JUDGMENT OF THE GENERAL COURT (Fourth Chamber, Extended Composition)

16 December 2020 (*)

(Competition – Association of undertakings – Speed skating events – Decision finding an infringement of Article 101 TFEU – Regulations of a sports federation – Balance between competition law and the specific nature of the sport – Sports betting – Court of Arbitration for Sport – Guidelines on the calculation of fines – Scope of territorial application of Article 101 TFEU – Restriction of competition by object – Corrective measures)

In Case T-93/18,

International Skating Union, established in Lausanne (Switzerland), represented by J.-F. Bellis, lawyer,

applicant,

v

European Commission, represented by H. van Vliet, G. Meessen and F. van Schaik, acting as Agents,

defendant,

supported by

Mark Jan Hendrik Tuitert, residing in Hoogmade (Netherlands),

Niels Kerstholt, residing in Zeist (Netherlands),

and

European Elite Athletes Association, established in Amsterdam (Netherlands),

represented by B. Braeken and J. Versteeg, lawyers,

interveners,

APPLICATION under Article 263 TFUE for annulment of Commission Decision C(2017) 8230 final, adopted on 8 December 2017 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT/40208 – International Skating Union's eligibility rules),

THE GENERAL COURT (Fourth Chamber, Extended Composition),

composed of S. Gervasoni, President, L. Madise, P. Nihoul, R. Frendo (Rapporteur) and J. Martín y Pérez de Nanclares, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 12 June 2020,

gives the following

Judgment

I. Background to the dispute

A. The International Skating Union

1 The International Skating Union ('the applicant' or 'the ISU') is the sole international sports federation recognised by the International Olympic Committee ('the IOC') as responsible at worldwide level for regulating and administering figure skating and speed skating on ice.

2 The applicant is composed of national associations that administer figure skating and speed skating on ice at national level ('the members'). The members comprise local skating clubs and associations, in which athletes who practise speed skating or figure skating as an economic activity are individual members.

3 The applicant also carries out a commercial activity in so far as it organises and owns the rights in the most important international speed skating events. International competitions organised by the applicant include, in particular, the European and World long-track and short-track speed skating championships, the Long Track Speed Skating World Cup and the Short Track Speed Skating World Cup. In addition, the Winter Olympic Games speed skating events are organised by the applicant in the form of international competitions.

B. The rules set by the applicant

4 As the body responsible for administering figure skating and speed skating on ice worldwide, the applicant has power, in particular, to determine the rules of affiliation which its members and individual skaters are required to observe.

5 The rules determined by the applicant are set out in its statutes and include its 'constitution' and procedural provisions, its general and special

regulations, its technical rules, the Code of Ethics, the anti-doping rules, the rules on anti-doping procedures and all currently valid communications of the applicant.

6 Among those rules, Rules 102 and 103 of the applicant's general rules ('the eligibility rules') determine the conditions in which skaters may participate in the speed skating and figure skating activities and events that fall within the competence of the applicant. Since 1998 the eligibility rules have provided for a 'comprehensive pre-authorisation system' ('the pre-authorisation system'), according to which skaters may participate only in events authorised by the applicant and/or by its members, which are organised by representatives approved by the applicant and under its rules. For the purposes of the present case, the relevant versions of the eligibility rules are those dating from June 2014 ('the 2014 eligibility rules') and June 2016 ('the 2016 eligibility rules').

7 As regards the 2014 eligibility rules, it is clear from Rule 102(2)(c) and (7) and Rule 103(2), read together, that, if they participated in an event not authorised by the applicant or by one of its members, the professional skaters and the representatives of the applicant would be exposed to a penalty of a lifetime ban from any competition organised by the applicant.

8 According to Rule 102(1)(a)(i), in the 2014 version, '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'.

9 Rule 102(1)(a)(ii) provided as from 2002 that 'the condition of eligibility [was] 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'.

10 In June 2016, the eligibility rules were revised with a view to amending, in particular, the rules relating to the imposition of penalties. Now, under Rule 102(7), penalties in the event of athletes participating in an event under the jurisdiction of the applicant and not authorised by the latter are to be determined in accordance with the seriousness of the infringement. The system provides for a warning in the case of a first infringement, a ban of up to 5 years in the event of negligent participation in non-authorised events, a ban of up to 10 years for deliberate participation in non-authorised events and finally a penalty consisting of a lifetime ban for very serious infringements, in particular, in the event of participation in non-authorised events which jeopardise the integrity and jurisdiction of the ISU.

11 In addition, the reference to the adequate protection of the applicant's economic interests, contained in the 2014 eligibility rules, was removed from the 2016 version. Rule 102(1)(a)(ii) now provides that 'the condition of eligibility [was] made for adequate protection of the ethical values, jurisdiction objectives and other legitimate respective interests' of the applicant, 'which uses its financial revenues for the administration and development of the ISU sport disciplines and for the support and benefit of the ISU members and their skaters'.

12 In addition, it must be noted that, since 30 June 2006, Article 25 of the applicant's constitution ('the arbitration rules') has provided for the possibility for skaters to lodge an appeal against an ineligibility decision solely before the Court of Arbitration for Sport ('the CAS'), established in Lausanne (Switzerland).

13 On 25 October 2015, the applicant published Communication No 1974 entitled 'Open international competitions', which sets out the procedure to be followed in order to obtain authorisation to organise an open international competition in the context of the pre-authorisation system. That procedure is applicable to members and third-party organisers.

14 Communication No 1974 stipulates that all such events must be authorised in advance by the applicant's council and organised in accordance with its rules. As regards the time limit for making a request for authorisation, that communication draws a distinction between members and third-party organisers. Third-party organisers must submit their requests at least six months before the starting date of the event, while that period is reduced to three months for members.

15 In addition, Communication No 1974 sets out a series of general, financial, technical, sporting and ethical requirements, with which an organiser must comply. First, it is apparent from that communication that any request for authorisation must be accompanied by technical and sporting information, such as information relating to the venue and the value of the prizes to be awarded, as well as general and financial information, such as, in particular, business plans, the budget and planned television coverage for the event. Next, in order to comply with the ethical requirements, the organiser and any person cooperating with the organiser are required to submit a declaration confirming that they accept the applicant's Code of Ethics and, in particular, that they undertake not to be involved in any betting activity. Finally, Communication No 1974 provides that the applicant reserves the right to request further information for each of those categories of requirements.

16 More particularly as regards ethical requirements, Article 4(h) of the applicant's Code of Ethics has, since 25 January 2012, contained a provision specifically obliging all who involve themselves with the applicant in any capacity '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'.

17 Communication No 1974 authorises the applicant to accept or reject a request for authorisation, in particular on the basis of the requirements set out in that communication and summarised in paragraph 15 above as well as on the basis of the applicant's fundamental objectives, as defined 'in particular' in Article 3(1) of its constitution. Article 3(1) of the applicant's constitution provides, in essence, that the applicant's objectives are to regulate, govern and promote two ice skating disciplines.

18 In the event that a request is rejected, Communication No 1974 states that the requester may appeal against the applicant's decision before the CAS, having signed an arbitration agreement in accordance with its procedural rules.

19 Moreover, Communication No 1974 stipulates that any organiser is required to pay a solidarity contribution to the applicant, the amount of which is to be determined on a case-by-case basis, for the promotion and development of sports falling within the competence of the applicant at local level.

II. Background to the dispute

A. Administrative procedure

20 On 23 June 2014, the European Commission received a complaint lodged by two of the interveners, Mr Mark Jan Hendrik Tuitert and Mr Niels Kerstholt ('the complainants'), two professional speed skaters, alleging that the 2014 eligibility rules were incompatible with Articles 101 and 102 TFEU. The complainants inter alia maintained that those rules prevented them from taking part in a speed skating event that the Korean company Icederby International Co. Ltd planned to organise in 2014 in Dubai (United Arab Emirates) ('the Dubai Grand Prix'). That event was to involve a new format of races that would take place on a special ice track on which long-track and short-track speed skaters would compete together.

21 On 5 October 2015, the Commission decided to initiate proceedings against the applicant in accordance with Article 2(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18).

