular in the area of anti-doping rules, are based on the special expertise of the arbitrators, the speed of decision-making, which in view of fixed dates for sports events is also very important for the athletes, the uniform application of the rules and the international recognition and enforcement of arbitration decisions.[70] However, these advantages are likely to be less significant in other areas than those covered by the rules relevant to safeguarding fairness and equal opportunities in competitions, in particular the anti-doping rules. In view of the predominantly economic character of disputes on account of violations of rule 40, bye-law 3 OC, there is reason to assume that a review pursuant to EU antitrust law must be ensured (just as in cases dealt with by a court of commercial arbitration) and that the court examining these legal provisions can submit questions regarding their interpretation to the ECJ for a preliminary ruling.[71]

(126) It is questionable whether this must also be applicable in cases where no sports-related sanctions are imposed. In the Bundeskartellamt's preliminary assessment, this is the case because as far as economic disputes are concerned, the arbitration agreement might not

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69 Cf. Swiss Federal Tribunal, judgment of 8 March 2006, 4P.278/2005, numbers 3.1, 3.2 (available at https://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht.htm), (expressly overruling an earlier decision of 13 November 1998, 4P.119/1998).

70 Cf. Federal Court of Justice, judgment of 7 June 2016 – KZR 6/15, *Pechstein*, WuW/E 2016, 364, para. 49 f., 59, 62.

71 Cf. ECJ, judgment of 1 June1999, case. C-126/97 – *Eco Swiss*, para. 35, 36 and 40.

represent a self-determined decision by the athletes in terms of their private autonomy[72], as it does not affect the guarantee of a fair sporting competition, which is also in the athletes' interests.

d) Conclusion

(127) In the Bundeskartellamt's preliminary assessment, the rules provided in the DOSB Guidelines 2016 and their application by the parties are subject to antitrust review pursuant to Article 102 TFEU and Section 19 GWB. The question whether any other reasons can represent an objective justification for the advertising restrictions, in particular the reasons not deemed to be legitimate objectives within the meaning of the Meca-Medina decision, can be left open in this case. The Bundeskartellamt considers that the commitments undertaken by the parties result in proportionate requirements for advertising measures to be observed by members of the German Olympic team pursuant to rule 40, bye-law 3 OC with regard to the achievement of the legitimate objective of preventing ambush market in order to ensure that the Olympic Games can take place on a regular basis. On the basis of these new stipulations which, pursuant to the commitments undertaken, are applicable until the conclusion of the 2026 Olympic Games, a violation of Article 102 TFEU, Section 19 GWB can be ruled out.

IV. Content and suitability of the commitment

(128) The market test of the modified DOSB Guidelines, prepared after the first round of negotiations with the parties, showed that from the point of view of both athletes and sponsors, further changes were necessary.[73] Further aspects that were considered problematic were the already shortened list of Olympic and Olympics-related terms and the limited opportunities for social media advertising. In this context, it was criticised that the use of (own) images of the athletes at the Olympic Games was not allowed. It was also found that the

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[72] In its Pechstein judgment the Federal Court of Justice denied external determination i.a. with a view to the assurance of doping-free sports and thus a fair sporting competition which is also, and in particular, in the interests of athletes (Federal Court of Justice, loc.cit., para 62).

[73] Approx. 54% of the sponsors who responded to question 7 saw little or no improvement in the modified DOSB guidelines compared to the DOSB Guidelines 2016 (cf. memorandum on the sponsor survey of 21 December 2017 (non-confidential version) of 8 March 2018, p. 4 f., p. 3380 f. of the file). Even 67.5% of the athletes who responded to question 6 considered the modifications after the first round of negotiations as little or no improvement (cf. p. 4 f. of the memorandum of 28 February 2018 on the athlete survey of 21 December 2017 (non-confidential version), p. 3324 f. of the file.

parties' competencies according to the definition of national applications in the modified DOSB Guidelines remained unclear. During talks with the joined parties it also transpired that it was not sufficiently clear that already under the modified DOSB Guidelines advertising measures were exclusively to be assessed according to substantive admissibility criteria defined as "key principles" and that there no longer was a general obligation to notify these measures. And finally, the talks showed that the CAS's exclusive competence for any disputes arising in the context of rule 40, bye-law 3 OC and the likelihood of sports-related sanctions have a strong deterrent effect.

