



EUROPEAN COMMISSION  
Competition DG

***CASE AT. 40208 -International Skating  
Union's Eligibility rules***

(Only the English text is authentic)

**ANTITRUST PROCEDURE  
Council Regulation (EC) 1/2003**

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Article 7 Regulation (EC) 1/2003

Date: 08/12/2017

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Brussels, 8.12.2017  
C(2017) 8240 final

**COMMISSION DECISION**

**of 8.12.2017**

**relating to proceedings under Article 101 of the Treaty on the Functioning of the  
European Union (the Treaty) and Article 53 of the EEA Agreement**

**Case AT.40208 – International Skating Union's Eligibility rules**

(Only the English text is authentic)

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# COMMISSION DECISION

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**Case AT.40208 – International Skating Union's Eligibility rules**

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union<sup>1</sup>,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>2</sup>, and in particular Article 7 and Article 23(2) thereof,

Having regard to the complaint lodged by two professional speed skaters on 23 June 2014, alleging infringements of Articles 101 and 102 of the Treaty and Article 53 of the EEA Agreement by the International Skating Union and requesting the Commission to put an end to those infringements,

Having regard to the Commission Decision of 5 October 2015 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty<sup>3</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

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<sup>1</sup> OJ, C 115, 9.5.2008, p.47.

<sup>2</sup> OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("the Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the Treaty is used throughout this Decision.

<sup>3</sup> OJ L 123, 27.4.2004, p. 18.

Having regard to the final report of the hearing officer in this case<sup>4</sup>,

Whereas:

## 1. INTRODUCTION

- (1) This Decision relates to an infringement of Article 101 of the Treaty on the Functioning of the European Union ("the Treaty") and Article 53 of Agreement on the European Economic Area ("the EEA Agreement"). The infringement consisted of the adoption and enforcement by the addressee of this Decision of rules that constitute a prohibited restriction of competition within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement from 19 June 1998 to the present.
- (2) This Decision is addressed to the International Skating Union ("ISU"), an international sport federation with its head offices in Lausanne, Switzerland<sup>5</sup>.
- (3) According to the ISU's Eligibility rules adopted in 2014 (the "2014 Eligibility rules")<sup>6</sup> - which clarified the Eligibility rules as they were already in place since 1998<sup>7</sup> - a speed skater<sup>8</sup> became ineligible for a period up to a lifetime to participate in the ISU's international speed skating events if he or she participated in any speed skating events not authorised<sup>9</sup> by the ISU or one of its Members<sup>10</sup>. Under the ISU's Eligibility rules adopted in 2016 (the "2016 Eligibility rules")<sup>11</sup>, a speed skater participating in events that are not authorised by the ISU or one of its Members is subject to sanctions ranging from a warning to periods of ineligibility from an unspecified minimum to a maximum of a lifetime ban. Until 2015, there were no pre-established criteria on the basis of which the ISU authorised third party events<sup>12</sup>, and, although the ISU introduced authorisation criteria afterwards, those criteria are not objective, transparent and non-discriminatory, and go further than necessary to protect legitimate aims.<sup>13</sup>
- (4) The ISU's Eligibility rules create significant barriers to finding skaters for third parties wishing to start organising and commercially exploiting international speed skating events in competition with the ISU and its Members because professional skaters cannot risk becoming ineligible and foregoing the possibility of competing in

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<sup>4</sup> Final report of the Hearing Officer of 30 November 2017.

<sup>5</sup> Submission of the ISU of 05.02.2016, pages 2-3.

<sup>6</sup> See Rules 102 and 103 of the ISU 2014 Constitution and General Regulations.

<sup>7</sup> Decision, recital (48).

<sup>8</sup> Although Rule 102 includes a general reference to "*A person (...) skating or officiating*", the focus of the Decision is on persons skating in speed skating disciplines.

<sup>9</sup> Although the ISU rules refer to the word "*sanction*", the Commission will in this Decision use the word "*authorise*" to allow for a clear distinction between the *authorisation* of events and the *sanctioning* of skaters if they participate in unauthorised events.

<sup>10</sup> See in particular Rules 102(1) a) (ii), 102(2) c), 102(7) and 103(2) of the General Regulations adopted by the 55th Ordinary Congress, June 2014 ("ISU General Regulations 2014").

<sup>11</sup> Rules 102 and 103 of the ISU 2016 Constitution and General Regulations, [http://www.isu.org/isu-statutes-constitution-regulations-technical/54-constitution-and-general-regulations-2016/file\\_downloaded\\_and\\_printed\\_on\\_17.11.2017](http://www.isu.org/isu-statutes-constitution-regulations-technical/54-constitution-and-general-regulations-2016/file_downloaded_and_printed_on_17.11.2017). Hereinafter, the general term "Eligibility rules" will be used to in a general manner refer to the ISU's Eligibility rules, including the 2014 Eligibility Rules and the 2016 Eligibility Rules. Equally, the term "ISU Constitution and General Regulations" will refer to the 2014 and 2016 versions of the ISU Constitution and General Regulations.

<sup>12</sup> Decision, recital (77).

<sup>13</sup> See in particular, Decision, Section 8.5.2.

important international speed skating events such as the Olympic Games, the ISU World Cup and the ISU Championships. The Eligibility rules thus not only limit the skaters' commercial freedom to participate in events that are not authorised by the ISU, but also prevent potential competitors from organising and commercially exploiting international speed skating events.

- (5) The ISU's Appeals Arbitration rules<sup>14</sup> ("Appeals Arbitration rules") grant exclusive jurisdiction to the Court of Arbitration for Sport ("CAS"), as regards certain decisions of the ISU, including those concerning the ineligibility of skaters and officials<sup>15</sup>. The Appeals Arbitration rules provide that all decisions of the CAS shall be final and binding<sup>16</sup>. Judicial recourse against CAS arbitral awards is possible, but only before the Swiss Federal Tribunal on a very limited number of grounds, which do not include a violation of the Union or EEA competition rules<sup>17</sup>. Furthermore, athletes have no choice but to accept the Appeals Arbitration rules and the exclusive competence of the CAS<sup>18</sup>.
- (6) The hurdles that the Appeals Arbitration rules impose on athletes in obtaining effective judicial protection against potentially anti-competitive ineligibility decisions of the ISU reinforce the restriction of their commercial freedom and the foreclosure of third party organisers of speed skating events since those rules protect potentially anti-competitive decisions issued under the Eligibility rules by curtailing the reach of Union and EEA competition law to those decisions.<sup>19</sup>

## 2. THE UNDERTAKING SUBJECT TO THE PROCEEDINGS

- (7) The ISU is a Swiss association founded in 1892<sup>20</sup>. The ISU is an international sport federation recognised by the International Olympic Committee as the body globally administering figure skating on ice and speed skating on ice<sup>21</sup>. The ISU is composed of the individual national associations ("Members") that administer figure and speed skating on ice at the national level. Members are typically composed of skating clubs and athletes are individual members of those clubs<sup>22</sup>. Those clubs include professional athletes who practice speed skating as an economic activity. All international matters are under the sole jurisdiction and control of the ISU<sup>23</sup>.

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<sup>14</sup> ISU 2014 Constitution and General Regulations , Article 25; ISU 2016 Constitution and General Regulations , Article 26.

<sup>15</sup> ISU 2014 Constitution and General Regulations, Article 25(2); ISU 2016 Constitution and General Regulations, Article 26(2).

<sup>16</sup> ISU 2014 Constitution and General Regulations , Article 25(6); ISU 2016 Constitution and General Regulations , Article 26(6).

<sup>17</sup> Articles 190-191 of the Swiss Federal Act on Private International Law (in French: Loi Fédérale sur le Droit International Privé; available at <https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html>), downloaded and printed on 25.08.2016. See also <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html#c201>, downloaded and printed on 25.08.2016.

<sup>18</sup> Decision, recital (57).

<sup>19</sup> See Decision, Section 8.7.

<sup>20</sup> Submission of the ISU of 26.09.2014, page 5.

<sup>21</sup> ISU Constitution and General Regulations, Article 1(1), and submission of the ISU of 05.02.2016, page 3.

<sup>22</sup> Submission of the Complainants of 23.06.2014, page 2. In this Decision the word "Member" refers to the ISU Member, and the word "member" – to any other membership.

<sup>23</sup> ISU 2014 Constitution and General Regulations , Article 1(1).



- (8) The ISU Statutes consist of the Constitution including its Procedural Provisions, General and Special Regulations and Technical Rules, as well as the ISU Code of Ethics (Communication 1717), the ISU Anti-Doping Rules (Communication 1765), and the ISU Anti-Doping Procedures (Communication 1800), and all currently valid ISU communications<sup>24</sup>.
- (9) The rules that are the subject of this Decision are the Eligibility rules contained in the ISU General Regulations, in particular Rules 102 (1) a) (ii), (1) b), (2) c), (7) and 103 (2) of the ISU's General Regulations 2014<sup>25</sup> and Rules 102 (1) a) (ii), (1) b), (2), (7) and 103 (2) of the ISU's General Regulations 2016<sup>26</sup>, as well as the Appeals Arbitration rules laid down in Article 25 of the ISU's 2014 Constitution<sup>27</sup> and Article 26 of the ISU's 2016 Constitution<sup>28</sup>.
- (10) According to the ISU's Constitution, the ISU is the international federation for skating which regulates, governs and promotes skating<sup>29</sup>. The ISU also organises international speed skating events, licenses broadcasting rights, negotiates sponsorship agreements and sells tickets worldwide<sup>30</sup>.
- (11) The ISU Congress is the highest-ranking body of the ISU. It consists of the ISU Members, which meet once every two years. The ISU Council is the executive body of the ISU, responsible for determining the policies of the ISU and deciding upon the general coordination of the ISU structure and strategy<sup>31</sup>. The ISU Council consists of a President, a Vice President and four members for the Figure Skating Branch, and a Vice President and four members for the Speed Skating Branch<sup>32</sup>.
- (12) In 2016, the ISU generated a worldwide consolidated turnover of EUR 31.7 million. According to the ISU's estimate, [business secret]% of its worldwide turnover is derived from speed skating activities and the remaining [business secret]% from figure skating activities. Of the turnover generated by speed skating activities, [business secret]% is generated in the EEA and the remaining [business secret]% in the rest of the world<sup>33</sup>.

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<sup>24</sup> ISU 2014 Constitution and General Regulations, Article 38(1); ISU 2016 Constitution and General Regulations, Article 39(1).

<sup>25</sup> ISU 2014 Constitution and General Regulations.

<sup>26</sup> ISU 2016 Constitution and General Regulations.

<sup>27</sup> ISU 2014 Constitution and General Regulations, Article 25.

<sup>28</sup> ISU 2016 Constitution and General Regulations.

<sup>29</sup> ISU Constitution and General Regulations, Article 3(1).

<sup>30</sup> Submission of the ISU of 05.02.2016, page 3.

<sup>31</sup> Submission of the ISU of 05.02.2016, page 4.

<sup>32</sup> ISU Constitution and General Regulations, Article 16.

<sup>33</sup> Submission of the ISU of 26.09.2017. The ISU bases the allocation of its revenues between speed skating and figure skating and between the EEA and the rest of the world as follows: (i) for broadcasting revenues, the ISU estimates that the EEA represents [business secret]% of the total revenue of the contract with the European Broadcasting Union (EBU); this contract provides a "deemed value" division between the rights for Speed Skating and Figure Skating of [business secret]% Speed Skating and [business secret]% Figure Skating; (ii) for sponsorship, the ISU estimates that the EEA represents [business secret]% of its contract with Infront (which applies to world-wide ISU Speed Skating Events); (iii) for the contribution provided by the IOC for the Winter/Youth Olympic Games, the ISU estimates that [business secret]% of the contribution is related to the EEA and that the total division between Speed Skating and Figure Skating for IOC revenue is [business secret]% Speed Skating to [business secret]% Figure Skating (submission of the ISU of 26.09.2017).

### 3. PROCEDURE

- (13) On 23 June 2014, the Commission received a complaint pursuant to Article 7 of Regulation (EC) No 1/2003, lodged by two professional speed skaters against the 2014 Eligibility rules<sup>34</sup>.
- (14) On 5 October 2015, the Commission initiated proceedings in this case within the meaning of Article 2(1) of Regulation No 773/2004<sup>35</sup>.
- (15) On 8 January 2016, the ISU informed the Commission that it considered making certain adjustments to the Eligibility rules. The adjustments to those rules were drafted for the consideration of the ISU Congress taking place in June 2016<sup>36</sup>, were adopted by the Congress and came into force on 11 June 2016<sup>37</sup>.
- (16) On 27 September 2016 the Commission adopted a Statement of Objections ("SO") that was notified to the ISU on 29 September 2016. The ISU replied to the SO on 16 January 2017.
- (17) On 1 February 2017, the ISU participated in an Oral Hearing.
- (18) On 6 October 2017, the Commission sent a Letter of Facts to the ISU, informing it about additional evidence identified after the adoption of the SO. The ISU replied to the Letter of Facts on 25 October 2017<sup>38</sup>.
- (19) On 27 April<sup>39</sup> and 30 October 2017<sup>40</sup>, the ISU submitted two sets of commitments involving several changes to the ISU Statutes which the Commission considered as insufficient to solve the identified competition concerns in a timely and effective manner.
- (20) The hearing officer issued his final report on 30 November 2017.

### 4. THE COMPLAINT

- (21) The complaint was lodged by two professional speed skaters domiciled in the Netherlands, Mr Mark Tuitert and Mr Niels Kerstholt ("the Complainants")<sup>41</sup>. Both of the Complainants are members of the Royal Netherlands Skating Federation ("KNSB") and, in the past, regularly participated in the activities and competitions of the ISU at the highest level<sup>42</sup>. As individual members of the KNSB, which is itself an ISU Member<sup>43</sup>, the Complainants are subject to the ISU Statutes and General

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<sup>34</sup> Submission of the Complainants of 23.06.2014.

<sup>35</sup> OJ L 123, 27.04.2004, p. 18-24.

<sup>36</sup> Submission of the ISU of 08.01.2016, page 1.

<sup>37</sup> Submission of the ISU of 05.09.2016.

<sup>38</sup> Submission of the ISU of 25.10.2017.

<sup>39</sup> Submission of the ISU of 27.04.2017.

<sup>40</sup> Submission of the ISU of 30.10.2017.

<sup>41</sup> Submission of the Complainants of 23.06.2014.

<sup>42</sup> Submission of the Complainants of 23.06.2014, page 3. Both skaters are now members of honour of the KNSB and, though one of them is no longer active in professional competitions, both are enrolled in the federation's training programme to become licensed coaches (e-mail messages of 21.04.2016 and 25.04.2016 from the Complainants, clarifying the status of their membership at that time).

<sup>43</sup> ISU Constitution and General Regulations, Article 1(3) provides that "*Members are those organisations recognized by the ISU as controlling in a country either or both of the Branches of skating (Figure and Speed)*".

Regulations, including the Eligibility rules and to decisions taken by the ISU Congress and the ISU Council<sup>44</sup>.

- (22) The Complainants alleged in their complaint that the 2014 Eligibility rules establishing a lifetime ban for athletes and officials taking part in competitions not authorised by the ISU were in breach of Articles 101 and 102 of the Treaty. In particular, the Complainants stressed that such rules prevented them from participating in an international speed skating event to be organised by Icederby International co., Ltd ("Icederby"), offering athletes an opportunity to make a better living out of their profession, thanks to the significant prize money and other sources of revenues (for instance, sponsoring)<sup>45</sup>.

## 5. FACTS

### 5.1. Regulatory framework in sport

- (23) Article 165 of the Treaty states that the "*Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function*". The specificity of sport has been recognised and taken into account by the Court of Justice in its judgments related to the sport sector<sup>46</sup>. The specificity of sport includes "*all the characteristics that make sport special, such as for instance the interdependence between competing adversaries or the pyramid structure of open competitions*"<sup>47</sup>.
- (24) The case law of the Court of Justice<sup>48</sup>, as well as the 2007 White Paper on Sport<sup>49</sup> and the 2011 Communication of the Commission "Developing the European Dimension in Sport"<sup>50</sup> ("the 2011 Communication") have made clear that, while respecting the specific nature of sport, sporting rules are subject to the application of Union law, including Union competition law.

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<sup>44</sup> ISU Constitution and General Regulations, Articles 6(3) and 7(1).

<sup>45</sup> Submission of the Complainants of 23.06.2014, page 21; see further, Decision, Section 5.6.2.

<sup>46</sup> See Case 13/76 *Donà* ECLI:EU:C:1976:115, paragraph 14.; Case C-415/93 *Bosman* ECLI:EU:C:1995:463, paragraph 76; Case C-176/96 *Lehtonen* ECLI:EU:C:2000:201, paragraph 33; Joined Cases C-51/96 and C-191/97 *Deliège* ECLI:EU:C:2000:199, paragraph 42; Case C-519/04 P *Meca-Medina* ECLI:EU:C:2006:492, paragraph 26.

<sup>47</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Developing the European Dimension in Sport", Brussels, 18.1.2011, COM (2011) 12 final, pages 10-11.

<sup>48</sup> Case 36/74 *Walrave and Koch* ECLI:EU:C:1974:140, paragraph 4, case 13/76 *Donà*, ECLI:EU:C:1976:115, paragraph 12.; Case C-415/93 *Bosman*, supra, paragraph 73; Case C-176/96 *Lehtonen*, supra, paragraph 32, Joined Cases C-51/96 and C-191/97 *Deliège*, supra, paragraph 41, Case C-519/04 P *Meca-Medina*, ECLI:EU:C:2006:492, paragraph 22, Case C-49/07 *MOTOE* ECLI:EU:C:2008:376, paragraph 22; Case C-325/08 *Bernard* ECLI:EU:C:2010:143, paragraph 27.

<sup>49</sup> "White Paper on Sport" of 11 November 2007, COM (2007) 391 final, {SEC (2007) 932} {SEC (2007) 934} {SEC (2007) 935} {SEC (2007) 936}.

<sup>50</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Developing the European Dimension in Sport", Brussels, 18.1.2011, COM (2011) 12 final.

- (25) In its 2011 Communication, the Commission has stated that "*sporting rules normally concern the organisation and proper conduct of competitive sport*"<sup>51</sup>. Such rules are under the responsibility of sport organisations and must be compatible with Union law. To assess the compatibility of sporting rules with Union law, the Commission considers – in line with the judgment of the Court of Justice in *Meca-Medina*<sup>52</sup> – the legitimacy of the objectives pursued by the rules, whether any restrictive effects of those rules are inherent in the pursuit of the objectives and whether those rules are proportionate to such objectives<sup>53</sup>.

## 5.2. The specificity of the sport structure

- (26) In the White Paper on Sport, the Commission stated that the specificity of European sport could be approached by looking through two prisms: one prism being the specificity of the structure of sport and the other the specificity of sporting activities and of sporting rules<sup>54</sup>. The specificity of the structure of sport, including notably the autonomy and diversity of sport organisations, can be described as a pyramid of competitions from grassroots<sup>55</sup> to elite level, with organised solidarity mechanisms between the different levels and operators. In addition, it includes the organisation of sport on a national basis, and the principle of having a single federation per sport<sup>56</sup>.
- (27) Sporting disciplines are generally governed by one or more umbrella organisations. For example, in football, the sports clubs are at the bottom of the pyramid. Clubs belong to a national sport association, which covers both high-level (elite) and grassroots sport. National sport associations operate under the umbrella of a European and/or international federation<sup>57</sup>.
- (28) With respect to sporting competitions as such, the Commission Staff Working Document accompanying the White Paper on Sport notes that the monopolistic pyramid structure of European sport serves, among others, to organise national championships and select national athletes<sup>58</sup>.

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<sup>51</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Developing the European Dimension in Sport", Brussels, 18.1.2011, COM (2011) 12 final, page 11.

<sup>52</sup> Case C-519/04 P *Meca-Medina*, ECLI:EU:C:2006:492, paragraph 42.

<sup>53</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Developing the European Dimension in Sport", Brussels, 18.1.2011, COM(2011) 12 final, page 11.

<sup>54</sup> The specificity of sporting activities and of sporting rules comprises separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions, which is not relevant for the purpose of this Decision.

<sup>55</sup> Grassroots sport covers all sport disciplines practiced by non-professionals and organised on a national level through national sport. The definition thus excludes individuals who spend the bulk of their time practicing sport, or who take the bulk of their revenue from the practice of sport. Study on the funding of grassroots sports in the EU, Vol. I, 27 June 2011, page 13.

<sup>56</sup> "White Paper on Sport" of 11 November 2007, COM (2007) 391 final, {SEC (2007) 932} {SEC (2007) 934} {SEC (2007) 935} {SEC (2007) 936}, page 13.

<sup>57</sup> Study on the funding of grassroots sports in the EU, Vol. I, 27 June 2011, page 23. As regards funding of grassroots sport, there are indications that the contribution of elite sport to grassroots sport often constitutes only a small fraction of the revenues generated, meaning that the bulk of the revenues remains at the top (professional sport) level (page 287 of the study).

<sup>58</sup> The Commission, "Commission staff working document – The EU and sport: Background and context", SEC (2007) 935, page 36.

- (29) There are differences in the scope and importance of the sporting pyramid depending on the sport. In particular, the system of open competitions is generally limited to team sports, and even in that case "the *system of open competitions is somewhat mitigated by a licensing system that introduces financial criteria for participation in competitions*"<sup>59</sup>. In other disciplines, such as motor sports and cycling, professional competitions are totally or partially closed, and in disciplines such as golf and tennis "the *organisation of competitions also largely diverges from the pyramid structure*"<sup>60</sup>.
- (30) Therefore, alongside the pyramid structure applicable to many team sports in Europe, different structures and systems of competitions exist in other sports, including popular sports, such as cycling, golf, tennis, motor sports<sup>61</sup> and triathlon<sup>62</sup>.
- (31) Speed skating is one of the individual sports where there is a pyramid structure as regards national championships and the selection of national athletes. The ISU is "the *exclusive international sport federation acknowledged by the International Olympic Committee administrating Figure Skating and Speed Skating Sports throughout the world*" and administers speed skating at the international level, whereas its Members administer speed skating at the national level. In that function, the ISU sets specific rules for the speed skating competitions of the Winter Olympic Games and all other international skating competitions organised within the pyramid structure<sup>63</sup>.

### 5.3. The disciplines of speed skating and the most important speed skating events

- (32) There are two Olympic speed skating disciplines, namely long track speed skating and short track speed skating. Both forms of speed skating take place on artificial ice<sup>64</sup>. Another speed skating discipline is marathon speed skating which is often conducted outdoors on natural ice over a distance of up to 200 km<sup>65</sup>. However, as marathon speed skating is not governed by the ISU, this speed skating discipline is not relevant for the purpose of this Decision.
- (33) In addition, the Commission is aware of a mixed ice skating event, the *Red Bull Crashed Ice*<sup>66</sup> series<sup>67</sup>. So far, however, the ISU considers that participation by its

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<sup>59</sup> Ibid, page 41.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> In triathlon, the World Triathlon Corporation (WTC) organises the Ironman competition. The Ironman is not authorised by the International Triathlon Union (ITU), the federation recognised by the IOC. See Minutes of the ITU Congress website of the ITU, downloaded and printed on 31.08.2016. In January 2017, the ITU and Ironman signed a Memorandum of Understanding for further cooperation (see recording from the Oral Hearing, at 1:25).

<sup>63</sup> Submission of the ISU of 05.02.2016, page 3.

<sup>64</sup> Official website of the Olympic Movement, consulted on 27.04.2016, available at: <http://www.olympic.org/speed-skating-equipment-and-history?tab=history>, downloaded and printed on 01.07.2016.

<sup>65</sup> See for example official website of the Dutch Skating Federation, available at: <https://knsb.nl/marathon/>, downloaded and printed on 19.07.2016; official website of the Austrian Speed Skating Federation, available at: <http://www.austrian-ice-racers.com/de/wettkaempfergebnisse/eisschnelllauf2/eventdbshow-oesterreichische-meisterschaft-marathon-21.01.2016?flat>, downloaded and printed on 19.07.2016; and official website of the Swedish Speed Skating Federation, available at: <http://www.skridsko.se/Arbetsrumslista/LangfardMarathon/>, downloaded and printed on 19.07.2016.

<sup>66</sup> Red Bull Crashed Ice <http://www.redbullcrashedice.com>, downloaded and printed on 13.06.2016.

athletes in the *Red Bull Crashed Ice* event does not require its authorisation. This indicates that the ISU does not consider this event as an international speed skating event and thus does not consider that its Eligibility rules are applicable to this mixed ice skating event<sup>68</sup>.

- (34) Long track speed skating was first introduced in the Olympic Games programme at the 1924 Winter Games<sup>69</sup>. It is a sport where competitive athletes are timed while skating a defined distance as fast as possible on a 400 metre oval track. Athletes skate in lanes counter-clockwise and compete in pairs. The usual distances are 500 metres, 1 000 metres, 1 500 metres, 3 000 metres, 5 000 metres, and 10 000 metres<sup>70</sup>.
- (35) Short track speed skating was added to the Olympic programme in 1992. Short track skaters compete on a standard track that is the same size as an international-sized hockey rink (111 metre oval rink). Athletes skate in a group without lanes<sup>71</sup>. The distances vary between 500 and 5 000 metres<sup>72</sup>.
- (36) Two of the most popular speed skating events are the ISU World Cup and the ISU Speed Skating Championship (both events are held separately for long track speed skating and short track speed skating)<sup>73</sup>. The ISU organises a number of other speed skating events throughout the skating season, such as the ISU Championships and International Competitions<sup>74</sup>.
- (37) Furthermore, the Olympic Winter Games is a major international sporting event that takes place once every four years. There are four key bodies that are responsible for the organisation of the Olympic Games. First of all, the International Olympic Committee ("IOC") ensures the regular occurrence of the Olympic Games<sup>75</sup>. Second, the National Olympic Committees of each participating country select the city that will host the Olympic Games, and also select, organise and lead their Olympic teams. The National Olympic Committee of the host city and the city itself organise the Olympic Games and establish a third body, the Organising Committee for the Olympic Games<sup>76</sup>. Fourth, the international federations, such as the ISU, have the responsibility to organise their respective sports (for the ISU: speed and figure skating) during the Olympic Games. In particular, the international federations set the rules for their sports and supervise their technical control and direction. The

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<sup>67</sup> Submission of the Complainants of 23.06.2014, page 16. During the *Red Bull Crashed Ice* series no measurement of speed takes place and athletes progress to the next level of the series simply by arriving first, overcoming various obstacles and jumping, at an individual race and/or eliminating their competitors including through "casual" tackling. This event requires a different skillset than those usually associated with speed skating, which explains why mainly ice hockey players participate.

<sup>68</sup> Submission of the ISU of 08.07.2016, page 15.

<sup>69</sup> Official website of the Olympic Movement, available at: <http://www.olympic.org/speed-skating-equipment-and-history?tab=history>, downloaded and printed on 01.07.2016.

<sup>70</sup> Website of Inline Skating.

<sup>71</sup> Official website of the Olympic Movement, available at: <http://www.olympic.org/speed-skating-equipment-and-history?tab=history>, downloaded and printed on 01.07.2016.

<sup>72</sup> Submission of the ISU of 26.09.2014, page 8, and official website of the Olympic Movement.

<sup>73</sup> Submission of the ISU of 05.02.2016, page 6.

<sup>74</sup> Submission of the ISU of 26.09.2014, page 9.

<sup>75</sup> Official website of the Olympic Movement, available at: <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Games-Salt-Lake-City-2002-Winter-Olympic-Games/Fundamentals-and-Ceremonies/Fundamentals-and-Ceremonies-3-4-Salt-Lake-City-2002.pdf>, downloaded and printed on 11.07.2016.

<sup>76</sup> Official website of the Olympic Movement.

international federations are also responsible for setting the eligibility criteria for the competitions at the Olympic Games<sup>77</sup>.

- (38) Speed skating provides relatively limited income opportunities for athletes. Only a very small number of high-level athletes are able to make a living out of the sport. The three main sources of revenues for professional speed skaters are: (i) salaries from a commercial team or from the National Olympic Committees; (ii) prize money; and (iii) sponsorship contracts<sup>78</sup>.
- (39) As regards the first source of income, by way of example, the monthly stipend paid by the Dutch Olympic Committee to top-level speed skaters (those who obtain the best positions in the European and World Championships or qualify for the Olympic Games) in 2015 ranged from EUR 738 to EUR 2 271 depending on the age of the athlete. Very few successful speed skaters manage to obtain a short-term (usually one-year) employment contract with a commercial team<sup>79</sup>.
- (40) The second source of income, prize money, generally represents no significant income for professional speed skaters<sup>80</sup>. In long track speed skating, the maximum prize money available for a World Cup Champion (first place final ranking) in a given category is USD 15 000 for an individual and USD 5 000 for teams. For an individual World Cup competition, the prize money is much lower (for instance, USD 1 500 for the winner of a given individual distance). In short track speed skating, the maximum prize money available for an individual World Cup Champion (first place final ranking) in a given category is USD 5 000 and for teams USD 6 000. Only if an individual short track speed skater becomes World Cup Champion (first place final ranking) in each of the single distance categories he or she could win a total of USD 15 000<sup>81</sup>.
- (41) As regards the third source of income, only the top 1% of skaters active in the international speed skating circuit receive income from individual sponsorship contracts. Other speed skaters may at best receive in-kind contributions, such as a pair of skates<sup>82</sup>.

#### **5.4. The ISU Eligibility rules**

- (42) The Eligibility rules are included in the ISU General Regulations (Rules 102-103)<sup>83</sup>, adopted by the ISU Congress<sup>84</sup>. Members constituting the ISU Congress took part in all stages of the development of each version of the Eligibility rules<sup>85</sup>. All ISU Members are invited to the Congress<sup>86</sup>, where they can exercise their right to vote as

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<sup>77</sup> Official website of the Olympic Movement.

<sup>78</sup> Submission of the Complainants of 05.02.2016, pages 6-8.

<sup>79</sup> Ibid, pages 6-7.

<sup>80</sup> Ibid, page 7.

<sup>81</sup> Submission of the Complainants of 23.12.2016, pages 5-6.

<sup>82</sup> Submission of the Complainants of 05.02.2016, pages 7-8.

<sup>83</sup> ISU Constitution and General Regulations, Rules 102 and 103.

