



Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 28 February 2019¹

Joined Cases C-612/17 and C-613/17

Federazione Italiana Golf (FIG)

v

**Istituto Nazionale di Statistica (ISTAT)
Ministero dell'Economia e delle Finanze (C-612/17)
and**

Federazione Italiana Sport Equestri (FISE)

v

Istituto Nazionale di Statistica (ISTAT) (C-613/17)

(Request for a preliminary ruling from the Corte dei conti (Court of Auditors, Italy))

(Reference for a preliminary ruling — Regulation (EU) No. 549/2013 — European system of national and regional accounts in the European Union — Non-profit institution (NPI) — Classification of an NPI as part of general government or as a Non-profit institution serving households (NPISHs) — Existence of control by government — Criteria applicable for the establishment of control of an NPI by government)

I. Introduction

1. As the recent economic history of the Member States of the Union can readily illustrate, few things are more important to the modern financial system than the preparation of accurate, standardised national accounts. This has been recognised by the European legislator, most recently through the enactment of Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union which governs the European System of Accounts 2010 ('the ESA Regulation').² Recital 3 of the ESA Regulation accordingly states that 'for the sake of comparability' national accounts 'should be drawn up on the basis of a single set of principles that are not open to differing interpretations.' The very fact that this regulation extends to almost 730 pages of text provides in its own way an indication of the importance of the issue and the complexity of the accounting tasks involved.

¹ Original language: English.

² OJ 2013 L 174, p. 1. See Article 1(1) of ESA Regulation. The legal basis of the ESA Regulation is Article 338(1) TFEU which provides 'without prejudice to Article 5 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for the production of statistics where necessary for the performance of the activities of the Union.' Paragraph 1.01 of Annex A to the ESA Regulation provides that the European system of accounts 'is an internationally compatible accounting framework for a systematic and detailed description of a total economy (that is, a region, country or group of countries), its components and its relations with other total economies.'

2. One such complex issue is now presented in this preliminary reference by the Corte dei conti (Court of Auditors, Italy). The fundamental question posed is, in essence, this: should the Federazione Italiana Golf (Italian Golf Federation) ('FIG') and Federazione Italiana Sport Equestri (Italian Equestrian Sport Federation) ('FISE') be treated by the Istituto Nazionale di Statistica (Italian National Statistics Office) ('ISTAT') as part of the general government sector,³ (S.13),⁴ covered by the consolidated public profit and loss accounts of the Italian State or, alternatively, as a non-profit institution serving households⁵ ('NPISHs'), (S.15).⁶ An NPISHs is an institutional unit or sector which is a non-market producer and which is *not* subject to control by government.⁷ By contrast, non-market NPIs which happen to be controlled by government are classified in the general government sector.⁸

3. This in turn raises the question of how the various criteria contained in the ESA Regulation governing the treatment for this purpose of non-profit organisations/institutions ('NPIs') such as FIG and FISE should be interpreted. As this appears to be the first occasion in which the Court has been called upon to give guidance in respect of the interpretation of this important regulation, these two preliminary references accordingly assume some significance.

4. Before any examination of the background facts, it is, however, first necessary to outline the relevant provisions of the ESA Regulation.

II. Legal context – European Union law

5. As I have already observed, the ESA Regulation established the European system of accounts 2010.⁹ The ESA Regulation contains two annexes.¹⁰ Annex A provides for a methodology on common standards, definitions, classifications and accounting rules which are required to be used in the preparation of national accounts. Annex B provides for a programme establishing the terms, including time-limits, within which the Member States transmit their national accounts to the Commission (Eurostat).

6. Paragraph 1.34 of Annex A of the ESA Regulation provides that 'sector accounts are created by allocating units to sectors and this enables transactions and balancing items of the accounts to be presented by sector. The presentation by sector reveals many key measures for economic and fiscal policy purposes. The main sectors are households, government, corporations (financial and non-financial), non-profit institutions serving households (NPISHs) and the rest of the world.¹¹ The distinction between market and non-market activity is an important one. An entity controlled by government which is shown to be a market corporation is classified in the corporation sector, outside the general government sector. Thus, the deficit and debt levels of the corporation will not be part of the general government deficit and debt.'