(129) The parties then consented to a new round of negotiations during which they declared their willingness to further relax the stipulations of rule 40, bye-law 3 OC. The further modifications have been implemented in the current version of the DOSB Guidelines attached to this decision. The parties refer to that version in their commitments and the concrete content of the commitments result from it. The Bundeskartellamt considers these commitments suitable for eliminating competition law concerns with regard to the applicability and application of rule 40, bye-law 3 OC. In detail:

1. Scope of application

(130) The scope of application of the current DOSB Guidelines is limited to advertising activities relating to Germany. Unlike the trademark and copyright law, especially the Act on the Protection of the Olympic Emblem and the Olympic Names is a German act which is not based on a European harmonisation of legislation. As a national competition authority, the Bundeskartellamt cannot transfer the main evaluation criteria, which were taken from the decision on the "Olympic rebate", to other legal systems and declare them as binding.

(131) The modified DOSB Guidelines stipulated that the advertising measure must target Germany exclusively, which did not withstand the market test. Especially the regulation regarding athletes' and sponsors' online advertising activities was considered unclear or even problematic. It was also stated that there are media other than the internet for which it cannot be clearly assessed whether they exclusively refer to Germany. Many athletes pointed out in this context that it was important to them to be able to communicate also in English on social media.[74]

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[74] Cf. evaluation of question 10 of the sponsor survey (p.8 of the memorandum on the sponsor survey of 21 December 2017 (non-confidential version) of 8 March 2018, p. 3384 of the file) and the athlete survey (p. 8

(132) Against this background, the scope of application of the current DOSB Guidelines was limited to individual advertising activities by members of Team Deutschland. The fact alone that the majority of the German athletes are mainly known in their own country is already sufficient to ensure a link to Germany. The scope comprises advertising activities of members of Team Deutschland with their individual sponsors which are aimed at Germany and have no effect beyond German-speaking countries (Switzerland, Austria). This is the case whenever individual advertising activities are carried out in the German language. However, individual advertising activities by German athletes carried out in the English language can also fall within the scope of application of the current DOSB Guidelines. This is the case if either one of the following three criteria is fulfilled: (1.) The advertising channel is a German medium (newspaper, TV channel, etc.); (2.) The advertising activities are carried out via a website with the country code ".de" or a redirection page ending in "/de", (3.) It is clear from its design (text, pictures or other circumstances) that the advertising addresses the German audience or Germany as a nation. For this criterion to be met, it is sufficient to address the German audience/Germany as a nation in social media by using a corresponding domain or hashtag (e.g. @athleteXYforGermany, #Germanfans).

(133) For advertising activities not falling under these criteria and hence not in the scope of application of the current DOSB Guidelines, the respectively effective IOC Rule 40 Guidelines apply. Advertising activities aimed at least at one non-German speaking country in addition to Germany are considered part of an international advertising campaign by the sponsor and thus subject to authorisation by the IOC.

(134) Opt-out regulations which might be in place in other German-speaking countries do not restrict German athletes and their individual sponsors when it comes to advertising activities under the DOSB Guidelines' scope of application. The current DOSB Guidelines stipulate that all members of Team Deutschland solely have to comply with the DOSB Guidelines for such advertising activities (cf. p. 8) and that the DOSB is the only competent body for processing applications for the authorisation of such advertising activities (cf. p. 9).

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of the memorandum on the athlete survey of 21 December 2017 (non-confidential version) of 28 February 2018, p. 3328 of the file).