<sup>84</sup> Submission of the ISU of 05.02.2016, page 18. Each statutory amendment to the Eligibility rules had to be adopted by a two-third majority of a quorum embracing at least 50 % of the ISU Members.

<sup>85</sup> Submission of the ISU of 05.02.2016, page 18.

<sup>86</sup> ISU 2014 Constitution and General Regulations , Article 29(1), Article 30(1) of the ISU 2016 Constitution and General Regulations .

set out in the ISU Constitution<sup>87</sup>. The ISU General Regulations are binding on Members, their affiliated clubs and individual members<sup>88</sup>.

- (43) According to the Eligibility rules, any person becomes ineligible to participate in the ISU events, the Olympic Winter Games, and all international speed skating events of the ISU or a Member by skating or officiating in events not authorised by the ISU or a Member.
- (44) Historically, only amateurs were allowed to qualify for the Olympic Games according to Article 26 of the Olympic Charter which defined the meaning of amateur in sport as "*one who participates and always participated in sport as an avocation without material gain of any kind*"<sup>89</sup>. In 1962, the IOC issued the Eligibility rules of the IOC, providing official explanations of Article 26 of the Olympic Charter<sup>90</sup>. Those rules specified that persons receiving remuneration and other material advantages for participation in sport were not eligible to compete in the Olympic Games. However, the IOC's concept of the Olympic Games and amateur sport developed over time, and by the end of the 1980s, the Olympic Games moved towards professionalisation<sup>91</sup>.
- (45) The ISU respected the Olympic principles, and until 1986, also in its General Regulations differentiated between amateur and professional skaters wishing to qualify for the Olympic Games<sup>92</sup>. In 1986, the Eligibility rules were brought in line with the rules of the IOC and the limitation imposed on professional skaters was removed<sup>93</sup>. In particular, the existing differentiation between "amateurs" and "professionals" was eliminated and replaced by the differentiation between "eligible" and "ineligible" persons<sup>94</sup>.
- (46) In 1994, a substantial change to the Eligibility rules was adopted by the ISU Congress. As of 1994, Rule 102(3) b) reads as follows:  
*"3. A person is not eligible in skating if he or she:  
[...]  
b) has participated in any capacity in a skating competition not sanctioned by the Member concerned and not approved by the ISU [...]"*<sup>95</sup>.
- (47) The reason for this change was outlined in the ISU Communication No 830 "Agenda of the ISU Congress", in Proposal 95, which was "*to ensure that the world's [...]*

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<sup>87</sup> ISU 2014 Constitution and General Regulations , Article 29(11), Article 30(11) of the ISU 2016 Constitution and General Regulations .

<sup>88</sup> ISU Constitution and General Regulations, Articles 6(3) and 7(1).

<sup>89</sup> Article 26 of the 1962 Olympic Charter – The Olympic Games – Fundamental Principles, Rules and Regulations, available at: <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Olympic-Studies-Centre/List-of-Resources/Official-Publications/Olympic-Charters/EN-1962-Olympic-Charter.pdf>, downloaded and printed on 25.08.2016.

<sup>90</sup> 1962 Eligibility rules of the International Olympic Committee, available at: <https://stillmed.olympic.org/Documents/Olympic%20Charter/Olympic Charter through time/1962-Eligibility rules of the IOC.pdf>, downloaded and printed on 25.08.2016, page 5.

<sup>91</sup> Article from CNN, available at: <http://edition.cnn.com/2012/07/22/opinion/greene-olympics-amateurs/>, downloaded and printed on 19.04.2016.

<sup>92</sup> Submission of the ISU of 05.02.2016, page 18.

<sup>93</sup> Submission of the ISU of 05.02.2016, page 18, and submission of the ISU of 08.07.2016, page 4.

<sup>94</sup> Submission of the ISU of 05.02.2016, page 18, and submission of the ISU of 08.07.2016, page 4.

<sup>95</sup> Submission of the ISU of 08.07.2016, Schedule 2, part 1, page 14.



*skating competitors are able to compete under the same (ISU) rules; to enable the ISU to set the standards for and retain control of [...] skating competitions in which these competitors participate so that the standards expected are uniform throughout the world and the system of evaluation is credible and fair*"<sup>96</sup>. In 1996, the prohibition was extended to also cover "exhibitions and tours"<sup>97</sup>.

- (48) In June 1998, a revised version of the Eligibility rules was drafted and it is that version, adopted by the 1998 ISU Congress that corresponds to the version of the Eligibility rules laid down in the ISU General Regulations 2014<sup>98</sup>. In particular, the 1998 version of the Eligibility rules formalised the function of such rules in setting a "comprehensive pre-authorisation system"<sup>99</sup>, notably by stipulating that eligible skaters could only take part in competitions approved by the ISU (and/or its Members), and conducted by ISU-approved officials and under the ISU Regulations<sup>100</sup>. At the 2002 Congress, the language of the Eligibility rules was clarified to indicate that the eligibility restrictions imposed by the rules were motivated by the "adequate protection of the economic and other interests of the ISU"<sup>101</sup>.

#### 5.4.1. The 2014 Eligibility rules

- (49) Rule 102 of the ISU General Regulations 2014 provides that a person becomes ineligible to participate in ISU activities and competitions by skating in an event not authorised by an ISU Member and/or the ISU<sup>102</sup>. The relevant parts of Rule 102 read as follows:

##### **"1. Eligibility Status**

*a) The eligibility Rules of the ISU are based upon the principles that:*

*i) a person has the privilege to take part in the activities and competitions under the jurisdiction of the ISU only if such person respects the principles and policies of the ISU as expressed in the ISU Statutes and fulfills those obligations on the basis of which the ISU functions and governs all its activities;*

*ii) the condition of eligibility is made for the adequate protection of the economic and other interests of the ISU, which uses its financial revenues for the administration and development of the ISU sport disciplines and for the support and benefit of the Members and their Skaters.*

[...]

##### **2. Definition of an ineligible person**

*A person becomes ineligible to participate in ISU activities and competitions by:*

[...]

*c) skating or officiating in an event not sanctioned by a Member and/or the ISU; or*

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<sup>96</sup> Ibid, page 10.

<sup>97</sup> Ibid, page 22.

<sup>98</sup> Submission of the ISU of 08.07.2016, page 3.

<sup>99</sup> ISU's response to the SO of 16.01.2017, paragraph 48.

<sup>100</sup> Submission of the ISU of 08.07.2016, Schedule 1, page 12.

<sup>101</sup> Submission of the ISU of 08.07.2016, Schedule 2, part 2, page 4.

<sup>102</sup> ISU 2014 Constitution and General Regulations.

[...]

### **3. Participation of eligible persons**

*Only eligible persons, including Skaters, are permitted to take part in ISU Events, ISU Congress, the Olympic Winter Games, the Winter Youth Olympic Games and other International Competitions unless another Rule explicitly provides otherwise (See paragraph 4 below and Rule 121, paragraph 3.a). Eligible persons may take part in exhibitions and tours which may include ineligible Skaters, only if such exhibitions and tours are sanctioned by a Member and/or the ISU.*

[...]

### **7. Loss of eligibility**

*a) The consequence of a breach of the eligibility Rules shall be the loss of eligibility. The status of a person disqualified or suspended under other applicable Rules, does not affect the eligible status of such person, but it limits, according to the terms of the applicable disciplinary sanction, the right of such person to participate in the competitions and activities of the ISU<sup>103</sup>.*

[...]"

- (50) Rule 103 of the ISU General Regulations 2014 contains rules about the reinstatement of an ineligible person. These rules set out that if a person violated the ban by participating in events that were not authorised by a Member and/or the ISU, he/she cannot be reinstated<sup>104</sup>. Rule 103(2) reads as follows:

#### ***"1. Reinstatement as an eligible person***

[...]

*2. A person who is or has been ineligible may apply for reinstatement as a Skater only if such person had not violated Rule 102, paragraph 2. b) and c).*

[...]"

- (51) Since the person who breached the Eligibility rules cannot be reinstated, the loss of eligibility is not limited in time. Therefore, a breach of Rule 102(2) c) of the ISU General Regulations 2014 results in a lifetime ban. Skaters who have committed such a breach are no longer allowed to participate in ISU events, the Olympic Winter Games, the Winter Youth Olympic Games and all international competitions, exhibitions and tours authorised by the ISU.

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<sup>103</sup> Rule 102(7) further provides: "*b) The ISU Council, upon the presentation of such evidence as it considers sufficient at its sole discretion, may rule upon an alleged breach of the eligibility Rules, whether or not any protest has been made against an individual's eligible status in skating.*

*c) Before a ruling is made by the Council, both the Member and the person concerned shall be notified and the person concerned shall be given the opportunity to furnish an explanation of the alleged breach (which may be in writing).*

*If the person concerned does not avail himself of such opportunity within fifteen (15) days of receipt of such notice, his right to furnish an explanation shall be waived".*

<sup>104</sup> ISU 2014 Constitution and General Regulations .

#### 5.4.2. *The 2016 Eligibility rules*

- (52) On 6 to 10 June 2016, during the ISU Congress that took place in Dubrovnik, the ISU adopted an updated version of the Eligibility rules, namely the 2016 Eligibility rules.
- (53) According to Rule 102(2) of the ISU General Regulations 2016, a person becomes ineligible by skating in an international competition not authorised by the ISU in any of the ISU sport disciplines, if ineligibility is imposed by the ISU Council<sup>105</sup>. The relevant parts of Rule 102 of the ISU General Regulations 2016 read as follows:

##### ***"1. Eligibility Status***

*a) The eligibility Rules of the ISU are based upon the principles that:*

*i) a person has the privilege to take part in the activities and competitions under the jurisdiction of the ISU only if such person respects the principles and policies of the ISU as expressed in the ISU Statutes and fulfills those obligations on the basis of which the ISU functions and governs all its activities;*

*ii) the condition of eligibility is made for adequate protection of the ethical values, jurisdiction objectives and other legitimate respective interests of the ISU, which uses its financial revenues for the administration and development of the ISU sport disciplines and for the support and benefits of the ISU Members and their Skaters.*

*[...]*

##### ***2. Definition of an ineligible person***

*A person becomes ineligible to participate in ISU activities and competitions by skating or officiating in an International Competition not sanctioned by the ISU in any of the ISU sport disciplines or otherwise violating this Rule 102, if ineligibility is imposed by the Council according to this Rule 102 paragraph 7 below.*

*[...]*

##### ***3. Participation of eligible persons***

*Only eligible persons, including Skaters, are permitted to take part in ISU Events, ISU Congress, the Olympic Winter Games, the Winter Youth Olympic Games and other International Competitions unless another Rule explicitly provides otherwise (See paragraph 4 below and Rule 121, paragraph 3.a). Eligible persons may take part in exhibitions and shows (including other events with a recreational and/or show type character) which may include ineligible Skaters in accordance with the conditions established by the Member of the participating Skater, Eligible persons may participate in ISU approved Open International Competitions that include invited ineligible Skaters as approved by the Council. [...]*

##### ***7. Loss of eligibility***

*a) The consequence of a breach of the eligibility Rules shall be the loss of eligibility. The status of a person disqualified or suspended under other applicable Rules, does not affect the eligible status of such person, but it limits, according to the terms of the applicable disciplinary sanction, the right of such person to participate in the competitions and activities of the ISU.*

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<sup>105</sup> Submission of the ISU of 02.05.2016, page 3.

[...] d) Violations of Paragraph 2 of this Rule 102 are subject to sanctions imposed by the ISU Council which may issue a warning or impose ineligibility for a determined period of time or for life time.

The ISU Council shall determine the applicable sanction in accordance with the principle of proportionality and in consideration of all relevant circumstances of each individual case, especially the degree of fault of the offender, his/her previous record and the seriousness of the violation with regards to the objectives of the ISU as laid down in Article 3 Paragraph 1 of the Constitution, its ethical principles as reflected in the ISU Code of Ethics, the ISU's commitment to care for health and safety of Skaters and the integrity of the ISU's sport and other legitimate interests of the ISU.

Within this framework, the ISU Council shall:

- i) issue a warning in case of minor, first time violations;
- ii) impose an ineligibility period for up to five years in case of medium heavy violations and in case of repeated minor violations;
- iii) impose an ineligibility period for up to ten years in case of serious violations;
- iv) impose an ineligibility period of up to life time in case of very serious violations, especially intentional violations which endanger the integrity and jurisdiction of the ISU."

- (54) Rule 103(2) of the ISU General Regulations 2016 contains provisions about the reinstatement of an ineligible person, and reads as follows<sup>106</sup>:

*"A person who is or has been ineligible may apply for reinstatement once he has served half of the period of ineligibility determined. In case of ineligibility for life-time, a request for reinstatement may be submitted by the respective person once 15 years of ineligibility have passed."*

## **5.5. The Appeals Arbitration rules**

- (55) The use of the CAS as an arbitration institution was introduced in 1994<sup>107</sup>. At that time the use of arbitration was limited to disputes related to (i) damages and money claims against the ISU (or any ISU office holder or agent) and (ii) claims and disputes which could otherwise be the subject of a lawsuit in a civil court. Decisions of the ISU Council, the ISU Congress and the ISU Appeals Commission were not subject to arbitration<sup>108</sup>.
- (56) On 30 June 2006, the ISU Congress modified the Appeals Arbitration rules, introducing the possibility of appealing an adverse ineligibility decision of the ISU Council before the CAS<sup>109</sup>.
- (57) The Appeals Arbitration rules are contained in Article 25 of the ISU Constitution, and read as follows<sup>110</sup>:

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<sup>106</sup> Ibid, page 5.

<sup>107</sup> Submission of the ISU of 29.07.2016, page 2.

<sup>108</sup> Submission of the ISU of 29.07.2016, schedule 11, page 1.

<sup>109</sup> Submission of the ISU of 05.02.2016, page 19.

## **1. Appeals**

*Appeals against decisions of the DC<sup>111</sup>, and of the Council when allowed by explicit provision of this Constitution, may be filed with the Appeals Arbitration Division of the Court of Arbitration for Sport (CAS), Lausanne, Switzerland.*

## **2. CAS Jurisdiction**

*The CAS shall have the power to hear and decide appeals in the following cases:*

*a) Against any decision of the DC, or of the DC Chair in the case of Article 24, paragraphs 8.e).*

*b) Against decisions of the Council imposing any penalty on or suspension of Membership of a Member.*

*c) Against any decision of the Council declaring ineligibility of a Skater, Official, Office Holder or other participant in ISU activities.*

*d) Against any decision of the Council sitting as a disciplinary body hearing charges against a member of the DC.*

[...]

**6.** *Decisions of the CAS shall be final and binding to the exclusion of jurisdiction of any civil court.*

- (58) In relation to Article 25(6), the Commission notes that recourse is available in certain circumstances pursuant to Swiss law<sup>112</sup>.

## **5.6. Entry attempts by the World Skating Federation and Icederby**

### **5.6.1. World Skating Federation**

- (59) In the past, there was an attempt to set up an alternative association to ISU in the field of figure skating. In March 2003, a group of several former figure skating champions (who at the time were practicing as coaches, judges, referees, amongst others) announced the creation of a new international governing body for figure skating, the World Skating Federation ("WSF")<sup>113</sup>. However, the attempt to create a body to replace the ISU for governing and promoting figure skating throughout the world failed.

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<sup>110</sup> ISU 2014 Constitution. Article 26 of the ISU 2016 Constitution contains identical wording, the only change is that in its Section 2 an additional point was added: "26(2) e) Against any decision of the Council not sanctioning an Open International Competition." (See submission of the ISU of 02.05.2016, page 2).

<sup>111</sup> DC stands for the ISU Disciplinary Commission. DC is an independent body elected by the Congress serving as a first instance authority to hear and decide all charges referred to it by any ISU authority or party against any Skater, Official, Office Holder or other participant in ISU activities (Alleged Offender) accused of a disciplinary or ethical offence (Offence). See ISU 2014 Constitution, Article 24 and ISU 2016 Constitution, Article 25.

<sup>112</sup> Articles 190-191 of the Swiss Federal Act on Private International Law (in French: Loi Fédérale sur le Droit International Privé; available at <https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html> downloaded and printed on 25.08.2016). See also <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html>, downloaded and printed on 25.08.2016. See also CAS rule R59, available at <http://www.tas-cas.org/en/arbitration/code-procedural-rules.html>, downloaded and printed on 13.06.2016.

<sup>113</sup> ISU Press release of 29 May 2006 "The Court of Arbitration for Sport Decision of 17 May 2006 dismissing the Joint Appeals of Sally-Anne Stapleford, Britta Lindgren and Janet Garden".

- (60) In April 2003, the ISU Council opened proceedings against the officials involved in this initiative for breach of the Eligibility rules. On 1 February 2005, the ISU issued a decision according to which the six persons concerned had breached Rule 102 by having actively participated in the foundation of the WSF. Those officials consequently lost their eligibility<sup>114</sup>.
- (61) All persons declared ineligible appealed the ISU Council's decision to the ISU Appeals Commission, which dismissed the appeals and upheld the ISU Council's decision. Three of the persons concerned appealed the ISU Appeals Commission's decisions to the CAS. On 17 May 2006, the CAS adopted an award dismissing the appeal and upholding the ISU's decision imposing a loss of eligibility<sup>115</sup>.

#### 5.6.2. *Icederby*

- (62) Icederby was established in November 2006 as an event and entertainment company with the purpose of launching a new format of ice racing and ice entertainment events<sup>116</sup>. Icederby envisaged organising ice racing events worldwide during the ISU off season (end-March to mid-October).
- (63) The first of its series of events was the Dubai Icederby Grand Prix, planned for six consecutive years in 2014-2020<sup>117</sup>. Icederby provided information to the ISU about the actions taken for organising its events, such as the signing of a partnership agreement and an action plan with the relevant government, the securing of a sports complex, and the drafting of various agreements for athletes and artists performances<sup>118</sup>.
- (64) In December 2011, Icederby representatives met with both the ISU President at that time, Mr Cinquanta, and Director General Mr Schmid and presented their planned events<sup>119</sup>. Icederby explained that it intended to organise a new type of skating events on a different size track than the ISU recognised track. In addition, Icederby wanted long track speed skaters to compete with short track speed skaters side by side in mass start races. Icederby also informed the ISU that betting would be allowed on its races in countries where betting is legal<sup>120</sup>. In particular, Icederby referred to pari-mutuel<sup>121</sup> as a form of betting that could be organised on its races<sup>122</sup>.
- (65) In January 2012, the ISU issued Communication No 1717<sup>123</sup>, containing a revised Code of Ethics which included the obligation to refrain from participating in all forms of betting or support for betting or gambling related to any event/activity under the jurisdiction of the ISU.

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<sup>114</sup> ISU Communication No 1311 "Decision of the ISU Council on Eligibility" of 24 March 2005.

<sup>115</sup> CAS award CAS 2005/A/961 Janet Elisabeth Garden; Britta Lindgren & Sally-Anne Stapleford v. International Skating Union of 17 May 2006.

<sup>116</sup> Submission of Icederby of 03.11.2015, pages 2-3.

<sup>117</sup> Submission of Icederby of 03.11.2015, page 4.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid, page 5.

<sup>120</sup> Ibid.

<sup>121</sup> Pari-mutuel is a form of betting in which all bets are placed in a pool, which is then shared amongst winners. See [https://en.wikipedia.org/wiki/Parimutuel\\_betting](https://en.wikipedia.org/wiki/Parimutuel_betting), downloaded and printed on 09.11.2017.

<sup>122</sup> Annex to the submission of the ISU of 08.07.2016, page 43.

<sup>123</sup> ISU Communication No 1717.

- (66) In January 2014, Icederby informed the ISU that there would be no betting organised in connection with the planned Dubai Icederby Grand Prix because betting is illegal in Dubai<sup>124</sup>.
- (67) The Complainants intended to participate in the planned Dubai Icederby Grand Prix 2014. They explained that the prize money offered by Icederby for this event was very attractive<sup>125</sup>. However, since the ISU was unwilling to authorise the Dubai Icederby Grand Prix 2014, as indicated by its Communication No 1853 (see Section 5.7.1), and the Complainants did not want to risk a lifetime ban pursuant to the ISU Eligibility rules, the Complainants refrained from participating in that Grand Prix<sup>126</sup>.
- (68) Due to the threat to skaters' careers posed by the Eligibility rules, Icederby could not secure the participation of speed skaters for the Dubai Icederby Grand Prix 2014 and decided not to organise the event in 2014<sup>127</sup>.
- (69) Icederby then planned another international speed skating event, the Thialf Icederby Grand Prix, to be organised in the Netherlands in October 2016, but explained that it again, it could not organise the event because the 2014 Eligibility rules represented an obstacle<sup>128</sup>.
- (70) On 29 January 2016, Icederby informed the ISU that it planned to organise an event in the Netherlands which would not be associated with betting. The ISU responded that an application received from a Member or a third party to organise an international speed skating event would be duly examined by the ISU<sup>129</sup>.
- (71) On 19 May 2016, the KNSB submitted an application to hold the "Dutch Icederby Grand Prix"<sup>130</sup> under Rules 104(14) b) and 107(14) b) of the ISU General Regulations, which applies to interclub competitions with participation of skaters from at least two ISU Members<sup>131</sup>. KNSB did not invoke Rule 107(13) addressing Open International Competitions covered by ISU Communication No 1974 (described in Section 5.7.2).
- (72) The Dutch Icederby Grand Prix was to be held between 24 and 26 March 2017 and co-organised by the KNSB and Icederby Europe BV<sup>132</sup>. After examining the submission, including compliance with technical and administrative requirements

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<sup>124</sup> Submission of Icederby of 03.11.2015, page 5. See also submission of the ISU of 26.09.2014, page 16, and Annex 9 of the submission of the ISU of 26.06.2015, page 2.

<sup>125</sup> Submission of the Complainants of 23.06.2014, page 22.

<sup>126</sup> Ibid, page 6.

<sup>127</sup> Submission of Icederby of 03.11.2015, page 6.

<sup>128</sup> Ibid, page 10-11.

<sup>129</sup> Submission of the ISU of 08.07.2016, page 14.

<sup>130</sup> Submission of the ISU of 29.07.2016, page 1.

<sup>131</sup> Rule 107(14) b) provides that: "*the organising club invites at least one club affiliated to another Member, either directly or through that Member*". Rule 104(14) b) provides that: "*a Member which intends to organize an International Competition that has not been included in the relevant annual ISU Communications on International Speed Skating Competitions must submit the announcement to the Secretariat for approval in order to have the competition recognized with the status of an International Competition*".

<sup>132</sup> Submission of the ISU of 29.07.2016, schedule 10.2, page 1.

and with the ISU Code of Ethics, on 26 July 2016, the ISU decided to include this event in the ISU calendar<sup>133</sup>.

## 5.7. Relevant ISU Communications

### 5.7.1. ISU Communication No 1853

- (73) On 6 March 2014, after Icederby's entry attempt, the ISU issued Communication No 1853, entitled "Betting and Gambling in ISU Sports"<sup>134</sup>.
- (74) In Communication No 1853, the ISU first restated the ISU's position on betting/gambling in sport by referring to its Code of Ethics contained in its Communication No 1717<sup>135</sup>. The ISU reminded participants in ISU competitions/activities of the obligation "(...) to refrain from participating in all forms of betting or support for betting or gambling related to any event/activity under the jurisdiction of the ISU". The ISU added that it would initiate disciplinary proceedings based on evidence of breach of these rules.
- (75) Second, the ISU informed its Members that it had been approached by an entity named "Icederby", which was planning to organise international competitions involving speed skaters in special competition formats and possibly "*closely connected to betting*". The ISU further explained in its Communication that, in light of ISU's position in relation to betting/gambling, the ISU would not authorise the proposed Icederby International Competitions, and that the involvement of skaters and/or officials from ISU Members would be sanctioned according to the ISU Rules, in particular but not limited to Rule 102(2) of the ISU General Regulations relating to eligibility<sup>136</sup>.
- (76) Third, the ISU reminded its Members that participation in any international ice skating competition not authorised by the ISU would result in the loss of ISU eligibility for participants, referring to Rule 102 (the Eligibility rule), but also to Rule 104, which contains the obligations of ISU Members<sup>137</sup>.

### 5.7.2. ISU Communication No 1974

- (77) On 20 October 2015, the ISU issued Communication No 1974, entitled "Open International Competitions"<sup>138</sup>. Communication No 1974 sets out the procedure for the authorisation of an Open International Competition, as referred to in Article 107(13) of the ISU General Regulations.
- (78) First, as a general rule, Open International Competitions have to be authorised by the ISU Council.
- (79) Second, Communication No 1974 distinguishes between ISU Members and third parties wishing to organise Open International Competitions. Both are referred to as applicants and have to submit to the ISU; Members have to submit an application at

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<sup>133</sup> Submission of the ISU of 29.07.2016, page 1. The Dutch Icederby Grand Prix finally did not take place: see the article from the newspaper *De Volkskrant*, dated 18 January 2017: <http://www.volkskrant.nl/sport/nederlandse-editie-van-lucratieve-icederby-gaat-toch-niet-door~a4449909/>, downloaded and printed on 09.11.2017

<sup>134</sup> ISU Communication No 1853, submission of Icederby of 05.11.2015.

<sup>135</sup> ISU Communication No 1717, submission of Icederby of 05.11.2015.

<sup>136</sup> ISU Communication No 1853, pages 1-2, submission of Icederby of 05.11.2015.

<sup>137</sup> ISU Communication No 1853, page 2, submission of Icederby of 05.11.2015.

<sup>138</sup> ISU Communication No 1974, submission of the ISU of 20.10.2015.



least three months prior to the intended starting date of the competition and non-Members have to submit an application at least six months prior to the intended starting date of the competition containing: (i) their details, (ii) general and financial information showing that they are capable of organising the event in question, including (a) an indicative business plan and overall budget, (b) a written declaration confirming that the applicant conforms to the ISU Statutes and jurisdiction and (c) planned TV coverage, (iii) technical and supporting information (venue, dates, invited skaters prize money, list of appointed officials), (iv) declaration on ethics confirming that the applicant is not engaged in betting activities and that it adheres to the ISU Code of Ethics, and (v) an agreement to pay a solidarity contribution to the ISU. The ISU reserves the right to request further information related to general and financial requirements and to technical and sporting requirements<sup>139</sup>.

- (80) The ISU Council shall accept or reject the application having regard to the ethical requirements; and/or the general and financial requirements; and/or technical and sporting requirements, and/or overriding objectives of the ISU, in particular as laid down in Article 3(1) of the ISU Constitution. If the ISU Council rejects the application, the applicant may appeal the decision of the ISU Council to the CAS, after signing an arbitration agreement in accordance with the Procedural Rules of CAS<sup>140</sup>.

## **6. RELEVANT MARKETS**

### **6.1. Relevant product market**

#### *6.1.1. Principles*

- (81) A relevant product market comprises all those products or services, which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use<sup>141</sup>.
- (82) The identification of the relevant markets by the Commission derives in particular from the existence of competitive constraints. Firms are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product<sup>142</sup>.
- (83) However, supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. There is supply-side substitution when suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When those conditions

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<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Commission notice on the definition of relevant market for the purposes of Community competition law ("Market definition notice"), OJ 97, C 372, page 3, point 7; see also Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* EU:C:2013:127, paragraph 77; and Case T-201/04, *Microsoft v Commission*, EU:T:2007:289, paragraph 484.

<sup>142</sup> Market definition notice, point 13; see also Case T-177/04 *easyJet Airline Co. Ltd v Commission* EU:T:2006:187, paragraph 99.

are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved<sup>143</sup>.

- (84) The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry<sup>144</sup>.
- (85) In the sports sector, the Court of Justice found in the *MOTOE* judgment that ELPA, the Greek member of the Fédération Internationale de Motocyclisme, was active in both the organisation of motorcycling events and in their commercial exploitation by means of sponsorship, advertising and insurance contracts, noting that these two activities are not interchangeable but rather functionally complementary<sup>145</sup>.

### 6.1.2. *Application to the case*

#### 6.1.2.1. Introduction

- (86) This case concerns the organisation and commercial exploitation of speed skating events. The organisation of speed skating events consists in the setting of sporting, technical and organisational rules for speed skating events, as well as the setting of the calendar, the entry of athletes, the appointment of referees and other technical staff. The commercial exploitation of speed skating events consists in the selling of tickets, media and sponsoring rights<sup>146</sup>. In Sections 6.1.2.2 to 6.1.2.5, the Commission assesses whether the organisation and commercial exploitation of speed skating events is part of a broader relevant market for the organisation and commercial exploitation of other sports events (Section 6.1.2.2); whether the organisation and the commercial exploitation of speed skating events belong to separate relevant markets (Section 6.1.2.3); and whether further distinctions should be made between national and international events (Section 6.1.2.4) and between (i) individual events and series; (ii) long-track and short-track speed skating events; and (iii) recurrent yearly speed skating events and speed skating events occurring only once every number of years (Section 6.1.2.5).

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<sup>143</sup> Market definition notice, point 20.

<sup>144</sup> Market definition notice, point 24.

<sup>145</sup> Case C-49/07 *MOTOE* ECLI:EU:C:2008:376, paragraph 33; in its decision concerning the Swedish Automobile Federation (Konkurrensverket Decision of 13 May 2011 in Case 709/2009), the Swedish Competition Authority identified a market for the organisation of automobile motor sports events having two complementary sides: the opportunity for drivers to compete and participate in events and the commercial exploitation of the events through ticketing, sponsoring and other licensing agreements. These findings were confirmed by the Swedish Market Court (Swedish Market Court, Ruling 2012:16 in case A 5/11, *Svenska Bilsportförbundet v. Konkurrensverket*, 20 December 2012).

<sup>146</sup> For the purpose of organising and commercial exploiting speed skating events, the federations may have recourse to specialised service providers, such as Infront, the sports marketing company managing commercial rights for federations, events organisers and athletes worldwide (see Announcement of the acquisition by Infront of Referee, the Dutch agency holding exclusive marketing rights for the ISU World Cup Speed Skating and the ISU World and European Speed Skating Championships, available at: <http://www.infrontsports.com/news/2015/02/infront-acquires-referee-sportsmarketing-further-expanding-its-european-presence-and-global-sports-portfolio/>, downloaded and printed on 13.06.2016).