7. According to paragraph 1.35 of Annex A to the ESA Regulation:

'The public sector consists of all institutional units resident in the economy that are controlled by government. The private sector consists of all other resident units.'

3 See paragraph 1.57(c) of Annex A to the ESA Regulation.

4 See Table 2.1, of Annex A to the ESA Regulation entitled 'Sectors and subsectors'.

5 See paragraphs 1.57(e) and 2.129 of Annex A to the ESA Regulation.

6 See Table 2.1, of Annex A to the ESA Regulation.

7 See paragraph 2.129 of Annex A to the ESA Regulation which refers to the fact that they are 'private non-market producers'.

8 See paragraph 2.130 of Annex A to the ESA Regulation.

9 See Article 1(1) of the ESA Regulation.

10 See Article 1(2) of the ESA Regulation.

11 These institutional units and sectors are mutually exclusive. See also paragraph 1.57 of Annex A to the ESA Regulation.

8. Paragraph 1.36 of Annex A to the ESA Regulation provides that ‘control is defined as the ability to determine the general policy or programme of an institutional unit’.

9. According to paragraph 1.37 of Annex A to the ESA Regulation ‘differentiating between market and non-market, and so, for public sector entities, classifying them into the general government sector or the corporations sector, is decided by the following rule:

An activity shall be considered as a market activity when the corresponding goods and services are traded under the following conditions:

- (1) sellers act to maximise their profits in the long term, and do so by selling goods and services freely on the market to whoever is prepared to pay the asking price;
- (2) buyers act to maximise their utility given their limited resources, by buying according to which products best meet their needs at the offered price;
- (3) effective markets exist where sellers and buyers have access to, and information on, the market. An effective market can operate even if these conditions are not met perfectly.’

10. Paragraph 4.125 of Annex A to the ESA Regulation on Current transfers to NPISHs provides that ‘current transfers to NPISHs include all voluntary contributions (other than legacies), membership subscriptions and financial assistance which NPISHs receive from households ...’. According to paragraph 4.126 (a) of Annex A to the ESA Regulation, current transfers to NPISHs include regular subscriptions paid by households to sporting organisations classified in the sector NPISHs.

11. Chapter 20 of the ESA Regulation is headed ‘The Government Accounts’. Paragraph 20.01 of the ESA Regulation explains that government activities are treated differently from the rest of the economy because ‘the powers, motivation and functions of government are different from those of other sectors’. Paragraph 20.01 of Annex A to the ESA Regulation continues by stating that Chapter 20 presents Government accounts in a fashion that ‘gives an integrated picture of government economic activities: revenue, expenditure, deficit/surplus, financing, other economic flows and balance sheet’.

12. Paragraph 20.04 of Annex A to the ESA Regulation recognises the difficulties of classification and measurement for the general government sector. The key provisions of the ESA Regulation so far as the present reference is concerned are, however, to be found in paragraphs 20.13 to 20.16 of Annex A.

13. Paragraph 20.13 of Annex A to the ESA Regulation states that :

‘Non-profit institutions (NPIs) that are non-market producers and are controlled by government units are units of the general government sector.’

14. Paragraph 20.14 of Annex A to the ESA Regulation states that:

‘Governments may choose to use some NPIs rather than government agencies to carry out government policies ‘because they are seen as more detached, objective, and less subject to political pressures. For example, research and development and the setting and maintenance of standards in fields such as health, safety, the environment, and education are areas in which NPIs may be more effective than government agencies.’

15. It is, however, paragraph 20.15 of Annex A to the ESA Regulation which is the most important provision so far as these preliminary references are concerned. It provides as follows:

‘Control of an NPI is defined as the ability to determine the general policy or programme of the NPI. Public intervention in the form of general regulations applicable to all units working in the same activity is irrelevant when deciding whether the government holds control over an individual unit. To determine whether an NPI is controlled by the government, the following five indicators of control should be considered:

- (a) the appointment of officers;
- (b) other provisions of the enabling instrument, such as the obligations in the statute of the NPI;
- (c) contractual agreements;
- (d) degree of financing;
- (e) risk exposure.