22 On 8 January 2016, the applicant informed the Commission that it proposed to make adjustments to the eligibility rules. The adjustments in question were approved by the applicant's congress and came into force on 11 June 2016.

23 On 27 September 2016, the Commission sent a statement of objections to the applicant, which replied on 16 January 2017.

24 On 1 February 2017, a hearing was held in the context of the administrative procedure conducted by the Commission.

25 On 27 April 2017, the applicant submitted a set of commitments in order to address the Commission's competition concerns. However, the Commission considered that those commitments were insufficient for the purpose of resolving the concerns raised within a reasonable time.

26 On 6 October 2017, the Commission sent a letter of facts to the applicant. The applicant replied on 25 October 2017.

27 On 30 October 2017, the applicant submitted a new set of commitments in order to address the Commission's concerns, which the Commission again considered insufficient for the purpose of resolving the concerns raised.

28 On 8 December 2017, the Commission adopted Decision C(2017) 8230 final relating to proceedings under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT. 40208 – International Skating Union's Eligibility rules) ('the contested decision').

B. The contested decision

1. Relevant market

29 The Commission concluded that the relevant market in the present case was the worldwide market for the organisation and commercial exploitation of speed skating ('the relevant market'). However, given the applicant's role as the organiser of the most important speed skating events and the regulator of the discipline, the Commission considered that the eligibility rules would restrict competition even if the market were to be defined more narrowly (recital 115 of the contested decision).

30 The Commission observed that the applicant was able to influence competition on the relevant market because it was the governing body and the only regulator of speed skating and that it had the power to authorise international competitions for that discipline. In addition, the applicant is responsible for organising the most important speed skating events. Its substantial market power is demonstrated by the fact that apart from the applicant and its members, no undertaking has been able to enter the relevant market successfully (recitals 116 à 134 of the contested decision).

2. Application of Article 101(1) TFEU

31 The Commission therefore concluded that the applicant was an association of undertakings and that the eligibility rules constituted a decision by an association of undertakings within the meaning of Article 101(1) TFEU (recitals 147 to 152 of the contested decision).

32 In Section 8.3 of the contested decision, the Commission stated that both the 2014 and 2016 eligibility rules have the object of restricting competition within the meaning of Article 101(1) TFEU. It considered, in essence, that those rules restricted the possibilities for professional speed skaters to take part freely in international events organised by third parties and, therefore, deprived potential organisers of competing events of the services of the athletes which are necessary in order to organise those events. It reached that conclusion after examining the content of those rules, their objectives, the economic and legal context of which they form part and the applicant's subjective intention to exclude third-party organisers (recitals 162 to 188 of the contested decision).

33 The Commission, having concluded that the eligibility rules constituted a restriction of competition by object, considered that there was no need to analyse their effects. However, in Section 8.4 of the contested decision, it set out the reasons why it was able to conclude that those rules also had the effect of restricting competition (recitals 189 to 205 of the contested decision).

34 In Section 8.5 of the contested decision, the Commission considered whether the eligibility rules could fall outside the scope of Article 101 TFEU. In that regard, it observed, in essence, that those rules did not serve only purely legitimate interests, but also corresponded to other interests of the applicant, including its economic interests. In addition, according to the Commission, the consequential effects of the eligibility rules are in part not inherent in the pursuit of legitimate objectives and, in any event, not proportionate to them (recitals 220 and 225 to 266 of the contested decision).

3. Assessment of the arbitration rules

35 In Section 8.7 of the contested decision, the Commission recognised that arbitration was a generally accepted method of resolving disputes and that agreeing to an arbitration clause as such did not constitute a restriction of competition. However, it considered that the arbitration rules reinforced the restrictions of competition caused by the eligibility rules (recital 269 of the contested decision).

36 That conclusion was based, first, on the fact that, in the Commission's view, the arbitration rules made it difficult to obtain effective judicial protection against any ineligibility decisions of the applicant that are contrary to Article 101 TFEU. Secondly, the Commission observed that athletes were required to accept the arbitration rules and the exclusive jurisdiction of the CAS (recitals 270 to 276 of the contested decision).

4. Operative part

37 The Commission therefore concluded, in the operative part of the contested decision, as follows:

‘Article 1

The International Skating Union has infringed Article 101 [TFEU] and Article 53 of the [EEA Agreement] 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 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.’

III. Procedure and forms of order sought

38 By application lodged at the Court Registry on 19 February 2018, the applicant brought the present action.

39 On 17 May 2018, the Commission lodged the defence at the Court Registry.

40 By documents lodged at the Court Registry on 1 June 2018, the European Elite Athletes Association and the complainants applied for leave to intervene in support of the form of order sought by the Commission.

41 The applications for leave to intervene were served on the main parties, which made no objections to them. However, in accordance with Article 144 of the Rules of Procedure of the General Court, they requested that certain confidential information in the case not be communicated to the interveners and, to that end, they produced a non-confidential version of the documents in question.

42 By order of 12 September 2018, the President of the Seventh Chamber allowed the applications to intervene.

43 On 25 March 2019, as the composition of the Chambers of the Court had changed, under Article 27(5) of the Rules of Procedure, the present case was assigned to a new Judge-Rapporteur sitting in the Fifth Chamber, to which the present case was therefore assigned.

44 On 16 October 2019, as the composition of the Chambers of the Court had changed once again, under Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Fourth Chamber, to which the present case was therefore assigned.

45 On 20 December 2019, on a proposal from the Fourth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the present case to a chamber sitting in extended composition.

46 Acting on a proposal from the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure, put written questions to the parties, requesting them to answer those questions at the hearing. In addition, at the invitation of the Court, the applicant submitted a copy of Communication No 1974.

47 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

48 The Commission contends that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

49 The interveners contend that the Court should dismiss the action.

IV. Law

50 In support of its action, the applicant puts forward eight pleas in law. By its first plea, the applicant submits, in essence, that the contested decision is vitiated by contradictory reasoning. By its second and third pleas, the applicant disputes the classification of a restriction of competition by object and by effect applied to the eligibility rules. By its fourth plea, the applicant criticises the Commission’s assessments concerning whether the eligibility rules inherently pursue and are proportionate to the objective of protecting the integrity of speed skating from sports betting. By its fifth plea, it contests the Commission’s taking into consideration of its decision refusing to grant authorisation to organise the Dubai Grand Prix, in so far as that decision does not fall within the territorial scope of Article 101 TFEU. By its sixth plea, the applicant disputes the conclusion that its arbitration rules reinforce

the alleged restriction of competition. By its seventh plea, the applicant claims that the Commission infringed Article 7 of Regulation (EC) No 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), by imposing, in Article 2 of the operative part of the contested decision, corrective measures not linked to the infringement identified. By its eighth plea, it disputes Article 4 of the operative part of the contested decision on the same grounds as invoked in support of the seventh plea as well as on account of the vague and imprecise nature of the remedies.

51 The Commission, supported by the interveners, disputes all of the arguments put forward by the applicant.

A. First plea, alleging that the reasoning of the contested decision is contradictory

52 By its first plea, the applicant maintains that the contested decision is vitiated by illegality in so far as it is based on manifestly contradictory reasoning.

53 According to settled case-law, the obligation to state reasons laid down in the second paragraph of Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (see judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 146 and the case-law cited; judgments of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraphs 114 and 115, and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 44), so that it would be inappropriate for the Court to examine, in considering fulfilment of the obligation to state reasons, the substantive legality of the reasons relied on by the Commission to justify its decision. It follows that, in a plea based on a failure to state reasons or a lack of adequate reasons, objections and arguments which aim to challenge the merits of the contested decision are misplaced and irrelevant (see judgment of 15 June 2005, *Corsica Ferries France* v *Commission*, T-349/03, EU:T:2005:221, paragraphs 58 and 59 and the case-law cited).

54 In the present case, in support of the first plea, the applicant puts forward a series of arguments the true position of which is to call into question the merits of the contested decision. Thus, in accordance with the case-law cited in paragraph 53 above, those arguments must be regarded as irrelevant in the context of the present plea. Therefore, in order to examine the first plea, it is necessary to determine only whether, as the applicant claims, the contested decision is vitiated by contradiction in its grounds.