### 6.1.2.2. The organisation and commercial exploitation of speed skating versus other sports events

- (87) In line with previous case-law and decisional practice, the Commission considers that the relevant market for the organisation and the commercial exploitation of sports events is limited to a single sports discipline.<sup>147</sup>
- (88) Demand for the organisation and commercial exploitation of sports events primarily comes from consumers following a certain sporting competition, either by attending it in dedicated infrastructures (stadiums, arenas, etc.) or by watching it live (usually on TV but increasingly also on media such as PCs, tablets or smartphones)<sup>148</sup>. Speed skating enjoys a very high popularity in the Netherlands<sup>149</sup> and a relative popularity in Germany, Norway and, to a lesser extent, Belgium, Finland and Hungary, while in other Member States, speed skating is generally considered a sport of lesser importance, if either compared to other similar, ice sports such as figure skating or

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<sup>147</sup> See for example: (i) Case C-49/07 *MOTOE* ECLI:EU:C:2008:376, paragraph 33, where the Court of Justice found that ELPA, the Greek member of the *Fédération Internationale de Motocyclisme*, was active in the organisation and commercial exploitation of motorcycling events (as opposed to the organisation of events in other sports disciplines); (ii) Chancery Division of the High Court, judgment of 5 October 2001, *Hendry and others v World Professional Billiards and Snooker Association Ltd*, paragraphs 84-89, ([2001] All ER (D) 71 (Oct)), where the court found that there is a market for organising and promoting snooker tournaments; (iii) Landgericht Dortmund, judgment of 14.05.2014, 8 O 46/13, paragraph 122, where the court identified a market for international handball competitions, subdivided into the market segments of league/club competitions and national team competitions; (iv) Oberlandesgericht München, judgment of 15.01.2015, Az. U 1110/14, paragraph 76, where the court found that the ISU was dominant in the market for the admission to the World Speed Skating Championship; (v) Swedish Competition Authority Decision of 13 May 2011 in Case 709/2009 concerning the Swedish Automobile Federation, where the Authority identified a market for the organisation of automobile motor sports; these findings were confirmed by the Swedish Market Court Ruling of 20 December 2012 (Ruling 2012:16 in case A 5/11, *Svenska Bilsportförbundet v. Konkurrensverket*.); (vi) Italian Competition Authority Decision no. 19946 of 30 June 2009 in Gargano Corse/ACI, (Bolletino no. 23/2009) where the Authority found that the Italian Automobile Federation (ACI) held a dominant position in the market for the organisation of automobile events. This conclusion is not called into question by the observations submitted by the ISU in its response to the Letter of Facts, submission of the ISU of 25.10.2017, pages 1 and 2. First, even if some of the judgments have been set aside following appeal proceedings (Oberlandesgericht München, judgment of 15.01.2015, Az. U 1110/14; Landgericht Dortmund, Urteil vom 14.05.2014, 8 O 46/13), such appeals have not challenged the conclusions reached on market definition. Second, even if market definition is presented briefly in some of those judgments and decisions (Landgericht Dortmund, judgment of 14.05.2014, 8 O 46/13; Italian Competition Authority Decision no. 19946 of 30 June 2009 in Gargano Corse/ACI (Bolletino no. 23/2009)), national courts have consistently concluded that events of one sport discipline are not substitutable with those of another. Third, the United States Court of Appeal in its 25 June 2010 judgment in *Deutscher Tennis Bund v. ATP Tour Inc* (610 F.3d 820 (2010)) merely concluded that the plaintiffs did not meet the required standard of proof in relation to the market definition. Fourth, even if specifically for sponsorship and broadcasting there is certain degree of substitutability between some sports (Chancery Division of the High Court, judgment of 5 October 2001, *Hendry and others v World Professional Billiards and Snooker Association Ltd* ([2001] All ER (D) 71 (Oct)), paragraph 88; Italian Competition Authority Decision no. 19946 of 30 June 2009 in Gargano Corse/ACI (Bolletino no. 23/2009)), this merely represents the secondary demand and is not the case for spectators, which constitute the primary customer base of the relevant market (see also recitals (88) to (90)). Last, the General Court's judgment in Case T-699/14, *Topps Europe Ltd v. Commission* is irrelevant to this Decision, as this Decision does not touch upon markets for the sale of entertainment collectibles.

<sup>148</sup> See e.g. OECD, Policy Roundtables, Competition Issues in Television and Broadcasting 2013, DAF/COMP/GF(2013)13, 28 October 2013, page 22, footnote 36 and page 458.

<sup>149</sup> Submission of the ISU of 05.02.2016, pages 6-10.

ice-hockey, or to other sports overall<sup>150</sup>. Speed skating also enjoys a certain degree of popularity outside the EEA, notably in Russia, China, the United States and South Korea<sup>151</sup>.

- (89) With regard to demand substitutability, fans of a given sports discipline are generally unlikely to substitute it with any other product for cultural, geographic and emotional reasons. It is therefore unlikely that a significant number of fans of speed skating would switch to another sport. Spectators attending a speed skating competition would not replace the event they choose to watch with another event (either in another sports discipline or in another field such as live music or entertainment performances) in the case of a hypothetical small but permanent relative increase in the price of tickets<sup>152</sup>.
- (90) Regarding the secondary demand represented by broadcasters, sponsors and other marketing/advertising companies, the appeal of a sports event depends on a variety of factors (the attractiveness of the event to viewers, brand exposure opportunities, the image of the sports event in question). For those companies speed skating events could be substituted with other products<sup>153</sup>.
- (91) Moreover, the substitutability between the organisation and the commercial exploitation of speed skating events and of other sports events is practically non-existent: an organiser and promoter of a speed skating event cannot engage in its activity without availing itself of the detailed sporting and technical regulations and of the organisational know-how of the organiser of such events<sup>154</sup>. In other words, if an organiser and promoter of ice hockey events has engaged in all the necessary activities that constitute the organisation and commercial exploitation of those events (namely defining and enforcing the necessary sporting, technical and organisational rules, securing the participation of ice hockey players and other technical staff and the availability of all other necessary inputs, concluding contracts for the marketing of the event), the organiser and promoter will not be able to switch to the organisation and the commercial exploitation of speed skating swiftly and without incurring material costs in the case of a hypothetical small but permanent increase in speed skating tickets or sponsoring and broadcasting contracts' price.

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<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Submission of the Complainants of 05.02.2016, page 3. See also the Decision 2000/12/EC in Case IV/36.888 - 1998 Football World Cup, OJ L 5, 08.01.2000, pages 55-74, in which the Commission found that an increase of at least 10% in the price of match tickets for the 1998 Football World Cup final would not have resulted in a significant switch in demand by the general public to otherwise competing products (that is, tickets for other sports events), on the basis of various considerations addressing the popularity of the sport and event in question, its timing and evidence related to supply and demand dynamics for the sale of tickets for the event (see recital (68) of that decision).

<sup>153</sup> Submission of the Complainants of 05.02.2016, page 4 and submission of EU Athletes of 21.01.2016, pages 2-3. See also Chancery Division of the High Court, judgment of 5 October 2001, *Hendry and others v World Professional Billiards and Snooker Association Ltd* ([2001] All ER (D) 71 (Oct)), paragraphs 86-88.

<sup>154</sup> See, by analogy, the description of the organisation and commercial exploitation of international automobile events in the FIA case (Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning cases COMP/35.163 - Notification of FIA Regulations, COMP/36.638 - Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship and COMP/36.776 - GTR/FIA & others, OJ C 169, 13.06.2001, pages 5-11).

- (92) Last, athletes can only switch to different sports disciplines in exceptional circumstances<sup>155</sup>. As in any other top level sport, speed skaters are highly skilled and to acquire and develop their skills as professional athletes, they have to specialise and maintain intensive training in their discipline from a very young age. Whilst there may be some technical similarities between speed skating and inline skating<sup>156</sup>, leading to a certain number of athletes competing in both disciplines, high-level athletes usually perform in only one sport. Due to the inherent differences in speed and figure skating on ice, there is practically no interchangeability between these two disciplines. Even within speed skating, there are very few examples of athletes capable of competing at a high level in both long-track and short-track speed skating<sup>157</sup>. As a consequence, the organisers and promoters of speed skating events are the only economic actors to which speed skaters can offer their services, as they could not offer them to organisers and promoters of other ice sports events, such as ice hockey or figure skating events. Speed skaters can only provide services to (associations of) undertakings that possess the necessary organisational know-how and that can secure contracts with relevant commercial partners so as for speed skating events to be organised and commercially exploited. Therefore, for athletes too, the organisation and the commercial exploitation of speed skating events is a distinct activity from the organisation and the commercial exploitation of events in other (ice- or non-ice related) sports disciplines.
- (93) In its response to the SO, the ISU argues that the primary market should be defined as the market for the organisation of ice sports events for commercial exploitation<sup>158</sup>. Furthermore, to support its statement that there is a broader market for ice sports, the ISU refers to the submission of EU Athletes stating that some spectators only watch one sport and others similar (or all) sporting competitions, and the ISU thus argues that the Commission disregarded its own market analysis in defining the relevant market<sup>159</sup>. The ISU also refers to a submission by Icederby concerning the possibility of organising events in different disciplines (speed skating, figure skating and ice-hockey) in a given ice rink to support its market definition<sup>160</sup>.
- (94) However, first, the ISU fails to identify any demand-side or supply-side substitutability between the organisation of various ice sports events. The ISU states that "*an organiser of an ice hockey event could organise a professional Speed Skating or Figure Skating event*"<sup>161</sup> without specifying what would be required in terms of investment and lead time for such organiser of ice hockey events to set up a professional speed skating competition.
- (95) Second, in response to the ISU's argument based on the statement of EU Athletes that some spectators watch more than one sport, the Commission notes that the market

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<sup>155</sup> Submission of the Complainants of 05.02.2016, page 4, and submission of the ISU of 05.02.2016, page 15.

<sup>156</sup> Regulations 2016 of FIRS. Inline skating is skating practiced on skates composed of a maximum of five wheels arranged in a single line or with two pairs of wheels fastened parallel to each other, available at: <http://www.rollersports.org/component/phocadownload/category/39-regulation> downloaded and printed on 30.08.2016.

<sup>157</sup> Submission of the Complainants of 05.02.2016, page 4.

<sup>158</sup> ISU's response to the SO of 16.01.2017, paragraph 201.

<sup>159</sup> ISU's response to the SO of 16.01.2017, paragraph 204.

<sup>160</sup> ISU's response to the SO of 16.01.2017, paragraphs 205-206.

<sup>161</sup> ISU's response to the SO of 16.01.2017, paragraph 203.

analysis undertaken by the Commission does not consist in an isolated statement of one association active in the market.<sup>162</sup> Moreover, the ISU omits to take into account the subsequent statement in the EU Athletes' submission that there is minimal substitution between different sports for athletes<sup>163</sup>, for the services of which organisers and promoters of speed skating events represent the only demand.

- (96) Third, the statement by Icederby does not refer to the organisation of sports events but rather to one of the necessary inputs for speed skating events, in this case limited to the appropriate ice arena that a promoter of sports events has to secure in order for the event to take place. The ISU, however, does not consider whether other necessary inputs for organising and promoting a speed skating event can also be secured. Moreover, and perhaps in light of these inconsistencies, the ISU concedes that the relevant market affected by the ISU Eligibility rules is "possibly" the "sub-market" for speed skating events<sup>164</sup>.
- (97) In light of recitals (87) to (96) and in particular having regard to the limited demand-side substitutability from the point of view of consumers, the Commission considers that there is a market for the organisation and commercial exploitation of speed skating events, as opposed to events in other sports disciplines.<sup>165</sup>

#### 6.1.2.3. Possible distinction between the organisation and commercial exploitation of speed skating events

- (98) In order to be able to organise and commercially exploit speed skating events, organisers must secure services provided in upstream markets that constitute necessary inputs for the speed skating event to take place and for revenues to be generated, such as (i) the services of athletes and/or clubs, technical staff (match officials and other relevant personnel) and equipment manufacturers; (ii) the hiring or acquisition of the premises where the event will take place; (iii) other relevant services (such as for instance insurance or ad-hoc security, safety and medical personnel and equipment)<sup>166</sup>. The athletes' services can be attracted by the award of

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<sup>162</sup> The same applies to the similar statement of the ISU regarding EU Athletes position on sponsorship, ISU's response to the SO of 16.01.2017, paragraph 230.

<sup>163</sup> Submission of EU Athletes of 21.01.2016, page 3.

<sup>164</sup> ISU's response to the SO of 16.01.2017, paragraph 207.

<sup>165</sup> The same conclusion would be reached if distinct markets were considered for the organisation and for the commercial exploitation of speed skating events (see Section 6.1.2.3). Promoters of speed skating events could not substitute the detailed sporting and technical regulations and the organisational know-how related to speed skating events with the regulations and know-how of any other sport event. Conversely, the organisers of any other sport could not supply the promoters of speed skating events with the required regulations and know-how. A narrower market for the organisation of events would therefore be limited to speed skating events. The commercial exploitation of speed skating events could also not be substituted with the commercial exploitation of any other sport. Fans and spectators constituting the primary demand would not switch to another event in case of a small but permanent relative price increase. From a supply side, promoters of other sports events would also not easily start commercially exploiting speed skating events, as they would need to first secure all necessary inputs for setting up and running the speed skating event and, on the other hand, conclude contracts enabling them to market the event. Therefore, a narrower market for the commercial exploitation of sports events would be limited to the commercial exploitation of speed skating events.

<sup>166</sup> For a description of such activities in the market for the organisation and promotion of professional snooker events, see Chancery Division of the High Court, judgment of 5 October 2001, *Hendry and others v World Professional Billiards and Snooker Association Ltd* ([2001] All ER (D) 71 (Oct)), paragraphs 84-85.

prize money for successful participation in speed skating events. Organisers and promoters of speed skating events are thus the buyers of professional speed skaters' services.

- (99) From a supply side, in the case of speed skating, the organisation and the commercial exploitation of speed skating events are jointly performed. The ISU and its Members are both in charge of the organisational aspects of speed skating events (rule-setting, calendar, entry of athletes, appointment of referees) and of the commercial exploitation of such events by way of selling media and sponsoring rights<sup>167</sup>. Neither the ISU nor any other entity performs an economic activity consisting merely of the organisation of speed skating events for a third party that commercially exploits the speed skating event. Conversely, the ISU in part directly and in part through its Members commercially exploits speed skating competitions and generates revenues through the sale of tickets and of sponsoring and broadcasting rights. The revenue the ISU generates through the commercial exploitation of ISU's events covers the cost of allocating resources for the organisation of the event<sup>168</sup>. On the other hand, the commercial exploitation of speed skating events is only possible if those events are organised and the organisational aspects will affect the success of their commercial exploitation (see recital (205), which explains how Icederby wanted to introduce innovative rules to attract more consumer demand)<sup>169</sup>. As the organisation and the commercial exploitation of speed skating events are intertwined, the Commission considers it unlikely that those activities belong to distinct relevant markets.
- (100) In its response to the SO, the ISU argues that the relevant market should be defined as the market for the organisation of ice sports or speed skating events for commercial exploitation, distinguishing between the organisation of a sports event and its actual commercial exploitation, even if functionally complementary<sup>170</sup>. The ISU is concerned that otherwise "purely sporting" amateur events with "no or almost no" involvement from professional skaters would come within the auspices of Union competition rules.
- (101) However, first, the ISU does not delineate the scope of such market. It appears to exempt from the relevant market sporting events to which commercial activities are secondary, as well as the exploitation of ticketing, broadcasting and sponsorship

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<sup>167</sup> For the purpose of organising and commercial exploiting speed skating events, the federations may have recourse to specialised service providers, such as Infront, the sports marketing company managing commercial rights for federations, events organisers and athletes worldwide (see Announcement of the acquisition by Infront of Referee, the Dutch agency holding exclusive marketing rights for the ISU World Cup Speed Skating and the ISU World and European Speed Skating Championships, available at: <http://www.infrontsports.com/news/2015/02/infront-acquires-referee-sportsmarketing-further-expanding-its-european-presence-and-global-sports-portfolio/>, downloaded and printed on 13.06.2016).

<sup>168</sup> ISU's Financial Report 2016, submission of the ISU of 26.09.2017, page 5, showing that approximately 60% of ISU's operating expenses were devoted to ISU's Events. Regarding ticketing, [ticket revenue agreements], submission of the ISU of 26.09.2017.

<sup>169</sup> See similarly Swedish Competition Authority Decision of 13 May 2011 in Case 709/2009, referenced in footnote 147 above, where the Swedish Competition Authority identified a market for the organisation of automobile motor sports events having two complementary sides, namely the opportunity for drivers to compete and participate in events and the commercial exploitation of the events through ticketing, sponsoring and other licensing agreements and also including the provision of administrative services by the Swedish Automobile Federation.

<sup>170</sup> ISU's response to the SO of 16.01.2017, paragraphs 197-200.

rights which it views as belonging to distinct markets, without describing the economic activities in which such market consists, if ticketing, broadcasting and sponsorship are exempted.

- (102) Second, the ISU contradicts itself by, on the one hand stating that the ISU is active on a market for the organisation for commercial exploitation in its function as a regulator and governing body of speed skating, whereas on the other hand, it considers that there is supply-side substitutability on that market between ice hockey and speed skating events, even though the ISU would, as a regulator of speed skating, not be in the position of organising ice hockey competitions<sup>171</sup>.
- (103) Third, the ISU's concern that purely sporting" amateur events with "no or almost no" involvement from professional skaters could come within the auspices of Union competition rules is unjustified, because the provisions on competition in the Treaty do not apply to an activity which, by its nature, aim and the rules to which it is subject, does not belong to the sphere of economic activity.<sup>172</sup>
- (104) Fourth, even if the relevant market were defined, as proposed by the ISU, as the market for the organisation of speed skating events for commercial exploitation, the ISU has a strong position and a substantial ability to influence competition on that relevant market as a result of its role as the regulator for speed skating and the organiser of the most important international speed skating competitions (see also Section 7).
- (105) In light of recitals (98) to (104), the Commission considers that the relevant market is likely to comprise both the organisation and commercial exploitation of speed skating events. However, even if narrower market definitions for the organisation and for the commercial exploitation of speed skating events were considered, the Eligibility rules would also restrict competition on those narrower markets as a result of the ISU's strong market position and the significance of its role as the regulator for speed skating and the organiser of the most important international speed skating competitions (see also Section 7).

#### 6.1.2.4. Possible distinction between national and international speed skating events

- (106) The market for the organisation and commercial exploitation of speed skating events can possibly be further subdivided according to the nature of the speed skating events, notably in terms of participating athletes.
- (107) The ISU distinguishes in its rules between international skating events, which fall under the exclusive competence of the ISU Regulations<sup>173</sup>, and national events which are governed by the relevant national federations. As noted in recital (119), all international competitions need to be authorised by the ISU and all authorised events are published in the annual ISU Communications on speed skating competitions.
- (108) In addition, there is a significant difference concerning the economic importance of national as compared to international events. While national speed skating competitions may be attractive to athletes with regard to the national titles and medals that can be awarded, such athletes are mainly interested in participating in national events because the best performers in those events may participate in the

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<sup>171</sup> ISU's response to the SO of 16.01.2017, paragraphs 205 and 207.

<sup>172</sup> Case C-309/99 *Wouters* ECLI: EU:C:2002:98, paragraph 57.

<sup>173</sup> ISU Constitution and General Regulations, Rule 101.



more prestigious and higher level international competitions, notably, for European athletes, the European and World Championships and the Winter Olympic Games<sup>174</sup>.

- (109) The commercial interest of national competitions is also mostly local whereas international competitions attract a wider audience and are therefore economically significantly more valuable: a higher number of fans will be interested in following a competition where famous speed skaters from different countries participate. For example, few national broadcasters (broadcasters in the Netherlands being an exception in this respect) would be interested in buying media rights for national speed skating events, whereas many of them would be interested in showing the major international events sold by the ISU through its partnership with the European Broadcasting Union ("EBU")<sup>175</sup>. The same can be said for sponsors: whilst national speed skating competitions are attractive for local sponsors only, international events attract a larger audience and offer a greater exposure opportunity for sponsors active across different territories<sup>176</sup>.
- (110) On this basis, the Commission concludes that a distinction should be made between national and international speed skating events.

#### 6.1.2.5. Other possible distinctions

- (111) The Commission does not exclude that, within the market for the organisation and commercial exploitation of international speed skating events, further distinctions could be made between: (i) individual speed skating events and series of speed skating events; (ii) long-track and short-track speed skating events; and (iii) recurrent yearly speed skating events (such as the World and European Speed Skating Championships) and speed skating events occurring only once every number of years (such as the Winter Olympic Games). However, with respect to such distinctions, the Commission can leave the exact delineation of the market open in light of the fact that the Eligibility rules would also restrict competition on those narrower markets as a result of the ISU's strong market position and the significance of its role as the regulator for speed skating and the organiser of the most important international speed skating competitions (see also Section 7).

#### 6.1.3. Conclusion on the relevant product market

- (112) The Commission concludes that the relevant product market is the market for the organisation and commercial exploitation of international speed skating events. However, the Commission's assessment under Article 101 of the Treaty would remain valid if the organisation and the commercial exploitation of international speed skating belong to distinct relevant markets and/or in case of further subdivisions.

## 6.2. Relevant geographic market

### 6.2.1. Principles

- (113) A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be

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<sup>174</sup> Submission of the Complainants of 05.02.2016, page 5.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas<sup>177</sup>.

#### 6.2.2. *Application to the case*

- (114) The Commission considers that the geographic scope of the market for the organisation and commercial exploitation of international speed skating events is worldwide, *inter alia* in view of the fact that: (i) the ISU events are not limited to continental areas; (ii) the ISU has Members all over the world and the ISU Members host the various ISU events (there is therefore supply substitution between the different locations that are capable of hosting such events); (iii) the same rules and standards apply to all international competitions in a given discipline; and (iv) international sports events (speed skating being no exception in this respect) attract a global audience<sup>178</sup>.

### 6.3. **Conclusion**

- (115) The Commission concludes that, for the purposes of this Decision, the relevant market is the worldwide market for the organisation and commercial exploitation of international speed skating events. However, given the significance of the ISU's role as the regulator for speed skating and the organiser of the most important international speed skating competitions (see also Section 7), the Eligibility rules also restrict competition if the organisation and commercial exploitation of international speed skating events belong to separate relevant markets and/or in case of further sub-divisions for (i) individual speed skating events and series of speed skating events; (ii) long-track and short-track speed skating events; and (iii) recurrent yearly speed skating events and speed skating events occurring only once every number of years should be made.

## 7. **POSITION OF THE ISU IN THE RELEVANT MARKET AND THE SIGNIFICANCE OF ITS ROLE FOR COMPETITION IN THE RELEVANT MARKET**

- (116) The ISU plays a central role in the worldwide market for the organisation and commercial exploitation of international speed skating events<sup>179</sup> as the sole governing body in charge of establishing and enforcing rules related to speed skating at the international level. Its regulations are binding on its Members and all international speed skating events must be conducted in accordance with the ISU Regulations<sup>180</sup>.
- (117) "ISU Events", as defined in the ISU Regulations<sup>181</sup>, are under the exclusive responsibility of the ISU. Only eligible skaters can participate in ISU Events. ISU Events encompass, among others, (i) all ISU Championships including the World and European long-track and short-track speed skating championships; (ii) ISU Series of International Competitions including the Speed Skating World Cup and the Short Track Speed Skating World Cup; and (iii) other international competitive

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<sup>177</sup> Market Definition Notice, point 8.

<sup>178</sup> Both the Complainants and the ISU agree with this definition: see submission of the Complainants of 05.02.2016, pages 5-6, and submission of the ISU of 05.02.2016, page 16.

<sup>179</sup> For more information about ISU's activities, see <http://www.isu.org/about-international-skating-union>, downloaded and printed on 28.11.2017.

<sup>180</sup> ISU General Regulations, Rule 101.

<sup>181</sup> Ibid, Rule 100(3) a).

events. The Olympic Winter Games speed skating competitions are administered by the ISU as an ISU International Competition<sup>182</sup>.

- (118) According to the ISU Rules, the ISU owns all rights for the marketing, advertising and broadcasting of ISU Events<sup>183</sup>. On 21 March 2014, the ISU signed an agreement with the EBU for the exclusive sale of media rights worldwide (with the exception of some countries) for the period 2015-2019<sup>184</sup>. The ISU has a number of official sponsors for its events (for example the sponsors of the 2015/2016 ISU World Speed Skating Championship were KPN and De Telegraaf, two Dutch companies)<sup>185</sup>.
- (119) There are other international competitions that may be organised by the ISU Members, which are conducted in accordance with the ISU rules and which have to avoid conflicts with ISU television and advertising contracts when they are organised as a series. Those competitions are defined as "International Competitions" in the ISU Regulations<sup>186</sup>. Only eligible skaters can participate in International Competitions. For this type of competition, Members must inform the ISU Secretariat in order for the competition to be published in the annual ISU Communications on International Competitions<sup>187</sup>. ISU Members can apply to the ISU if they want to organise ISU international speed skating events. Once selected, the relevant Member will organise the designated ISU competition in its country, in accordance with the applicable ISU rules<sup>188</sup>.
- (120) In addition, international competitions may be organised by third parties, that is to say entities other than the ISU or its Members. Those competitions are defined as Open International Competitions and must be authorised by the ISU, which also has the right to approve the financial conditions for all parties and persons involved. Open International Competitions may involve the participation of both eligible and ineligible persons<sup>189</sup>.
- (121) The central role of the ISU as the body recognised by the International Olympic Committee as the global administrator of speed skating on ice, as well as the organiser of the most important international speed skating competitions is reflected in following functions.
- (122) First, the ISU adopts the rules applicable to international speed skating events. Those rules include: (i) the ISU Constitution which lays down rules on administrative, procedural and judicial matters such as the membership, functioning and organisation of the ISU itself, jurisdiction, appeals, sanctions and decision-making process; (ii) the ISU General Regulations, which govern horizontal matters related to ice-skating competitions such as eligibility, age limits, participation of athletes, announcements

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<sup>182</sup> Ibid, Rule 126.

<sup>183</sup> Ibid, Rule 100(3). When national associations organise individual events within the ISU series of international competitions (e.g. ISU Speed Skating World Cup), the organising national association can exploit the domestic TV rights and the marketing/advertising rights of the event. However, TV rights, marketing and advertising rights for all other territories are owned by the ISU (Rule 105(1)).

<sup>184</sup> ISU Press Release of 21 March 2014.

<sup>185</sup> Submission of the ISU of 05.02.2016, page 12.

<sup>186</sup> ISU General Regulations, Rule 107(4).

<sup>187</sup> Ibid, Rule 104(14).

<sup>188</sup> ISU Communication No 1993 of 25 February 2016, inviting the ISU Members to submit their application for a number of events to be organised during the 2017/2018 and 2018/2019 seasons.

<sup>189</sup> ISU Constitution and General Regulations, Rule 107(13).

and calendars; and (iii) the ISU Special Regulations and Technical Rules related to long-track speed skating and short-track speed skating, which cover specific issues such as distances, tracks, entries for competitions, duties and powers of officials and equipment.

- (123) According to Rule 101(3) of the ISU General Regulations 2014, "*all International Competitions and exhibitions must be conducted strictly in accordance with the ISU Regulations in effect at the time such events are held*". The ISU therefore has exclusive and complete control over the various rules governing international speed skating competitions organised by it or by its Members as well as Open International Competitions (i.e. international competitions that may be organised by third parties).
- (124) Second, the ISU controls and coordinates the annual calendar of international speed skating events. According to Rule 104(14) of the ISU General Regulations 2014, "*each Member must announce to the Secretariat, by June 1<sup>st</sup>, the International Competitions it intends to organize in the coming season*". In case of conflicting dates and places, the ISU acts as a mediator so that the final calendar is agreed by 1 July and the annual Communication with the list of international events is published by 1 August.
- (125) Third, all international speed skating competitions have to be authorised by the ISU. For ISU Events, the ISU issues memorandums of guidance and the events are attended by ISU Representatives, ISU Event Coordinators and members of the relevant Technical Committees<sup>190</sup>. For International Competitions, the relevant ISU Member is in charge of ensuring compliance with the relevant ISU rules.
- (126) Fourth, the ISU, through its various sets of rules as presented in Sections 5.4 to 5.7, is responsible for the competition formats, and the selection, entry and participation of athletes in international speed skating competitions. Skaters can only participate in those competitions by way of an entry made through the relevant ISU Member<sup>191</sup>.
- (127) Fifth, the ISU is responsible for the division of officials in different categories (for international speed skating events, the applicable categories are "ISU" and "International" officials) and for the rules governing their nomination and appointment<sup>192</sup>.
- (128) Sixth, the ISU owns the exclusive rights for the downstream commercial exploitation of ISU Events in the field of international speed skating<sup>193</sup>.
- (129) Seventh, the ISU and its Members are practically the only undertakings acquiring the services of speed skaters as organisers of international speed skating events<sup>194</sup>.
- (130) In view of recitals (116) to (129), the Commission concludes that the ISU has a strong position in the relevant market for the organisation and commercial exploitation of international speed skating events, irrespective of whether further segmentations exist within that market. This conclusion is supported by the fact that,

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<sup>190</sup> Submission of the ISU of 26.09.2014, page 10.

<sup>191</sup> ISU Constitution and General Regulations, Rules 109, 126 and 130. For certain international competitions entry of athletes can be made through the clubs but the relevant ISU member has to be informed (Rule 107(14)).

<sup>192</sup> ISU Constitution and General Regulations, Rules 121 and 122.

<sup>193</sup> Ibid, Rule 100(3).

<sup>194</sup> Submission of the Complainants of 23.06.2014, page 16.

apart from the ISU and its Members, no third party has been able to enter the relevant market, even though there have been attempts to enter it<sup>195</sup>.