A single indicator can be sufficient to establish control. However, if an NPI that is mainly financed by government remains able to determine its policy or programme to a significant extent along the lines mentioned in the other indicators, then it would not be considered as being controlled by government. In most cases, a number of indicators will collectively indicate control. A decision based on these indicators will be judgmental in nature,¹²

16. Paragraph 20.16 of Annex A to the ESA Regulation then states that the ‘non-market characteristics of an NPI is determined in the same way as for other units of general government’.

III. The main proceedings and the questions referred for a preliminary ruling

17. Before considering the questions referred by the Corte dei conti (Court of Auditors) in any detail, it is first necessary to sketch out some details regarding the manner in which Italian sport is organised. As found by the referring court, the organisation of Italian sport is based on the Comitato Olimpico Nazionale Italiano (Italian National Olympic Committee) (‘CONI’). CONI is a legal person governed by Italian public law to which the various national sports organisations are affiliated. These latter entities are all non-profit legal persons.¹³

18. Although CONI is an organisation governed by public law, it is nonetheless essentially a confederation of national sporting organisations and associated sporting disciplines. Its principal function is as the authority responsible for disciplining, regulating and managing sporting activities within Italy. The principle of sporting autonomy is a key feature of the Statute of CONI,¹⁴ so that the national sports federations are granted technical, organisational and managerial autonomy under the general supervision of CONI. CONI is nonetheless empowered to adopt fundamental principles governing the recognition for sporting purposes of the federations, the criteria and procedure for carrying out its inspections on the sports federations and the decision to place federations into administration in the case of serious and exceptional breaches of the rules of sport.¹⁵ The Statute of CONI further lays down powers of approval of the statutes and budgets of the federations.

¹² See also paragraph 2.39 of Annex A to the ESA Regulation which applies to NPIs recognised as independent legal entities.

¹³ Codice civile (Italian Civil Code), Book 1, as amended by Legislative Decree No 242 of 23 July 1999 (‘Legislative Decree 242/1999’).

¹⁴ Article 4 of the Statute of CONI.

¹⁵ Article 6(4) of the Statute of CONI and Article 5 of Legislative Decree 242/1999.

19. The representatives of sports federations such as FIG and FISE participate in the National Council and the National Board of CONI. The federations thus participate in the organisation and activities of CONI by helping to make up the central bodies which have the most significant powers and contributing to the decision-making of CONI.

20. FIG and FISE are national sports federations in Italy. As indicated at point 17 above, they are non-profit associations with legal personality under private law. The referring court considers that the sports federations have a uniform, homogeneous legal nature of entities governed by private law covered by Book I of the Italian Civil Code, with the result that acts of the sports federations are normally governed by general law (subject to special sports law).¹⁶

21. FIG's and FISE's statutes provide that their respective management activities are exercised exclusively by the bodies of those federations. The key management bodies of those federations are their National Assembly, their President, their Federal Council and their Secretariat-General. The general powers of guidance lie with the National Assembly which is made up of the representatives of the basic categories and which also elects the principal officers of the organisation, along with the members of the Federal Council. The powers of administration in each case lie with the President who is elected by the Federal Assembly. The Federal Council has the power to monitor the correct implementation of the technical sports programme, assess sporting results and supervise the proper conduct of the management. It should be noted, however, that CONI is empowered to appoint two members of the Board of Auditors, while the President is also elected by the National Assembly.

22. FIG and FISE are generally responsible for the registration of members of clubs. FIG and FISE are funded by contributions from CONI, along with their own resources, including affiliation fees, association and registration fees, sponsorship contracts and income from sporting events and the management of goods and services. The statute of FIG sets out its fundamental governing principle, namely, its private, membership-based and non-profit status.¹⁷ It is important to state, however, that the size of the contributions from CONI to FIG and FISE are significant, amounting to 30% of FIG's revenue in 2013, 27% in 2014 and 30% in 2015. The contributions from CONI to FISE are also in the region of 30% of the latter's revenue.