55 In that regard, the applicant claims in essence that the grounds for the contested decision are vitiated by contradiction in so far as the Commission concluded that the eligibility rules restricted competition as such, without having considered that the pre-authorisation system, which they include, did not inherently pursue legitimate objectives. That contradiction is further highlighted by the fact that the Commission stated that the applicant could put an end to the infringement while retaining its pre-authorisation system.

56 It follows from the case-law that the statement of reasons must be logical and, in particular, contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the contested act (see, to that effect, judgments of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 169, and of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 151).

57 In the present case, the Commission concluded that the eligibility rules as conceived and applied by the applicant on the relevant market restricted competition both by object and effect within the meaning of Article 101 TFEU (see Sections 8.3 to 8.5 of the contested decision).

58 It is apparent from Section 8.5 of the contested decision that the applicant had claimed, during the administrative procedure, that the eligibility rules were not caught by the prohibition in Article 101 TFEU, inter alia, because the pre-authorisation system included in those rules was essential in order to ensure that the organisers of speed skating events conformed to the applicant's standards and objectives.

59 In recital 254 of the contested decision, the Commission considered that, for the purposes of the present case, it did not need to take a view on whether a pre-authorisation system inherently pursued legitimate objectives. However, it put forward several reasons in support of its conclusion that the pre-authorisation system established by the applicant was not proportionate to the objectives it pursued and, therefore, was caught by the prohibition laid down in Article 101 TFEU (see recitals 254 to 258 of the contested decision).

60 In so doing, the Commission applied the case-law to the effect that not every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 101(1) TFEU. In accordance with that case-law, the restrictions arising from a decision by an association of undertakings escapes the prohibition laid down in Article 101 TFEU if they satisfy two cumulative conditions. In the first place, the restriction must be inherent in the pursuit of legitimate objectives and, in the second place, it must be proportionate to those objectives (see, to that effect, judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 42).

61 In the present case, as indicated in paragraph 59 above, the Commission set out several reasons that led it to conclude that the pre-authorisation system did not satisfy the second criterion set out in the case-law cited in paragraph 60 above, that is, the criterion concerning proportionality. Since the criteria in that case-law are cumulative, the Commission was not required to take a view in the contested decision on whether the system in question inherently pursued legitimate objectives and did not, accordingly, vitiate its decision on account of a contradiction.

62 It is true that the Commission acknowledged, in recital 339 of the contested decision that it would be possible for the applicant to bring an end to the infringement found while retaining a pre-authorisation system. However, that finding is not contrary to the conclusion that the eligibility rules restrict competition, in so far as any acceptance by the Commission of such a system is clearly subject to the condition that 'substantial' changes be made to bring an end to the infringement, that is, changes which aim to counteract the disproportionate nature of that system. It follows that, contrary to what the applicant submits, the Commission did not approve the retention of the applicant's pre-authorisation system as it was designed and, in that regard, nor did it vitiate the reasoning for its decision on account of a contradiction.

63 Consequently, the first plea must be rejected.

B. The second, third and fourth pleas, alleging that the eligibility rules do not restrict competition by object and effect and fall outside the scope of application of Article 101 TFEU

64 By its second, third and fourth pleas, the applicant disputes, first, the assessments made by the Commission concerning the existence of a restriction of

competition and, secondly, its conclusion that the eligibility rules are caught by the prohibition laid down in Article 101 TFEU. The Court considers it appropriate to examine those pleas together.

65 To be caught by the prohibition laid down in Article 101(1) TFEU, a decision by an association of undertakings must have 'as [its] object or effect' the prevention, restriction or distortion of competition in the internal market. According to the settled case-law of the Court of Justice since the judgment of 30 June 1966, *LTM* (56/65, EU:C:1966:38), the alternative nature of that requirement, as shown by the conjunction 'or', means that it is first necessary to consider the precise object of the decision by the association of undertakings (see, to that effect, judgments of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 16, and of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 24).

66 The concept of restriction of competition by object can be applied only to certain types of coordination between undertakings that reveal, by their very nature, a sufficient degree of harm to the proper functioning of normal competition that it may be found that there is no need to examine their effects (see, to that effect, judgments of 30 June 1966, *LTM*, 56/65, EU:C:1966:38, p. 249; of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 49, 50 and 58 and the case-law cited, and of 16 July 2015, *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 31).

67 According to the Court of Justice's case-law, in order to determine whether an agreement between undertakings reveals a sufficient degree of harm that it may be considered a restriction of competition by object within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part (see judgment of 16 July 2015, *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 33, and the case-law cited).

68 Accordingly, in the present case, it is necessary to examine the eligibility rules, in the light of their alleged objectives and their specific context, comprising in particular the power of sports federations to give authorisation, for the purpose of ascertaining whether the Commission was fully entitled to classify the eligibility rules as restricting competition by object.

1. The obligations imposed on a sports federation which has a power of authorisation

69 The applicant argues that the case-law arising from the judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraphs 51 and 52), cited in the footnote on page 267 of the contested decision, is not applicable in the present case, in so far as that case-law concerns the application of Articles 102 and 106 TFEU and not that of Article 101 TFEU as in the present case.

70 In that regard, it must be noted that, according to that case-law, when a rule entrusts a legal person, which itself, organises and commercially operates competitions, with the task of designating the persons authorised to organise those competitions and to determine the conditions under which they are organised, it grants that entity an obvious advantage over its competitors. Such a right may therefore lead the undertaking making use of it to prevent access by other operators to the market concerned. The exercise of that regulatory function should therefore be made subject to restrictions, obligations and review, so that the legal person entrusted with giving that consent may not distort competition by favouring events which it organises or those in whose organisation it participates (see, to that effect, judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 51 and 52).

71 It must be held that it follows from the judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, EU:C:2013:127, paragraphs 88 and 92), that the Court of Justice applied that case-law by analogy in a case concerning the application of Article 101 TFEU to the rules adopted by an association of undertakings which was both an operator in and the regulator of the relevant market as in the present case. Accordingly, the applicant's argument that the case-law cited in paragraph 70 above is solely applicable in a case concerning the application of Articles 102 and 106 TFEU must be rejected.

72 Furthermore, according to the applicant, the judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, EU:C:2013:127, paragraphs 88 and 92) does not justify the application of the case-law cited in paragraph 70 in the present case, since, in that judgment, the Court of Justice applied that case-law in the context of an analysis of a restriction by effect and not of a restriction by object as in the present case. It follows from the case-law that an agreement may restrict competition by object in a particular context, whereas, in other contexts, an analysis of the effects of the agreement would be necessary (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 84). It follows that the fact that the Court of Justice classified the rules of the Association of Chartered Certified Accountants as a restriction by effect does not prevent the case-law cited in paragraph 70 above from being applied in the case of an analysis of a restriction by object.

73 In the present case, as is clear from paragraph 4 above, the applicant has the power to lay down rules in the disciplines for which it has jurisdiction. While it is true that that regulatory function was not delegated to it by a public authority as in the cases giving rise to the judgments cited in paragraphs 70 and 71 above, the fact remains that it exercises, as the sole international sports federation recognised by the IOC for the disciplines in question, a regulatory activity (see, to that effect, judgment of 26 January 2005, *Piau* v *Commission*, T-193/02, EU:T:2005:22, paragraph 78).

74 In addition, it is apparent from recitals 38 to 41 of the contested decision, which moreover are not disputed by the applicant, that speed skating provides very limited income opportunities for the great majority of professional skaters. Moreover, as the Commission noted in recital 172 of the contested decision, again without being contradicted by the applicant, the latter organises or controls the organisation of the most important speed skating events in which skaters who practise that discipline must take part in order to make their living. It must be noted that the eligibility rules laid down in the exercise of the applicant's regulatory function provide for ineligibility penalties in the event that skaters take part in an unauthorised competition. Since skaters cannot miss the opportunity to take part in more important events organised by the applicant, it follows that third party organisers that intend to organise a speed skating event must obtain prior authorisation from the applicant if they wish skaters to take part.