- (131) The ISU argues that it does not hold a "very strong" market power due to its regulatory functions and that its market power is limited to the undertakings which voluntarily submit themselves to its jurisdiction<sup>196</sup>. The ISU also suggests that it is relevant that the Commission has not found that the ISU is in a dominant position.<sup>197</sup>
- (132) First, the Commission is not required to demonstrate that the ISU has a dominant position on the relevant market because it does not pursue the case under Article 102 of the Treaty.
- (133) Second, the ISU's strong position results from its position as a governing body. Since the participation of professional skaters is required for a third party organiser to be able to compete on the market for the organisation and commercial exploitation of international speed skating events, third party organisers can only compete if they can acquire the skaters' speed skating services. Although the ISU does not regulate unauthorised events, athletes have no choice other than to submit themselves to the ISU's jurisdiction in order to be able to participate in important international competitions (as explained in recitals (38) to (41))<sup>198</sup>. Therefore, in practice, international speed skaters can only provide their services at third party speed skating events that have been authorised by the ISU. Without such an authorisation, third party organisers are not able to secure the speed skaters' services and to compete in the organisation and commercial exploitation of international speed skating events.
- (134) Third, even assuming that the ISU did not hold a strong market position on the relevant market, this would not detract from the fact that the ISU has a substantial ability to influence competition on the relevant market due to its role as the regulator for speed skating and the organiser of the most important international speed skating competitions. The Commission stresses that an association of undertakings with regulatory powers can also restrict competition on a market in which it itself is not active<sup>199</sup>.

## **8. LEGAL ASSESSMENT UNDER ARTICLE 101 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT**

### **8.1. Introduction - Application of Article 101 of the Treaty and Article 53 of the EEA Agreement in the field of sport**

- (135) Article 101(1) of the Treaty prohibits as incompatible with the internal market agreements between undertakings, decisions by associations of undertakings and

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<sup>195</sup> Only when Icederby entered into a partnership with a Member (the KNSB), was their planned event authorised (see recital (72)). However, as noted in footnote 133 above, the Dutch Icederby Grand Prix finally did not take place: see the article from the newspaper De Volkskrant, dated 18 January 2017: <http://www.volkskrant.nl/sport/nederlandse-editie-van-lucratieve-icederby-gaat-toch-niet-door-a4449909/>, downloaded and printed on 09.11.2017.

<sup>196</sup> ISU's response to the SO of 16.01.2017, paragraph 208.

<sup>197</sup> ISU's response to the SO of 16.01.2017, paragraph 196.

<sup>198</sup> Contrary to the ISU's suggestion that the principle of consent and free choice prevail; ISU's response to the SO of 16.01.2017, paragraphs 10 and 115.

<sup>199</sup> Case C-309/99 *Wouters* ECLI: EU:C:2002:98, paragraphs 60-66 and 111-115, where the Court assessed whether a decision of the Bar of Netherlands restricted competition on the market for legal services, even though the Bar of Netherlands was not itself active on that market.

concerted practices which may affect trade between Member States and which either have as their object or their effect the prevention, restriction or distortion of competition within the internal market, provided that the conduct does not meet the conditions of an exemption pursuant to Article 101(3) of the Treaty. Article 53(1) of the EEA Agreement contains a similar prohibition. However, the reference in Article 101(1) of the Treaty to trade “*between Member States*” is replaced by a reference to trade “*between contracting parties*” in Article 53(1) of the EEA Agreement and the reference to competition “*within the internal market*” in Article 101(1) of the Treaty is replaced by a reference to competition “*within the territory covered by the ... [EEA] Agreement*” in Article 53(1) of the EEA Agreement.

- (136) Although sport fulfils very important educational, public health, social, cultural and recreational functions and has some distinctive features<sup>200</sup>, restrictions relating to the area of sport are not generally excluded from the application of Union competition law<sup>201</sup>.
- (137) International sport associations which have as their members national sport associations are undertakings to the extent they themselves carry out activities of an economic nature (such as the organisation and commercial exploitation of sport events)<sup>202</sup>. International sport associations may also be associations of undertakings if their members carry out activities of an economic nature, regardless of whether the international sport associations themselves carry out such activities<sup>203</sup>.
- (138) In order to assess whether sporting rules adopted by an international sport association come within the scope of Article 101(1) of the Treaty, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or in which it produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them<sup>204</sup>.

## 8.2. Decisions of association of undertakings

### 8.2.1. Principles

- (139) Article 101(1) of the Treaty not only prohibits anti-competitive agreements and concerted practices but also anti-competitive decisions of associations of undertakings. The three concepts of "agreement", "concerted practice" and "decisions by associations of undertakings" are intended, from a subjective point of view, to

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<sup>200</sup> See Article 165 of the Treaty and also "White Paper on Sport" of 11 November 2007, COM (2007) 391 final, {SEC (2007) 932} {SEC (2007) 934} {SEC (2007) 935} {SEC (2007) 936}. As explained in Section 5.2, the specificity of sport includes *inter alia* the interdependency between competing adversaries; the need for a certain degree of competitive balance in order to assure the uncertainty of the result of the sporting competition; and the pyramid structure of the sport.

<sup>201</sup> Case 36/74 *Walrave and Koch*, ECLI:EU:C:1974:140, paragraph 4; Case 13/76 *Donà*, ECLI:EU:C:1976:115, paragraph 12; Case C-415/93 *Bosman*, ECLI:EU:C:1995:463, paragraph 73; Joined Cases C-51/96 and C191/97 *Deliège*, ECLI:EU:C:2000:199, paragraph 41; Case C-176/96 *Lehtonen and Castors Braine*, ECLI:EU:C:2000:201, paragraph 32 and Case C-519/04 P *Meca-Medina* ECLI:EU:C:2006:492, paragraph 22.

<sup>202</sup> Commission decision of 27 October 1992, Cases 33384 and 33378 Distribution of package tours during the 1990 World Cup, OJ 1992 L326/31, paragraphs 52-53.

<sup>203</sup> Case T-193/02 *Laurent Piau*, ECLI:EU:T:2005:22, paragraph 72.

<sup>204</sup> Case C-519/04 P *Meca-Medina*, ECLI:EU:C:2006:492, paragraph 42.

catch forms of collusion having the same nature, and which are distinguishable from each other only by their intensity and the forms in which they manifest themselves<sup>205</sup>.

- (140) The concept of an "association of undertakings" is not defined in Article 101 of the Treaty. The Commission has traditionally given a broad meaning to the concept of association of undertakings and has not restricted it to trade associations, thereby including, amongst others, agricultural co-operatives<sup>206</sup>, professional regulatory bodies, associations without legal personality, non-profit making associations and associations of associations. In this vein, groups such as UEFA<sup>207</sup>, the Institute of Professional Representatives before the European Patent Office<sup>208</sup>, and an economic interest grouping administering the co-reinsurance of environmental risks<sup>209</sup> were deemed to be association of undertakings. Some of those entities had a legal personality and a corporate form, while others did not.
- (141) Advocate General Léger explained the rationale underlying the "association of undertakings" as preventing undertakings from circumventing the prohibition enshrined in Article 101 of the Treaty on account of the form in which they coordinate their conduct on the market<sup>210</sup>. According to AG Léger, the concept of an association of undertakings "*seeks to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct on the market. To ensure that this principle is effective, Article [101(1)] covers not only direct methods of coordinating conduct between undertakings (agreements and concerted practices) but also institutionalised forms of cooperation, that is to say, situations in which economic operators act through a collective structure or a common body*"<sup>211</sup>.
- (142) The Court of Justice has traditionally interpreted the concept of an association of undertakings broadly and qualified acts of professional bodies<sup>212</sup> as decisions of an association of undertakings. Neither the legal personality nor the incorporation of an entity is an obstacle to qualifying an entity as an association of undertakings. The legal framework within which agreements are concluded and decisions are taken and the classification given to that framework by national legal systems are indeed irrelevant<sup>213</sup>.

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<sup>205</sup> Case C-8/08 *T-Mobile Netherlands and Others* ECLI:EU:C:2009:343, paragraph 23; Case C-382/12 P *MasterCard v Commission* ECLI:EU:C:2014:2201, paragraph 63.

<sup>206</sup> Case T-217/03 and T-245/03 *FNCBV and others v Commission* ECLI:EU:T:2006:391, paragraph 4.

<sup>207</sup> Commission decision of 23 July 2003, OJ L 291 of 8 November 2003, p. 25, COMP 37.398, paragraph 109.

<sup>208</sup> Commission decision of 7 April 1999, OJ L 106 of 23 April 1999, p. 14, COMP 36.147, paragraph 25.

<sup>209</sup> Commission decision of 14 January 1992, OJ L 37 of 14 February 1992, p. 16, paragraphs 1 and 26.

<sup>210</sup> Opinion of AG Léger in Case C-309/99 *Wouters*, ECLI:EU:C:2001:390, paragraph 62.

<sup>211</sup> Opinion of AG Léger in Case C-309/99 *Wouters*, ECLI:EU:C:2001:390, paragraph 62. See also T-111/08 *MasterCard and Others v Commission* ECLI:EU:T:2012:260, paragraph 243 (judgment confirmed by the Court of Justice on appeal in Case C-519/04 P *MasterCard v Commission* ECLI:EU:C:2014:2201).

<sup>212</sup> Case C-309/99 *Wouters*, ECLI:EU:C:2002:98, paragraphs 56 and 64.

<sup>213</sup> Case 123/83 *BNIC v Clair* ECLI:EU:C:1985:33, paragraph 17 and Case C-35/96 *Commission v Italy* ECLI:EU:C:1998:303, paragraph 40.

- (143) As a general rule, an association consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests vis-à-vis other economic operators, government bodies and the public in general<sup>214</sup>.
- (144) Important features of an "association of undertakings" within the meaning of Article 101(1) of the Treaty are that an association is composed of representatives of the business activity at stake<sup>215</sup> and that members coordinate themselves through a standing body or statutory arrangements<sup>216</sup>. As AG Léger put it, some "*institutionalised form of cooperation*" is needed, that is to say, a situation "*in which economic operators act through a collective structure or a common body*"<sup>217</sup>.
- (145) Where an association of undertakings is found to exist, its restrictive decisions coordinating the conduct of its members fall within the scope of Article 101(1) of the Treaty. An association of undertakings can be held liable alone<sup>218</sup> or in parallel with its members<sup>219</sup>. In order for an association to be held liable (either alone or together with its members), case law requires that it "*play[s] a separate role in the implementation*"<sup>220</sup> of the restriction and that its conduct is distinguishable from that of its members.

#### 8.2.2. *Application to the case*

- (146) The Commission considers that the ISU is an association of undertakings within the meaning of Article 101 of the Treaty.
- (147) According to Article 3(1) of the ISU Constitution, the objectives of the ISU comprise regulating, governing and promoting the sports of figure and speed skating<sup>221</sup>. Besides its regulatory activities, the ISU conducts commercial activities related to the organisation and marketing of international ice sports events, including speed skating. Such commercial activities include the licensing of broadcasting rights and sponsorship agreements<sup>222</sup>. Since the ISU conducts economic activities, even if secondary to its primary objectives<sup>223</sup>, it can be considered as an undertaking within the meaning of Article 101(1) of the Treaty.
- (148) The ISU is an association that is composed of individual national associations which administer skating and conduct economic activity<sup>224</sup> at the national level<sup>225</sup>.
- (149) For example, when Members organise individual events within the ISU series of international competitions (for instance, the ISU Speed Skating World Cup), the organising Member can exploit the domestic TV rights and the marketing/advertising

<sup>214</sup> See in particular Case C-309/99 *Wouters*, ECLI:EU:C:2002:98, paragraphs 61 and 62.

<sup>215</sup> Case C-309/99 *Wouters*, ECLI:EU:C:2002:98, paragraph 64.

<sup>216</sup> See in particular the judgment in C-309/99, *Wouters*, ECLI:EU:C:2002:98, paragraph 64.

<sup>217</sup> Opinion of AG Léger in C-309/99 *Wouters*, ECLI:EU:C:2001:390, paragraph 62.

<sup>218</sup> See e.g. Case C-382/12 P *MasterCard Inc. v Commission* ECLI:EU:C:2014:2201.

<sup>219</sup> See e.g. Case 246/86 *SC Belasco and others v Commission* ECLI:EU:C:1989:301.

<sup>220</sup> Joined cases 89/85 etc. *A. Ahlström Osakeyhtiö and others v Commission* ECLI:EU:C:1993:120, paragraph 27.

<sup>221</sup> ISU Constitution and General Regulations, Article 3(1).

<sup>222</sup> Submission of the ISU of 05.02.2016, page 3.

<sup>223</sup> Submission of the ISU of 05.02.2016, page 3.

<sup>224</sup> ISU Constitution and General Regulations, Rule 100(3)c) and Rule 105(1).

<sup>225</sup> ISU Constitution and General Regulations, Article 1(1).



rights of the event<sup>226</sup>. Therefore Members also constitute undertakings within the meaning of Article 101(1) of the Treaty.

- (150) In that respect, the Members forming the ISU can be considered as a group of (potential) competitors since they carry out or are capable of carrying out economic activities on the same market, namely on the market for the organisation and commercial exploitation of international speed skating events. This does not detract from the fact that the ISU Statutes and the coordinating role of the ISU limit de-facto competition between the Members<sup>227</sup>.
- (151) Since the Members themselves qualify as undertakings, the ISU constitutes an association of undertakings within the meaning of Article 101(1) of the Treaty that is active in the market for the organisation and commercial exploitation of international speed skating events<sup>228</sup>.
- (152) According to the ISU General Regulations, the Eligibility rules are binding on all Members and their affiliated clubs as far as international matters are concerned<sup>229</sup>. Due to the binding nature of the Eligibility rules, they coordinate the behaviour of the ISU Members<sup>230</sup>. The Commission therefore concludes that the Eligibility rules constitute a decision of an association of undertakings within the meaning of Article 101(1) of the Treaty.
- (153) This conclusion is not called into question by the arguments of the ISU, claiming first, that the ISU and the Members were not acting as undertakings when adopting the Eligibility rules which are related to the regulatory functions of the ISU; and second, that the adoption and implementation of the ISU Eligibility rules [...] be viewed as merely unilateral conduct that falls outside the scope of Article 101 of the Treaty<sup>231</sup>. The ISU's view is inconsistent with the case-law, for instance *Piau*<sup>232</sup>, in which the Court of First Instance in similar circumstances considered that the FIFA Players' Agents Regulations, constituted a decision of an association of undertakings within the meaning of Article 101 (1) of the Treaty. Whether a decision of an association of undertakings falls outside the scope of Article 101 of the Treaty is a separate issue that will be discussed in Section 8.5<sup>233</sup>.

### 8.3. Restriction of competition by object

#### 8.3.1. Principles

- (154) Article 101(1) of the Treaty prohibits agreements, decisions of associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

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\* Should read: must

<sup>226</sup> ISU Constitution and General Regulations, Rule 100(3)c) and Rule 105( 1).

<sup>227</sup> As explained above, Members can exploit domestic TV rights and marketing/advertising rights of the events organised by them within the ISU series of international competitions. See ISU Constitution and General Regulations, Rule 100(3) c) and Rule 105(1).

<sup>228</sup> Cf. Case T-193/02 *Laurent Piau*, ECLI:EU:T:2005:22, paragraph 72.

<sup>229</sup> ISU Constitution and General Regulations, Rule 101.

<sup>230</sup> Cf. Case 45/85 *Verband der Sachversicherer eV v. Commission*, ECLI:EU:C:1987:34, paragraph 32.

<sup>231</sup> ISU's response to the SO of 16.01.2017, paragraph 238-239.

<sup>232</sup> Case T-193/02 *Laurent Piau*, ECLI:EU:T:2005:22, paragraph 75.

<sup>233</sup> See also Case C-519/04 P *Meca-Medina* ECLI:EU:C:2006:492, paragraph 45.

- (155) According to the case-law of the Court of Justice, certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects<sup>234</sup>. To determine whether an agreement (or decision or concerted practice) reveals such a sufficient degree of harm to competition that it may be considered a restriction of competition by object, regard must be had *inter alia* to:
- (1) the content of its provisions;
  - (2) the objectives it seeks to attain; and
  - (3) the economic and legal context of which it forms a part<sup>235</sup>. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question<sup>236</sup>.
- (156) Although the intention of the parties to an agreement is not a necessary factor in determining whether that agreement is restrictive, there is nothing prohibiting the Commission from taking that aspect into account<sup>237</sup>. Thus, the anti-competitive object of an agreement may be deduced not only from the content of its clauses but also from the intention of the parties as it arises from the "*genesis*" of the agreement and/or manifests itself in the "*circumstances in which it was implemented*" and in the "*conduct*" of the companies concerned<sup>238</sup>.
- (157) The list of by object infringements in Article 101(1) a) to e) of the Treaty is not an exhaustive list.<sup>239</sup> According to the case-law, an agreement between undertakings or a decision of an association of undertakings qualifies as a restriction by object pursuant to Article 101(1) of the Treaty if it consists in an agreement or decision by a

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<sup>234</sup> Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission*, ECLI:EU:C:2014:2204, paragraph 49.

<sup>235</sup> See, to that effect, *CB v. Commission*, ECLI:EU:C:2014:2204 paragraph 53; Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* ECLI:EU:C:2011:631, paragraph 136; C-67/12 P *CB v. Commission*, ECLI:EU:C:2014:2204, paragraphs 52-53; C-501/06 *GlaxoSmithKline v Commission*, ECLI:EU:C:2009:610, paragraph 58; Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission*, ECLI:EU:C:1983:310, paragraph 25; and Case C-209/07 *Beef Industry Development Society and Barry Brothers*, ECLI:EU:C:2008:643, paragraphs 16 and 21.

<sup>236</sup> Case C-32/11, *Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal*, ECLI:EU:C:2013:160, paragraph 36; Case C-67/12 P *Cartes Bancaires v. Commission*, ECLI:EU:C:2014:2204, paragraph 53, C-8/08 *T-Mobile Netherlands and Others*, ECLI:EU:C:2009:343, paragraph 43.

<sup>237</sup> See, to that effect, Joined Cases C-501/06, C-513/06 P, C-515/06 P; and C-519/06 P *GlaxoSmithKline Services and others v Commission and others*, EU:C:2009:610, and *IAZ International Belgium and Others v Commission*, ECLI:EU:C:1983:310, paragraphs 23 to 25.

<sup>238</sup> See Joined Cases C-96/82 to C-102/82, C-104/82, C-105/82, C-108/82 and C-110/82 *IAZ v Commission*, ECLI:EU:C:1983:310, paragraphs 23 to 25. See also, Case C-56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38, paragraph 8, Joined Cases C-29/83 and C-30/83 *CRAM v Commission*, EU:C:1984:130, paragraph 26; and Opinion of Advocate General Tizzano delivered on 25 October 2005 in Case C-551/03 P *General Motors*, EU:C:2006:229, paragraphs 77-78 (Opinion followed by the Court of Justice in Case C-551/03 P, *General Motors v Commission*, ECLI:EU:C:2006:229, paragraphs 78-79).

<sup>239</sup> Case C-209/07 *Beef Industry Development Society and Barry Brothers* ECLI:EU:C:2008:643, paragraphs 23.

group of competitors coordinating the exclusion of an actual or potential competitor or eliminating competition from the relevant market<sup>240</sup>.

- (158) It is also settled case-law that an agreement (or decision or concerted practice) can be considered to restrict competition by object even if it also pursues legitimate objectives<sup>241</sup>. In *Irish Beef*, the Court of Justice confirmed that "*an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives*"<sup>242</sup>. In *IAZ* the Court of Justice found that "*the purpose of the agreement [...] is appreciably to restrict competition within the common market, notwithstanding the fact that it also pursues the objective of protecting public health and reducing the cost of conformity checks. That finding is not invalidated by the fact that it has not been established that it was the intention of all parties to the agreement to restrict competition*"<sup>243</sup>. Thus, once it is established on the basis of the content, objectives and the context of the agreement that the agreement has an anticompetitive object, the fact that the same agreement also pursues legitimate objectives does not affect this qualification<sup>244</sup>.
- (159) Some forms of conduct can be regarded, by their very nature, as being injurious to the proper functioning of normal competition and, in such cases, the analysis of the economic and legal context in which the conduct occurs may be limited to what is strictly necessary<sup>245</sup>. In other cases, it may be necessary to resort to individual and specific examination of the content and objective of the agreement and the legal and economic context of which it forms a part<sup>246</sup>.

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<sup>240</sup> Case T-90/11 *Ordre national des pharmaciens (ONP) and Others v Commission* ECLI:EU:T:2014:1049, paragraph 58; Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.*, ECLI:EU:C:2013:71 paragraph 19; Case C-73/74 *Groupement des fabricants de papiers peints de Belgique*, ECLI:EU:C:1975:160, paragraph 21. T-5/00 and T 6/00; *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV v Commission* ECLI:EU:C:2006:592.

<sup>241</sup> Case C-209/07 *Beef Industry Development Society and Barry Brothers* ECLI:EU:C:2008:643, paragraphs 19-21.

<sup>242</sup> Case C-209/07 *Beef Industry Development and Barry Brothers*, ECLI:EU:C:2008:643, paragraph 21. See also Joined Cases C-96/82 to C-102/82, C-104/82, C-105/82, C-108/82 and C-110/82 *IAZ v Commission*, ECLI:EU:C:1983:310, paragraph 25.

<sup>243</sup> Joined Cases C-96/82 to C-102/82, C-104/82, C-105/82, C-108/82 and C-110/82 *IAZ v Commission*, ECLI:EU:C:1983:310, paragraph 25.

<sup>244</sup> Contrary to the claims of the ISU (ISU's response to the SO of 16.01.2017, paragraph 187), the case law cited in Section 8.3.1, including the ONP case (Case T-90/11 *Ordre national des pharmaciens (ONP) and Others v Commission* ECLI:EU:T:2014:1049) continues to be relevant. See in particular paragraph 58 of the judgment whereby the Court stated that "[...] there was an infringement relating to the decisions designed to prevent groups of laboratories from developing which must be characterised as barriers to production, technical development and investment on the relevant market in such a way as to constitute a manifest infringement of European competition law") and the Irish Beef case (Case C-209/07 *Beef Industry Development Society and Barry Brothers*, ECLI:EU:C:2008:643). The Court of Justice even expressly refers to *Irish Beef* in *Cartes Bancaires* as one of the cases containing the legal criterion for by object restrictions (Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission*, ECLI:EU:C:2014:2204, paragraph 57).

<sup>245</sup> See Judgment of the Court of Justice of 19 March 2015 *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, paragraph 114 and the case-law cited; Judgment of the Court of Justice of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/1, paragraph 35; Case C-373/14 P *Toshiba Corporation v Commission* EU:C:2016:26, paragraph 29.

<sup>246</sup> See to that effect Judgment of the General Court of 8 September 2016 *Lundbeck v Commission*, T-472/13, paragraph 438: experience mentioned in *Groupement des cartes bancaires* case "*does not concern the specific category of an agreement in a particular sector but rather the fact it is established*

(160) For the purposes of the application of Article 101 of the Treaty, there is no need to take into account the actual effects of an agreement which has as its object the prevention, restriction or distortion of competition within the internal market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved<sup>247</sup>. According to the Court of Justice in *Expedia*, "an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition"<sup>248</sup>.

### 8.3.2. Application to the case: restriction of competition by object

(161) The Commission concludes that the Eligibility rules, *inter alia* having regard to their content, objectives and the legal and economic context, have the object of restricting potential competition on the relevant market<sup>249</sup> within the meaning of Article 101(1) of the Treaty.

#### 8.3.2.1. Content of the 2014 Eligibility rules

(162) As set out in Section 5.4.1, Rule 102 of the ISU General Regulations 2014 – which in substance already applied since June 1998 (see recital (48)) – provided that a person becomes ineligible to participate in the ISU activities and competitions by skating in an event not authorised by an ISU Member or the ISU. Rule 103 of the ISU General Regulations 2014 provided that a person who became ineligible could apply for reinstatement as a skater only if that person had not violated Rule 102(2) b) and c). In other words, if an athlete became ineligible as a consequence of participating in an unauthorised event, the athlete could not apply for reinstatement. Hence, a breach of the 2014 Eligibility rules would result in a lifetime ban.

(163) Given that the 2014 Eligibility rules provided for severe exclusionary sanctions on athletes participating in international speed skating events not organised or specifically authorised by the ISU, including a lifetime ban, and given the absence of a direct link in those rules with legitimate objectives, such as the integrity of the sport, the protection of the athletes' health and safety or the organisation and proper conduct of sport, the content of those rules suggests that they have an anti-competitive purpose, namely to restrict the possibilities for professional speed skaters

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*that certain forms of collusion are, in general, and in view of the experience gained, so likely to have negative effects that it is not necessary to demonstrate that they had such effects in the particular case at hand. The fact that the Commission has not in the past considered that a certain type of agreement was a restriction by object does not prevent it from doing so in the future following an individual and detailed examination".* See also Judgment of the Court of Justice of 13 October 2011, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, Case C-439/09, ECLI:EU:C:2011:649, paragraph 47.

<sup>247</sup> Case C-8/08 *T-Mobile Netherlands and Others*, ECLI:EU:C:2009:343, paragraph 31; Case C-32/11, *Allianz Hungária Biztosító and Others*, ECLI:EU:C:2013:160 paragraphs 28-30; and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P; and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others*, ECLI:EU:C:2009:610, paragraph 55.

<sup>248</sup> Case C-226/11 *Expedia*, ECLI:EU:C:2012:795, paragraph 37.

<sup>249</sup> Although the Commission will throughout its legal assessment refer to the market for the organisation and commercial exploitation of international speed skating events, its assessment would remain valid if further (sub)divisions exist within that market due to its role as the regulator for speed skating and the organiser of the most important international speed skating competitions (as explained in Sections 6.1.2 and 7).

to freely engage in other international speed skating events organised by third parties<sup>250</sup>, and to thereby foreclose (potential) competing speed skating events organisers from the athletes' services which are necessary to organise competing international speed skating events<sup>251</sup>. In the absence of the Eligibility rules, professional skaters would be able to provide their services to third party organisers of alternative speed skating events, even if they have not been authorised by the ISU.

- (164) Further, the content of Rule 102(1) a) (ii) of the ISU General Regulations 2014 that *“the condition of eligibility is made for the adequate protection of the economic and other interests of the ISU, which uses its financial revenues for the administration and development of the ISU sport disciplines and for the support and benefit of the Members and their Skaters<sup>252</sup>”* underlines that the Eligibility rules are aimed at protecting the economic interests of the ISU. This is further confirmed by the assertion made by the ISU that it uses the funds generated by its commercial activities to contribute to the organisation of international competitions by its Members<sup>253</sup>.
- (165) The reference to the protection of the economic and other interests of the ISU was introduced in 2002 in the wording of Eligibility rules<sup>254</sup>. The Agenda of the Congress of 2002 indicates the following reason for the proposed modification: *“clarification of the need for eligibility rules”<sup>255</sup>*. The Minutes of the Congress of 2002 states that the modification was *“to clarify the reasons for the eligibility Rule”*. The reference to the ISU's economic interest was therefore not a new objective that was introduced in 2002; the wording introduced in 2002 simply clarified the already existing objective of the protection of the ISU's economic and other interests<sup>256</sup>.
- (166) Moreover, the 2014 Eligibility rules were not directly related to any concrete ISU competition or series of competitions. The 2014 Eligibility rules applied to athletes even if they actually did not participate in an ISU international competition. For example, if the athletes were to participate in an international competition not authorised by the ISU, the ISU could impose ineligibility sanctions even if the athletes were not registered to participate in ISU competitions in that period of time<sup>257</sup>.
- (167) The conclusions of recitals (163) to (166) are not called into question by the ISU's observation that the Eligibility rules are linked to the ISU's principles and policies and that this has been recognised by the CAS<sup>258</sup>. The ISU's principles and policies, as

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<sup>250</sup> Compare Case C-519/04 P *Meca-Medina* ECLI:EU:C:2006:492, paragraph 47.

<sup>251</sup> As explained in Section 5.6.2, both in 2014 (the first of a series of the Dubai Icederby Grand Prix) and in 2016 (the Thialf Icederby Grand Prix), Icederby wanted to organise international speed skating events. However, due to the Eligibility rules and the threat of the ISU's sanctions on athletes, Icederby could not secure athletes for its planned event and therefore decided not to organise the events (see submission of Icederby of 03.11.2015, pages 4-7 and 10-11).

<sup>252</sup> ISU 2014 Constitution and General Regulations, Rule 102(1) a).

<sup>253</sup> ISU's response to the SO of 16.01.2017, paragraphs 100-101.

<sup>254</sup> Submission of the ISU of 08.07.2016, page 2.

<sup>255</sup> Submission of the ISU of 08.07.2016, page 2.

<sup>256</sup> Contrary to the ISU's suggestion in its response to the SO (ISU's response to the SO of 16.01.2017, paragraph 242).

<sup>257</sup> Skaters are bound by the ISU Statutes; see ISU Constitution and General Regulations, Articles 6(3) and 7(1).

<sup>258</sup> ISU's response to the SO of 16.01.2017, paragraphs 113-114.

set out in the ISU Constitution<sup>259</sup>, merely refer to the ISU's role as the sole body recognised by the IOC to administer its sports disciplines and the ISU's goals to regulate, govern and promote those disciplines on the basis of friendship and mutual understanding. The ISU's principles and policies also refer to the ISU's efforts to increase the popularity and improve the quality of its sports disciplines, as well as the fact that the ISU ensures that the interests of all Members are respected. No direct reference is made in the ISU's principles and policies, however, to legitimate objectives such as the integrity of the sport, the protection of the athletes' health and safety or the organisation and proper conduct of the sport.

#### 8.3.2.2. Objectives of the Eligibility rules

- (168) By imposing severe sanctions, including a lifetime ban, on athletes who participate in unauthorised speed skating events, the Eligibility rules inherently aim at preventing athletes from participating in events not authorised by the ISU, resulting in the foreclosure of competing event organisers.
- (169) As set out in Rule 102(1) a) (ii), one of the explicit objectives of the Eligibility rules is the protection of the ISU's economic interest. This confirms that the objectives of the Eligibility rules are not – or at least not purely – of a sports nature, but rather of an economic one. The rules aim to exclude competing event organisers which could potentially harm the economic interests of the ISU.
- (170) The ISU's argument that there are no established precedents in relation to the conduct at stake<sup>260</sup> cannot be accepted. First, an agreement between or a decision of an association of undertakings which consists of a decision by a group of competitors to coordinate the exclusion of an actual or potential competitor or eliminating competition from the relevant market, has already been qualified as a restriction by object pursuant to Article 101(1) of the Treaty by the Court of Justice<sup>261</sup>. Second, the fact that the Commission has not in the past considered that a certain type of agreement was a restriction by object does not prevent it from doing so in the future following an individual and detailed examination<sup>262</sup>.
- (171) Even if it was established, as the ISU argues<sup>263</sup>, that the Eligibility rules also have other, entirely legitimate objectives, such as the protection of the integrity of the sport, this does not bar the possibility of finding a restriction of competition by object<sup>264</sup>.