23. The issues raised in the preliminary references arise in the following way: ISTAT has been given the authority by Italian legislation¹⁸ to prepare the annual consolidated public profit and loss accounts of public authorities as part of the requirements of Article 121 TFEU. Part of that process necessarily involves the identification of the institutional elements of the Italian State which form part of the general government sector according to the criteria prescribed by the ESA Regulation itself.

24. By decision published in the *Gazzetta ufficiale della Repubblica italiana* (Official Journal of the Italian Republic) on 30 September 2016, ISTAT registered FIG and FISE on the 2016 ISTAT list. ISTAT considered that in accordance with the ESA Regulation FIG and FISE were, by virtue of the market / non-market test provided for in paragraph 20.29 of Annex A to that regulation, non-market institutional units. In order to determine whether these units should be classified as NPISHs or in the general government sector, ISTAT verified whether FIG and FISE are subject to control by government.

25. ISTAT concluded that both federations were controlled by government. While the federations had a certain degree of decision-making autonomy, ISTAT considered that FIG and FISE did not have the 'complete ability to exercise self-determination' in view of the significant influence exerted by CONI over their management.

¹⁶ The federations can also perform public functions, specifically attributed by statute, to which public law applies within the limits laid down in Article 1(1b) of Law 241/1990.

¹⁷ See Article 4 of the FIG Statute and Article 1 of the FISE Statute.

¹⁸ Law No 196 of 31 December 2009.

26. FIG and FISE deny that they meet these criteria. They accordingly commenced the present proceedings on 29 November and 7 December 2016 respectively in which they sought the annulment of the list of public authorities entered into the public profit and loss accounts and identified pursuant to Article 1(3) of Law No 196 of 31 December 2009 which had been adopted by ISTAT ('the ISTAT list') in so far as FIG and FISE were listed as producers of 'welfare, recreation and cultural services.' It may be noted that FIG had previously commenced similar proceedings concerning its inclusion on both the 2014 and 2015 ISTAT list. The first set of proceedings concerning the 2014 list had been dismissed by the Corte dei conti (Court of Auditors) on 11 February 2015, while that contesting the 2015 ISTAT list was upheld by the Combined Chambers of the Corte dei conti (Court of Auditors) by judgment delivered on 9 March 2017.

27. So far as the present of proceedings are concerned, by judgments dated 13 September 2017, the Corte dei conti (Court of Auditors) decided to refer the following three questions to this Court pursuant to Article 267 TFEU:

- (1) Must the concept of "public intervention in the form of general regulations applicable to all units working in the same activity" referred to in paragraph 20.15 of [Annex A to the ESA Regulation] be understood broadly as covering also the powers of guidance of a sporting nature (so-called soft law) and the powers of recognition, laid down by law, for the purposes of acquiring legal personality and enablement powers in the sports sector, both powers relating generally to all Italian national sports federations?
- (2) Must the general indicator of control referred to in paragraph 20.15 of [Annex A to the ESA Regulation] ("the ability to determine the general policy or programme of [a non-profit institution]") be interpreted in a substantive sense as the ability to manage, constrain and influence the management activity of the non-profit institution or can it be understood in a non-technical sense as also covering powers of external supervision other than those defined by the specific indicators of control referred to in subparagraphs (a), (b), (c), (d) and (e) of paragraph 20.15 [of Annex A to the ESA Regulation] (such as, for example, powers to approve budgets, appoint auditors, and approve statutes and certain types of regulations, sports guidelines or recognition for the purposes of sport)?
- (3) On the basis of the combined provisions of paragraphs 20.15, 4.125 and 4.126 of [Annex A to the ESA Regulation], can account be taken of membership fees for the purposes of establishing the existence or otherwise of government control, specifying whether a high level of such fees, together with other own revenues, can demonstrate, in the light of the particular features of the case at issue, that the non-profit institution has significant ability to exercise self-determination?

IV. The procedure before the court

28. Case C-612/17 and Case C-613/17 were joined by decision of the President of the Court of 17 November 2017.

29. The request by the referring court pursuant to Article 105(1) of the Rules of Procedure of the Court that Case C-612/17 and Case C-613/17 be determined pursuant to an expedited procedure was rejected by order of the President of the Court dated 14 December 2017.

