

Antitrust Compliance Programme

New Regulation 39

A submission from the Czech Sailing Association, Real Federación Española de Vela, Hellenic Sailing Federation, Slovak Sailing Union, Turkish Sailing Federation and Hungarian Yachting Association

Purpose or Objective

The present submission proposes the adoption of a World Sailing Antitrust Compliance Programme.

The Antitrust Compliance Programme has three main purposes:

- 1) preventing anticompetitive practices;
- 2) detecting breaches of competition law; and
- 3) mitigating the negative consequences of antitrust violations.

As will be argued in greater detail below, compliance with competition rules worldwide cannot be presumed and/or secured through the application of codes of ethics.

In order to ensure that, in pursuing its statutory objectives, World Sailing effectively respects antitrust law, therefore it is essential to elaborate a more structured and complex set of rules which vary from control mechanisms to communication protocols and from training programmes to sanctioning procedures.

Proposal

New Regulation - 39 - Antitrust Compliance Programme (ACP)

With a view to guarantee full compliance with competition law worldwide, World Sailing shall adopt an Antitrust Compliance Programme.

The ACP shall address a number of substantive issues concerning specific anticompetitive practices, planned or implemented, directly or indirectly traceable to:

- a) World Sailing or one of its employees or members of staff;**
- b) to Member National Authorities (MNAs) or one of its employees or members of staff and**
- c) to all undertakings, including their employees, members of staff and managers, involved in the organization of official sailing events.**

Most notably, in relation to both vertical and horizontal agreements, the provisions included in the ACP must be applicable to the following anticompetitive conducts: fixing of prices or terms or conditions; sharing of markets; boycotts; restriction of production/sales. With respect to undertakings in a dominant position (including World Sailing when granting the status of class to a given boat or board), which have a special responsibility (for the US, see e.g. *ZF Meritor v. Eaton*, 696 F.3d 254, 3d Cir. 2012; for the EU, see e.g. *NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities*, case 322/81, ECLI:EU:C:1983:313), the ACP must cover both exploitative and exclusionary conduct, and in particular: discrimination; tying; predatory pricing; refusal to sell; imposing inappropriate prices, terms or conditions; restrictions of production, sales or technical development.

The ACP shall be drafted in accordance with international standards. In this regard, suffice it here to recall that according to the UK Office for Fair Trading (OFT): “[T]he core of an

effective compliance culture is a clear and unambiguous commitment to competition law compliance, throughout the organisation” (How your business can achieve compliance with competition law, 2011, para 2.1). Thus, a clear, firm and public compliance position shall be adopted by World Sailing’s management bodies and, more broadly, by all managers and representatives of MNAs.

In order to be credible, the ACP must be elaborated within World Sailing, but with the assistance and support of impartial and independent experts, and comprise all the elements listed below. The elaboration and, subsequently, the monitoring of the ACP shall be entrusted to an *ad hoc* committee, sub-committee, commission, or working group appointed in accordance with the Constitution and Regulations of World Sailing.

• Training programs

Employees, staff and managers must have an adequate knowledge and understanding of competition law and be made aware of the risk of administrative, criminal and civil sanctions for breach of competition law. The training activities must be offered by an outside attorney (face-to-face and/or online) and be compulsory for all members and new joiners. Periodical refresher courses must also be foreseen.

• Risk identification and risk assessment procedures

The potential competition law risks must be singled out and appraised having due regard to the personnel involved (e.g. high-risk staff, medium-risk staff and low-risk staff).

• Controls

Effective controls are of the utmost importance and shall in any case comply with labour legislation. They must be efficient and cost-effective. More precisely, it is necessary to provide for both direct and indirect controls. As to the former, World Sailing should be able to

a) ask any representative or member of staff of the MNAs or interested undertakings (builders of boats and boards selected for World Sailing official events, suppliers and distributors of sails, masts, etc.) for explanations on facts or documents relating to the subject-matter and purpose of the inspection;

b) carry out inspections at premises and offices of the MNAs and the interested undertakings; and

c) examine books and other records related to the business (irrespective of the medium on which they are stored).

Indirect forms of control, on the other hand, must include appropriate whistle blowing mechanisms. In this respect, it is pivotal to create incentives for reporting (e.g. online confidential form and possible benefits for cooperation in discovering anticompetitive practices).

• Enforcement

The implementation of the ACP requires a sound system of enforcement whenever a breach of competition law is detected. This includes, necessarily, the provision of:

a) penalties;

b) disciplinary sanctions; and

c) other deterrent measures (e.g. suspension or exclusion from events or from World Sailing) of MNAs, affiliated associations, undertakings and individuals.

• Periodical reviews

Periodical reviews are essential and must contemplate inputs from staff and MNA members.Current Position

None.

Reasons

1. The reasons for advocating the adoption of a World Sailing Antitrust Compliance Programme are two-fold:
 2. Firstly, as indicated above, it is essential to avoid antitrust violations, and consequently the imposition of administrative fines and/or criminal sanctions on the interested natural and legal persons, the introduction of stand-alone or follow-on (civil) actions against the undertakings responsible for concluding an anticompetitive agreement or abusing of their dominant (single or collective) position, but also the disqualification of the members of staff involved, as well as, more generally, the loss of reputation of World Sailing. That being said it should also be noticed that parent companies remain liable for infringement of their subsidiaries, even if the former gave specific antitrust compliance instructions (ECJ, judgment of June 16, 2016, C-155/14 P, *Evonik Degussa*, para. 41).
 3. Secondly, the adoption of an Antitrust Compliance Programme would contribute to reducing the negative effects of possible breaches of competition law. Indeed, depending on the competent administrative and/or judicial authority (U.S., EU and EU Member States, Brazil, Canada, Japan, etc.), the presence of an Antitrust Compliance Programme can entail important legal consequences for World Sailing and its members. In the U.S. undertakings can benefit from the existence of a compliance programme, but only where the offence is not criminal in nature. In Brazil pre-existing compliance programs can entail fine reductions and in Canada the circumstance can be taken into consideration when deciding whether to pursue civil or criminal charges against the undertakings and/or individuals concerned. With particular regard to the European experience: the European Commission openly welcomes compliance programmes (EU Commission, *Compliance Matters*, 2012) while the UK, French and Italian competition authorities value the implementation of effective compliance programme and consider it to be a mitigating circumstance (cfr. CMA, *Guidance as to the appropriate amount of a penalty*, September 2012, para. 2.15 and *Framework-Document of 10 February 2012 on Antitrust Compliance Programmes*, p. 1 and *Decision by the AGCM of 17 January 2017, I792, pt. 425 ff.*) and in Germany compliance programs are obligatory (Sec. 130 Administrative Offences Act: violation of supervisory duty).
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