2. Key modifications

(135) The current DOSB Guidelines mainly contain the following modifications for individual advertising activities[75] during the frozen period (i.e. from the ninth day before the opening ceremony until the third day after the closing ceremony) which fall within their scope of application:

(136) German athletes are no longer under the obligation to register with the DOSB advertising activities with their sponsors during the frozen period and to wait for authorisation. However, if they want to avoid disputes and be sure of whether these advertising activities comply with the current requirements set forth in the DOSB Guidelines, they can request the DOSB to review their planned activities. If the request for review is handed in until at the latest 21 days before the beginning of the Games (opening ceremony), the DOSB will inform the German athletes in writing or via e-mail on whether according to his assessment the intended advertising activities are admissible or not at least one day before the opening ceremony. Unless the information is received, a fictitious consent takes hold, i.e. the DOSB's consent to carrying out these advertising activities and hence their compliance with the requirements set forth in the current DOSB Guidelines is assumed.

(137) The restriction on individual advertising activities that had been ongoing for a specified period prior to the frozen period is abolished. German athletes and their sponsors can now also start advertising activities during the Games.

(138) Among the symbols and designations which German athletes must not use for individual advertising activities with their sponsors are those protected by the Act on the Protection of the Olympic Emblem and the Olympic Names, i.e. the five intertwined rings and designations Olympiad, Olympia, Olympic, Olympic competitor. Further protected elements are the "Citius-Altius-Fortius" slogan and the conclusively listed terms "venue + year" of the respective games (e.g. PyeongChang 2018), "Team Deutschland", "Team D" and "Team Germany", under which the parties market the Olympic Games or the German Olympic team(so-called event designations).[76] Other event designations are not protected. It is true, as the BSI rightly points out, that Section 3(2) OlympSchG contains a reservation of fairness

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[75] The following statements exclusively refer to advertising activities under the scope of application of the current DOSB Guidelines unless stated otherwise.

[76] Cf. para.118 on the consideration and cooperation obligation for athletes with regard to the use of these event designations during the frozen period.

and therefore not every use of protected designations or symbols is unlawful. However, the Bundeskartellamt currently assesses that the general prohibition to use these symbols and designations is not disproportionate considering that the athletes' participation alone establishes a connection to the Games and that the prohibition only applies during a limited period of time, i.e. the frozen period. In this context, it is also relevant that the use of other terms, including "Medaille" (medal), "Gold" (gold), "Silber" (silver), "Bronze" (bronze), "Sommerspiele" (summer games), "Winterspiele" (winter games) or "Leistung" (performance) is allowed, which enables German athletes to market their participation in the games. They are also allowed to individually use the year and venue of the games they participate in.

(139) Members of the German Olympic team now have considerably more opportunities to use pictures or videos of themselves at Olympic venues for individual marketing advertising activities with their sponsors. The Bundeskartellamt currently assesses them as sufficient. Pictures include both static and continuous pictures as well as slide shows unless they are designed to create the impression of a flowing motion through their type and speed. Videos, however, are motion pictures. Pictures showing athletes at Olympic venues can generally only be used if the aforementioned protected designations, symbols or logos are not visible or rendered unrecognisable. As far as further detailed requirements are concerned, it has to be differentiated between Olympic competition pictures[77] and Olympic non-competition pictures[78].

(140) Having conducted a survey among Olympic associations, the Bundeskartellamt currently assesses that athletes do not have available a sufficient number of competition pictures from other competitions which do not show the Olympic symbols and designations protected by the Act on the Protection of the Olympic Emblem and the Olympic Names for their own advertising activities. Rather, the evaluation of the replies to the questionnaire of 25 July 2018 has shown that German athletes are subject to, in some cases very far-reaching,

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[77] Olympic competition pictures are exclusively pictures showing the athlete during the competition or a ceremony on the playing field. The "playing field" is the area in the competition venues that is used for an athletic competition or a ceremony, including directly adjacent areas which are clearly marked as being inaccessible for spectators. The exact design of the playing field depends on the sports discipline (e.g. course, track, field, ring, etc.).