30. Written observations were submitted by FIG, FISE, the Italian Republic and the Commission. FIG, the Italian Republic and the Commission appeared at the hearing held at the Court on 6 February 2019.

V. Analysis

A. Preliminary remarks

31. A two-step procedure is called for in order to determine whether sports federations such as FIG and FISE can be classified as ‘NPI’s controlled by government or, alternatively, as NPISHs and thus outside the public sector. The first step is to inquire whether the NPI is a market or a non-market producer. It is only in the event that the relevant NPI *fails* this test (i.e., the sales of goods and services cover *less* than 50% of the costs) and is deemed a non-market producer¹⁹ that one then proceeds to the second step, namely, to examine the question of whether a governmental entity has control in respect of the relevant NPI.

32. The referring court clearly stated in its orders of reference that FIG and FISE are non-market producers. This finding of fact is not open to question before this court.²⁰ The critical issue which lies at the heart of the questions which have been referred to this court, therefore, is whether there is ‘control’ by a government entity over sports federations such as FIG and FISE in accordance with the rules of the ESA Regulation so that for the purposes of national accounts they should be included in the public sector under ‘general government’ (S.13).

33. One can certainly envisage a situation where a particular sports federation depended almost exclusively on State funds for its revenue and where, indeed, its officials were appointed by a national government. Such a federation would be very likely to be regarded as subject to control by government for a range of public law purposes - not least for the statistical purposes envisaged by the ESA Regulation – precisely because its general policy was in substance either controlled or at least heavily influenced by a relevant governmental agency, even if it was also clear that in matters of purely sporting judgment the decisions of the sports federation concerned were autonomous and genuinely independent.

34. What, then, is the position with regard to FIG and FISE in the light, of the criteria set out at paragraph 20.15 of Annex A to the ESA Regulation? This, essentially, is the ultimate issue posed by the three separate questions emanating from the referring court. Before examining these questions, however, it is worth observing at the outset that the language of paragraph 20.15 of Annex A to the ESA Regulation is exclusive in nature. That provision clearly states that ‘...the following five indicators of control should be considered...’.²¹ This means that in the case of NPIs such as FIG and FISE it is these enumerated criteria only which can be employed to determine the question of control and whether an NPI which is a non-market producer should be classified under general government or as an NPISHs.

35. This is of some importance because elsewhere in the ESA Regulation, in particular paragraphs 20.309²² and 20.310 of Annex A to that regulation, a slightly different – and, in some instances, at least, a broader – definition of control is used in the context of determining whether certain other bodies should be treated as public sector bodies.²³ Contrary to the argument advanced

19 In this regard it is important to note that NPIs which are market producers controlled by a government entity are classified as public corporations. See paragraph 20.307 of Annex A to the ESA Regulation. A privately controlled NPI is classified in the non-financial corporations and financial corporations sectors, if it is a market producer. See paragraph 3.31 of Annex A to the ESA Regulation.

20 According to the referring court, the proceeds from the sale of FIG and FISE services are in fact very low, amounting to less than 10% of its output. FIG and FISE cannot therefore be regarded as being market entities and they are thus clearly non-market NPIs within the meaning of paragraphs 20.29 and 20.30 of Annex A to the ESA Regulation.

21 No particular weight or priority is accorded to any of the five specific indicators of control laid down in paragraph 20.15 of Annex A to the ESA Regulation. Indeed, that provision states that ‘a single indicator can be sufficient to establish control.’

22 The Commission makes numerous references in its observations to this provision and considers that it is relevant for determining control of NPIs. It considers, in effect, that the rules in paragraph 20.309 of Annex A to the ESA Regulation are more detailed than those in paragraph 20.15.

23 See also paragraphs 1.36, 2.32, 2.35 to 2.39 and 20.18 of Annex A to the ESA Regulation.

by the Commission in its submissions and at the hearing, I do not think that other – admittedly analogous – provisions of the ESA Regulation of this kind can, so to speak, be imported into the definition of control contained in paragraph 20.15 of Annex A to the ESA Regulation. The definition of control contained in that latter provision amounts to a *lex specialis* which cannot be expanded by reference to other general provisions such as paragraphs 20.309 and 20.310 of Annex A to the ESA Regulation, even if those provisions also address the issue of control or indeed control in the public sector in the case of the latter provisions.