75 Therefore, having regard to the fact that the applicant organises events and also has the power to authorise events organised by third parties, it must be held that that situation is capable of giving rise to a conflict of interests. In those circumstances, it follows from the case-law cited in paragraphs 70 and 71 above that the applicant must ensure, when examining applications for authorisation, that those third parties are not unduly deprived of market access to the point that competition on that market is distorted.

76 Consequently, it is necessary to examine the applicant's arguments disputing the Commission's assessment of the scope and objectives of the eligibility rules taking into account the fact that, in the exercise of its regulatory function, the applicant is required to comply with the obligations arising from the case-law cited in paragraphs 70 and 71 above.

2. The content and objectives of the eligibility rules

77 According to settled case-law, the compatibility of a rule with the rules of EU competition law cannot be assessed in the abstract. Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them is necessarily caught by the prohibition laid down in Article 101(1) TFEU. For the purposes of applying that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings in question was taken or produces its effects, and, more specifically, of its objectives. Next, it is necessary to examine whether the restrictions arising therefrom are inherent in the pursuit of legitimate objectives and are proportionate to those objectives (see, to that effect, judgments of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 97, and of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 42).

78 As regards the objectives that may be pursued, it should be recalled that the second subparagraph of Article 165(1) TFEU provides that the European Union is to 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. Under paragraph 2 of that article EU action in that field is aimed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and ethical integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

79 Accordingly, in the context of the analysis of possible justifications for restrictions in the field of sport, it is necessary to take into consideration the specific characteristics of sport in general and its social and educational function (see, to that effect and by analogy, judgment of 16 March 2010, *Olympique Lyonnais*, C-325/08, EU:C:2010:143, paragraph 40).

80 In the present case, the applicant disputes the assessments made by the Commission concerning the content and objectives of the eligibility rules. In particular, it maintains that the eligibility rules pursue the legitimate objective of protecting the integrity of speed skating from the risks associated with betting.

(a) The content of the eligibility rules

81 The applicant disputes the examination of the content of the eligibility rules and Communication No 1974. In the first place, it claims that those rules could restrict competition by object only if they prohibited skaters entirely from taking part in events organised by third parties, which is not so in the present case.

82 That argument must be rejected at the outset, since it amounts to acknowledging that the classification of conduct constituting a restriction by object relies on the elimination of all competition on the relevant market. It should be noted that the classification of a restriction of competition by object is not reserved for decisions by associations of undertakings which eliminate all competition. It follows from the case-law that that classification is applicable to any decision by an association of undertakings which reveals in itself a sufficient degree of harm to the proper functioning of competition taking into account its content, the objectives pursued and the context in which it takes place (see, to that effect, judgments of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 117).

83 In the second place, the applicant claims that none of the evidence taken into consideration by the Commission permits the conclusion that the eligibility rules have as their object the restriction of competition. According to the applicant, the Commission took into consideration four factors in classifying the eligibility rules as a restriction of competition by object, that is, the lack of a direct link with legitimate objectives, the severity of the penalties, the reference to the protection of the applicant's economic interests and the lack of a link with an event or a series of events organised by the applicant.

(1) The lack of a direct link with legitimate objectives

84 The applicant argues that the finding that the eligibility rules have no direct link with legitimate objectives has no basis.

85 In the first place, it must be held that the eligibility rules do not explicitly state the legitimate objectives that they pursue. It is true that, as the applicant maintains, Rule 102 has referred since 1998 to 'the principles and policies [of the applicant], as expressed in [its statutes]', and provides, following the 2016 amendment that 'the condition of eligibility is made for adequate protection of the ethical values … of the ISU'. However, whereas 'the ethical values' may derive from the applicant's Code of Ethics, the 'principles and policies' have not been explicitly defined or listed in the applicant's statutes or rules. Accordingly, those vague expressions do not in themselves make it possible to clearly identify the legitimate objectives pursued by those rules.

86 In the second place, it should be noted that, since 1998 and up to the publication of Communication No 1974 on 20 October 2015, the eligibility rules did not provide for any authorisation criterion for competition that third parties sought to organise as open international competitions. It follows that, before the publication of that communication, the regulatory framework of the applicant lacked content concerning the criteria for authorising events, so that the applicant had full discretion to refuse to authorise events that third parties planned to organise.

87 That discretionary power was not significantly amended with the publication of Communication No 1974, which supplemented the content of the eligibility rules. Although that communication lists a certain number of requirements of a general, technical, sporting and ethical nature, the fact remains that those requirements are not exhaustive, since that communication provides, in addition, that the applicant will accept or reject an application for authorisation, taking into account 'in particular' requirements that it determines, which entitles it to accept or refuse an application for authorisation on grounds other than those expressly set out as requirements established by that communication. Moreover, as indicated in paragraph 15 above, it is clear from the content of Communication No 1974 that the applicant reserves the right to request from organisers additional information linked to the abovementioned various requirements.

88 Therefore, it must be held that all the requirements of Communication No 1974 are not authorisation criteria that are clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring the organisers of events effective access to the relevant market (see, to that effect and by analogy, judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 99).

89 It follows from those considerations that, since 1998 and even until after the adoption of Communication No 1974, the applicant had broad discretion to refuse to authorise events proposed by third parties, including for reasons not explicitly provided for, which could lead to the adoption of refusal decisions on grounds which are not legitimate. In those circumstances, the Commission was fully entitled to find, in recitals 163 and 185 of the contested decision, that the eligibility rules, by their content, had no direct link to the legitimate objectives invoked by the applicant during the

administrative procedure.

(2) The severity of the penalties

90 The applicant claims that the severity of the penalties is not a relevant factor when determining whether the content of its pre-authorisation system has the object of restricting competition.

91 The Court of Justice has previously held that the repressive nature of rules and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition, since they could, if the penalties are not limited to what is necessary to ensure the proper conduct of the sporting competition and if they were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the sporting activity at issue is engaged in (see, to that effect, judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 47).

92 In the present case, according to the eligibility rules, skaters who participate in events not authorised by the applicant or one of its members incur a penalty. As is clear from paragraph 7 above, until their amendment in 2016, the eligibility rules provided for a single and extremely severe penalty consisting of a lifetime ban which applied in all cases, irrespective of whether the matter concerned a first or repeated infringement. It follows that the restrictions arising from the 2014 eligibility rules were manifestly disproportionate with regard to the objective of the protection of the integrity of skating.

93 It is true that, as is apparent from paragraph 10 above, in 2016, the system of penalties was relaxed in so far as it no longer provides for a single penalty of a lifetime ban for all infringements. However, it must be noted that the average length of a skater's career is eight years – a fact that the applicant moreover does not dispute. It must therefore be held that the penalties set out in the 2016 eligibility rules, even those with a fixed time limit of 5 to 10 years continue to be disproportionate in so far as they apply, inter alia, to participation in unauthorised third-party events.

94 Furthermore, the 2016 eligibility rules do not precisely set out the conditions that allow the dividing line between different categories of infringements to be determined. In particular, they do not clearly distinguish infringements deemed to be 'very serious' from those which are not. It follows that the system of penalties is unpredictable and thus presents a risk of arbitrary application which leads to those penalties having an excessive deterrent effect.

95 In those circumstances, contrary to what the applicant claims, the severity of the penalties provided for in the eligibility rules constitutes a particularly relevant factor in analysing their content. That severity may dissuade athletes from participating in events not authorised by the applicant, even where there are no legitimate objectives that can justify such a refusal, and, consequently, is likely to prevent market access to potential competitors who are deprived of the participation of athletes that is necessary in order to organise their sporting event.

(3) The absence of a link between the eligibility rules and an event or series of events of the applicant

96 The applicant argues that the fact that the eligibility rules have no link with an event or series of events organised by it is irrelevant in the context of the analysis of a restriction by object.

