

BSI - Position paper

German Cartel Office:

Administrative proceedings: IOC (International Olympic Committee) Rule 40 / DOSB (Deutscher Olympischer Sportbund) Guidelines on IOC Rule 40 (Feb 2019)

14 May 2019

Summary

- The Sporting Goods Industry welcomes the decision of the German Federal Cartel Office regarding the IOC rule 40, paragraph 3 as a positive step lessening the effect of the general advertising ban for athletes during the Olympic Games.
- The sporting goods industry now sees an urgent need for action for a uniform European solution in order to treat Olympic athletes from different European countries equally in their marketing activities during the respective Olympic Games and not to discriminate them on the basis of their nationality.
- The sporting goods industry does not see the need for maintaining IOC Rule 40, paragraph 3. An unlawful sponsor protection cannot be in the interest of the sponsors themselves, the participants and the European legislator. Moreover, there is no evidence that sponsors demand such protection at all. For the Olympic Games, like for any other sport event, sponsor protection within the legally prescribed framework should be sufficient and should prevail.
- The regulation is not necessary for the financing of the Olympic Games, since the event is financed mainly by National Public Authorities, municipalities and cities hosting the Games. The largest source of income on the part of the IOC is in the marketing of the TV Licensing Rights for the event and not the resources provided by the Olympic Sponsors.

Therefore, as a sporting goods industry, we strongly advocate in the favor of the abolition of IOC Rule 40, para. 3.

We call on the European Union to provide all parties including athletes, economic operators and commercial partners with the due legal clarity by legally evaluating the compliance of IOC Rule 40, para.3 with EU legislation.

- Independently of this, the sporting goods industry is committed to continue supporting athletes materially and financially in their careers. We see us as “true partners of sports”.

1. Background: German Federal Cartel Office: Decision on IOC Rule 40, Paragraph 3

The Olympic Charter Rule 40, para.3 prohibits all individual advertising activities by Olympic participants during the so-called "frozen period" of the respective Olympic Summer or Winter Games, lasting from nine days prior to three days after the event. The objective is to protect, among others, the contractual exclusivity rights of the IOC sponsors. With this approach, the IOC, intervenes in the contractual relations between athletes and commercial partners who are providing services such as marketing, sponsoring, and others in order to maximize its own revenues. As a sports association, the IOC thus pursues economic interests and is subject to competition and antitrust law according to current case law (Meca-Medina, EuGH, Case C-519/04 P, 2006).

Within the framework of administrative proceedings, the German Cartel Office has investigated in the last two years if this behavior of the IOC / DOSB is objectively justified, or whether further parties concerned are unfairly hindered in their commercial freedom of action and whether this advertising ban violates the provisions of European and German antitrust laws. On 27 February 2019, it decided to discontinue the proceedings on the basis of the commitments given by the IOC and the DOSB to significantly relax the individual advertising ban for German Olympic athletes. This solution is binding until the 2026 Winter Olympics included. The German Cartel Office will monitor compliance on an ongoing basis. Violations by the IOC and the DOSB are subject to fines.

The content of this commitment is defined in more detail in the new DOSB Guideline on IOC Rule 40 (Feb. 2019), approved by the IOC. Advertising campaigns by German Olympic athletes are now also permitted within the legal framework during the "frozen period" and can only be prohibited if they contravene legal requirements. (MarkenG, UrhG, UWG, OlympSchG) taking into account the restrictive interpretation by German courts. Specifically, these are advertising activities by German Olympic athletes in German or English focused on the German market. This is particularly the case if the advertising is in a German medium, on a website domain with a ".de", recognizably addressing the German public or Germany as a country. This also applies to advertising campaigns that have additional effects on other countries (e.g. in German-speaking countries abroad), for all forms of media (print, Internet, images, social media) as well as for generic advertising such as greetings and congratulations to the individual sponsor or the individual sponsor to the athlete.

German Olympic athletes do not have to pre-register or approve their advertising activities during the "frozen period" corresponding to the above-mentioned definition with the DOSB. However, voluntary registration is possible. From now on any infringements can only result in economic sanctions (proportionate contractual penalties and/or indemnities). These sanctions would also have to be enforced by the IOC and/or the DOSB before ordinary German courts. Sports-related sanctions according to the Olympic Charter, i.e. an exclusion from the Olympic Games, a ban, a return of medals, and appeals to sports arbitration courts (CAS) are excluded.

Thus, Olympic athletes can now market their participation in the Olympic Games within the framework of the legal possibilities and thus profit financially from their participation in the event. At the same time, the new legal certainty means that they no longer have to fear any sporting sanctions in the event of possible infringement. Conversely, individual sponsors also benefit from the possibility of marketing athletes during the Olympic Games who they have supported materially and financially for many years within the boundaries of the legal framework.

In particular they have the legal certainty that the athletes during the Olympic Games cannot be held responsible for any unintentionally mistakes made by the companies. Furthermore, advertising activities by German athletes without an Olympic connection, which according to the wording of IOC Rule 40 are also prohibited and would have to be discontinued during the "frozen period", are now fully permitted and can continue or be restarted during the period without requiring prior notification or information to the DOSB. It is also permitted for German Olympic participants to advertise at parallel events to the Olympic Games (Wimbledon Tennis Tournament or Tour de France) without having to pre-register with the DOSB. For international advertising activities that target more than one country, the IOC is exclusively responsible for German Olympic-Athletes; other countries that reserve special approvals for international advertising measures no longer need to be contacted. Still the requested process of approval for international or EU-wide advertising activities by IOC is in itself legally questionable as it affects as well the EU-common market, whereas the regulatory basis for the demands of the German Cartel Office applies to the EU-level likewise.