36. In my view, the object of paragraphs 20.309 and 20.310 of Annex A to the ESA regulation is *not* to determine whether a non-market NPI should be classified under general government or as an NPISHs²⁴ but rather is to determine whether corporations (which are market producers and which may include NPIs)²⁵ should be classified under the public sector or private control.²⁶

37. With this in mind we can now turn to a consideration of the specific questions posed by the referring court.

B. The first question: The exact interpretation of the concept of ‘public intervention in the form of general regulations’

38. As I have already noted, the opening two sentences of paragraph 20.15 of Annex A to the ESA Regulation provide:

‘Control of an NPI is defined as the ability to determine the general policy or programme of the NPI. Public intervention in the form of general regulations applicable to all units working in the same activity is irrelevant when deciding whether the government holds control over an individual unit...’

39. The referring court is unsure what is meant by the phrase ‘general regulations’ in this sense. It considers that this is a broad concept which could, in the case of sporting organisations, refer to both the guidelines (‘soft law’) of the International Olympic Committee and CONI, together with the general provisions of Italian law regarding the recognition of such organisations for sporting purposes. According to the referring court, ordinary recognition of such sporting bodies must first be preceded by that of recognition by CONI.²⁷

40. While the Commission acknowledges that CONI’s power to adopt general rules establishing common standards for sporting activities falls in principle within the terms ‘public intervention in the form of general regulations’ it considers that its power to recognise sporting federations is likely to create a *de facto* monopoly in favour of that federation over the sport in question, given that only one federation may be recognised for that sport. The Commission therefore considers that such a power does not come within the terms ‘public intervention in the form of general regulations’.

²⁴ This is the object of the *lex specialis* in paragraph 20.15 of Annex A to the ESA Regulation. See also to that effect, Eurostat Manual on Government Deficit and Debt, Implementation of ESA 2010, 2016 edition available at <https://ec.europa.eu/eurostat/documents/3859598/7203647/KS-GQ-16-001-EN-N.pdf/5cfae6dd-29d8-4487-80ac-37f76cd1f012>. At page 15, paragraph 11, of that manual it is stated that ‘the concept of government control in national accounts is the same for both financial corporations and non-financial corporations, and developed in the following paragraphs. The control of non-profit institutions and educational units is addressed *separately* further below.’ (emphasis supplied)

²⁵ In accordance with paragraph 20.307 of Annex A to the ESA Regulation, non-market public sector units are classified under general government and market sector units are classified as public corporations.

²⁶ It is clear from the diagram contained in paragraph 20.303 of Annex A to the ESA Regulation, that the rules laid down in paragraphs 20.303 to 20.319 of Annex A to the ESA Regulation on the public sector do not contain rules in order to determine whether an entity is an NPISHs.

²⁷ Article 15 of Legislative Decree 242/1999.

41. The Commission also considers that CONI's power to recognise sporting federations gives it the ability to determine the general policy of those federations in accordance with the indicator of control contained in paragraph 20.309(h) of Annex A to the ESA Regulation which refers to 'control via excessive regulation'. According to that provision, 'when regulation is so tight that it effectively dictates the general policy of the business, it is a form of control. Public authorities can in some cases have powerful regulatory involvement, particularly in areas such as monopolies and privatised utilities where there is a public service element. It is possible for regulatory involvement to exist in important areas, such as price setting, without an entity ceding control of general policy'. The Commission considers that the indicator of control in paragraph 20.309(h) of Annex A to the ESA Regulation is linked to those in paragraphs 20.15(b) and 2.39(b) of Annex A to the ESA Regulation.

42. In my view, the term 'general regulations' as it appears in paragraph 20.15 of Annex A to the ESA Regulation naturally cannot be interpreted simply in the abstract: it rather takes its meaning from the general legislative context. The fact that the phrase is preceded by the words 'public intervention in the form of...' is surely of some importance, because it thereby presupposes that the regulations in question have some official backing or standing. It follows, therefore, that in this context the reference to 'general regulations' is principally to regulations which are contained either in a legislative act of the Italian State or which otherwise constitute implementing rules or principles contained in such legislation.