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<sup>259</sup> Articles 1 and 3 of the ISU Constitution and General Regulations.

<sup>260</sup> ISU's response to the SO of 16.01.2017, paragraph 250.

<sup>261</sup> Case T-90/11 *Ordre national des pharmaciens (ONP) and Others v Commission* ECLI:EU:T:2014:1049, paragraph 58; Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.*, ECLI:EU:C:2013:71 paragraph 19; Case C-73/74 *Groupement des fabricants de papiers peints de Belgique*, ECLI:EU:C:1975:160, paragraph 21. Cases T-5/00 and T 6/00; *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV v Commission*, ECLI:EU:C:2006:592.

<sup>262</sup> Judgment of the General Court of 8 September 2016 *Lundbeck v Commission*, T-472/13, paragraph 438.

<sup>263</sup> ISU's response to the SO of 16.01.2017, paragraph 245.

<sup>264</sup> C-209/07 *Irish Beef*, ECLI:EU:C:2008:643, paragraph 21; C-96/82 to C-102/82, C-104/82, C-105/82, C-108/82 and C-110/82 *IAZ v Commission*, ECLI:EU:C:1983:310, paragraph 25.

### 8.3.2.3. Legal and economic context

- (172) As explained in Section 5.2, speed skating is one of the sports where there is a pyramid structure of competitions from grassroots to elite levels and where there is a single international federation (ISU) setting the rules for the sport. The functioning of the market is further characterised by the fact that the ISU controls the organisation of important international speed skating events, such as the European and World Championships as well as access to the Winter Olympic Games and (see Section 5.3). Professional speed skaters need to have the possibility to participate in the main international speed skating events, such as the European and World Championships and the Winter Olympic Games in order to make a living from the sport. The Winter Olympic Games are unique and create significant revenue streams for professional speed skaters<sup>265</sup>.
- (173) Contrary to the claims of the ISU<sup>266</sup>, the Commission takes into consideration the fact that international sports federations have regulatory functions and are entitled to conduct economic activities besides their regulatory functions. However, where an association of undertakings is active in the organisation and commercial exploitation of speed skating events, but at the same time, through its regulatory function, has the power to authorise sports events organised and commercially exploited by other, independent service providers, this may lead to a conflict of interest<sup>267</sup>. The exercise of the ISU's regulatory power should therefore be subject to restrictions, obligations and review to avoid a distortion of competition by favouring its own events and/or those of its Members above those of third party organisers<sup>268</sup>.

### 8.3.2.4. Intention

- (174) While the reference to the protection of the ISU's economic interest in Rule 102(1) a) (ii) of the General Regulations 2014 makes clear that the ISU has the objective intention of excluding potential competitors from organising competing international speed skating events which potentially might harm ISU's economic interests, the ISU's intentions can also be indicatively deduced from how the Eligibility rules are implemented in practice.
- (175) First, since the entry into force of the Eligibility rules, the ISU has not authorised any third party commercial speed skating event<sup>269</sup>. Until October 2015 – the time when the Commission opened formal proceedings – there was not even any formal authorisation procedure in place<sup>270</sup>. In July 2016, the ISU approved the Dutch Icederby Grand Prix, a competition co-organised by an ISU Member (the KNSB) and

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<sup>265</sup> Submission of the Complainants of 05.02.2016, pages 5-6, where it is also explained that salaries/financial assistance from the National Olympic Committee are, in relative terms, important revenue streams for professional speed skaters.

<sup>266</sup> ISU's response to the SO of 16.01.2017, paragraph 238.

<sup>267</sup> See also Opinion of Advocate General Kokott delivered on 6 March 2008 in Case C-49/07 *MOTOE* ECLI:EU:C:2008:142, paragraph 98. For the notion of the possible conflict of interest of an entity charged with the authorisation of sports events, in the case in which that entity is also active in the organisation and commercial exploitation of sports events, cf. Case C-49/07 *MOTOE* ECLI:EU:C:2008:376, paragraphs 51-52.

<sup>268</sup> See also Opinion of Advocate General Kokott delivered on 6 March 2008 in Case C-49/07 *MOTOE* ECLI:EU:C:2008:142, paragraph 109.

<sup>269</sup> Submission of the ISU of 05.02.2016, page 26, and submission of the ISU of 20.10.2015, page 2.

<sup>270</sup> ISU Communication No 1974 has been adopted on 20 October 2015, see submission of the ISU of 20.10.2015.

Icederby<sup>271</sup>. However, this event is not an Open International Competition, but an Interclub Competition, and the application for the ISU's approval was submitted by the KNSB<sup>272</sup>.

- (176) Second, the ISU's intention to foreclose potential competitors is illustrated by the fact that it issued Communication No 1853 after having been contacted by Icederby<sup>273</sup>. That Communication specifically mentioned Icederby and stated that the ISU would not authorise Icederby's proposed international speed skating events and that sanctions would be imposed on athletes who participated in those events<sup>274</sup>. As a consequence, Icederby could not secure athletes for its planned event and had to refrain from organising it<sup>275</sup>.
- (177) Third, the ISU's intention to foreclose competitors is further demonstrated by its behaviour towards the WSF. In figure skating – where the ISU also acts as a sole regulator – several former champions created a new federation, the WSF in March 2003<sup>276</sup>. The ISU Council saw this as a "*clear threat against the ISU's existence and its jurisdiction*" and accordingly, it commenced eligibility procedures against the concerned WSF persons in April 2003. Following the eligibility proceedings, the ISU declared the concerned persons ineligible<sup>277</sup>. The ISU thus relied on the Eligibility rules to foreclose the entrance of a potential competitor in the field of figure skating.
- (178) This conclusion is not called into question by the fact that the ISU claims that the WSF case concerned a "purely sporting dispute on the scoring of figure skating"<sup>278</sup> and that the ISU "acted to protect its very existence"<sup>279</sup>. Through the enforcement of its Eligibility rules, the ISU prevented the establishment of a competing entity that aimed at organising and commercially exploiting competitive events in the field of figure skating.
- (179) On the basis of recitals (174) to (178), the Commission concludes that the ISU had the intention to restrict competition by excluding its potential competitors through the adoption and enforcement of the Eligibility rules.

#### 8.3.2.5. The changes to the Eligibility rules introduced in 2016

- (180) According to Rule 102(2) of the ISU General Regulations 2016, a person becomes ineligible for any of the ISU sport disciplines by skating or officiating in an international competition not sanctioned by the ISU, if ineligibility is imposed by the ISU Council<sup>280</sup>. According to Rule 102(7) d) ii – iv), the Council should impose an ineligibility period for a determined period of time (up to five years in case of medium heavy violations or repeated minor violations; up to ten years for serious

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<sup>271</sup> Submission of the ISU of 29.07.2016, Schedule 10.2, page 7.

<sup>272</sup> Submission of the ISU of 29.07.2016, Schedule 10.1, page 2.

<sup>273</sup> The ISU adopted the Communication No 1853 in March 2014.

<sup>274</sup> Submission of Icederby of 05.11.2015, page 2.

<sup>275</sup> Submission of Icederby of 03.11.2015, page 6.

<sup>276</sup> Submission of the ISU of 05.02.2016, page 21.

<sup>277</sup> ISU Communication No 1311, submission of the ISU of 24.05.2016.

<sup>278</sup> ISU's response to the SO of 16.01.2017, paragraph 159.

<sup>279</sup> ISU's response to the SO of 16.01.2017, paragraph 249.

<sup>280</sup> Submission of the ISU of 02.05.2016, page 3.



violations) or for lifetime (in case of very serious violations, especially intentional violations which endanger the integrity and jurisdiction of the ISU)<sup>281</sup>.

- (181) Rule 102(7) d) also stipulates that the Council must determine the applicable sanctions in accordance with the principle of proportionality and taking into account various elements and circumstances including "*the ISU's commitment to care for health and safety of Skaters and the integrity of the ISU's sports*"<sup>282</sup>.
- (182) According to Rule 103(2) of the ISU General Regulations 2016, a person who is ineligible may apply for reinstatement once he/she served half of the period of ineligibility determined. In case of ineligibility for lifetime, a request for reinstatement may be submitted once the person has served 15 years of ineligibility<sup>283</sup>.
- (183) Rule 102(1) (a) (ii) of the General Regulations 2016 states that the "*condition of eligibility is made for adequate protection of the ethical values, jurisdiction objectives and other legitimate respective interests of the ISU, which uses its financial revenues for the administration and development of the ISU sport disciplines and for the support and benefit of the Members and their Skaters*"<sup>284</sup>. (emphasis added)
- (184) The changes introduced in 2016 do not alter the Commission's view that the Eligibility rules have as their purpose to restrict the possibilities for professional speed skaters to freely participate in international speed skating events organised by third parties and thereby, to foreclose potential competitors from entering the market by depriving them from the necessary services provided by such skaters; as such, the 2016 Eligibility rules have the object of restricting competition in the EEA.
- (185) First, the 2016 Eligibility rules are not directly linked to legitimate objectives, such as the protection of the integrity of sport, the athletes' health and safety or the organisation and proper conduct of sport<sup>285</sup>. According to the 2016 Eligibility rules, sanctions on athletes participating in unauthorised events are imposed even if such events would not endanger the integrity of sport, the athletes' health and safety or the proper conduct of sport in any way.
- (186) Second, the 2016 Eligibility rules still provide for severe sanctions (up to a lifetime ban) for the athletes participating in unauthorised events. The sanctions go up to five years for negligent participation in unauthorised events, up to 10 years for athletes that knowingly participate in unauthorised events and a lifetime ban for athletes participating in unauthorised events endangering, *inter alia*, the '*ISU jurisdiction*'<sup>286</sup>. These sanctions are thus very severe, especially in light of the fact that the athletes' average career span is about eight years<sup>287</sup>, and will still prevent athletes from participating in unauthorised third party events. The Commission notes that in the ISU Council Guidelines on Sanctions<sup>288</sup>, the Council committed itself to sanction

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<sup>281</sup> Submission of the ISU of 02.05.2016, page 4.

<sup>282</sup> Ibid.

<sup>283</sup> Submission of the ISU of 02.05.2016, page 5.

<sup>284</sup> Submission of the ISU of 02.05.2016, page 3.

<sup>285</sup> See recital (163).

<sup>286</sup> Submission of the ISU of 02.05.2016, page 4.

<sup>287</sup> Submission of the EU Athletes of 21.01.2016, page 5.

<sup>288</sup> Submission of the ISU of 02.05.2016, page 1.

skaters with ineligibility for no more than two years for negligent participation in unauthorised events and no more than four years for knowingly participating in unauthorised events. Such sanctions, however, remain severe sanctions, in particular because skaters generally know whether or not events are authorised (only authorised events are on the calendar<sup>289</sup>) and thus face a sanction of up to four years for participation in an unauthorised event, that is half of an average skating career. The ISU does not contest that the Eligibility rules prevent athletes from participating in unauthorised events<sup>290</sup>.

- (187) Third, the changes to the wording in Rule 102(1) (a) (ii) do not alter the Commission's assessment. While the wording of the General Regulations adopted in 2016 no longer expressly refers to the protection of ISU's economic interest in the context of the protection of ISU's other legitimate interests, it still makes a reference to financial aspects<sup>291</sup>. Rule 102(1) (ii) of the General Regulations 2016 links the protection of the ISU's other legitimate interests to the use of the ISU's financial revenues. This reference suggests that the 2016 Eligibility rules still serve to protect the ISU's economic interests. As mentioned in recital (164), this conclusion is not called into question but rather reinforced by the fact that the ISU considers that it is allowed to use its financial revenues (in part obtained through a solidarity contribution from third party organisers) to support competitive events organised by its Members<sup>292</sup>, whereas no such funds are made available for the organisation of third party events.

#### 8.3.2.6. Conclusion

- (188) In light of recitals (162) to (187), in particular the content and objectives of the Eligibility rules, their economic and legal context and the ISU's intent to exclude competition from third party organisers, the Commission concludes that the Eligibility rules restrict competition by object in the worldwide market for the organisation and commercial exploitation of international speed skating events within the meaning of Article 101(1) of the Treaty, even though the Eligibility rules may at the same time also pursue other objectives such as protecting the integrity of the sport.<sup>293</sup>

### 8.4. Restriction by effect

- (189) Section 8.3 concluded that the Eligibility rules constitute a restriction of competition by object. Although it is therefore unnecessary to analyse the effects of the Eligibility rules<sup>294</sup>, the Commission will nonetheless show that the Eligibility rules also have as

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<sup>289</sup> See recitals (124) and (125).

<sup>290</sup> Recording from the Oral Hearing, at 1:08.

<sup>291</sup> Submission of the ISU of 02.05.2016, page 3.

<sup>292</sup> ISU's response to the SO of 16.01.2017, paragraph 100.

<sup>293</sup> This conclusion is not called into question by the arguments of the ISU that the Brussels Court of Appeal rejected any suggestion in the FEI/Global Champions League case of a by object restriction (ISU's response to the SO of 16.01.2017, paragraph 250). This is irrelevant for the present decision since the proceedings pending before the Belgian Competition Authority and before the Brussels Court of Appeal concern a different case involving a different factual and legal context.

<sup>294</sup> See among others, Joined cases C-56/64 and C-58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, ECLI:EU:C:1965:60, p. 342; Judgment of the Court of Justice of 17 July 1997, *Ferriere Nord SpA v Commission*, C-219/95 P, ECLI:EU:C:1997:375, paragraph 14; Judgment of the Court of Justice of 7 January 2004, *Aalborg Portland A/S, Irish Cement Ltd, Ciments français SA, Italcementi - Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir -*

their effect a restriction of (potential) competition within the meaning of Article 101 of the Treaty.

#### 8.4.1. Principles

- (190) In assessing the restrictive effects on competition of an agreement or decision, account should be taken of the actual conditions in which it produces its effects, namely the economic and legal context, the nature of the product concerned, the real operating conditions and the structure of the market concerned<sup>295</sup>. According to the case law, the Commission must carry out an objective analysis of the impact of the agreement or decision on the competitive situation<sup>296</sup>. This analysis looks at the restraint not in isolation or abstractly, but under the existing conditions for market entry and prevailing market forces<sup>297</sup>. This analysis also has to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent<sup>298</sup>.
- (191) It follows from this that the scenario envisaged on the basis of the hypothesis that the restrictive arrangements are absent must be realistic. From that perspective, it is permissible, where appropriate, to take account of the plausible developments or likely developments that would occur on the market in the absence of those arrangements<sup>299</sup>. According to the settled case-law of the Court of Justice, Article 101(1) of the Treaty does not restrict such an assessment to actual effects alone, it must also take account of the potential effects of the agreement or practice in question on competition<sup>300</sup>.
- (192) The examination of conditions of competition on a given market must be based not only on existing competition between the undertakings already present on the relevant market but also on potential competition: *"It must also be stressed that the examination of conditions of competition is based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real concrete*

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*Cementerie del Tirreno SpA v Commission*, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, paragraph 261; Joined cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission and Commission v GlaxoSmithKline Services Unlimited and European Association of Euro Pharmaceutical Companies (EAEPIC) v Commission and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission*, ECLI:EU:C:2009:610, paragraph 55; Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, paragraph 28.

<sup>295</sup> Case T-461/07 *Visa Europe Ltd and Visa International Service v Commission*, ECLI:EU:T:2011:181, paragraph 67; Case C-382/12 P *MasterCard, Inc. and Others v Commission*, ECLI:EU:C:2014:2201, paragraphs 165 and Case C-67/12 P *Cartes Bancaires v. Commission*, ECLI:EU:C:2014:2204, paragraph 53.

<sup>296</sup> Judgment of the Court of First Instance of 2 May 2006, *O2 (Germany) GmbH & Co. OHG v Commission*, T-328/03, ECLI:EU:T:2006:116, paragraph 77.

<sup>297</sup> Judgment of the Court of 26 November 2015, *SIA "Maxima Latvija" v Konkurences padome*, C-345/14, EU:C:2015:784, paragraph 27 and 28.

<sup>298</sup> Case C-67/12 P *Cartes Bancaires v. Commission*, ECLI:EU:C:2014:2204, paragraph 52.

<sup>299</sup> Case C-382/12 P *MasterCard, Inc. and Others v Commission*, ECLI:EU:C:2014:2201, paragraph 173.

<sup>300</sup> Case C-345/14 *SIA „Maxima Latvija” v Konkurences padome*, ECLI:EU:C:2015:784, paragraph 30, which refers to Case C-238/05 *Asnef-Equifax and Administración del Estado*, ECLI:EU:C:2006:734, paragraph 50 and the case-law cited.

*possibilities for the undertakings concerned to compete among themselves or for a new competitor to penetrate the relevant market and compete with the undertakings already established (Delimitis, cited above, paragraph 21).<sup>301</sup> Such analysis "must not be based on a mere hypothesis, but must be supported by evidence or an analysis of the structures of the relevant market (see, to that effect, European Night Services and Others v Commission, paragraph 67 above, paragraphs 142 to 145)".<sup>302</sup>*

(193) As the General Court has stated, "*the mere fact of [the existence of an undertaking outside that market] may give rise to competitive pressure on the undertakings currently operating in the market, a pressure represented by the likelihood that a new competitor will enter the market*".<sup>303</sup>

#### 8.4.2. Application to the case: restriction of competition by effect

(194) The Commission considers that the ISU Eligibility rules have the effect of restricting competition within the meaning of Article 101 of the Treaty.

(195) First, the Eligibility rules prevent athletes from participating in international speed skating events other than the events organised or specifically authorised by the ISU. In light of the general prohibition for athletes to participate in unauthorised events and the severe sanction for breaching the Eligibility rules (ineligibility up to a lifetime)<sup>304</sup>, athletes are prevented from participating in unauthorised events. They cannot risk foregoing the possibility to participate in events such as the Olympic Games or the World and European Championships, as this would be damaging and possibly even put an end to their international speed skating career<sup>305</sup>.

(196) If athletes were to risk the imposition of a sanction by the ISU, the application of the Eligibility rules would be capable of producing adverse effects on competition as this could result in the athletes' unwarranted exclusion from international speed skating events<sup>306</sup>, and as a consequence, the restriction of the athletes' freedom to provide their professional services.

(197) Second, the fact that athletes are prevented from providing their services to unauthorised organisers of international speed skating competitions creates a quasi-insurmountable entry barrier for potential competitors. Due to the Eligibility rules and their deterrent effects, new entrants in the market, i.e. third party organisers of international speed skating events, are unable to attract the services of athletes which are necessary in order to be able to organise their events<sup>307</sup>. As a result, the Eligibility rules foreclose potential competitors.

(198) Due to the Eligibility rules, the athletes provide their services only to the ISU or its Members. As a result of the ISU's regulatory power as a governing body (as

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<sup>301</sup> Joined cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services Ltd (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission*, ECLI:EU:T:1998:198, paragraph 137.

<sup>302</sup> Judgment of the General Court of 14 April 2011, *Visa Europe Ltd and Visa International Service v Commission*, T-461/07 ECLI:EU:T:2011:181 paragraph 167.

<sup>303</sup> Case T-461/07 *Visa Europe Ltd and Visa International Service v Commission*, ECLI:EU:T:2011:181, paragraph 169.

<sup>304</sup> Submission of the ISU of 26.09.2014, page 10; submission of the ISU of 02.05.2016, page 4.

<sup>305</sup> Submission of the Complainants of 23.06.2014, page 9.

<sup>306</sup> Case C-519/04 P *Meca-Medina* ECLI:EU:C:2006:492, paragraph 47.

<sup>307</sup> Submission of Icederby of 03.11.2015, page 6.

explained in Section 7), the Eligibility rules have significant restrictive effects in the market for the organisation and commercial exploitation of international speed skating events. This is confirmed by the fact that, effectively, no other organisers of international speed skating events than the ISU (and the Members of which the ISU consists that are bound by the ISU rules) are present on the market for the organisation and commercial exploitation of international speed skating events<sup>308</sup>.

- (199) In the absence of the Eligibility rules, the athletes' commercial freedom would not be restricted and they would be able to offer their speed skating services to competing organisers of international speed skating events even if those events have not specifically been authorised by the ISU. Since there would be no restriction on the availability of the athletes' services, potential competitors would be able to enter the market for the organisation and commercial exploitation of international speed skating events<sup>309</sup>. There was at least one potential entrant in this market that would likely have been able to organise and commercially exploit competing international speed skating events, namely Icederby<sup>310</sup>, but which was prevented from doing so due to the Eligibility rules.
- (200) In 2014, Icederby tried to enter the market but it had to refrain from organising the Dubai Icederby Grand Prix 2014 because it could not secure athletes for its speed skating event due to the ISU Eligibility rules<sup>311</sup>. Icederby explained that its planned event would have been conducted annually for 6 years. It also provided information about the steps taken for the organisation of the event, such as signing partnership agreements with the relevant government, securing the arena for the planned event, drafting various agreements for athletes and artist performances<sup>312</sup>. Icederby would have organised its events during the off-season of ISU skaters, offering additional speed skating events to consumers. Icederby planned another event for October 2016, but explained that the Eligibility rules represented an obstacle for this<sup>313</sup>.
- (201) There were international speed skaters who were willing to participate in the events organised by Icederby. The Complainants, two high-level athletes, intended to participate in the Dubai Icederby Grand Prix 2014 but refrained from doing so due to the Eligibility rules. The Complainants explained that the prize money offered by Icederby for this event was very attractive<sup>314</sup>. As athletes are generally interested in maximising their income during their short careers<sup>315</sup>, it is likely that other athletes would, in the absence of the Eligibility rules, also have been willing to provide their services to Icederby.
- (202) On the basis of recitals (195) to (201), the Commission concludes that in the absence of the Eligibility rules, athletes would be able to offer their services freely to speed skating event organisers other than the ISU or its Members or organisers whose events were specifically authorised by the ISU. Moreover, there would have been

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<sup>308</sup> After the Commission had opened proceedings in the present case, in July 2016 the ISU authorised an event which was co-organised by a third party (Icederby) and a Member. However, this event was not an Open International Competition. The application was submitted by a Member (KNSB).

<sup>309</sup> Submission of the Complainants of 23.06.2014, page 22.

<sup>310</sup> Submission of Icederby of 03.11.2015, pages 4-5.

<sup>311</sup> Submission of the Icederby of 03.11.2015, page 6.

<sup>312</sup> Submission of the Icederby of 03.11.2015, page 4.

<sup>313</sup> Submission of the Icederby of 03.11.2015, pages 10-11.

<sup>314</sup> Submission of the Complainants of 23.06.2014, pages 21-22.

<sup>315</sup> Submission of EU Athletes of 21.01.2016, page 2.

real concrete possibilities for a potential competitor to enter the market for the organisation and commercial exploitation of international speed skating events without the need for the ISU's authorisation.

- (203) The Eligibility rules have a negative impact on several parameters of competition, in particular: 1) output; and 2) consumer choice and innovation.
- (204) First, the Eligibility rules result in an output restriction. In the absence of the Eligibility rules, potential new entrants, such as Icederby, would not be confronted with a limitation of their sources of supply within the meaning of Article 101 of the Treaty and could organise additional speed skating events, without the need for the ISU's authorisation<sup>316</sup>.
- (205) Second, the Eligibility rules have an adverse effect on consumer choice and innovation since potential competitors could offer different, innovative formats of speed skating events. For instance, Icederby intended to offer a new format of speed skating, conducted on a 220 metre track (at ISU events, long track speed skaters use a 400 metre track and short track skaters use a 110 metre track)<sup>317</sup>. This new form of competition, where short track and long track speed skaters compete side-by-side, might have been an attractive new speed skating event for consumers. However, due to the Eligibility rules, Icederby was prevented from organising this innovative form of competition in 2014<sup>318</sup>.
- (206) Those findings are not called into question by the ISU's allegation that any effects of the Eligibility rules were only indirect<sup>319</sup>. The risk of losing eligibility and therefore the right to participate in prestigious ISU events has a significantly preventive effect on athletes. This is also shown by the example of the Complainants who decided not to participate in Icederby's event because of the risk of losing eligibility for ISU events<sup>320</sup>. The Commission notes that the ISU made contradictory statements in this respect: on the one hand, in its response to the SO the ISU stated that any effects of the Eligibility rules are indirect and that "*skaters are not prevented from providing their services to unauthorised organisers*"<sup>321</sup>; on the other hand the ISU stated that "*it is true that the ISU Eligibility rules prevent athletes from participation in unauthorised events.*"<sup>322</sup> At the Oral Hearing the ISU admitted that the Eligibility rules indirectly prevent athletes from participating in unauthorised events<sup>323</sup>.

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<sup>316</sup> Submission of Icederby of 03.11.2015, page 11.

<sup>317</sup> Submission of Icederby of 03.11.2015, page 2.

<sup>318</sup> Submission of Icederby of 03.11.2015, page 6. Similarly, the Eligibility rules would prevent other potential entrants from introducing various innovative forms of speed skating: the Eligibility rules' adverse effect on innovation can be illustrated by an example from figure skating (where the ISU is also the sole regulator and the Eligibility rules apply). The organisers of the 1998 Gay Games wished to have a figure skating competition, introducing same sex teams. However, as the ISU rules do not allow same-sex teams, the figure skating competition was cancelled (submission of the Complainants of 24.05.2016, page 10). The ISU notes that, after the Commission opened proceedings on the case, the relevant rules were changed so as to allow for same-sex teams in figure skating events (ISU's response to the SO of 16.01.2017, paragraph 255).

<sup>319</sup> ISU's response to the SO of 16.01.2017, paragraph 256.

<sup>320</sup> Submission of the Complainants of 23.06.2014, page 18.

<sup>321</sup> ISU's response to the SO of 16.01.2017, paragraph 256.

<sup>322</sup> ISU's response to the SO of 16.01.2017, paragraph 245.

<sup>323</sup> Recording from the Oral Hearing, at 1:08.

(207) These findings are also not called into question by the ISU's allegation that the impact of the Eligibility rules is only *de minimis* since the rules only indirectly concerned Icederby, which is one third party organiser in the relevant market<sup>324</sup>. As indicated in recital (206), the rules have an appreciable effect on all athletes (irrespective of their nationality) who are prevented from participating in unauthorised events in general (not only in Icederby's planned event). In addition, as indicated above in recital (199), the effect of the Eligibility rules on the market is appreciable since, as a consequence of the rules, no third party organisers of international speed skating events other than the ISU and its Members are present on the relevant market.

#### 8.4.3. *The changes to the Eligibility rules introduced in 2016*

(208) The changes introduced in 2016<sup>325</sup> do not alter the Commission's view that the Eligibility rules have the effect of restricting of competition. Although the sanction for athletes' participation in unauthorised events is no longer an automatic lifetime ban, the sanctions are still disproportionately punitive, especially in light of the relatively short average career span of professional speed skaters (see recital (186)). According to the 2016 Eligibility rules, the sanctions go up to five years for negligent participation in unauthorised events, up to 10 years for athletes that knowingly participate in unauthorised events and a lifetime ban for athletes participating in unauthorised events endangering, *inter alia*, the 'ISU jurisdiction'<sup>326</sup>. The Commission notes that in the ISU Council Guidelines on Sanctions<sup>327</sup>, the Council committed itself that skaters will be sanctioned with ineligibility for no more than two years for negligent participation in unauthorised events and no more than four years for knowingly participating in unauthorised events. However, as explained in recital (186), such sanctions remain severe sanctions, in particular because skaters generally know whether or not events are authorised (only authorised events are on the calendar<sup>328</sup>) and thus face a sanction of up to four years for participation in an unauthorised event, that is half of an average skating career. Due to the threat of these heavy sanctions, the 2016 Eligibility rules still have the effect of preventing athletes from participating freely in speed skating events other than those organised or specifically authorised by the ISU and foreclosing competing speed skating event organisers.

#### 8.4.4. *Conclusion*

(209) The Commission concludes that the ISU Eligibility rules have the effect of restricting competition within the meaning of Article 101 of the Treaty in the worldwide market for the organisation and commercial exploitation of international speed skating events within the meaning of Article 101(1) of the Treaty.

### **8.5. The Eligibility rules are within the scope of Article 101 of the Treaty**

(210) The Eligibility rules constitute rules related to the organisation of competitive sport. In *Meca-Medina*, the Court of Justice ruled that such rules are generally subject to Union competition law. They may fall outside the application of Article 101 of the

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<sup>324</sup> ISU's response to the SO of 16.01.2017, paragraph 258.

<sup>325</sup> Submission of the ISU of 02.05.2016.

<sup>326</sup> See submission of the ISU of 02.05.2016, page 4.

<sup>327</sup> Submission of the ISU of 02.05.2016, page 1.

<sup>328</sup> See recitals (124) and (125).

Treaty in certain circumstances, taking into account (i) the overall context in which the rules were taken or produce their effects and their objectives, (ii) whether the consequential effects restrictive of competition are inherent in the pursuit of the objectives and (iii) whether they are proportionate to them<sup>329</sup>.

8.5.1. *Do the Eligibility rules pursue legitimate objectives?*

- (211) Legitimate objectives of sporting rules will normally relate to the "organisation and proper conduct of competitive sport"<sup>330</sup> and may include, for instance, ensuring fair competitions with equal chances for all athletes as well as the protection of athletes' health, the integrity and objectivity of competitive sport and ethical values in sport<sup>331</sup>. The specificity of sport, i.e. the distinctive features setting sport apart from other economic activities, such as the interdependence between competing adversaries, will be taken into consideration when assessing the existence of a legitimate objective<sup>332</sup>.
- (212) In line with the case law of the Court of Justice<sup>333</sup>, the Commission considers that the protection of the integrity of sport, the protection of the health and safety of skaters and the organisation and proper conduct of competitive sport can be regarded as legitimate objectives in the general interest.
- (213) The ISU argues that the Eligibility rules have the following legitimate objectives: the protection of the integrity<sup>334</sup>, health and safety<sup>335</sup> and the good functioning of the sport<sup>336</sup>.
- (214) According to the ISU, the Eligibility rules protect the integrity of the ISU sports by ensuring that the persons who want to be eligible for participation in international competitions under the application of the ISU rules adhere to the ISU principles and policies. These principles include *inter alia* fairness, friendship, non-discrimination and the unacceptability of doping, illegal betting and corruption<sup>337</sup>. The ISU explains that "*illegal betting*" represents a great danger to skating events<sup>338</sup>.
- (215) In connection with the objectives of health and safety, the ISU refers to the fact that speed skating is an inherently dangerous sport. Athletes skate at a very high speed; they could fall and suffer cuts which could be life-threatening<sup>339</sup>. The ISU explains that its rules on safety ensure that safety standards are met (these standards concern for example the safety of the venue, presence of trained emergency medical team,

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<sup>329</sup> Case C-519/04 P *Meca-Medina* ECLI:EU:C:2006:492, paragraph 42. Contrary to the ISU's position stated in its response to the SO (ISU's response to the SO of 16.01.2017, paragraphs 2, 183 and 193), the case law of the Court of Justice does not create a presumption of legality of such rules. Sporting rules are not presumed to be lawful just by the mere fact that they were adopted by a sports federation (see Case C-519/04 P *Meca-Medina*, ECLI:EU:C:2006:492, paragraphs 27-28).