[78] Olympic non-competition pictures, however, are pictures showing the athletes in areas of an Olympic venue other than the "playing field" or not showing them during the competitions. These other areas include in particular the German House, the Olympic village, the training and practice sites, the areas for accredited spectators and the so-called back-of-house areas. "Back-of-house" areas are non-public areas within and/or around an Olympic venue which are located behind the accreditation point and serve as general operational support areas. These areas are typically not visible to the public and access is limited to accredited persons. Back-of-House areas also include areas reserved for athletes and their coaches only.

advertising restrictions both in terms of their options for using competition pictures taken during competitions organised by the associations and generally with regard to their individual advertising opportunities. Looking at the advertising restrictions weighed by the number of athletes participating in the 2016 and 2018 Olympic Games per association, approx. 52% of the athletes were subject to fairly serious or very serious restrictions. Restrictions ranged from the associations' right to reserve approval of the use of pictures for advertising or the protection of economic interests/exclusivity of the associations' sponsors to an exclusive transfer of athletes' privacy rights to the association or granting associations a share in the athletes' advertising revenue with individual sponsors.

(141) The current DOSB Guidelines now stipulate that German athletes can use competition pictures of themselves for advertising purposes unless they contain logos, symbols or designations protected to the benefit of the parties involved pursuant to the Guidelines. In essence, these are Olympic symbols, designations or logos. These stipulations take into account that Olympic symbols or designations are subject to special protection pursuant to the Act on the Protection of the Olympic Emblem and the Olympic Names. An athlete can have such competition pictures taken by someone s/he knows with non-professional photo equipment. Such pictures have to be edited to eliminate the aforementioned logos, symbols and designations. Restrictions regarding the creation and use of such pictures as stipulated in the "Terms & Conditions of Ticket Purchase, Possession and Use" of each edition of the games[79], which spectators have to consent to upon purchasing a ticket, or which can result from "Accreditation Terms" that athletes have to consent to, do not apply. The IOC allows German athletes to use such competition pictures without the need for a separate statement provided that the use complies with the regulations set forth in the current DOSB Guidelines.

(142) Furthermore, German athletes can purchase competition pictures of themselves from a press agency that is accredited for the Olympic Games, provided that they are so-called "clean pictures". Clean pictures are pictures not containing any Olympic logos, symbols or designations, either because these elements were not contained in the picture in the first place or because they were cropped. A survey among press agencies that have been accredited for several Olympic Games has confirmed that a significant number of such pictures is taken during the Games, although the number of pictures taken depends on the

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[79] Cf. e.g. items 5.3 and 5.4 of the "PyeongChang 2018 Terms & Conditions of Ticket Purchase, Possession and Use", available at https://library.olympic.org/Default/doc/SYRACUSE/171868/pyeongchang-2018-terms-conditions-of-ticket-purchase-possession-and-use-the-pyeongchang-organising-c?_lg=en-GB.

clothes the athletes have to wear when competing. The IOC has given all athletes a general permission to commercially use such clean pictures purchased from accredited press agencies. Athletes can thus use these pictures for individual advertising activities with their own sponsors without having to seek the IOC's approval for each individual case. As the use of such clean pictures for advertising purposes is admissible and the general clause for good behaviour is observed, which stipulates that the rights of third parties are to be observed and criminal law provisions and other fundamentals of mutual respect or fair play must not be violated, a violation of other rules of the Olympic Charter which are linked to advertising activities, like bye-law 3 to rule 40 of the Olympic Charter, does not come into question. This also applies in cases where the competition clothing as such or non-Olympic logos, symbols or names of third parties attached on the competition clothing can be seen in the pictures.