43. Subject to ultimate verification by the referring court, the Italian legislative scheme providing for the recognition of sporting organisations would appear to constitute exactly the form of general regulations envisaged by paragraph 20.15 of Annex A to the ESA Regulation. As the referring court itself makes clear, the rules regarding such matters as the recognition of sporting organisations, the protection of the integrity of sporting organisations and the competitions which they organise and the safeguarding of the health and welfare of athletes are expressly provided for by law and apply indistinctly and generally to all sporting organisations by setting common standards for this purpose. Nor, as the Commission observed in its submissions, do these rules seek to control or otherwise determine the general policy or programme²⁸ which sporting organisations such as FIG or FISE may wish to follow. The key point, however, is that a 'general regulation' of this sort which is generally applicable to all sporting organisations and which does not seek in any material respect to control the policy or programme of the sporting organisation concerned is irrelevant for the purposes of determining whether the organisation in question is subject to control by government units²⁹ for the purposes of the ESA Regulation.³⁰

44. All of this means that the fact that FIG and FISE – like other Italian sporting organisations – were required under the provisions of Italian law to apply to CONI for recognition is irrelevant for the purposes of establishing whether there was the requisite degree of control by government under paragraph 20.15 of Annex A to the ESA Regulation. If, therefore, FIG and FISE are to be regarded as subject to control by government for the purposes of that provision of the ESA Regulation, it must be for some other reason.

45. I am of the view, therefore, that the concept of 'public intervention in the form of general regulations applicable to all units working in the same activity' laid down in paragraph 20.15 of Annex A to the ESA Regulation refers, *inter alia*, to the rules regarding such matters as the recognition of sporting organisations, the protection of the integrity of sporting organisations and the competitions which they organise and the safeguarding of the health and welfare of athletes which are expressly

²⁸ See, *inter alia*, paragraph 1.36 of Annex A to the ESA Regulation.

²⁹ See paragraph 20.13 of Annex A to the ESA Regulation.

³⁰ While I consider that the Commission's reference to 'control via excessive regulation' contained in paragraph 20.309(h) of Annex A to the ESA Regulation is not relevant as it is the *lex specialis* contained in paragraph 20.15 of that Annex which is applicable, it is also clear from the very wording of that former provision that this test has no application in the context of sporting federations, as it refers to 'monopolies and privatised utilities where there is a public service element'.

provided for by law and apply indistinctly and generally to all sporting organisations by setting common standards for this purpose. The power to establish such rules is irrelevant when deciding whether government controls a sporting organisation which is an NPI and a non-market producer for the purpose of paragraph 20.15 of Annex A to the ESA Regulation.

C. The second question: the exact interpretation of the concepts of ‘control’ and the ‘ability to determine the general policy or programme of an institutional unit’.

46. By its second question, the referring court draws attention to the fact that it is possible to envisage two possible interpretations of the concept of ‘control’ within the meaning of paragraph 20.15 of Annex A to the ESA Regulation. On one interpretation, ‘control’ refers to the ability of a government or governmental agency to determine the general policy or programme of the entity concerned by managing or influencing in a decisive manner the management of the institutional unit. The other interpretation of ‘control’ suggested by the referring court refers to what it describes as the formal control by means of the general and external supervision of sporting organisations envisaged by the Italian legislative scheme in general and by CONI in particular.

47. As the referring court accepts, the concept of ‘control’ at issue here refers to the power to determine the general policy or programme of the entity concerned by managing or influencing in a decisive manner the management of that entity. Such is clear from the language and context of paragraph 20.15 of Annex A to the ESA Regulation, since as we shall shortly see, all of the five specific indicators of control enumerated therein³¹ relate to the concept of ‘control’ in that substantive sense. One may here conveniently emphasise the fact that the reference here to the ‘managing or influencing in a decisive manner the management of the institutional unit’ is *not* a separate test but merely seeks to clarify or illustrate the test for control laid down in paragraph 20.15 of Annex A to the ESA Regulation, namely, ‘the ability to determine the general policy or programme of the NPI’. It is evident from these terms that the test for control in that provision does not relate to the day to day management of the NPI but rather to the definition and management of its overall strategy.