97 It is apparent from recitals 166 and 243 of the contested decision, read together, that the Commission criticises the fact that the eligibility rules do not subject the imposition of a penalty to the fact that the unauthorised event in which the athletes in question were to have participated coincided with one of the applicant's events. That finding is no more, in reality, than an example of the lack of a direct link with the legitimate objectives invoked by the applicant during the administrative procedure and reveals the broad, or excessive scope, of the eligibility rules. Those rules allow the applicant to impose ineligibility penalties on athletes if they take part in unauthorised events, even if the applicant's schedule does not include any event at the same time and even if the athletes in question cannot, for any reason, take part in events organised by the applicant. Accordingly, the applicant's complaint that the finding made in recitals 166 and 243 is irrelevant must be rejected.

98 The arguments relating to the reference to the protection of the applicant's economic interests are examined in paragraphs 106 to 111 below in the context of the analysis of the objectives of the eligibility rules.

(b) The objectives pursued by the eligibility rules

99 The complaints raised by the applicant concerning the Commission's examination of the objectives of the eligibility rules may be divided into two parts. First, by its fourth plea, it disputes the conclusion that the eligibility rules are not justified by the legitimate objective of protecting the integrity of speed skating from the risks associated with betting. Secondly, in the context of its second plea, the applicant claims that, by relying on the reference to the protection of economic interests contained in the 2014 eligibility rules to support the conclusion that they seek to exclude organisers of competing events, the Commission made a superficial analysis of the objectives pursued.

(1) The first part, based on the objective pursued by the eligibility rules of protecting the integrity of speed skating from the risks associated with betting

100 It should be noted that, during the administrative procedure, the applicant claimed that the eligibility rules pursued several objectives particular to the specific characteristics of the sport. In the context of the present proceedings, although the applicant has relied on several legitimate objectives, it has put forward detailed arguments only in support of the legitimate objective of protecting the integrity of skating from betting.

101 In that regard, it must be noted that the Court of Justice has previously recognised that the protection of the integrity of the sport constitutes a legitimate objective (judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 43). However, the pursuit of legitimate objectives cannot in itself suffice to preclude a finding of restriction of competition by object if the means used to attain them are contrary to the provisions of Article 101 TFEU (see, to that effect, judgments of 6 April 2006, *General Motors* v *Commission*, C-551/03 P, EU:C:2006:229, paragraph 64 and the case-law cited, and of 20 November 2008, *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 21). It is appropriate in particular to examine whether the restrictions in question are inherent in the pursuit of those objectives and proportionate to those objectives (see, to that effect, judgments of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 97, and of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 42).

102 In the present case, it may be considered that it was legitimate for the applicant to establish rules seeking to prevent sports betting from creating risks

of manipulation of competitions and athletes, in accordance with the recommendations of the IOC of 24 June 2010 entitled 'Sports betting: A challenge to be faced' and the Convention on the Manipulation of Sports Competitions adopted by the Council of Europe in 2014.

103 However, even if the restrictions arising from the pre-authorisation system established in the present case are inherent in the pursuit of that legitimate objective of protecting the integrity of speed skating from the risks associated with betting, the fact remains that, in particular for the reasons set out in paragraphs 92 to 95 above, they go beyond what is necessary to achieve such an objective within the meaning of the case-law cited in paragraph 77 above.

104 Accordingly, the applicant's argument that the restrictions arising from the eligibility rules are justified by the objective of protecting the integrity of speed skating from the risks associated with betting must be rejected.

(2) The second part, criticising the Commission's reliance on the objective of protecting the applicant's economic interests

105 In the first place, the applicant criticises the use made by the Commission of the reference to the protection of its economic interests contained in the 2014 eligibility rules in support of the conclusion that they had as their object the protection of its economic interests. The applicant submits, in particular, that the Commission relied incorrectly on the reference to the economic interests contained in the 2014 version of the eligibility rules in concluding that those rules sought to exclude any organiser of competing events that could potentially affect its economic interests, whereas it is clear from the circumstances in which those rules were drawn up that they sought to ensure the conformity of all events under the applicant's jurisdiction with common standards.

106 As the Commission found in recitals 164 and 165 of the contested decision, Rule 102(1)(a)(ii) provided, as from 2002 until its amendment in 2016 that the eligibility condition was made for 'the adequate protection of the economic and other interests of the ISU'. In addition, it is apparent from the case file that that wording was introduced in 2002 to 'clarify the reasons for the eligibility rule'. It follows that the objective of protecting the economic interests preceded the amendment made in 2002, since it was merely explained by the latter. Accordingly the Commission was entitled, without making any error of assessment, to conclude that that objective existed from the start of the infringing period in 1998 until 2016.

107 By contrast, the Commission was wrong to consider, in recital 187 of the contested decision that, despite the removal of the reference to economic interests in the 2016 version of the eligibility rules, it was apparent from the content of that version that those rules continued to seek to protect the applicant's economic interests. The mere fact that Rule 102(1)(a)(ii) in the 2016 version links the words 'other legitimate interests of the applicant' to the use of the applicant's revenues does not permit the view that, since 2016, the eligibility rules have effectively and as a priority pursued the protection of the applicant's economic interests. However, that error on the Commission's part is not capable of calling into question the analysis of legitimate objectives in the contested decision.

108 In that regard, it must be noted that it is legitimate to consider, as the applicant submits (see paragraph 105 above), that, given the specific nature of the sports, it is necessary to ensure that sporting competitions comply with common standards, seeking in particular to ensure that competitions take place fairly and the physical and ethical integrity of sportspeople is protected. The applicant was also reasonably entitled to consider that a pre-authorisation system, intended to ensure that any organiser respect such standards, was a suitable mechanism to achieve that objective.

109 In addition, even if it were established that the 2016 eligibility rules also pursue an objective of protecting the applicant's economic interests, it should be noted that the fact that a federation seeks to protect its own economic interests is not in itself anticompetitive. As the Commission acknowledged at the hearing, the pursuit of economic objectives is an inherent feature of any undertaking, including a sports federation when it carries out an economic activity.

110 However, as the Commission rightly pointed out in recitals 255 to 258 of the contested decision, the pre-authorisation system as designed by the applicant in the present case goes beyond what is necessary to pursue the objective of ensuring that sporting competitions comply with common standards. First, Communication No 1974 imposes certain obligations on third-party organisers to disclose information of a financial nature which goes beyond what is necessary to achieve the stated objective. In that regard, it should be noted that, although disclosure of a planned budget could be justified by the need to ensure that a third-party organiser is in a position to organise a competition, the applicant has not adduced any evidence to show that disclosure of the business plan as a whole is necessary in order to achieve such an objective. Secondly, the applicant has not provided any justification as to why the pre-authorisation system as formalised in Communication No 1974 provides for a longer and more restrictive time limit for the submission of a request for authorisation in the case of an event organised by a third party (see paragraph 14 above). Thirdly, the requirements laid down by Communication No 1974 are not exhaustive and leave the applicant broad discretion to accept or reject an application for an open international competition. Fourthly, Communication No 1974 does not provide for specific time limits for dealing with requests for authorisation, which could also give rise to arbitrary treatment of such requests.

111 It follows that, even though the Commission wrongly relied on the objective of protecting the applicant's economic interests as regards the 2016 eligibility rules, it was right to find that the pre-authorisation system was disproportionate, in particular in the light of the alleged other objective pursued by the eligibility rules, that all events should comply with common standards.

112 In the second place, the applicant criticises the Commission for considering that it could use its own revenues to support events organised by its members where it would not make its funds available to third parties, in order to then conclude that the 2016 eligibility rules continued to seek protection of the applicant's economic interests. According to the applicant, it is apparent that the Commission would have it finance events organised by third parties.

113 However, in recitals 187 and 220 of the contested decision, the Commission merely observed that the applicant may not use resources from a solidarity contribution also paid by third parties to finance its own events and those of its members, when it did not confer that same benefit on third-party organisers.