(143) Pursuant to the current DOSB Guidelines, Olympic non-competition pictures can be taken by the members of the German Olympic team in areas of an Olympic venue other than the actual "playing field"[80] or outside competitions. However, such pictures must show athletes wearing neutral clothes, i.e. they must not wear the official Olympic clothing or clothing bearing their sponsors' logos or other information about their products or services. Wearing neutral clothing for the purpose of taking clean pictures is not a violation of the athletes clothing guidelines that apply during the Olympic Games.

(144) Taking into consideration that the IOC or the Olympic Movement as organisers of the competition can market broadcasting rights, athletes must not use videos recorded in Olympic venues. However, the members of the German Olympic team can use videos of themselves at the German House, the Olympic village or the back-of-house areas for their individual advertising activities, provided that the logos, symbols or designations protected by the DOSB Guidelines to the benefit of the parties are either not visible or have been rendered unrecognisable.

(145) And finally, when marketing products or services offered by sponsors of individual athletes, as is also the case with Olympic sponsors, no product or service reference must be established, i.e. the athlete's participation in the Olympic Games, and his/her sports performance must not be linked to the product or service in a way that suggests that the athlete's participation or his/her success at the games are caused by the product/service.

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[80] Cf. footnote 77; for areas in Olympic venues that can be used for taking non-competition pictures, cf. footnote 78.

(146) Individual advertising activities during the frozen period are generally admissible if the requirements regarding symbols and designations, pictures and videos as well as the prohibition to use product or service references, i.e. the so-called admissibility criteria, are observed. Pursuant to the clause stipulating exceptions, such activities can only be inadmissible in very exceptional cases, i.e. if the advertising campaigns, due to other design features, cause a risk of confusion or unfair advantage or are detrimental to the reputation of the Olympic Games or the Olympic Movement. By "other design features", it is to be understood that the exceptional inadmissibility must not be based on the admissibility criteria stipulated in the current DOSB Guidelines. Hence, it may in particular not be based on the use of admissible symbols, designations, pictures or videos or a combination of these elements. Instead, to show that there is a risk of confusion or an unfair taking advantage of or detriment to the reputation of the Olympic Games or the Olympic Movement, further circumstances that are not specified in the current DOSB Guidelines would have to exist. This may be the case if, for instance, a German athlete uses the Olympic torch or the Olympic hymn for individual advertising campaigns. In its decision on the "Olympic rebate" the German Federal Court of Justice defined criteria for a risk of confusion or an unfair taking advantage of or detriment to the reputation of the Olympic Games.[81] The Bundeskartellamt preliminarily assesses that such an exception clause is a reasonable and proportionate "residual concept" with a view to the wide variety of advertising options that exclude a conclusive list of admissibility or prohibitions criteria.

(147) German athletes now have clearly more options to use their social media accounts (for advertising activities) during the frozen period. However, it has to be noted that certain designations must not be used in domain or user names or hashtags, especially if the account is used (inter alia) for advertising purposes. An account is deemed to be used for advertising purposes if the specific article or posting creates a relation between the athlete's individual sponsors or the sponsors' products or services on the one hand and the Olympic Games or the Olympic Movement on the other hand. Such advertising articles or posts must fulfil the admissibility criteria and comply with the exceptions clause. In particular, the pictures or videos showing the athlete at Olympic venues may only be used according to and in observance of the aforementioned criteria. Athletes may now post messages of greeting or thanks to their own sponsors and include advertising messages in their personal accounts of events, i.e. first-person reports about their own experiences, successes or impressions

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[81] Cf. para. 110 f.

of the Olympic Games. Furthermore, the members of the German Olympic team may re-tweet, repost or share contents provided by IOC/OCOG/DOSB/Team Deutschland (including pictures) combined with a message of greeting or thanks to their sponsors if the greeting or thank-you message in itself meets the criteria for advertising use. Retweets, reposts or sharing contents of the individual sponsors or third-party contents referring to the sponsors or their products or services, however, are only allowed if the retweet/repost and the original contents fulfil these requirements.