<sup>330</sup> Case C-519/04 P *Meca-Medina*, ECLI:EU:C:2006:492, paragraph 45.

<sup>331</sup> Case C-519/04 P *Meca-Medina*, ECLI:EU:C:2006:492, paragraph 43.

<sup>332</sup> Commission Staff Working Document - The EU and Sport: Background and Context - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)934} {SEC(2007)936} /\* SEC/2007/0935 final, page 68.

<sup>333</sup> Case C-519/04 P *Meca-Medina*, ECLI:EU:C:2006:492, paragraphs 43 and 45.

<sup>334</sup> Submission of the ISU of 26.09.2014, pages 24-28.

<sup>335</sup> Submission of the ISU of 26.09.2014, page 36-37.

<sup>336</sup> Submission of the ISU of 05.02.2016, page 19.

<sup>337</sup> Submission of the ISU of 05.02.2016, page 19.

<sup>338</sup> Submission of the ISU of 26.09.2014, page 23, paragraph 85.

<sup>339</sup> Submission of the ISU of 26.09.2014, page 36.



presence of an ambulance, safety of clothing and equipment). According to the ISU, if athletes were allowed to participate in events which are not authorised by the ISU, their safety would be put at risk. In the ISU's view, the Eligibility rules ensure that organisers of unsafe events cannot encourage athletes to participate in their events<sup>340</sup>.

- (216) In addition, the ISU claims that the Eligibility rules protect the jurisdiction, the objectives and other legitimate interest of the ISU<sup>341</sup>. The ISU considers the protection of its jurisdiction to be a means of safeguarding the pyramid structure of the sport<sup>342</sup>. Further, the ISU mentions some additional legitimate objectives, such as the development of uniform rules for the sport, the good functioning of the skating calendar, developing skating through a solidarity model, the administration and development of skating and the protection of the volunteer model of sport<sup>343</sup>.
- (217) The objectives mentioned in recitals (213) to (216) are not explicitly referred to as the objectives or principles of the Eligibility rules which only mention the ISU's "ethical values"<sup>344</sup>. The legitimate objectives referred to in recital (213) are only referred to in the paragraph of the 2016 Eligibility rules addressing sanctions for the violation of the Eligibility rules<sup>345</sup>. As explained in Section 8.3.2.2, the Eligibility rules do not, or at least not only, protect legitimate interests, such as the integrity of the sport. The Eligibility rules refer to the ISU's principles and policies<sup>346</sup>, but until 2015 the ISU did not apply any pre-established authorisation criteria in order to protect such unspecified principles and policies. Further, it follows explicitly from Rule 102(1) a) (ii) of the ISU General Regulations 2014 that the protection of the ISU's economic interest is one of the objectives of the Eligibility rules<sup>347</sup>. While the wording of the General Regulations adopted in 2016 no longer expressly refers to the protection of ISU's economic interest in the context of the protection of ISU's other legitimate interests, it still makes a reference to financial aspects<sup>348</sup>. It also refers to the ISU's jurisdiction objectives<sup>349</sup>.
- (218) The Commission assesses the objectives put forward by the ISU as follows.
- (219) First, in line with the case law (see recital (212)), the Commission considers that the protection of the integrity of the sport, the protection of health and safety and the organisation and proper conduct of competitive sport may constitute legitimate objectives that justify a restriction of competition. The Commission will consider the protection of the good functioning of the ISU's calendar and the protection of uniform rules of sport in the context of the objective of the organisation and proper conduct of competitive sport.

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<sup>340</sup> Submission of the ISU of 26.09.2014, page 37.

<sup>341</sup> Submission of the ISU of 05.02.2016, page 19.

<sup>342</sup> Submission of the ISU of 05.02.2016, page 23; and submission of the ISU of 12.02.2016, page 2.

<sup>343</sup> ISU's response to the SO of 16.01.2017, paragraphs 61-111.

<sup>344</sup> See the 2016 Eligibility rules, as described in recital (53).

<sup>345</sup> Rule 102 (7) (d) of the ISU 2016 Eligibility Rules, as described in recital (53).

<sup>346</sup> Rule 102 (1) (a) (i) of the Eligibility rules, as described in recitals (49) and (53).

<sup>347</sup> See Section 5.4.1.

<sup>348</sup> As explained in recital (183), Rule 102(1) (a) (ii) of the ISU's General Regulations 2016 link the protection of the ISU's other legitimate interests to the use of the ISU's financial revenues, thus suggesting that the Eligibility rules still serve to also protect the ISU's economic interests.

<sup>349</sup> See Section 5.4.2.

- (220) Second, the protection of economic and/or financial interests does not, however, constitute a legitimate objective that can justify a restriction of competition. Such interests have also not been recognised by the Court of Justice as a legitimate objective capable of restricting the economic freedoms granted to undertakings operating in the EEA under Internal Market or competition rules. In particular, the Court has held that imperative requirements that can be invoked to justify limited restrictions to such rules can only be of a non-economic nature<sup>350</sup>. Concerning the ISU's argument that it uses part of the revenues it generates through commercial activities for the development of the sport, the Commission notes that these funds are, however, also redistributed to the ISU's own Members for the organisation of international competitions (as indicated in recital (164)), thus putting third party event organisers at competitive disadvantage.
- (221) Third, as to the protection of the ISU's jurisdiction, the Commission notes that, without prejudice to the question whether the principle of having one regulator per sport can be considered as legitimate objective capable of justifying restrictions of competition law, the measures established by the ISU (that is, the pre-authorisation system embodied by the ISU's Eligibility rules and by Communication No 1974 on Open International Competitions) are neither inherent in the pursuit of those objectives nor proportionate to them for the reasons set out in Section 8.5.2.
- (222) Fourth, with regard to the claimed protection of the solidarity model in skating, the Commission recognises that some forms of horizontal solidarity (for instance, equal distribution of revenues to all the clubs participating in the same competition) or vertical solidarity (for instance, redistribution of revenues from the elite/professional level of a sport to the low/grassroots level) may justify limited restrictions to the economic freedom of undertakings involved in sport, in particular within a sport pyramid.
- (223) Fifth, the Commission does not exclude that the protection of the volunteer model of sport, as mentioned in Article 165 of the Treaty, may be considered as a legitimate objective of general interest<sup>351</sup>.
- (224) Sixth, as regards the arguments that third party organisers of speed skating events would free-ride on the ISU's costs incurred for the administration of the sport<sup>352</sup>, the prevention of free-riding cannot be considered as a legitimate objective but rather as a claim related to the economic efficiencies generated by the ISU rules. This claim will therefore be addressed in Section 8.8.2. The Commission adds that the ISU's argument of freeriding is contradicted by the fact that the ISU requests from third

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<sup>350</sup> The Court has consistently held that economic aims cannot justify restrictions to the fundamental freedoms guaranteed by the Treaty. See, for example, (i) in the field of free movement of goods: Case C-120/95, *Nicolas Decker v Caisse de maladie des employés privés*, ECLI:EU:C:1998:167, paragraph 39 and case C-254/98, *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH*, ECLI:EU:C:2000:12, paragraph 33; (ii) in the field of freedom to provide services: Case C-352/85, *Bond van Adverteerders and others v The Netherlands State*, ECLI:EU:C:1988:196, paragraph 34, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media*, ECLI:EU:C:1991:323, paragraph 11, Case C-398/95, *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ypourgos Ergasias*, ECLI:EU:C:1997:282, paragraph 23 and Case C-49/98, *Finalarte and Others*, ECLI:EU:C:2001:564, paragraph 39; (iii) in the field of free movement of persons: Case C-137/04, *Amy Rockler v Försäkringskassan*, ECLI:EU:C:2006:106, paragraph 24.

<sup>351</sup> ISU's response to the SO of 16.01.2017, paragraph 102.

<sup>352</sup> ISU's response to the SO of 16.01.2017, paragraph 94.

parties applying for the organisation of an Open International Competition a solidarity contribution, which is used to subsidise events organised by the ISU and/or its Members<sup>353</sup>.

8.5.2. *Is the restriction of competition inherent in the pursuit of legitimate objectives and proportionate to them?*

(225) To fall outside the scope of Article 101(1) of the Treaty, the restrictions caused by the Eligibility rules need to be inherent in the pursuit of legitimate objectives and proportionate to them.

(i) Integrity of the sport

(226) First, the Commission will examine whether the ISU's policies in relation to betting-related match-fixing are inherent in the pursuit of the aim of protecting the integrity of sport and proportionate to that objective as betting-related issues were central in the ISU's decision not to authorise the Dubai Grand Prix planned by Icederby (see Section 5.6.2).

(227) The Commission notes that, as explained in Section 5.6.2, when Icederby first presented its project in 2011, the ISU did not have any clear, pre-established specific rules in place to address the issue of betting-related match-fixing. The ISU's Code of Ethics, containing the obligation to refrain from participating in all forms of betting or support for betting or gambling related to any event/activity under the jurisdiction of the ISU, was adopted in January 2012.

(228) As explained in recitals (229) to (238), the prescriptions laid down in the Code of Ethics are not applied by the ISU according to objective, transparent and non-discriminatory criteria.

(229) The ISU makes a series of unclear or contradictory statements concerning betting. It refers to "illegal betting" as a threat to sport, whilst also stating that the ISU has the right to prohibit betting even if betting is legal in a particular jurisdiction<sup>354</sup>. This sentence is immediately contradicted by the affirmation that international federations cannot prevent online or external betting on sports events<sup>355</sup>. According to the documents mentioned by the ISU to support its alleged claim that "*betting represents the greatest threat to the integrity of sports*"<sup>356</sup>, namely the European Convention on the Manipulation of Sports Competitions and the IOC Working Group on Sports Betting, it is not betting that is seen as a significant threat to sport but betting-related match-fixing. The IOC document affirms that "*betting is part of sport since the beginning*" and that "*sports betting is a way of demonstrating the public's attachment to sports and athletes*"<sup>357</sup>. Moreover, at the Oral Hearing both the Complainants and EU Athletes stressed that Olympic athletes, notably speed skaters, are funded by money derived from betting (in the specific case of Dutch speed skaters, the Dutch Olympic Committee receives funding from the national lottery)<sup>358</sup>.

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<sup>353</sup> See the description of ISU Communication No 1974 in Decision, recital (79).

<sup>354</sup> Submission of the ISU of 05.02.2016, page 19 and ISU's response to the SO of 16.01.2017, paragraphs 71-73.

<sup>355</sup> ISU's response to the SO of 16.01.2017, paragraph 75.

<sup>356</sup> ISU's response to the SO of 16.01.2017, paragraph 69.

<sup>357</sup> IOC Working Group on Sports Betting – Technical Meeting dated 29 September 2010, Annex 4 to the ISU Observations of 26.09.2014, page 4.

<sup>358</sup> See recording from the Oral Hearing, at 0:47 and 1:01.

- (230) The ISU claims that in order to safeguard the high integrity standards it has set for skating, it needs to prohibit the participation of skaters in pari-mutuel events, such as those planned by Icederby. In this respect, the ISU refers to *Liga Portuguesa*<sup>359</sup>, a judgment concerning the regulation of the national gambling markets, and draws an analogy with the recognition of the right for Member States to determine their policies in this field including the possibility to prohibit betting activities.
- (231) However, the reasoning of the Court of Justice in *Liga Portuguesa* has to be read in the context of a series of judgments of the Court of Justice in the area of gambling activities which have confirmed that, whilst Member States may restrict or limit the cross-border supply of all or certain types of online gambling services on the basis of public interest objectives that they seek to protect, they must nonetheless demonstrate the suitability and necessity of the measures in question and also demonstrate that the public interest objectives they have chosen to ensure are being pursued in a consistent and systematic manner<sup>360</sup>.
- (232) Even if one were to assume that this case-law applies to the ISU, which is not a Member State, it is not to the ISU's avail because the ISU does not apply its ethical principles concerning the risks of betting in a consistent and systematic manner. Whereas the ISU, on the one hand, affirms that it is entitled to prohibit betting as part of skating events and as a consequence not to authorise the event planned by event organisers like Icederby, (i) the ISU, on the other hand, admits that it cannot prevent betting on sports events (see recital (229)) and (ii) betting is organised at official ISU speed skating events such as the Olympic Winter Games<sup>361</sup>.
- (233) Concerning the ISU's intention not to "prohibit betting" but to prevent betting-related match-fixing by prohibiting skaters (or officials) from betting on the events in which they were participating, the point was discussed between the initial exchanges between the ISU and Icederby, and Icederby provided indications about how this issue would be addressed in its planned competitions<sup>362</sup>. First, the ISU has not shown that Icederby was directly or indirectly promoting match-fixing by the way in which it would organise its events. Second, the ISU complains that Icederby did not have a policy prohibiting skaters from betting in events where they are participants<sup>363</sup>, but the ISU itself did not have such a policy at the time that Icederby first informed the ISU of its planned speed skating events. The ISU only introduced such policy in 2012 when it adopted its revised Code of Ethics.<sup>364</sup> Third, the provisions of the ISU's revised Code of Ethics put the responsibility on skaters to prevent possible episodes of betting-related match-fixing, by obliging the skaters not to bet in events in which they participate. This confirms that there is a less restrictive way of ensuring the

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<sup>359</sup> Case C-42/07, *Liga Portuguesa de Futebol Profissional* ECLI:EU:C:2009:519.

<sup>360</sup> For a detailed review of the jurisprudence of the Court in this field, see the Staff Working Document (SWD(2012) 345 final) accompanying the Communication from the Commission "Towards a comprehensive European framework for online gambling" (COM(2012) 596 final).

<sup>361</sup> See the announcement by the IOC of the setting up of a monitoring system with various partners, including betting operators, ahead of the Sochi Olympic Games in January 2014: <https://www.olympic.org/news/ioc-steps-up-fight-for-clean-sport-with-interpol-mou-and-new-intelligence-system>, downloaded and printed on 04.10.2017.

<sup>362</sup> Annex 6 to the submission of the ISU of 26.09.2014, page 11.

<sup>363</sup> ISU's response to the SO of 16.01.2017, paragraph 132.

<sup>364</sup> See recital (65).

protection of the integrity of sport and that it is not, as the ISU argues, unworkable and unfair to impose concrete integrity requirements on athletes<sup>365</sup>.

- (234) Moreover, if the ISU's concern was that Icederby would be in a position of a conflict of interest if it could act as a betting operator in the skating competitions it planned to organise, it could have asked Icederby to clarify this point; in fact, Icederby stated in its plans that it would not act as trackside pari-mutuel operator but use an established operator to this effect<sup>366</sup>. When Icederby announced in 2014 that its planned Dubai Grand Prix would not include betting, since betting is illegal in Dubai, the ISU nonetheless did not authorise the event on the ground that "*this did not exclude the possibility that betting on the Dubai event could be organised with Icederby's involvement in other countries and/or through the internet*"<sup>367</sup>. However, the ISU itself admits that sports federations cannot control betting on the events they organise (see recital (229)). It is therefore inconsistent to require from an organiser of a skating event to fulfil obligations that the ISU itself cannot fulfil. Moreover, the ISU did not request Icederby to sign its Code of Ethics, whereas that seemed sufficient for the ISU to authorise the Dutch Icederby Grand Prix, which is inconsistent<sup>368</sup>.
- (235) Recitals (228) to (234) show that the ISU Eligibility rules are not inherent in the pursuit of the objective of protecting the integrity of skating from betting-related match-fixing nor proportionate to that objective because the betting policy applied by the ISU does not protect skating against the risks associated to betting-related match-fixing but was rather used to prevent Icederby from organising its planned Dubai Grand Prix.
- (236) This conclusion is not called into question by the observations submitted by the ISU in response to the Letter of Facts<sup>369</sup>. In these observations the ISU introduces a distinction between betting "on" speed skating events and betting "at" speed skating events, noting that betting "on" speed skating events is done without any cooperation by the ISU and that betting "at" speed skating events requires cooperation between the organiser of the event and betting operators. The ISU also refers to the Integrity Betting Intelligence System (IBIS), a system developed by the IOC to encourage sports bodies, betting operators and public authorities to share information with a view to preventing betting-related match-fixing at sports events. The distinction introduced by the ISU between betting "on" speed skating events and betting "at" speed skating events is both artificial and irrelevant. Betting is always organised on the results or any other aspect of sports events<sup>370</sup>. With reference to the IBIS monitoring system set up by the IOC, the focus of the system is on the involvement of online betting operators, as evident from the list of signatories presented in the factsheet submitted by the ISU<sup>371</sup>. In online betting, it is irrelevant where the betting takes place, since punters can place their bets on a variety of platforms, including tablets and smartphones; online betting occurs either "at" sports events (that is, in the premises where the events are organised) or "outside" sports events with no relation

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<sup>365</sup> ISU's response to the SO of 16.01.2017, paragraph 120.

<sup>366</sup> Submission of Icederby of 22.01.2016, page 14.

<sup>367</sup> ISU's response to the SO of 16.01.2017, paragraph 136.

<sup>368</sup> See recitals (71) and (72).

<sup>369</sup> Submission of the ISU of 25.10.2017, pages 6-7.

<sup>370</sup> See [https://en.wikipedia.org/wiki/Sports\\_betting](https://en.wikipedia.org/wiki/Sports_betting), downloaded and printed on 09.11.2017.

<sup>371</sup> Submission of the ISU of 25.10.2017, page 3.

being established by the ISU as to whether one form or the other of online sports betting represents a greater threat to the integrity of speed skating.

(237) The ISU's observations in response to the Letter of Facts confirm the Commission's view that the ISU's position on sports betting is contradictory: the ISU affirms that its Code of Ethics requires all those involved in skating to refrain from participating in all forms of betting or support for betting, including any cooperation with online or other betting operators, whereas, as is clear from the factsheet submitted by the ISU<sup>372</sup>, IBIS is exactly a form of structured cooperation between sports governing bodies (amongst which the IOC and ISU) and betting operators (listed at the end of the document).

(238) If the ISU's reference to betting "at" sports events (that is, betting organised in the premises where the sports events take place) implies that the ISU would object to pari-mutuel types of events such as the ones originally planned by Icederby, as being inherently more dangerous for the integrity of sports than other modalities of bets, notably fixed-odds betting (that is, the types of bets proposed by, amongst others, the betting operators associated to the IBIS system), the ISU position is not supported by any evidence to this effect. On the contrary, pari-mutuel bets were in the past in many countries the only possible form of sports betting, they are still predominant in certain sporting competitions (horse and greyhound races) and they are inherently considered as less risky from the point of view of the possible manipulation of sports competitions for a variety of factors (low online liquidity, low probability of individual fraud, etc.)<sup>373</sup>.

(ii) The protection of health and safety and anti-doping

(239) With regard to health and safety measures and to anti-doping measures, an outright prohibition for athletes to participate in unauthorised events organised by third party event organisers, combined with severe sanctions for breaches of such a prohibition, is neither inherent in the pursuit of the legitimate objective of protecting the athletes' health and safety and fighting against doping nor proportionate to those objectives. Whilst the ISU's Communication No 1974, for the authorisation of third party events, makes a reference to the respect by third parties of the relevant ISU regulations in the areas of health and safety and anti-doping, the Communication is unclear with regard to the way in which the standards are set and applied to third party events and to the ISU Council's role in assessing whether and how the set standards are met by third parties.

(240) In its response to the SO, the ISU explained that it requires competitors such as Icederby to have exactly the same medical facilities as those present at ISU events<sup>374</sup>. Even if those requirements were to be necessary and proportionate to protect the health and safety of professional speed skaters, when asked at the Oral Hearing, the ISU stated that it had in the context of the Dubai Grand Prix planned in 2014 not

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<sup>372</sup> Submission of the ISU of 25.10.2017.

<sup>373</sup> For an analysis of the risks for sports integrity related to the nature of the betting formulas, see the study carried out by the Sorbonne University, "Fighting against the manipulation of sports competitions", 2014, Final Report part 2, pages 63-67 ([http://sorbonne-icss.univ-paris1.fr/fileadmin/migrated/content/uploads/Sorbonne-ICSS\\_Final\\_Report\\_Part\\_2\\_-\\_6\\_Dec.\\_2014\\_01.pdf](http://sorbonne-icss.univ-paris1.fr/fileadmin/migrated/content/uploads/Sorbonne-ICSS_Final_Report_Part_2_-_6_Dec._2014_01.pdf), downloaded and printed on 09.11.2017).

<sup>374</sup> ISU's response to the SO of 16.01.2017, paragraph 82.

informed Icederby that the specific requirements referred to in its Response to the SO had to be met before Icederby could receive its authorisation<sup>375</sup>.

(241) In any event, even if it was established that the pre-authorisation system represented by the ISU Eligibility rules (in combination with ISU Communication No 1974 and the relevant health and safety and anti-doping regulation) were to be inherent in achieving the objectives of protecting the health and safety of athletes and fighting against doping, the sanctioning system embodied by the Eligibility rules is not proportionate to those objectives for the reasons explained in recitals (260) to (266).

(iii) The organisation and proper conduct of competitive sport

(242) With regard to the organisation and proper conduct of competitive sport and in particular the right to protect the good functioning of the calendar and the rules of the games, which the ISU has invoked as legitimate objectives, the Commission notes the following.

(243) As regards the protection of the good functioning of the ISU calendar<sup>376</sup>, the Commission first notes that the Eligibility rules (read in conjunction with Communication No 1974 and with the relevant provisions in the ISU General Regulations, notably rule 104(14) on the planning of international speed skating competitions) do not provide that a decision of ineligibility can only be taken by the ISU if the unauthorised event in which a speed skater participates clearly interferes with the skater's responsibilities within the ISU's calendar. The ISU has not shown – and also does not claim<sup>377</sup> – that the Dubai Grand Prix event, planned by Icederby, would make it impossible for speed skaters participating in those events to participate in the ISU events in which they were expected to participate or for which they had already registered. On the contrary, the planned Icederby Dubai Grand Prix would take place during the official skating off-season<sup>378</sup>.

(244) Second, the ISU also does not apply any pre-established objective, non-discriminatory and proportionate criteria in order to protect the good functioning of the calendar. Sanctioning athletes merely for participating in unauthorised events, without applying an authorisation system that is based on such criteria, is not inherent in the pursuit of the organisation and proper conduct of the sport and proportionate to that objective.

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<sup>375</sup> Recording from the Oral Hearing, at 1:53.

<sup>376</sup> The ISU notes that the Commission has in principle in *UEFA Champions League* accepted that at least for certain sports and in certain cases some form of cooperation amongst the participants is essential to ensure the good organisation of sport (ISU's response to the SO of 16.01.2017, paragraph 86). However, that decision concerned the organisation of a competition in (professional) football, in which the requirements are different compared to speed skating, namely insofar as football players participate, throughout the year, in a great number of national and international club competitions as well as national team competitions. Such considerations do not apply in the same manner to speed skating, which is a winter sport with a long off-season going approximately from March to October every year. Moreover, in that decision the Commission considered that certain arrangements between competing undertakings (in this case, cooperation amongst football clubs to organise and commercially exploit a football league) are restrictions of competition that can be individually exempted pursuant to Article 101(3) of the Treaty. The Commission therefore did not generally exempt all sports organisational rules from the scope of application of Union competition law.

<sup>377</sup> ISU's response to the SO of 16.01.2017, paragraph 91, where the ISU states that a single event scheduled to take place in the off-season is highly unlikely to give rise to competition concerns.

<sup>378</sup> Submission of Icederby of 03.11.2015, page 5.

(245) As regards the protection of the uniform rules of the game, the ISU has not shown – and also does not claim – that the participation of speed skaters in Icederby's planned event in Dubai, based on a different track and format, would endanger in any way the organisation and proper conduct of speed skating. The same event received the ISU's authorisation to be organised in the Netherlands, with no opposition being raised by the ISU concerning the event's alternative rules of the game. In any event, as in relation to the good functioning of the calendar, the ISU does not apply objective, transparent and non-discriminatory criteria that can justify the non-authorisation of a competing skating event (and the corresponding severe sanctions for the participation of athletes in such event) on the basis of the different rules of the game.

(iv) Preservation of the solidarity and volunteer model in skating

(246) With regard to the ISU's claim that the Eligibility rules are necessary to ensure the preservation of the solidarity model and of volunteering in skating, the Commission notes that the ISU mentions that this model is "*at the heart of the ISU's objectives*" without providing any concrete details<sup>379</sup>. In particular, it appears that the ISU does not refer to vertical solidarity (between professional and grassroots sport) but rather to horizontal solidarity (between richer and poorer participants in a given competition). The reference to the ISU Development Programme<sup>380</sup> in this respect points to a very narrow and specific form of solidarity, that is, solidarity amongst the different ISU Members (so that all Members, including smaller Members or Members with fewer affiliates are able to develop skating and host and organise skating competitions).

(247) The ISU does not convincingly substantiate how preventing skaters from participating in speed skating events organised by third party organisers would be necessary to preserve the ISU's solidarity model. If the purpose is to foster and develop the sport of speed skating, a solidarity contribution to be requested from third party organisers of skating events may under certain circumstances be accepted but such a contribution should be fair and reasonable, be used to finance grassroots sports activities and not have exclusionary effects (a solidarity contribution should for instance not be used to cross-subsidise the events organised by the governing body collecting the contribution – or its Members – to the detriment of events organised by third party organisers).

(248) The Commission notes that ISU Communication No 1974 refers to a solidarity contribution to be paid by applicants for the organisation of Open International Competitions to the ISU in favour of the developments of the ISU sport, but leaves the amount of the contribution unspecified. During the Oral Hearing, the ISU acknowledged that it does not apply any objective criteria to set the amount of the solidarity contribution, but decides on a case-by-case basis<sup>381</sup>. This leaves a wide margin of discretion to the ISU to set the level of the contribution at an arbitrary and discriminatory level without any link to the development of the sport at a grassroots level.

(249) Concerning the protection of the volunteer model of sport, the Commission notes that the fact that speed skating is heavily dependent on volunteers indicates that the ISU

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<sup>379</sup> ISU's response to the SO of 16.01.2017, paragraph 96.

<sup>380</sup> ISU's response to the SO of 16.01.2017, paragraphs 95-101.

<sup>381</sup> Recording of the Oral Hearing, at 0:17.



and its Members benefit from the activities carried out by volunteers, rather than that the ISU's revenues are necessary to finance volunteers. In any event, the financial support given by the ISU to volunteers, in terms of reimbursement for travel costs and expenses<sup>382</sup>, can at most be invoked as a reason to justify the request for a solidarity contribution from third parties under the conditions discussed in recital (247) above. Prohibiting the participation of athletes in events organised by third party organisers is not necessary to protect the volunteer model of sport and in any event not proportionate.

- (250) The Commission's views are not called into question by the arguments of the ISU, based on the *DLG* judgment<sup>383</sup>, that regulatory regimes that prohibit dual membership are compatible with competition law<sup>384</sup> and that, by analogy, the Eligibility rules facilitate competition from third party organisers by allowing them the use of ISU's whole system for integrity, health and safety<sup>385</sup>. The *DLG* judgment notes that "*the restrictions imposed on members by the statutes of cooperative purchasing associations must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.*" However, first, this case does not concern dual membership. Second, the Eligibility rules sanction athletes for participating in unauthorised events, irrespective of whether the non-authorisation was justified on the basis of legitimate objectives and irrespective of whether such participation has any impact on the well-functioning of the ISU. Therefore, the Eligibility rules are more restrictive than necessary to ensure that the ISU functions properly.

(v) Pre-authorisation system

- (251) The ISU argues that it needs to have *ex ante* control over all competing international speed skating events<sup>386</sup> and that its pre-authorisation system is indispensable for the ISU's standards to be applicable to the organisers of speed skating events<sup>387</sup>. The Eligibility rules which prohibit athletes from participating in unauthorised events serve to enforce such an *ex ante* control<sup>388</sup>. In its response to the SO, the ISU develops its arguments as follows: the ISU Eligibility rules are part of the ISU's pre-authorisation system, which is central to the functioning of the pyramid model of sport (as described in Section 5.2) and which translates into the ISU having the right to regulate sport pursuant to uniform rules throughout the world; the ISU therefore has to exercise its jurisdiction over all organisations or sportspeople engaged in its sports<sup>389</sup>.
- (252) Whilst the ISU argues that its own exclusive *ex-ante* control system is "the norm" for regulating organised sport<sup>390</sup>, the Commission notes that there are Olympic sports where events organised by third party organisers and not pre-emptively authorised by

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<sup>382</sup> ISU's response to the SO of 16.01.2017, paragraphs 102-103.

<sup>383</sup> Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvarereselskab AmbA*. (DLG), ECLI:EU:C:1994:413.

<sup>384</sup> ISU's response to the SO of 16.01.2017, paragraph 187.

<sup>385</sup> ISU's response to the SO of 16.01.2017, paragraph 252.

<sup>386</sup> Submission of the ISU of 05.02.2016, pages 23-24.

<sup>387</sup> ISU's response to the SO of 16.01.2017, paragraph 116.

<sup>388</sup> Submission of the ISU of 05.02.2016, page 28.

<sup>389</sup> ISU's response to the SO of 16.01.2017, paragraphs 33-54.