114 It is true, as the applicant submits, that a sports federation with limited revenue may legitimately rely on the right to use the solidarity contribution in order to finance events which, in its view, merit such financing, and to deprive others of it. However, in view of its role as an organiser of events and holder of the power to authorise events organised by third parties, the applicant is required to ensure undistorted competition between economic operators within the meaning of the case-law cited in paragraphs 72 and 73 above. It follows that, as the Commission rightly considered, the applicant cannot make the authorisation of events organised by third parties subject to payment of a solidarity contribution which is used to finance only its own

events and those of its members. Accordingly, the argument that the Commission required the applicant to finance events organised by third parties must be rejected, since the applicant has not made any other criticisms of recitals 187 and 220 of the contested decision concerning the solidarity contribution.

3. Other aspects of the context of the eligibility rules

115 The applicant claims that the Commission did not carry out a serious analysis of the relevant market in the light of its context. In particular, it submits that the Commission wrongly refused to take into consideration the figure skating events that it had approved.

116 However, figure skating events do not form part of the relevant market as defined by the Commission, namely the global market for the organisation and commercial exploitation of speed skating, a definition which the applicant does not dispute.

117 It is true that, the Court of Justice has held that, when analysing a restriction by object, it is necessary to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the actual conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market (judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 78). However, in the case giving rise to that case-law there were interactions between the relevant market and a different related market, which has not been established in the present case. The mere fact that the applicant also has jurisdiction in respect of figure skating and that the same rules apply to both disciplines is not sufficient to demonstrate such interactions. Accordingly, the Commission was not required to take into consideration the events authorised by the applicant in a market different from the relevant market.

118 Furthermore, as stated in paragraphs 86 to 89 above, both before and after the publication of Communication No 1974, the eligibility rules did not provide the exercise of the applicant's regulatory function with the necessary safeguards to ensure that third parties had effective access to the relevant market. Given the absence of objective, transparent, non-discriminatory and verifiable authorisation criteria, the applicant's broad discretion to authorise or reject such events was in no way limited.

119 It follows that the fact that the applicant was able to approve figure skating events, even if they were genuine independent events, is irrelevant to the analysis of the context of the eligibility rules because it does not call into question the conclusion that the applicant's pre-authorisation system allows it to distort competition on the relevant market by favouring its own events to the detriment of events offered by third parties and that, therefore, those rules do not ensure effective access to that market.

120 In the light of all the foregoing considerations, the Commission was right to conclude that the eligibility rules have as their object the restriction of competition. In the light of their content and their objectives, and of the context of the eligibility rules, those rules reveal a sufficient degree of harm to be regarded as restricting competition by object within the meaning of Article 101 TFEU.

121 Since the existence of a restriction of competition by object is sufficiently substantiated by the examination of the content and objectives of the eligibility rules and of their context, there is no need to rule on the applicant's arguments concerning the Commission's conclusions relating to its intention to exclude organisers. Since the intention is not a necessary factor in determining whether a decision by an association of undertakings is restrictive by object (see, to that effect, judgment of 6 April 2006, *General Motors* v *Commission*, C-551/03 P, EU:C:2006:229, paragraph 77), the arguments put forward by the applicant against that part of the examination of restriction by object are ineffective.

122 The applicant's second and fourth pleas must therefore be rejected.

123 Since the Commission has established correctly the existence of a restriction of competition by object, it is not necessary to examine its effects on competition (judgments of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 17, and of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 25). Accordingly, it is not necessary to examine the merits of the third plea raised by the applicant, alleging that the Commission wrongly concluded that the eligibility rules have the effect of restricting competition.

C. Fifth plea, alleging that the decision relating to the 2014 Dubai Grand Prix does not fall within the territorial scope of Article 101 TFEU

124 The applicant claims that the decision not to approve the Dubai Grand Prix does not fall within the territorial scope of Article 101 TFEU, since that event was to take place outside the territory of the European Economic Area (EEA).

125 As a preliminary point, it should be recalled that, according to the case-law, the Commission's competence under public international law to find and punish conduct adopted outside the European Union may be established on the basis of either the implementation test or the qualified effects test (judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 40 and 47). By virtue of the implementation test, the Commission's competence is justified by the place where the alleged conduct was carried out (judgment of 31 March 1993, *Ahlström Osakeyhtiö and Others* v *Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 16). In accordance with the qualified effects test, the Commission may also justify its competence where the conduct is capable of producing immediate, substantial and foreseeable effects on the territory of the European Union (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 48 to 53).

126 In the present case, the Commission concluded, in Article 1 of the operative part of the contested decision, that the applicant had 'infringed Article 101 [TFEU] … by adopting and enforcing the eligibility rules …'. That conclusion must be read in the light of the grounds of the contested decision.

127 In that regard, although it is true that the contested decision on several occasions criticises the decision adopted by the applicant on the occasion of the Dubai Grand Prix, the fact remains that it is not directed at the refusal decision in respect of that Grand Prix as such. The Commission used the applicant's refusal to approve the Dubai Grand Prix merely to illustrate the way in which it applies the eligibility rules in practice (see, inter alia, recitals 175, 176, 199 to 205, 232 to 235 and 243 of the contested decision).

128 Therefore, in so far as the contested decision concerns the eligibility rules and not the Dubai Grand Prix, the relevant question is not whether that event would have taken place within or outside the territory of the EEA, but whether the Commission was entitled, in accordance with the case-law cited in paragraph 125 above, to rule on the compatibility of the eligibility rules with Article 101 TFEU.

129 In that regard, it must be held that, in view in particular of the severe and disproportionate penalties provided for in the event of the participation of skaters in events not authorised by the applicant and the absence of objective, transparent, non-discriminatory and verifiable authorisation criteria, the applicant's eligibility rules prevent skaters from offering their services to organisers of international speed skating events not authorised by the applicant and, therefore, prevent those organisers from using their services for competing events within or outside the EEA. Consequently, the eligibility rules are capable of producing immediate, substantial and foreseeable effects in the territory of the European Union within the meaning of the case-law referred to in paragraph 125 above. Accordingly, the Commission was entitled in the present case to adopt the contested decision and that decision was not adopted in breach of the territorial scope of Article 101 TFEU.

130 It follows that the fifth plea must be rejected as unfounded.

D. Sixth plea, disputing the conclusion that the applicant's arbitration rules reinforce the restrictions of competition

131 By its sixth plea, the applicant claims that the conclusion in Section 8.7 of the contested decision that its arbitration rules reinforce the restrictions of competition caused by the eligibility rules is unfounded and should be ignored.

132 The Commission raises a plea of inadmissibility against the sixth plea, alleging that the applicant has in no way sought annulment of the finding relating to the arbitration rules. At the hearing, the Commission also stated that Section 8.7 of the contested decision constituted an analysis which it carried out for the sake of completeness and that the conclusion of that section, relating to the arbitration rules, does not therefore form part of the infringement found. In the light of that statement, it follows that the Commission is asking the Court to reject that plea as ineffective. According to the case-law, the ineffective nature of a plea which has been raised refers to its capacity, in the event that it is well founded, to lead to the annulment sought by an applicant; and not to the interest which that applicant may have in bringing such an action or even in raising a specific plea, since those are issues relating to the admissibility of the action and the admissibility of the plea respectively (judgment of 21 September 2000, *EFMA* v *Council*, C-46/98 P, EU:C:2000:474, paragraph 38).

133 In the alternative, the Commission also submits in its defence that the sixth plea is, in any event, unfounded.

1. The effectiveness of the sixth plea

134 In response to a question put to it at the hearing, the applicant confirmed that its request to disregard Section 8.7 of the contested decision in fact concerned seeking of the annulment of the contested decision in so far as it was based on the considerations set out in that point .

135 Article 1 of the contested decision provides that the applicant 'infringed Article 101 [TFEU] and Article 53 of the [EEA Agreement] 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'. Furthermore, it is apparent from Section 8.6 of the contested decision, entitled 'Conclusion on Article 101 [TFEU] and Article 53(1) of the EEA Agreement', that Article 1 of the operative part is based on the statement of reasons contained in Sections 8.3 to 8.5 of the contested decision.