(148) Pursuant to the current contracts, the regulations of the current DOSB Guidelines become binding for the members of Team Deutschland upon signing the athlete agreement with the DOSB or upon declaring their participation to the IOC, respectively. Any violation rule 40, bye-law 3 OC by advertising activities falling under the scope of application of the current DOSB Guideline can then only be punished by economic sanctions pursuant to German law, i.e. contractual penalties and/or damages. Sports-related sanctions are, however, ruled out. In addition, in the event of disputes arising from rule 40, bye-law 3 OC with regard to advertising activities falling under the scope of application of the DOSB Guidelines, legal recourse to German state courts is possible. This also applies to cases where it is unclear whether an advertising activities falls under the scope of application of the current DOSB Guidelines. Sanctions are also restricted and German state courts can be turned to in the event of violations of the clothing guidelines in non-competition pictures and violations of advertising-relevant stipulations of the Olympic Charter other than rule 40 regarding the clothing worn in Olympic competition pictures.

3. Monitoring

(149) Compliance with the parties' commitments is monitored by the Bundeskartellamt. Compliance with the commitments is examined ex officio by the decision division. Should the parties not comply with their commitments, the decision division can repeal its commitment decision and reinitiate the proceedings pursuant to Section 32b(2) no. 2 GWB. However, the parties also agreed to being monitored by the Bundeskartellamt's decision division. The decision division in particular reserved the right to request comprehensive information and documents on the handling of individual advertising activities for the upcoming Olympic Games from the parties based on its reasonable discretion while the commitment is valid. This right applies to all applications for review by the DOSB or the IOC and to all documents referring to advertising activities that were commented on, discussed or sanctioned by one of the parties although athletes had not applied for review. Members of the German Olympic team and their individual sponsors and accredited press agencies may also be questioned.

V. Exercise of discretion and decision taken

(150) In consideration of all circumstances and reasons outlined above, the decision division deems the parties' commitments suitable and sufficient to eliminate the antitrust concerns against the application of rule 40, bye-law 3 OC by the DOSB towards the members of the German Olympic team and their (potential) sponsors and thus issues this commitment agreement pursuant to Section 32b GWB. Said agreement is the least severe measure to eliminate potential competition restraints. One reason is that it provides a quicker and more efficient solution compared to a contested decision pursuant to Section 32 GWB, which would require further investigations, e.g. into the market definition or other recognised legitimate objectives. With a view to the 2020 Olympic Games, athletes and their (potential) sponsors can already benefit from the considerable alleviation of the former advertising restrictions based on this commitment decision. Any doubts with regard to the actual implementation of the commitments by the parties resulting from the way in which the facts of the case were clarified in the course of the proceedings can be resolved by the monitoring scheme outlined above. The parties have agreed to the scheme that facilitates close monitoring of the application of the regulations of the current DOSB Guidelines by the Bundeskartellamt's Decision Division.

(151) The validity of this decision is limited pursuant to Section 32b (1) sentence 3 GWB. The Bundeskartellamt exercised its discretion based on the consideration that the economic conditions for the interests defined in the commitments are subject to rapid and constant change. These interests are the parties' interest in marketing of the Olympic Games on the one hand and the athletes' and their sponsors' interest in participating in the Olympic Games on the other hand. Change in particular affects the area of marketing one's participation on social media, the development of which cannot be forecast with a sufficient degree of certainty. The distinction made by the commitments is therefore an initial step which will comprise two summer and two winter games in the course of its eight-year duration. Based on the experience gathered during these competitions, the decision division will decide on the initiation of renewed proceedings and the then necessary next steps in the light of the associations' and the athletes' future statements.

C. Fees

(152) […]

LEGAL REMEDY INSTRUCTION

[…]

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