The German Cartel Office has thus agreed a balance between the Olympic athletes as participants in the Olympic Games and the IOC as organizer and event organizer. German athletes may now benefit from the financial advertising opportunities around the event within the legal framework.

2. Position and Claims of the Sporting Goods Industry

The sporting goods industry welcomes the outcome of the proceedings and in particular the new legal certainty created by the solution for German athletes and their individual sponsors. Since online advertising activities in particular are no longer limited to one country and therefore no longer restricted to national borders, we believe that a European solution should be established as quickly as possible so that German and non-German athletes can be placed on a level playing field during the Olympic Games. Olympic athletes within the EU should not be restricted in their advertising activities on the basis of their nationality and thus be discriminated. In this context, there is an urgent need for action, above all, because the various National Olympic Committees (NOCs) within the European Union execute very different advertising restrictions during the Olympic Games. In some countries advertising activities of Olympic athletes and international advertising of Olympic athletes from other European countries are completely prohibited. This applies not only to advertising during the Olympic Games, but also to advertising without an Olympic dimension and to advertising by Olympic athletes at parallel events such as the tennis tournament at Wimbledon.

The German Cartel Office also stated in its decision on the administrative procedure that the members of the Olympic Movement can be regarded as a collective commercial entity adopting a dominant position for the commercial exploitation of the Olympic Games considered itself as limited event market. Therefore they are jointly norm addressees of Art.102 TFEU and Art.19 (1) in conjunction with (1) ARC.

For this reason, we see an urgent need for immediate action from the European Union in order to establish a uniform European solution for Olympic athletes and their individual sponsors as quickly as possible.

With regard to the German Cartel Office's decision, we would like to state that the reasons for the retention of the Olympic advertising ban under IOC Rule 40, Paragraph 3, were presented insufficiently and not transparently in the course of the proceedings. It is not clear why the Olympic Games, like all other sporting events, could not be successfully financed without such a general advertising ban. According to our knowledge, international sponsors do not demand such an illegal regulation that their financial or material

commitment to supporting sports or cultural events would depend on such illegal behaviour. On the contrary, it should be in the interest of all sponsors that event organisers comply with existing legislation.

Against this background, we call on the European Union to assert the existing legislation for the protection of sponsors at events against the IOC. In our opinion, despite the principles of the specificity of sport there is no justification for a special regulation for the Olympic movement in its intervention in the commercial advertising practices of third parties.

With regard to the financing of the Olympic Games, there is also no dependence on the IOC sponsors, whose rights are to be protected by IOC Rule 40, Paragraph 3, according to the official information provided by the IOC. According to the IOC, the Olympic Games are financed as stated below:

The revenues from the marketing of sponsorship rights, TV broadcasting rights and ticketing revenues are distributed to the Olympic organizations (NOKs, IF - International Federations, OCOG) according to a fixed key. In addition, the respective organizing committee of the Olympic Games also generates income from its own marketing of sponsors' rights as well as licenses, ticket sales and coin and stamp programs. The Olympic Marketing Fact Files (2018 Edition) for the respective Olympic Games contain current breakdowns of revenues for the period 2013 - 2016:

	TV-Licenses (IOC)	TOP-Sponsors (IOC)	Tickets, Licenses, Sponsors (OCOG)	Sum (Billion US \$)
2013 - 2016	4,157	1,003	2,638	7,798

Source: Olympic Marketing Fact Files 2018¹

Over the same period, total revenues fell from US\$ 8,046 billion (2009 - 2012) to US\$ 7,798 billion (2013 - 2016), while revenues from TV rights and TOP sponsors of the IOC amounted from US\$ 4,800 billion (2009-2012) to US\$ 5,160 billion (2012-2016).

In return, the following sums were reimbursed to the organizers for the refinancing of the Olympic Games in the above-mentioned period as a contribution of the IOC:

Winter Olympic Games in Sochi 2014:
833 US \$ million for a total event cost of 40 US\$ billion.

Summer Olympic Games in Rio 2016:
1.531 US \$ billion for a total event cost of 11.8 US\$ billion.

As outlined, there is no dependency between the sponsoring revenues of the IOC on the one hand and the financing of the Olympic Games on the other.

¹ https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Marketing-and-Broadcasting-General-Files/Olympic-Marketing-Fact-File-2018.pdf#_ga=2.183390178.53447491.1526225101-293754259.1510147539

Since the contributions of the Olympic sponsors do not play a decisive role for the financing of the Olympic Games, the advertising restriction laid down in IOC rule 40 para. 3 is not justified for the financing of the Olympic Games and can in our opinion be abolished for this reason. We hereby call on the European Union to work towards this objective in the interests of Olympic athletes, citizens and sponsors.

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The Association of the German Sporting Goods Industry is the federation of German sporting goods manufacturers, wholesalers and importers founded in 1910. It includes roughly 150 leading firms, usually SME, with international market leaders from various sectors among them. The German sporting goods industry generates an annual turnover of approx. EUR 30 billion. Germany is the country with the largest number of 1.15 million sport-related jobs in the European Union, which accounts for 27% of all sport-related jobs at EU level.

The BSI is a member of the Federation of the European Sporting Goods Industry FESI based in Brussels and therefore also a member of the World Federation of the Sporting Goods Industry WFSGI based in Bern.