<sup>390</sup> ISU's response to the SO of 16.01.2017, paragraph 274.

the relevant sport regulatory body exist<sup>391</sup>. In these sports, the federations have no *ex-ante* control over third party events and there is no indication that the lack of *ex-ante* control endangers the organisation of sport in any way. This finding is not called into question by the response of the ISU to the Letter of Facts<sup>392</sup>. The ISU's observations rather confirm that the rules and statutes of these federations do not include provisions related either to the authorisation of third party events or to the sanctioning of athletes for participation in unauthorised events. The fact that certain federations, such as the International Bobsleigh and Skeleton Federation (IBSF) or the International Canoe Federation (ICF), have rules in place indicating that international competitions or championships can only be organised by the international federation or by its members, in no way contradicts the statement by the Commission that those federations have no rules similar to the ISU's Eligibility rules in their statutes, namely those federations have no rules in place for sanctioning athletes participating in unauthorised third party events.

- (253) The ISU argues, with reference to the *Wouters* judgment, that every sport discipline has its own characteristics and that the fact that other sports federations operate in a different manner does not put into question the ISU's system<sup>393</sup>. However, first, the number and range of sports federations which do not have any pre-authorisation system in place and the fact that the ISU refers in its response to the Letter of Facts to alleged restrictions included in the regulations established by associations of professional players in golf or tennis, and not in the statutes of the respective international federations as recognised by the International Olympic Committee, confirm the view of the Commission that the ISU's *ex ante* control system based on the pyramid structure of sport is not "the norm" for regulating sport but rather one model alongside other, alternative governance models. Second, while it may be

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<sup>391</sup> See for instance the cases of (i) bobsleigh (International bobsleigh rules 2017 of the International Bobsleigh and Skeleton Federation (IBSF): [http://www.ibsf.org/images/documents/downloads/Rules/2017\\_2018/2017\\_International\\_Rules\\_BOBS\\_LEIGH.pdf](http://www.ibsf.org/images/documents/downloads/Rules/2017_2018/2017_International_Rules_BOBS_LEIGH.pdf), downloaded and printed on 05.10.2017); (ii) tennis (2017 ITF Constitution: <http://www.itftennis.com/media/248417/248417.pdf>, downloaded and printed on 05.10.2017; 2017 Grand Slam Rule Book: <http://www.itftennis.com/media/248302/248302.pdf>, downloaded and printed on 05.10.2017. To be noted is that, notwithstanding the lack of pre-authorisation, athletes may be sanctioned in case, after they have entered and are accepted in a Grand Slam tournament, they participate, without being authorised to do so, in another event during the period of such tournament - see Grand Slam Rule Book, page 35); (iii) golf (Constitution of the International Golf Federation (IGF): <http://d2aygmo1xd84v8.cloudfront.net/igfgolf/wp-content/uploads/sites/49/2014/09/Constitution-of-International-Golf-Federation-Adopted-Oct-2010.pdf>, downloaded and printed on 05.10.2017); (iv) judo (Statutes of the International Judo Federation (IJF): [http://99e89a50309ad79ff91d-082b8fd5551e97bc65e327988b444396.r14.cf3.rackcdn.com/up/2017/09/IJF\\_Statutes\\_Swiss\\_Associati-on-1506604354.pdf](http://99e89a50309ad79ff91d-082b8fd5551e97bc65e327988b444396.r14.cf3.rackcdn.com/up/2017/09/IJF_Statutes_Swiss_Associati-on-1506604354.pdf), downloaded and printed on 05.10.2017); (v) taekwondo (2017 Statutes of the World Taekwondo Federation (WTF): <http://www.worldtaekwondo.org/wp-content/uploads/2017/08/World-Taekwondo-Statutes-June-23-2017-1.pdf>, downloaded and printed on 05.10.2017); (vi) canoe (Statutes of the International Canoe Federation (ICF): [https://www.canoeicf.com/sites/default/files/icf\\_statutes\\_2015\\_final.pdf](https://www.canoeicf.com/sites/default/files/icf_statutes_2015_final.pdf), downloaded and printed on 05.10.2017); and (vii) triathlon (Constitution of the International Triathlon Union: [https://www.triathlon.org/uploads/docs/constitution\\_2017\\_final2.pdf](https://www.triathlon.org/uploads/docs/constitution_2017_final2.pdf), downloaded and printed on 05.10.2017).

<sup>392</sup> Submission of the ISU of 25.10.2017, pages 3-6. The ISU notes that certain international federations have established rules limiting the organisation of international competitions to themselves or to their members, and that certain restrictions are included in the rules adopted by associations of professional players.

<sup>393</sup> ISU's response to the SO of 16.01.2017, paragraph 275.

acceptable for a governing body to adopt stricter rules for its sport than other governing bodies, this should be justified on the basis of specific facts and evidence related to the features of the sport in order to be inherent in the pursuit of legitimate objectives and proportionate to them. In this respect, whereas the ISU explains in some details the specific threats for the health and safety of skaters deriving from the characteristics of speed skating, it does not develop any arguments explaining why the risks to integrity (match-fixing or doping) or to the proper running of competitions (rules of the game, calendar) are higher in skating than in other sports.

- (254) For the purpose of this Decision, the Commission does not need to take a view on the question of whether a pre-authorisation system is inherent in the pursuit of legitimate objectives (as discussed in Section 8.5.1). Even if the prior authorisation were to be accepted as inherent in the pursuit of legitimate objectives, the ISU's authorisation system is clearly disproportionate to those objectives in light of the fact that, until recently, there were not even criteria for the authorisation of third party events. The prior authorisation system, which has been in place since October 2015<sup>394</sup>, is disproportionate for the following reasons.
- (255) First, ISU Communication No 1974 setting out the procedure for sanctioning an open international competition contains a number of disproportionate conditions and disclosure obligations, including the disclosure of financial information and business plans<sup>395</sup>. The fact that the requested financial information is not detailed but only indicative<sup>396</sup> does not call into question the disproportionate nature of the condition since no similar obligation is imposed on the ISU Members for the organisation of international competitions<sup>397</sup>.
- (256) Second, the Communication provides that the Council might request additional information (that is, information in addition to the data set out in the Communication) in connection with the applicant's financial situation. It is not clear why such far-reaching requirements are necessary to protect any legitimate objectives. Due to the procedures and criteria set out in Communication No 1974, third parties applying for the ISU's authorisation to organise an Open International Competition are not able to run their event in an independent manner.
- (257) Third, the criteria set out in Communication No 1974 are non-exhaustive and the Communication allows a very broad margin of discretion for the Council to decide whether to accept or reject an application for the organisation of an international speed skating event.
- (258) Fourth, the Communication does not set out clear deadlines as to the authorisation procedure. The ISU explains that third party organisers have to submit an authorisation request six months prior to the planned event<sup>398</sup> which is discriminatory because Members only need to apply three months in advance. It is not clearly set out in Communication No 1974 within which time period the ISU will approve or reject the request.

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<sup>394</sup> Submission of the ISU of 20.10.2015.

<sup>395</sup> See Section 5.7.2.

<sup>396</sup> ISU's response to the SO of 16.01.2017, paragraph 260.

<sup>397</sup> See Rules 104-106 of the ISU General Regulations.

<sup>398</sup> ISU's response to the SO of 16.01.2017, paragraph 260.

(259) For the reasons set out in recitals (255) to (258), the Commission rejects the arguments of the ISU and considers that, even if the pre-authorisation system established by the ISU and embodied in the Eligibility rules were to be inherent in the pursuit of the legitimate objectives identified in Section 8.5.1, it would not be proportionate to those objectives<sup>399</sup>.

(vi) The sanctions

(260) Even if the Eligibility rules and their consequential effects restrictive of competition were inherent in the pursuit of any legitimate objectives, the sanctions imposed on athletes in case of a breach of the Eligibility rules are manifestly disproportionate. The 2014 Eligibility rules provided for the heaviest sanction of a lifetime ban, even for the first infringement of the Eligibility rules, without taking into consideration the circumstances of the case<sup>400</sup>.

(261) The ISU argued that the Eligibility rules were being applied in a proportionate manner, since so far there has only been one case involving a figure skater on whom a lifetime ban was imposed for violation of the Eligibility rules; and that figure skater was reinstated by the Council after 12 months<sup>401</sup>.

(262) For the purposes of the assessment of the proportionality of the Eligibility rules it is however not relevant how many times the ISU has actually imposed sanctions. The fact that a lifetime ban was imposed only once on an athlete may even underline the strong deterrent effect of the sanctions.

(263) Although the sanctions system has been modified in the General Regulations 2016<sup>402</sup>, the sanctions remain disproportionately punitive, as they provide for periods of ineligibility that go up to five years for negligent participation in unauthorised events, up to 10 years for athletes that knowingly participate in unauthorised events and a lifetime ban for athletes participating in unauthorised events endangering, *inter alia*, the 'ISU jurisdiction'. These are disproportionately heavy sanctions in particular in view of the fact that on average a professional athlete's entire career is around eight years long<sup>403</sup>. Also the imposition of a five-year ban is therefore likely to impact very heavily on an athlete's career who, after years of training and sacrifices, loses the possibility to gain income through the participation in the ISU's international events.

(264) In the ISU Council Guidelines on Sanctions<sup>404</sup>, the Council committed itself to sanction skaters with ineligibility for no more than two years for negligent

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<sup>399</sup> This finding is not called into question by the ISU' statement that all applications for Open International Competitions were approved (ISU's response to the SO of 16.01.2017, page 68, paragraph 260). The ISU itself recognises that no application for an Open International Competition has ever been made in the field of speed skating (submission of the ISU of 05.02.2016, page 26); the fact that such applications have been approved (either before or after the adoption of Communication No 1974) in the field of figure skating is not relevant to this case.

<sup>400</sup> According to Rule 102(7) of the General Regulations, the consequence of a breach of the Eligibility rules is the loss of eligibility. The automatic sanction for the athletes' participation in unauthorised events is a life-time ban.

<sup>401</sup> Submission of the ISU of 05.02.2016, page 20.

<sup>402</sup> Rule 102(7) d) of the General Regulations 2016 establishes a scale of sanctions for participating in an event not authorised by the ISU. The sanctions go from a warning to a lifetime ban, depending on the circumstances of the case. Submission of the ISU of 02.05.2016, page 4.

<sup>403</sup> Submission of the EU Athletes of 21.01.2016, page 5.

<sup>404</sup> Submission of the ISU of 02.05.2016, page 1.

participation in unauthorised events and no more than four years for knowingly participating in unauthorised events. However, as explained above in recital (186), such sanctions remain disproportionately severe.

- (265) In addition, the Commission notes that there are no pre-established, clear and transparent criteria as to how the sanctions are to be applied. The wording of Rule 102(7) d) of the 2016 Eligibility rules refers to minor, medium heavy, serious and very serious violations. However, the rule does not provide a clear definition of the different types of violations. This gives a wide discretion to the ISU Council as to the qualification of a violation, resulting in an unpredictable, unclear and non-transparent sanctioning system. Contrary to the ISU's claims<sup>405</sup>, the Council Guidelines adopted in June 2016<sup>406</sup> give little clarity as to how the sanctions would be applied and how the different categories (such as negligent or intentional violations) would be assessed. The wording of Rule 102(7) b) of the 2016 Eligibility rules confirms the wide discretion of the ISU Council, stating that the "*ISU Council [...] at its sole discretion, may rule upon the alleged breach of the eligibility Rules*"<sup>407</sup>.
- (266) In light of recitals (225) to (265), the Commission concludes that the consequential effects of the Eligibility rules, namely the restriction of the athletes' commercial freedom to participate in international speed skating events organised by third parties and the foreclosure of potential competitors in the market for organisation and commercial exploitation of international speed skating events, are in part not inherent in the pursuit of legitimate objectives, and, in any event, not proportionate to them.

## **8.6. Conclusion on Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement**

- (267) On the basis of Section 8.5, the Commission concludes that the Eligibility rules fall within the scope of Article 101 of the Treaty and have as their object and effect the restriction of competition within the meaning of Article 101(1) of the Treaty.

## **8.7. The Appeals Arbitration rules reinforce the restrictions of competition**

- (268) According to the Appeals Arbitration rules, appeals against the implementation of the Eligibility rules are subject to the exclusive jurisdiction of the Court of Arbitration for Sport (CAS) based in Lausanne, Switzerland, which is the only appeal body for decisions of the ISU Council declaring the ineligibility of "*a Skater, Official, Office Holder or other participant in ISU activities*"<sup>408</sup>.
- (269) Arbitration is a generally accepted method of binding dispute resolution and agreeing on an arbitration clause as such does not restrict competition<sup>409</sup>. However, the Commission takes the view that the Appeals Arbitration rules reinforce the restrictions of competition that are caused by the Eligibility rules.

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<sup>405</sup> ISU's response to the SO of 16.01.2017, pages 70-71.

<sup>406</sup> Submission of the ISU of 02.05.2016, page 1.

<sup>407</sup> The text of 102(7) b) is identical in both the 2014 and the 2016 versions of the ISU General Regulations. See submission of the ISU of 26.09.2014, page 90 and submission of the ISU of 02.05.2016.

<sup>408</sup> See Section 5.5.

<sup>409</sup> See also COMP/39471 *Certain joueurs de tennis professionnel/Agence mondiale antidopage, ATP Tour Inc. et Fondation Conseil international de l'arbitrage en matière de sport*, paragraph 40.

- (270) First, the Appeals Arbitration rules make it difficult to obtain effective judicial protection against ineligibility decisions of the ISU that violate Article 101 of the Treaty.
- (271) The Appeals Arbitration rules provide that all decisions of the CAS shall be final and binding<sup>410</sup>. Judicial recourse against CAS arbitral awards is possible, but only before the Swiss Federal Tribunal on a very limited number of grounds, such as lack of jurisdiction, violation of elementary procedural rules or incompatibility with public policy<sup>411</sup>. The Swiss Federal Tribunal has ruled that Union competition law does not pertain to international public policy in the sense of the Swiss legal order<sup>412</sup>. The Swiss Federal Tribunal is therefore not likely to annul a CAS arbitral award that confirms an ineligibility decision taken in violation of Article 101 of the Treaty. The Commission adds that, even if the Swiss Federal Tribunal were to apply the Union competition rules, it cannot – unlike national courts within the Union – refer a question for preliminary ruling to the Court of Justice in case of doubts about the interpretation of those rules<sup>413</sup>.
- (272) CAS awards are enforceable in any court of competent jurisdiction<sup>414</sup>. However, once an ineligibility decision is imposed by the ISU, there is generally no need for enforcement by national courts because the ISU has the disciplinary power to enforce the decision itself (in cooperation with its Members): the ineligible speed skater will not be allowed to participate in ISU events and will not be registered on the participants' lists for those events. Although many awards have been rendered by CAS, only in very few instances has their recognition and enforcement been sought before the national courts<sup>415</sup>.

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<sup>410</sup> ID 37, ISU 2014 Constitution, Article 25(6); of the ISU Constitution 2016, Article 26(6).

<sup>411</sup> Articles 190-191 of the Swiss Federal Act on Private International Law (in French: Loi Fédérale sur le Droit International Privé; available at <https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html> downloaded and printed on 25.08.2016 (ID 571)). See also <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html#c201> downloaded and printed on 25.08.2016 (ID 568).

<sup>412</sup> Swiss Federal Tribunal, *Tensaccia v Terra Armata*, judgment of 8 March 2006, 4P.278/2005.

<sup>413</sup> Case C-102/81 *Nordsee v Reederei Mond Hochseefischerei et al.*, ECLI:EU:C:1982:107; and Opinion of AG Wathelet in Case C-567/14 *Genentech Inc. v Hoechst GmbH and Sanofi-Aventis Deutschland GmbH* ECLI:EU:C:2016:177, paragraphs 55-72.

<sup>414</sup> In accordance with Article III of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>415</sup> See A. Duval, *The Court of Arbitration for Sport and EU Law*, 22 MJ 2 (2015), page 247. This conclusion is not called into question by the observations submitted by the ISU in its response to the Letter of Facts, ID 1139, submission of the ISU of 25.10.2017, page 8, as the CAS decisions cited by the ISU as not possible to "self-enforce" are not related to athletes' eligibility but concern cases in which damages had to be recovered (Case 10–24028 *Chelsea FC v. Mutu Florida* (D. 13 Feb. 2012)) or medals returned (BBC, "Olympic medals: The tricky job of reallocating - and getting them back" 16 August 2017, available at: <http://www.bbc.com/sport/athletics/40746615>, downloaded and printed on 09.11.2017 (ID 1177)). In addition, at the Oral Hearing the ISU referred to the example of French football player Lassana Diarra (ID 957-2, recording from the Oral Hearing, at 0:24); however, this case is not relevant since the question examined by the competent Belgian tribunal concerned whether Mr Diarra was bound to arbitration before CAS on the basis of the FIFA statutes (the tribunal found that this was not the case since the relevant provisions in the FIFA statutes were unclear), whereas the ISU does not dispute that its Appeals Arbitration rules clearly limit the possibility for challenging decisions of the ISU Council solely before CAS, with the exclusion of ordinary courts.

- (273) As also noted by the ISU<sup>416</sup>, only if an athlete were to bring a civil action triggering an enforcement dispute in a Member State where it is denied participation in an ISU skating event<sup>417</sup> would a national court within the EEA have competence to review whether the recognition and enforcement of the CAS arbitral award (confirming an ineligibility decision) violates EU/EEA competition law<sup>418</sup>. However, even if the national court of a Member State were to engage in such a review and to deem the circumstances of the case sufficiently exceptional to refuse the recognition and enforcement of the arbitral award<sup>419</sup>, it could under no circumstances annul an anti-competitive ineligibility decision by the ISU or a CAS arbitral award for violation of Article 101 and/or Article 102 of the Treaty. A national court could merely refuse recognition or enforcement of the arbitral award for reasons of public policy in that specific Member State<sup>420</sup>.
- (274) Moreover, the Procedural Rules of the CAS purport to remove the rights of athletes to have recourse to national courts in the EEA for interim relief. Rule 37 of the Procedural Rules of the CAS provides for the possibility of provisional and conservatory measures, stating that the parties "*expressly waive their rights to request any such measures from state authorities or tribunals*"<sup>421</sup>.
- (275) The Appeals Arbitration rules, and in particular the exclusive competence of CAS therefore make it very difficult to obtain effective judicial protection against a potentially anti-competitive ineligibility decision of the ISU. In particular, it would be burdensome and costly to try to block the enforcement of an arbitral award in every Member State where an athlete would like to participate in an ISU speed skating event (athletes generally participate in international speed skating events all over the world). Moreover, many scheduled speed skating events are likely to have

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<sup>416</sup> In its response to the Letter of Facts of 25 October 2017, ID 1139, submission of the ISU of 25.10.2017, page 8, the ISU refers to the possibility of athletes to challenge a foreign arbitral award before the national courts of a member state, even in cases where enforcement proceedings are not necessary.

<sup>417</sup> As, for instance, in the *Pechstein* case referred to in the ISU's response to the SO (ID 810, ISU's response to the SO of 16.01.2017, pages 78-79).

<sup>418</sup> In Case C-126/97 *EcoSwiss v Benetton* ECLI:EU:C:1999:269, paragraph 41, the Court held that a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty (now Article 101 of the Treaty), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy. Arguably, this should also apply to the recognition and enforcement of foreign arbitral awards because the Court of Justice in paragraph 39 of the judgment explicitly referred to the provisions of Article 101 of the Treaty (ex Article 85 EC) as a matter of public policy within the meaning of the New York Convention.

<sup>419</sup> According to Case C-126/97 *EcoSwiss v Benetton*, ECLI:EU:C:1999:269, paragraph 35, it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances. In practice, national courts have applied different standards of review. For instance, the French courts consider that the violation of Union competition law rules must be "*flagrant, effective and concrete*" to be deemed contrary to public policy on the recognition and enforcement of foreign arbitral awards (Judgment of the Cour d'appel de Paris, 18 November 2004, *Thalès v Euromissile*, case no. 2002/60932; and judgment of the Cour d'appel, 4 June 2008, *SNF v CYTEC*, Case No. 04/19673, confirmed by the Cour de Cassation, judgment no. 680 of 4 June 2008).

<sup>420</sup> In accordance with Article V(2)b of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>421</sup> See also the Order of the Landgericht München of 23 June 2016 in *Euroleague v FIBA*, 1 HK O 8126/16, page 21, where the Court held that the application for interim measures was inadmissible for the majority of the applicants because they were bound by Rule 37 of the Procedural Rules of the CAS.

already taken place by the time that a national court in the EEA would decide on the compatibility of the CAS arbitral award with Article 101 of the Treaty and interim relief is unlikely to be obtained in the light of Rule 37 of the Procedural Rules of the CAS.

- (276) Second, in the light of the ISU's position as the international governing body for speed skating<sup>422</sup> and the impossibility of professional speed skaters to skate in alternative international speed skating events, athletes have no real choice but to accept the Appeals Arbitration rules and the exclusive competence of the CAS. If they oppose the signing of the arbitration clause, they are not able to compete in ISU speed skating events and therefore not able to carry out their profession<sup>423</sup>. The Swiss Federal Tribunal has acknowledged that there is a lack of real consensus given by the athletes to adhere to compulsory arbitration<sup>424</sup>. Moreover, the difficulty imposed by the Appeals Arbitration rules for athletes to obtain effective judicial protection against potentially anti-competitive ineligibility decisions in and of itself supports the conclusion that athletes' choices to submit themselves to those rules are not truly voluntary<sup>425</sup>.
- (277) In the view of the Commission, the hurdles that the Appeals Arbitration rules impose on athletes in obtaining effective judicial protection against potentially anti-competitive ineligibility decisions of the ISU reinforce the restriction of their commercial freedom and the foreclosure of ISU's potential competitors as set out in Sections 8.3 and 8.4, since those rules protect potentially anti-competitive decisions of the ISU Council issued under the Eligibility rules by curtailing the reach of EU/EEA competition law to those decisions.
- (278) In its response to the SO, the ISU raises the following arguments against the Commission's objections concerning the Appeals Arbitration rules<sup>426</sup>: (i) the Commission's objections in relation to the Appeals Arbitration rules fall outside of the scope of the investigation; (ii) such rules do not represent a decision by an association of undertakings; (iii) the objective of such rules is to ensure the uniform and worldwide application of sporting justice and it is inherent in the pursuit of that objective and proportionate to it to exclude national courts at first instance; (iv) Union competition law can be invoked as mandatory law by the parties before the

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<sup>422</sup> See Section 7.

<sup>423</sup> See Sections 8.3 and 8.4.

<sup>424</sup> See Swiss Federal Tribunal, 13 February 2012, *World Anti-Doping Agency v Flemish Tennis Federation*, 4A\_428/2011, Section 3.2.3, where the Tribunal refers to "(...) an athlete who has no other choice than accepting the arbitration clause contained in the Regulations of the sports federation to which he is affiliated" and draws a parallel with mandatory arbitration imposed by States. See similarly, Swiss Federal Tribunal 22 March 2007, *Cañas v Commission*, 4P.172/2006, where the Tribunal considered that the waiver of appeal signed by a professional tennis player "(...) will not generally be the result of a freely expressed desire on his part."

<sup>425</sup> In addition, in the framework of proceedings initiated against FIFA in 1998 following a complaint against FIFA's transfer rules in force at the time (Case AT.36583 SETCA+FGTB/FIFA+URBSFA+1), the Commission investigated FIFA's Statutes which obliged FIFA's members and their clubs to exclusively solve their disputes through a system of commonly agreed arbitration tribunal. The question of exclusive arbitration was debated in the ensuing discussions between FIFA, UEFA, FIFPro and the Commission. At the end of this process, the Commission noted that amongst the rules that underpinned the new transfer system adopted by FIFA figured the principle that "arbitration is voluntary and does not prevent recourse to national courts" (IP/02/824 of 5 June 2002 available at [http://europa.eu/rapid/press-release\\_IP-02-824\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-02-824_en.htm?locale=en)).

<sup>426</sup> ID 810, ISU's response to the SO of 16.01.2017, pages 77-85.



CAS and the Swiss Federal Tribunal can set aside a CAS award in case a Union law argument, when invoked, is not taken into consideration in the award; (v) the enforcement of CAS awards can be challenged before national courts on grounds of Union competition law (as part of public policy) and national courts in this context can make a preliminary reference to the Court of Justice, with the consequence that if a CAS award is declared unenforceable because of breach of competition law in one Member State (with or without prior preliminary ruling of the Court of Justice) it cannot be enforced anywhere in the Union; and (vi) in addition to arbitration, one can bring complaints before national competition authorities or before the Commission.

- (279) The ISU's arguments should be rejected for the following reasons.
- (280) First, the Commission notes that the decision to initiate proceedings against the ISU of 5 October 2015 states that the Commission will investigate "*alleged anticompetitive restrictions imposed by the International Skating Union on athletes and officials' economic activities and alleged foreclosure of competing alternative sport event organisers. In particular, the Commission will investigate the International Skating Union's Eligibility Rules that impose a life-time ban on athletes and officials if they were to participate in events not organised or specifically approved by the International Skating Union as well as the application of such rules by the International Skating Union*" (emphasis added). The opening of proceedings does not prejudge the outcome of the investigation and the Commission is not required to, at that early stage of its proceedings, to refer to all circumstances that the Commission may later take into account. Moreover, the ISU Eligibility rules and the Appeals Arbitration rules are closely linked: the Appeals Arbitration rules are the procedural rules according to which the Eligibility rules (the substantive rules) can only be appealed before the CAS. For that reason, the Appeals Arbitration rules cannot be considered to fall outside the scope of the Commission's investigation. In relation to the ISU's claim that the inclusion of the Appeals Arbitration rules in the scope of the investigation breaches its rights of defence, the Commission notes that the opening of proceedings means that the Commission is treating the case as a matter of priority but does not prejudge the outcome of the investigation. The ISU has been able to effectively exercise its right to be heard after the notification of the SO: the ISU submitted its response to the SO on 16 January 2017, was able to present its arguments at the oral hearing organised on 1 February 2017 and responded to a Letter of Facts on 25 October 2017
- (281) Second, the Commission considers that the Appeals Arbitration rules reinforce the restriction of competition caused by the Eligibility rules. It is therefore sufficient that the Eligibility rules qualify as a decision of an association of undertakings within the meaning of Article 101 of the Treaty.
- (282) Third, the Appeals Arbitration rules can be set up in a way that ensures the uniform and worldwide application of sporting justice as much as possible, but such rules may not go so far as to reinforce a restriction of competition within the meaning of Article 101 of the Treaty by making it difficult for athletes to obtain effective judicial protection against the potentially anti-competitive ineligibility decisions of the ISU. In this respect, it should be noted that Union competition law has been recognised as public policy by the Court of Justice of the EU<sup>427</sup>.

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<sup>427</sup> See footnote 418.

- (283) Fourth, the fact that the parties to proceedings before the CAS can invoke Union competition law as mandatory law does not offer any guarantee that Union competition law will be interpreted and applied to the requisite substantive and procedural standards by the CAS arbitrators. This is not altered by the fact that the Commission has in one of its decisions referred to a CAS award involving the interpretation of Union competition rules (the ENIC decision mentioned by the ISU in its response<sup>428</sup>)<sup>429</sup>. Moreover, as underlined by the Commission in recital (271) above, in case of doubts about the interpretation of Union competition rules, neither the CAS nor the Swiss Federal Tribunal can make a preliminary reference to the Court of Justice.
- (284) Fifth, the enforcement of CAS awards, as foreign arbitral awards, can be challenged before national courts in the EEA on the grounds of public policy, which includes Union competition law. However, such challenges are in practice difficult and burdensome for athletes for the reasons explained in recitals (272) to (275). That difficulty derives mainly from the self-enforcing character of sanctions imposed by sports governing bodies<sup>430</sup>. The ISU does not contest the fact that only in a few cases recognition or enforcement was sought before national courts, but states that *"the important matter is not the number of such challenges but that it is possible to challenge the enforcement of a CAS award"*<sup>431</sup>. However, it is precisely the practical hurdles involved in such actions that may discourage athletes from seeking judicial redress against anti-competitive ineligibility decisions. Furthermore, contrary to the ISU's claims that *"any CAS decision declared unenforceable as a matter of EU law by a national court in the EU would be a dead letter throughout the EU"*<sup>432</sup>, a judgment rendered under Article V(2)b of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards merely covers the (Member) State in question and is not automatically applicable in the whole EEA<sup>433</sup>.

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<sup>428</sup> CAS 98/200, *AEK Athens v. UEFA* ("ENIC" case), referred to in ID 810, ISU's response to the SO of 16.01.2017, pages 80-81, paragraphs 295-296.

<sup>429</sup> Case 37 806, *ENIC/ UEFA*, where the Commission makes reference to the CAS award in the factual part of its decision: [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/37806/37806\\_7\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/37806/37806_7_3.pdf).

<sup>430</sup> See M. Maisonneuve, *L'arbitrage des litiges sportifs*, L.G.D.J. (2011), pages 403-407.

<sup>431</sup> ID 810, ISU's response to the SO of 16.01.2017, paragraph 303.

<sup>432</sup> ID 810, ISU's response to the SO of 16.01.2017, paragraph 310.

<sup>433</sup> See recital (273). Concerning the fact that, while a contracting state to the New York Convention can rely on its local public policies to deny effect to arbitral awards, its exercise of this freedom is not binding on other contracting states, and that Union law (Union competition law in particular) can be interpreted differently by national courts when invoked as public policy exception to refuse recognition and enforcement of arbitral awards (as shown by the narrow approach taken by French courts referred to in footnote 419), see *International Commercial Arbitration (Second Edition)* (Born; Jan 2014), p.3641-3642; *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, *Arbitration International*, Volume 19, Issue 2, 1 June 2003, page 254, Recommendation 1(c); and *Redfern and Hunter on International Arbitration (Sixth Edition)* (Blackaby, Partasides, Redfern, et al.; Sep 2015), pages 615 and following. This point is not called into question by the observations submitted by the ISU in its response to the Letter of Facts, ID 1139, submission of the ISU of 25.10.2017, pages 9 and 10. The ISU acknowledges that *"EU national courts share an equivalent public policy when it comes to EU law"*, but not the same public policy. Moreover, the ISU refers to the finding in Blackaby, Partasides, Redfern et al (paragraph 11.121) that *"Dutch and Belgian courts have shown themselves ready to undertake a substantive review of awards from a competition law perspective"* among others in the judgment of the Brussels Court of First Instance of 8 March 2007 in *SNF v Cytec Industries BV*. However, on the same facts, the Paris Court de Cassation reached the opposite conclusion in its *SNF v. Cytec* ruling of 4 June 2008, finding that the violation of Union

- (285) Sixth, as regards the possibility to submit complaints before national competition authorities or the Commission, it should be noted that they have limited resources and cannot prioritise all complaints. National courts in the EEA are well placed to hear individual cases<sup>434</sup>, but the Appeals Arbitration rules make it burdensome for athletes to have access to such courts, thereby reinforcing the restriction of competition caused by the Eligibility rules.
- (286) Last, this conclusion is not called into question by the observations submitted by the ISU in its response to the Letter of Facts<sup>435</sup>, as the Commission does not conclude that the Appeals Arbitration rules constitute a breach of athletes' right to a fair hearing, but merely that in combination with the Eligibility rules, the Appeals Arbitration rules reinforce the restriction of their commercial freedom and the foreclosure of ISU's potential competitors.