136 By contrast, the assessments concerning the arbitration rules appear in a section following the conclusion concerning whether there is a restriction of competition, namely in Section 8.7 of the contested decision. In that section, the Commission did not conclude that the arbitration rules constituted a separate infringement of competition law, but merely that they reinforced the restrictions of competition created by the applicant's eligibility rules.

137 It follows that, as the Commission acknowledged at the hearing, having regard to the infringement found, Section 8.7 of the contested decision dealing with the arbitration rules is superfluous since, even if that section were vitiated by an error, that error would not call into question the existence of a restriction of competition as such. Accordingly, the fact that that section is vitiated by illegality cannot lead to the annulment of Article 1 of the operative part of the contested decision. Accordingly, the applicant's sixth plea, in so far as it seeks annulment of Article 1 of the operative part of the contested decision, is ineffective.

138 However, under Article 2 of the contested decision, the applicant is required, in particular, to bring to an end the infringement referred to in Article 1 and to refrain from repeating any act or conduct having the same or similar object or effect. That article must be read in the light of recitals 338 to 342 of the contested decision, which determine the measures to be taken by the applicant in order to comply with its obligation to bring the infringement to an end. In those recitals, the Commission stated that the applicant could, in essence, put an end to the infringement while retaining its pre-authorisation system only if it introduced substantial amendments not only to the eligibility rules and to Communication No 1974, but also to its arbitration rules.

139 Thus, the Commission made the lawfulness of maintaining the applicant's pre-authorisation system conditional on the substantial amendment, inter alia, of its arbitration rules. It follows that Section 8.7 of the contested decision forms part of the necessary support for Article 2 of its operative part.

140 Therefore, contrary to what the Commission claims, the sixth plea is effective in so far as it is raised in support of the claim for annulment of Article 2 of the contested decision.

2. Substance

141 As regards the merits of that plea, the applicant claims that Section 8.7 of the contested decision is vitiated, in essence, by two errors of assessment. First, the Commission wrongly concluded that the arbitration rules made effective judicial protection against a potentially anticompetitive decision of the applicant more difficult. Secondly, it submits that that section is not relevant in so far as the Commission does not consider that recourse to the CAS arbitration procedure constitutes an infringement of Article 101 TFEU.

142 As is apparent from paragraph 132 above, the Commission acknowledges that the arbitration rules do not constitute an infringement of Article 101 TFEU. However, it defends the assessment it made in Section 8.7 of the contested decision and replies that it was entitled to carry out the analysis at issue.

143 In its written pleadings, the Commission submits, inter alia, that it could have regarded the arbitration rules as an aggravating circumstance within the meaning of point 28 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines'), if it had decided to impose such a penalty.

144 The contested decision does not make use of the concept of an aggravating circumstance and makes no reference to the 2006 Guidelines.

145 However, it must be noted that, having concluded that the eligibility rules restricted competition, the Commission went on to find that the arbitration rules reinforced the restrictions created by those eligibility rules. In addition, it considered, in essence, that in the event of maintaining the pre-authorisation system, the eligibility rules, Communication No 1974 and the applicant's arbitration rules would have to be substantially amended.

146 Thus, while it is true that the Commission did not impose a fine in the present case, after considering doing so at the stage of the statement of objections, the fact remains that the fact that it considered that the arbitration rules reinforced the restrictions created by the eligibility rules led it to extend the scope of the obligations imposed on the applicant, making the lawfulness of maintaining its pre-authorisation system subject to the amendment, inter alia, of those rules.

147 In essence, the Commission thus continued to follow the logic of the 2006 Guidelines on the taking into account of aggravating circumstances in the calculation of fines, even though it did not ultimately impose a fine in the contested decision.

148 Even if the Commission had, as it maintains, extended the obligations incumbent on the applicant on the basis of the 2006 Guidelines and could thus invoke the application of those guidelines without a substitution of grounds, it must be held that it was wrong to consider that the arbitration rules constituted an aggravating circumstance within the meaning of the 2006 Guidelines.

149 In that regard, it must be borne in mind that, while it is true that the guidelines do not constitute the legal basis of the decisions adopted by the Commission, the fact remains that, by adopting such rules of conduct and announcing, by publishing them, that it will apply them, the Commission imposes a limit on the exercise of its own discretion. Accordingly, it cannot depart from those rules without being found, in some circumstances, in breach of general principles of law, such as the principles of equal treatment or of the protection of legitimate expectations. It is not therefore inconceivable that, in certain circumstances and depending on their content, such rules of conduct of general application may produce legal effects (see, to that effect, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 209 to 211).

150 Point 28 of the 2006 Guidelines is worded as follows:

'The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

– where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed [Article 101 TFEU] or [Article 102 TFEU]. The basic amount will be increased by up to 100% for each such infringement established;

– refusal to cooperate with or obstruction of the Commission in carrying out its investigations;

– role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.'

151 The use of the words 'such as' in the first paragraph of point 28 of the 2006 Guidelines indicates that it is a non-exhaustive list of aggravating circumstances (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 105).

152 Nonetheless, it must be held that the aggravating circumstances listed in point 28 of the 2006 Guidelines have in common the fact that they describe unlawful conduct or circumstances which render the infringement more harmful and which justify a particular ruling, resulting in an increase in the penalty imposed on the undertaking responsible. In point 4 of the 2006 Guidelines, the Commission's power to impose fines at a sufficiently deterrent level entails the need to adjust the basic amount of any fine by taking into account, inter alia, any aggravating circumstances surrounding the infringement.

153 It follows that only unlawful conduct or circumstances which render the infringement more harmful, such as the three circumstances listed in point 28 of the guidelines, may justify an increase in the fine imposed for an infringement of EU competition law, since no one can be deterred from lawful or non-harmful conduct.

154 In the present case, it should be noted, first, as the Commission acknowledges in recital 269 of the contested decision, that arbitration is a generally accepted method of binding dispute resolution and that agreeing on an arbitration clause as such does not restrict competition.

155 Secondly, as is apparent from recital 286 of the contested decision and contrary to what the applicant claims, it must be held that the Commission did not consider that the applicant's arbitration rules infringed athletes' right to a fair hearing.

156 Thirdly, it should be noted that the binding nature of arbitration and the fact that the arbitration rules confer exclusive jurisdiction on the CAS to hear disputes relating to decisions on ineligibility made by the applicant may be justified by legitimate interests linked to the specific nature of the sport. In that regard, it should be noted that the European Court of Human Rights has ruled to that effect in a case which concerned, inter alia, the arbitration rules. It recognised that it was clearly in the interest of disputes arising in the context of professional sport, in particular those involving an international dimension, that they could be submitted to a specialised court which is capable of adjudicating quickly and economically. It added that high-level international sporting events are organised in different countries by organisations having their seat in different States, and that they are often open to athletes throughout the world. In that context, recourse to a single, specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty (ECtHR, 2 October 2018, *Mutu and Pechstein v. Switzerland*, CE:ECHR:2018:1002JUD004057510, § 98).

157 Fourthly, it must be borne in mind that the Court of Justice has already held that any person is entitled to bring proceedings before a national court and claim compensation for the harm suffered where there is a causal link between that harm and an agreement or practice prohibited under Article 101 TFEU (see judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 22).

158 The right of any individual to claim compensation for such a loss actually strengthens the working of the EU competition rules, since it discourages

agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (see judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 27, and of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 23).

159 In the present case, while it is true that the arbitration rules do not permit skaters to bring an action before a national court for annulment of an ineligibility decision which infringes Article 101(1) TFEU, the fact remains that skaters may bring, if they so wish, in accordance with the case-law cited in paragraphs 157 and 158 above, an action for damages before a national court. Furthermore, organisers who are third parties may also bring an action for damages where they consider that a decision refusing authorisation infringes Article 101(1) TFEU. In such cases, the national court is not bound by the CAS's assessment of the compatibility of the ineligibility decision or the refusal of authorisation with EU competition law and, where appropriate, may submit a request for a preliminary ruling to the Court of Justice under Article 267 TFEU.