## **8.8. Application of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement**

### *8.8.1. Principles*

- (287) Pursuant to Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement, the provisions of Article 101(1) of the Treaty and the provisions of Article 53(1) of the EEA Agreement may be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, or any concerted practice or category of concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objects; and does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- (288) The undertakings claiming the benefit of Article 101(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled<sup>436</sup>.
- (289) Regarding the first condition of Article 101(3) of the Treaty, only the objective advantages resulting specifically from an agreement may be taken into account<sup>437</sup>. This means that efficiencies are not assessed from the subjective point of view of the parties. The examination of an agreement for the purposes of determining whether it contributes to the improvement of the production or distribution of goods or to the

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competition law in this case was not sufficiently flagrant, effective and concrete and thus confirming that the national courts of each Member State have to conduct an individual assessment as to whether a violation of Union competition law infringes public policy.

<sup>434</sup> Contrary to the ISU's suggestion that national courts cannot efficiently deal with sports cases (ID 810, ISU's response to the SO of 16.01.2017, paragraph 20 and pages 78-80), national courts are competent to apply Union competition law also in sports cases and may, if justified by the facts of the case, adopt interim relief decisions; see also in this context the Order of the Landgericht München of 23 June 2016 in *Euroleague v FIBA*, 1 HK O 8126/16, page 21, where the Court did not consider the application for interim measures for the majority of the applicants because they were bound by Rule 37 of the Procedural Rules of the CAS.

<sup>435</sup> Response of the ISU to the Letter of Facts, submission of the ISU of 25.10.2017, pages 8 and 9.

<sup>436</sup> See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 2.

<sup>437</sup> Case C-382/12 P *MasterCard, Inc. and Others v Commission*, ECLI:EU:C:2014:2201, paragraph 231.

promotion of technical or economic progress, and whether that agreement generates appreciable objective advantages, must be undertaken in the light of the factual arguments and evidence provided by the undertakings.

- (290) Regarding the second condition of Article 101(3) of the Treaty, the concept of "fair share" implies that the pass-on of benefits must at least compensate consumers for any actual or potential negative impact caused to them by the restriction of competition found under Article 101(1) of the Treaty. In other words, parties have to demonstrate that it brings appreciable objective advantages of such a character as to compensate for the disadvantages caused by the agreement in relation to competition<sup>438</sup>. While objective advantages may potentially also arise on markets other than on the relevant market, it must be established that the consumers in the relevant market affected by the restriction obtain a fair share of such objective advantages<sup>439</sup>. The analysis of the pass-on of efficiency gains to consumers, which balances the negative and positive effects of a restrictive agreement on consumers, must not include the effects of any restrictions which fail the indispensability test<sup>440</sup>.
- (291) Regarding the third condition of Article 101(3) of the Treaty, the agreement must be reasonably necessary in order to achieve the efficiencies. Moreover, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies<sup>441</sup>.
- (292) Regarding the fourth condition of Article 101(3) of the Treaty, whether competition is being eliminated depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, that is to say the reduction in competition that the agreement brings about. This requires a realistic analysis of the various sources of competition in the market, the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on this competitive constraint. Both actual and potential competition must be considered in that regard<sup>442</sup>.

#### 8.8.2. *Application to the case*

- (293) The Commission examined whether the Eligibility rules satisfy the conditions under Article 101(3) of the Treaty.
- (294) As for the first condition, the Commission did not identify any efficiency gains due to the Eligibility rules. The ISU argued that the Eligibility rules contribute to improving the production or distribution of goods or to promoting technical and economic progress, since they provide organisers and skaters with a one-stop-shop<sup>443</sup>. However, in the absence of clear authorisation criteria that do not go beyond what is necessary to protect legitimate aims, the Eligibility rules impede the creation

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<sup>438</sup> See Joined Cases 56/64 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, ECLI:EU:C:1966:41, pages 347-348; Case C-382/12 P *MasterCard, Inc. and Others v Commission*, ECLI:EU:C:2014:2201, paragraph 234.

<sup>439</sup> Case T-111/08 *MasterCard, Inc. and Others v Commission*, ECLI:EU:T:2012:260, paragraph 228 and the case-law cited therein.

<sup>440</sup> Commission Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, page 105) paragraph 39.

<sup>441</sup> Commission Guidelines on the application of Article 81(3) of the Treaty, paragraph 73.

<sup>442</sup> Commission Guidelines on the application of Article 81(3) of the Treaty, paragraphs 107-108.

<sup>443</sup> ISU's response to the SO of 16.01.2017, page 74.

of any new, potentially innovative competitive events without bringing any improvement to the production or distribution of goods.

- (295) In addition, the ISU argues that for both organisers and skaters the Eligibility rules ensure that events will not clash with major events on the International Skating Calendar. For the reasons explained in recital (243), it is doubtful that protecting the functioning of the ISU international calendar<sup>444</sup> through the Eligibility rules could be seen as a relevant efficiency gain pursuant to Article 101(3) of the Treaty. Generally preventing athletes from participating in unauthorised events, without reference to clear, objective, transparent and non-discriminatory criteria indicating which events in the calendar need to be protected and how protection can be achieved, cannot be seen as indispensable for the good functioning of the ISU calendar. In addition, the Eligibility rules do not make any distinction between events that might endanger the proper functioning of the calendar and events that do not interfere with the calendar. In this case, the potential competitor Icederby planned to organise international speed skating events during the off-season of the ISU. Preventing the organisation of such off-season events cannot serve the proper functioning of the ISU calendar.
- (296) Also the protection of the pyramid structure of the sport and the protection of ISU's role as a sole regulator of the sport as claimed by the ISU<sup>445</sup>, cannot be accepted as an efficiency under Article 101(3) of the Treaty. As discussed in Section 8.5, authorisation criteria were only established in 2015 and those criteria are not objective, transparent non-discriminatory and go further than necessary to protect legitimate aims. For the same reasons, the ISU's pre-authorisation system cannot be considered an efficiency under Article 101(3) of the Treaty.
- (297) With regard to the issue of free-riding, whereby, as alleged by the ISU, third party event organisers would unduly benefit from the costly expenses incurred by the ISU in administering and developing speed skating<sup>446</sup>, the Commission does not consider that putting in place a prior authorisation system that is not underpinned by objective, transparent and non-discriminatory criteria and procedures constitutes any efficiency.
- (298) As for the second condition, the ISU claims that the Eligibility rules allow consumers a fair share of benefits, since spectators receive a guarantee that skating events authorised by the ISU are run in accordance with its rules and principles on integrity, health and safety and that there will be no clashes between events on the International Skating Calendar<sup>447</sup>. However, the Eligibility rules lead to the exclusion of potential competing events (i) on grounds relating to the ISU's economic interests; and (ii) in a way that is neither inherent in the pursuit of legitimate objectives nor proportionate to them, could benefit consumers. On the contrary, due to the Eligibility rules, consumers' choices are limited, since they are deprived of a wider choice of competing events, offered by competitors<sup>448</sup>. In addition, consumers cannot benefit from any innovations (for instance innovative formats of events) which could be potentially brought about by third party competitors.

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<sup>444</sup> Submission of the ISU of 26.09.2014, page 42; submission of the ISU of 12.02.2016, page 1.

<sup>445</sup> Submission of the ISU of 05.02.2016, page 23; and submission of the ISU of 12.02.2016, page 2.

<sup>446</sup> ISU's response to the SO of 16.01.2017, paragraph 94.

<sup>447</sup> ISU's response to the SO of 16.01.2017, page 74.

<sup>448</sup> Submission of Icederby of 03.11.2015, p. 9-10.

(299) As for the third condition, contrary to the claims of the ISU<sup>449</sup>, the Commission finds that the Eligibility rules are not reasonably necessary in order to achieve any possible efficiency. As explained in Section 8.5.2, even if the ISU claimed that the restrictions create efficiencies, the restrictions cannot be considered proportionate, since there would be less restrictive means to achieve the claimed results.

(300) As for the fourth condition, the Commission finds that the competition in the relevant markets is eliminated by the Eligibility rules, since they create an entry barrier for potential competitors by limiting the access to the services of athletes, necessary for the organisation and commercial exploitation of international speed skating events.

#### 8.8.3. *Conclusion on Article 101(3) of the Treaty*

(301) Consequently the Commission concludes that the Eligibility rules do not meet the four cumulative conditions of Article 101(3) of the Treaty.

### **8.9. Conclusion on the application of Article 101 of the Treaty**

(302) The Commission considers that the ISU Eligibility rules constitute a restriction of competition under Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement that cannot be exempted under Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement.

### **8.10. Effect upon trade (between Member States and between the EEA contracting parties)**

#### 8.10.1. *Principles*

(303) Article 101 of the Treaty prohibits anti-competitive agreements between undertakings and decisions of associations of undertakings which may affect trade between Member States. Equally, Article 53 of the EEA Agreement is applicable to agreements and to decisions of associations of undertakings which may affect trade between Contracting Parties to the EEA Agreement.

(304) According to settled case law, the effect on trade criterion consists of three elements<sup>450</sup>.

(305) First, "trade between Member States" must be affected. The concept of trade is not limited to traditional exchanges of goods and services across borders, but covers all cross-border economic activity. In addition, it also encompasses practices affecting the competitive structure of the internal market by eliminating or threatening to eliminate a competitor operating within the Union territory<sup>451</sup>.

(306) Second, a practice must be capable of having an effect on trade between Member States<sup>452</sup>. According to settled case law, this notion implies that it must be foreseeable with a sufficient degree of probability on the basis of a set of objective

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<sup>449</sup> ISU's response to the SO of 16.01.2017, pages 74-75.

<sup>450</sup> See Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty ('Guidelines on the effect on trade concept'), OJ C 101 of 27.4.2004, page 81, paragraphs 18, 19-22, 23-43 and 44-57.

<sup>451</sup> Joined Cases 6 and 7/73 *Commercial Solvents*, ECLI:EU:C:1974:18, paragraphs 32-33 and Joined cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge and others v Commission*, ECLI:EU:T:1996:139, paragraph 203.

<sup>452</sup> Case 322/81 *Michelin v Commission*, ECLI:EU:C:1983:313, paragraph 104; Case C-41/90 *Höfner and Elser v Macrotron*, ECLI:EU:C:1991:161, paragraph 32; and Case T-228/97 *Irish Sugar v Commission*, ECLI:EU:T:1999:246, paragraph 170.

factors of law or fact that the practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States<sup>453</sup>.

- (307) Third, the effect on trade between Member States must be "appreciable". This is assessed primarily with reference to the position of an undertaking on a relevant product market<sup>454</sup>. The stronger the position of an undertaking, the more likely it is that the effect on trade between Member States of a practice will be appreciable.
- (308) The Court of Justice has clarified that it follows from well-established case law that the interpretation and application of the condition relating to effects on trade between Member States contained in Article 101 of the Treaty must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Union law and the law of the Member States.<sup>455</sup>
- (309) Thus, Union law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the internal market<sup>456</sup>.

#### 8.10.2. *Application to the case*

- (310) The Commission concludes that the Eligibility rules have an effect on trade between Member States and between EEA Contracting Parties within the meaning of Article 101(1) of the Treaty and Article 53 of the EEA Agreement.
- (311) First, the Eligibility rules apply world-wide and are implemented in every country where the ISU is present through its Members. Similarly, the ISU's decisions applying the Eligibility rules have the potential to eliminate competitors and to limit the commercial freedom of skaters in the world-wide market.
- (312) Second, the Eligibility rules have as their object and effect the exclusion of potential competitors – organisers of international speed skating events – that would be active within the EEA. Similarly, the decision of the ISU limits the commercial freedom of the athletes who – in the absence of the Eligibility rules – would provide their services to third-party organisers of international speed skating events within the EEA.
- (313) Third, due to the regulatory powers of the ISU as the sole governing body for international speed skating set out in Section 7, the Eligibility rules are capable of having a significant effect on trade between Member States and between EEA Contracting Parties.
- (314) The conclusions in recitals (310) to (313) are not called into question by the ISU's argument that the Eligibility rules have no appreciable effect on trade because Icederby's 2014 Grand Prix was planned in Dubai, other events were planned by

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<sup>453</sup> Case 5/69 *Franz Völk v Établissements J. Vervaecke*, ECLI:EU:C:1969:35, paragraph 5/7.

<sup>454</sup> Case 5/69 *Franz Völk v Établissements J. Vervaecke*, ECLI:EU:C:1969:35, paragraph 5/7.

<sup>455</sup> Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission of the European Communities*, ECLI:EU:C:1979:138, paragraph 17.

<sup>456</sup> Case 22/78 *Hugin v Commission* ECLI:EU:C:1979:138 paragraph 17; Case C-475/99 *Ambulanz Glöckner* ECLI:EU:C:2001:577, paragraph 47; Case C-407/04 *P Dalmine v Commission* ECLI:EU:C:2007:53, paragraph 89.

Icederby in non-EEA territories and the only EEA territory mentioned by Icederby is the Netherlands. As indicated in recital (207), the Eligibility rules apply to all athletes irrespective of their nationality. Since international speed skating competitions involve athletes from various countries, the rules have an effect on trade within the EEA because they restrict the athletes' ability to provide their services cross-border, as well as potential third party organisers' ability to organise international speed skating events in various territories across the EEA.

#### **8.11. Priority assessment by the Commission**

- (315) In its response to the SO, the ISU alleges that in October 2014 the Commission had informed the ISU that the case was not a priority and that it welcomed further clarifications made by the ISU, including the proposed new scale of sanctions. However, contrary to the ISU's alleged expectation that the case would be closed, the ISU was informed on 5 October 2015 that the Commission would open a formal investigation without having had the opportunity to address new or additional concerns. The ISU considers that the Commission's way of proceeding infringed its right to a fair trial and the principles of good administration<sup>457</sup>.
- (316) The Commission notes that the internal notes in the case file that have been prepared in relation to the meetings held with the ISU and its external counsel<sup>458</sup> do not include any reference to any discussions about the priority status of the case. The Commission also notes that ISU has not questioned the content of these notes which were made accessible to ISU as part of its access to the file. The only alleged evidence of such an assurance by the case team to the ISU's counsel is an email from the ISU's external counsel to the ISU that was not shared with the Commission as the ISU claims legal professional privilege in respect of this document<sup>459</sup>. Therefore, the Commission rejects the ISU's allegation that the case team would have ever provided any assurance that the case was not a priority case.
- (317) In any event, a decision on the priority status of the case is an internal decision of the Commission which does not create any legitimate expectation or any other legal rights for the party concerned. The Commission is free to change its internal views on the priority of a case at any time without consulting the party concerned. Moreover, any information from the case team that the case was not a priority for the Commission would also not have represented a breach of (i) the ISU's right to be heard which requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty<sup>460</sup>; or of (ii) the principles of good administration since the preliminary concerns of the case team were made known to the ISU's external counsel at an early stage of the investigation as indicated by the notes prepared by the case team following the meetings held with the ISU or its external counsel and the ISU has been able to effectively exercise its right to be heard throughout the administrative procedure (see also recital (280) above).

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<sup>457</sup> ISU's response to the SO of 16.01.2017, pages 86-88.

<sup>458</sup> Notes of the meeting held with the ISU's external counsel on 16.10.2014.

<sup>459</sup> ISU's response to the SO of 16.01.2017, footnote 276.

<sup>460</sup> ISU's response to the SO of 16.01.2017, pages 86, footnote 280 and case law cited therein.



## **9. THE RELATIONSHIP BETWEEN THE TREATY AND THE EEA AGREEMENT**

- (318) ISU's conduct described in this Decision covered the whole world, including the entire territory of the EEA (the Union together with Norway, Liechtenstein and Iceland)<sup>461</sup>. The conduct was therefore liable to affect competition in the whole of the internal market and the territory covered by the EEA Agreement.
- (319) Insofar as ISU's conduct affected competition in the internal market and trade between Member States of the European Union, Article 101 of the Treaty is applicable. Article 53 of the EEA Agreement is applicable insofar as the arrangements affected competition in the territory covered by that Agreement and trade between the Contracting Parties to that Agreement.
- (320) References to Article 101 of the Treaty should, where applicable, be understood as also including Article 53 of the EEA Agreement.

## **10. JURISDICTION**

### **10.1. Principles**

- (321) In order to justify the Commission's jurisdiction, it is sufficient that conduct is either implemented in the EEA (implementation test) or is liable to have immediate, substantial and foreseeable effects in the EEA (qualified effects test)<sup>462</sup>.
- (322) The criterion of immediate, substantial and foreseeable effects of conduct in the EEA is satisfied when the conduct in question is capable of having such an effect, there being no need to show actual effects<sup>463</sup>. A relevant factor in conducting this assessment is whether the conduct was intended to produce effects within the internal market<sup>464</sup>.

### **10.2. Application to the case**

- (323) The Commission came to the conclusion that it has jurisdiction to apply Article 101 of the Treaty and Article 53 of the EEA Agreement to ISU's conduct, as described in this Decision.
- (324) First, the ISU's conduct is implemented throughout the world, including the territories of the Contracting Parties to the EEA Agreement<sup>465</sup>. The ISU Eligibility rules are applicable worldwide for skaters of all nationalities, including skaters from the EEA countries.
- (325) Second, the ISU's conduct is also capable of producing immediate, substantial and foreseeable effects because it prevents EEA and non-EEA skaters, like the Complainants, from offering their services to competing organisers of international speed skating events not authorised by the ISU, both inside and outside the EEA. In

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<sup>461</sup> ISU Constitution and General Regulations, Article 1(1) providing that ISU is active worldwide.

<sup>462</sup> Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others v Commission*, ECLI:EU:C:1988:447, paragraphs 11-18; Case T-102/96 *Gencor v Commission* EU:T:1999:65, paragraphs 89-101; Case C-413/14 P *Intel v Commission*, ECLI:EU:C:2017:632, paragraphs 40-65.

<sup>463</sup> Case C-413/14 P *Intel v Commission*, ECLI:EU:C:2017:632, paragraphs 48-53.

<sup>464</sup> Case C-413/14 P *Intel v Commission*, ECLI:EU:C:2017:632, paragraphs 54-58.

<sup>465</sup> ISU Constitution and General Regulations, Article 1(1) providing that ISU is active worldwide.

other words, ISU's conduct is capable of foreclosing potential competing event organisers' access to the services of skaters for events within and outside of the EEA.

- (326) Contrary to the ISU's view<sup>466</sup>, the Commission does not need to show that actual events within the EEA were precluded by the Eligibility rules. It is sufficient to show that the rules were capable of foreclosing competing event organisers in the worldwide market for the organisation and commercial exploitation of international speed skating events. Moreover, the Commission stresses that professional speed skaters who participate in unauthorised events outside of the EEA become ineligible to participate in ISU events in and outside the EEA, thus causing direct effects on competition in the EEA.

## 11. ADDRESSEE

### 11.1. Principles

- (327) Articles 101 of the Treaty and 53 of the EEA Agreement apply to undertakings and associations of undertakings<sup>467</sup>. The notion "undertaking" covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed<sup>468</sup>.

### 11.2. Application to this case

- (328) As set out in recital (7), the ISU is the only international sport federation recognised by the International Olympic Committee as the body administering globally figure skating on ice and speed skating on ice<sup>469</sup>. All international matters are under the sole jurisdiction and control of the ISU<sup>470</sup>. For the reasons set out in Section 8.2.2, the Commission considers that the ISU is an association of undertakings and that its Eligibility rules are a decision of this association.
- (329) The ISU is thus held solely liable for the conduct set out in this Decision.

## 12. DURATION OF THE INFRINGEMENT

- (330) The infringement lasted 19 years until the date of adoption of this decision and is ongoing.
- (331) It is apparent from the facts described in Section 5 that the infringement identified in this Decision lasted at least from June 1998, the date when the respective Eligibility rules were substantially redrafted and adopted by the 1998 ISU Congress<sup>471</sup>. At least from 19 June 1998 onwards, the relevant Eligibility rules contained sanctions on athletes for participation in unauthorised events<sup>472</sup>.

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<sup>466</sup> ISU's response to the SO of 16.01.2017, pages 72-73.

<sup>467</sup> Case C-437/09 *AG2R Prévoyance*, EU:C:2011:112, paragraph 40.

<sup>468</sup> Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission*, EU:C:2005:408, paragraph 112; Case C-222/04 *Cassa di Risparmio di Firenze and Others*, EU:C:2006:8, paragraph 107; and Case C-205/03 P *FENIN v Commission*, EU:C:2006:453, paragraph 25.

<sup>469</sup> ISU Constitution, Article 1(1), and submission of the ISU of 05.02.2016, page 3.

<sup>470</sup> ISU Constitution, Article 1(1).

<sup>471</sup> Submission of the ISU of 08.07.2016, Schedule 1, document 1.2(b), pages 12-14.

<sup>472</sup> Submission of the ISU of 08.07.2016, page 3 and pages 5-6.

- (332) In its response to the SO, the ISU argues that 1998 is an inappropriate cut-off date for the infringement since the reference to the "economic and other interests of the ISU" was added to the Eligibility rules only in 2002<sup>473</sup> as a "secondary" element to the primary purpose of the Eligibility rules themselves. However, the ISU previously noted that the reference to its economic interests was proposed as an amendment to the Eligibility rules at the 2002 Congress in Kyoto by the ISU Council to add "the motives for the need of eligibility rules"<sup>474</sup>. The reason presented by the Council for this amendment is as follows: "Clarification of the need for eligibility rules"<sup>475</sup>. The reference to the ISU's economic interests introduced in 2002 was therefore not an additional, secondary element of the rules but rather a clarification of the rules themselves, which made explicit that the rules as adopted in 1998 had the objective of protecting the ISU's economic and other interests. The ISU's suggestion that the infringement only started in 2002 should therefore be rejected.
- (333) The infringement is still ongoing. While the Eligibility rules have been amended in June 2016 (as explained in Section 5.4.2), they continue to restrict competition on the market for the organisation and commercial exploitation of international speed skating events within the meaning of Article 101 of the Treaty.

### 13. REMEDIES

#### 13.1. Principles

- (334) Article 7(1) of Regulation (EC) No 1/2003 provides that where the Commission finds that there is an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement, it may by decision require the undertaking concerned to bring such an infringement to an end. For that purpose, it may also impose on the undertaking concerned any behavioural or structural remedies which are proportionate to the infringement committed and necessary to effectively bring the infringement to an end.
- (335) It follows that a decision pursuant to Article 7(1) of Regulation (EC) No 1/2003 may include an order to "*do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty*"<sup>476</sup>.
- (336) The requirement that a remedy has to be effective<sup>477</sup> empowers the Commission to enjoin an undertaking to refrain from adopting any measures having the same or an equivalent object or effect as the conduct identified as restricting competition.<sup>478</sup> Any

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<sup>473</sup> ISU's response to the SO of 16.01.2017, page 13 and page 89.

<sup>474</sup> Submission of the ISU of 08.07.2016, page 6.

<sup>475</sup> Submission of the ISU of 08.07.2016, Schedule 2, part 2 final, page 2.

<sup>476</sup> Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, EU:C:1974:18, paragraph 45; Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v Commission*, EU:C:1995:98, paragraph 90.

<sup>477</sup> Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, EU:C:1974:18, paragraph 46.

<sup>478</sup> Case T-83/91, *Tetra Pak v Commission*, EU:T:1994:246 paragraphs 220-21; Case T-65/98, *Van den Bergh Foods*, EU:T:2003:281, paragraph 205.

remedy must also apply in relation to the infringement that has been established<sup>479</sup> and be proportionate to the infringement identified.<sup>480</sup>

- (337) Where there is more than one way of bringing an infringement effectively to an end in conformity with the Treaty, it is for the addressee to choose between those various ways<sup>481</sup>.

### **13.2. Application to this case**

- (338) The ISU is required to bring the infringement established in this Decision effectively to an end and henceforth refrain from any measure that has the same or an equivalent object or effect.

- (339) As there is more than one way of bringing that infringement effectively to an end in conformity with the Treaty, it is for the ISU to choose between these various ways, including for instance the abolishment of its pre-authorisation system and of the sanctions imposed on athletes for participation in unauthorised events<sup>482</sup>. If the ISU were to choose to maintain a pre-authorisation system, it would appear that the ISU can only effectively bring the infringement to an end by substantially changing its Eligibility rules, the Appeals Arbitration rules and the authorisation criteria as currently laid down in Communication No 1974, in the following way.

- (340) First, the ISU should only provide for sanctions and authorisation criteria that are inherent in the pursuit of legitimate objectives. The ISU's financial and economic interests are not considered as legitimate objectives.

- (341) Second, the ISU should provide for objective, transparent and non-discriminatory sanctions and authorisation criteria that do not go beyond what is necessary to achieve legitimate objectives.

- (342) Third, the ISU should provide for an objective, transparent and non-discriminatory procedure for the adoption and effective review of decisions regarding the ineligibility of skaters and for the authorisation of speed skating events.

## **14. PERIODIC PENALTY PAYMENTS**

### **14.1. Principles**

- (343) Pursuant to point (a) of Article 24(1) of Regulation (EC) No 1/2003 and Article 5 of Council Regulation (EC) No 2894/94<sup>483</sup>, the Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the day appointed by the decision, in order to compel them to

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<sup>479</sup> Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, EU:C:1974:18, paragraph 45.

<sup>480</sup> Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v Commission*, EU:C:1995:98, paragraph 93; Case C-119/97 P, *Ufex and Others v Commission*, EU:C:1999:116, paragraph 94.

<sup>481</sup> Case T-69/89, *Radio Telefis Eireann v Commission*, EU:T:1991:39, paragraph 98, upheld on appeal in Joined Cases C-241/91 P and C-242/91 P, EU:C:1995:98, paragraph 91; Case T-Case T-167/08, *Microsoft v Commission*, EU:T:2012:323, paragraph 95.

<sup>482</sup> As indicated in recital (252), there are a number of Olympic sports where international federations have no *ex-ante* control over third party events.

<sup>483</sup> Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area (OJ L 305, 30.11.1994, p. 6).

put an end to the infringement, in accordance with a decision taken pursuant to Article 7 of Regulation (EC) No 1/2003.

#### **14.2. Application to this case**

- (344) The Commission concludes that it is necessary to impose periodic penalty payments pursuant to point (a) of Article 24(1) of Regulation No 1/2003 and Article 5 of Council Regulation (EC) No 2894/94 if the ISU were to fail to implement measures that bring the infringement effectively to an end within 90 days from the date of notification of this Decision.
- (345) In setting the level of the periodic penalty payments, the Commission takes into account the need to impose periodic penalty payments sufficient to ensure compliance by the ISU with this Decision.
- (346) Consequently, if the ISU fails to comply with any of the requirements set out in recitals (338) to (342), the Commission hereby imposes a daily periodic penalty payment of 5% of the ISU's average daily turnover in the business year preceding such a failure to comply.

### **15. FINES**

#### **15.1. Principles**

- (347) Pursuant to Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 101 of the Treaty and Article 53 of the EEA Agreement. Where the Commission decides, exceptionally, not to impose a fine on an undertaking even though that undertaking has infringed the Union competition rules, it must base its decision on objective reasons capable of justifying such a departure from the principles set out in Article 101 of the Treaty<sup>484</sup>.

#### **15.2. Application to this case**

- (348) In the specific context of this Decision, the Commission does not impose a fine on the ISU for the following cumulative reasons: (i) this is the first decision pursuant to Article 7 of Regulation (EC) No 1/2003 adopted by the Commission concerning rules set by sports governing bodies, whereas the specific nature of sport is recognised in Article 165 of the Treaty; (ii) the ISU Eligibility rules have been in place and were publicly known upon their adoption in 1998; and (iii) the ISU is an international sports federation that, besides being involved in commercial activities, acts to promote the sport of speed skating worldwide including by devolving part of its revenues to the development of the sport.

### **16. CONCLUSION**

- (349) In light of the considerations set out in this Decision, the Commission finds that the ISU has infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by adopting and enforcing the decision of association of undertakings to which this Decision relates.

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<sup>484</sup> Case C-499/11 P, *Dow Chemical and Others v Commission*, ECLI:EU:C:2013:482, paragraphs 44-47.

HAS ADOPTED THIS DECISION:

*Article 1*

The International Skating Union has infringed Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area by adopting and enforcing the Eligibility rules, in particular Rules 102 and 103 of the ISU 2014 General Regulations and the ISU 2016 General Regulations, with regard to speed skating. The infringement started in June 1998 and is still ongoing.

*Article 2*

The International Skating Union shall, within 90 days of the date of notification of this Decision, bring to an end the infringement referred to in Article 1 and shall, within that period of time, communicate to the Commission all the measures it has taken for that purpose.

The International Skating Union shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

*Article 3*

The Commission may at its sole discretion and upon reasoned and timely request by the ISU grant an extension of the time limit provided for in the first paragraph of Article 2.

*Article 4*

If the International Skating Union fails to comply with any of the orders set out in Article 2, the Commission hereby imposes a daily penalty on the International Skating Union of 5% of its average daily turnover in the business year preceding such a failure to comply pursuant to Article 24(1) of Regulation (EC) No 1/2003. This penalty will be calculated as from the first day after the infringed order takes effect.

*Article 5*

This Decision is addressed to the International Skating Union, Avenue Juste-Olivier 17, 1006 Lausanne, Switzerland.

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 8.12.2017

*For the Commission*

*Signed*

*Margrethe VESTAGER*

*Member of the Commission*