160 Furthermore, it should be noted that skaters and third-party organisers who have been the subject of an ineligibility decision or a refusal to grant authorisation contrary to Article 101(1) TFEU may also lodge a complaint with a national competition authority or the Commission, as the complainants have done in the present case. In the event that the authority dealing with the case had to make a decision, that decision could further, if necessary, be reviewed before the EU Courts. The EU Courts could find it necessary to rule on such a matter in the context of an action for annulment brought against a Commission decision or following a reference for a preliminary ruling made by a national court hearing an action brought against a decision of a national competition authority.

161 It follows from the findings set out in paragraphs 157 to 160 above that, contrary to what is argued by the Commission, use of the CAS arbitration system is not such as to compromise the full effectiveness of EU competition law.

162 The case-law relied on by the Commission cannot cast doubt on that conclusion. Unlike the circumstances at issue in the case giving rise to the judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraph 55), the establishment of the CAS does not derive from a treaty by which Member States agreed to remove from the jurisdiction of their own courts and, therefore, from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of competition law.

163 It follows from the foregoing that the fact that the arbitration rules conferred on the CAS exclusive jurisdiction to review the legality of ineligibility decisions and that the arbitration in the present case is binding do not constitute unlawful circumstances which make the infringement found in the present case more harmful, as the circumstances listed within the meaning of point 28 of the 2006 Guidelines do. Accordingly, the Commission was not entitled to consider that the arbitration rules constituted an aggravating circumstance and therefore, it was not entitled to conclude that they reinforced the restrictions of competition created by the eligibility rules.

164 It follows that the applicant's sixth plea, alleging that the conclusion contained in Section 8.7 of the contested decision is unfounded, must be upheld.

E. Seventh plea, alleging infringement of the second sentence of Article 7(1) of Regulation No 1/2003

165 By its seventh plea, the applicant disputes the legality of Article 2 of the contested decision, claiming, in essence, that the Commission infringed Article 7 of Regulation No 1/2003 by imposing on it corrective measures which are unrelated to the alleged infringement. In particular, the applicant submits that the Commission wrongly required it, in breach of Article 7(1) of Regulation No 1/2003, to make amendments to the eligibility rules, when the aspects of the rules to which those amendments were to relate did not constitute infringements. Similarly, since the Commission did not find that the arbitration rules constituted an infringement, it cannot require the applicant to amend them.

166 The Commission replies that it did not impose corrective measures on the applicant. It maintains that it merely required the applicant to bring the infringement to an end in accordance with the first sentence of Article 7(1) of Regulation No 1/2003, while leaving it the choice as to how to bring the infringement to an end.

167 It must be borne in mind that Article 7(1) of Regulation No 1/2003 provides that:

'Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [101] or of Article [102 TFEU], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end …'

168 The condition laid down in that provision that the corrective measures must be proportionate to the infringement committed means that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed (judgment of 6 April 1995, *RTE and ITP* v *Commission*, C-241/91 P and C-242/91 P, EU:C:1995:98, paragraph 93).

169 Under Article 2 of the contested decision, the Commission ordered the applicant to bring the infringement found to an end and henceforth to refrain from taking any measure having the same object or effect, or an equivalent effect or object. In recital 339 of the contested decision, the Commission stated that there was 'more than one way' of bringing that infringement effectively to an end, and then identified two. Thus, it considered, first, that the applicant could abolish its pre-authorisation system and the associated system of penalties. Secondly, if the applicant were to choose to maintain a pre-authorisation system, the Commission stated, in recital 339 of the contested decision, that it could 'only' effectively bring the infringement to an end by substantially changing the eligibility rules, the ISU arbitration rules and the authorisation criteria laid down in Communication No 1974, while listing a series of steps that the applicant would need to follow to do this.

170 It must be held at the outset that, since the Commission rightly found that there was a restriction by object in the present case, the present plea must be rejected in so far as it criticises the Commission for imposing on it measures which do not correspond to a finding of infringement.

171 On the other hand, as the Commission submitted at the hearing in reply to a written question put by the Court, the arbitration rules do not form part of the infringement found and, as is apparent from paragraph 163 above, the Commission was wrong to take the view that they reinforced that infringement.

172 In recital 339 of the contested decision, the Commission considered that the maintenance of the pre-authorisation system was possible only if the applicant amended the arbitration rules (see paragraph 169 above). Such a ground, read in the light of Article 2 of the contested decision, which orders the applicant to bring the infringement to an end and to communicate to the Commission the measures taken in that regard, has binding force, even if, as the Commission maintains, that request for amendment of the arbitration rules does not constitute a 'remedy' within the meaning of the second sentence of Article 7(1) of Regulation No 1/2003.

173 It follows from the foregoing that the Commission was wrong to require the applicant to amend the arbitration rules, which did not reinforce the severity of the infringement found and were not, moreover, an integral part of them.

174 Therefore, the seventh plea must be upheld in part in so far as the Commission required the substantial amendment of the arbitration rules in the event that the pre-authorisation system was maintained, and must be rejected as to the remainder.

F. Eighth plea, alleging that the imposition of periodic penalty payments lacks any valid legal basis

175 The applicant submits that the Commission was not entitled to impose periodic penalty payments on it for two reasons. First, the remedies imposed are vague and imprecise and, secondly, they are not linked to the infringement found.

176 In the first place, as is apparent from the examination of the seventh plea, the Commission provided sufficiently precise information concerning the measures to be taken by the applicant in order to put an end to the infringement found. Therefore, the applicant's argument that the Commission was not entitled to impose periodic penalty payments in view of the vague and imprecise nature of those measures must be rejected.

177 In the second place, it should be borne in mind that, under Article 24(1(a) of Regulation No 1/2003, when the Commission adopts a decision pursuant to Article 7 of that regulation, it may also impose periodic penalty payments on undertakings and associations of undertakings in order to compel them to bring to an end an infringement of Article 101 or 102 TFEU. As stated in connection with the seventh plea, the arbitration rules were not part of the infringement found, so that the Commission could not require the applicant to amend them and, consequently, it could not impose periodic penalty payments connected with the requirement to amend those rules.

178 The eighth plea must therefore be upheld in part in so far as it relates to the imposition of periodic penalty payments in the event of failure to amend the arbitration rules and must be rejected as to the remainder.

V. Conclusion on the outcome of the action

179 The applicant's form of order sought concerning the claim for annulment of Article 1 of the contested decision must be rejected.

180 By contrast, it is apparent from the analysis of the sixth and seventh pleas in law, that the Commission was wrong to conclude that the arbitration rules reinforced the restrictions of competition caused by the eligibility rules and that it required substantial amendment to those rules, even though they were not an integral part of the infringement established in Article 1 of the contested decision. Therefore, Article 2 of the contested decision must be annulled in part.

181 Finally, it follows from the analysis of the eighth plea that, consequently, Article 4 of the contested decision, which provides for periodic penalty payments in the event of failure to comply with Article 2, must be annulled in part, in so far as it relates to the requirement to amend the arbitration rules.

Costs

182 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

183 In the present case, since the applicant has been unsuccessful as regards its claim for annulment of Article 1 of the contested decision and has been partially successful with regard to its claim for annulment of Articles 2 and 4 of that decision, each party must be ordered to bear its own costs.

184 Under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than the Member States and institutions to bear his or her own costs. In the circumstances of this dispute, it is appropriate that the interveners bear their own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. **Annuls Articles 2 and 4 of Commission Decision C(2017) 8230 final, adopted on 8 December 2017 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT/40208 – International Skating Unions's eligibility rules), in so far as, by requiring the International Skating Union to put an end to the infringement established which is subject to a periodic penalty payment, the Commission refers to the arbitration rules and requires that they be amended in the event that the pre-authorisation system is maintained.**

2. **Dismisses the action as to the remainder.**

3. **Orders the International Skating Union and the European Commission to bear their own costs.**

4. **Orders the European Elite Athletes Association, Mr Mark Jan Hendrik Tuitert and Mr Niels Kerstholt to bear their own costs.**

Gervasoni Madise Nihoul

Frendo Martín y Pérez de Nanclares

Delivered in open court in Luxembourg on 16 December 2020.

E. Coulon M. van der Woude

Registrar President

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* Language of the case: English.