48. Moreover, as I have already observed in the answer to the first question, it is also plain from the language of the ESA Regulation that the external supervision inherent in the generally applicable rules provided in Italian law is irrelevant³² for determining such control within the meaning of paragraph 20.15 of Annex A to the ESA Regulation. In addition, given the *lex specialis* character of paragraph 20.15 of Annex A to the ESA Regulation, only the five specific indicators of control referred to in subparagraphs (a), (b), (c), (d) and (e) of paragraph 20.15 of Annex A to the ESA Regulation may be taken into account in order to determine the existence of control by government over NPIs - such as FIG and FISE - which are non-market producers and thus whether government can determine their general policy or programme.

49. The Commission advanced the argument that as the Italian sporting federations exercise certain functions such as selecting athletes which participate in national and international competitions such as the Olympic games and as they also rule on disputes in the sporting field, those federations exercise public functions and should accordingly be classified as government units under paragraph 20.06 of Annex A to the ESA Regulation. These functions are not, in my view, inherently public in nature and, in any event, it must be stressed again that the governing test is simply that contained in paragraph 20.15 of Annex A to the ESA Regulation. One is thus compelled to conclude that the Commission’s argument based on paragraph 20.06 thereof is irrelevant for this purpose.

³¹ Which constitute a closed category.

³² In itself or combined with other criteria.

50. In fact, as it happens, the Statute of CONI confers on that entity a number of powers over sporting organisations such as FIG and FISE. Thus the statute of CONI provides that its national congress must approve the forecast and final balances of those sporting federations³³ and nominate the auditors representing CONI.³⁴ Contrary to the arguments advanced by the Commission, these powers cannot, in my view, be treated as equivalent to the actual appointment of officers by CONI to FIG and FISE.³⁵ So far as the substantive powers themselves are concerned, the power to approve the accounts and nominate auditors of the sporting organisations³⁶ in question would not normally be regarded as a power to control or otherwise materially influence the general policy of the organisations themselves. Matters might, admittedly, be different if, for example, these powers went further and included a power to approve or (as the case may be) to veto particular spending plans on the part of FIG or FISE. While this would ultimately be a matter for the referring court to verify, it seems implicit in the orders for reference that that court considers that the powers to approve the accounts of each sporting federation and to nominate auditors which are vested in CONI represent simply a standard auditing power³⁷. Viewed thus, these powers of audit do not in themselves amount to an indicator of control for the purposes of paragraph 20.15 of Annex A to the ESA Regulation.³⁸ I would observe in this context that, subject also to verification by the referring court, while the annual accounts of the national sports federations are subject to the approval of CONI, in the event of a negative opinion of that entity, it is the national assembly of the sporting federation that must ultimately approve those accounts.³⁹ In any event, as both FIG and the agent for the Italian Republic submitted at the hearing, this further underscores the purely supervisory nature of this external control.

51. The Commission also refers to the powers conferred on CONI's national commission to approve the statutes and certain rules or regulations of sporting organisations⁴⁰ and considers that they are indicators of control pursuant to paragraph 20.309(i) and indeed paragraph 20.15(b) of Annex A to the ESA Regulation. Aside from the fact that the only indicators which are relevant are those contained in paragraph 20.15 of Annex A to the ESA Regulation, the powers in question fall under the concept of 'public intervention in the form of general regulations applicable to all units working

33 Articles 7(5)(g2) and 21(5) of the Statute of CONI.

34 Article 7(5)(h12) of the Statute of CONI.

35 The power to appoint officers is one of the five specific indicators of control expressly provided for in paragraph 20.15(a) of Annex A to the ESA Regulation.

36 Which could potentially come within the terms of paragraph 20.15(b) of Annex A to the ESA Regulation.

37 FIG and the agent for the Italian Republic indicated at the hearing that the aim of such external supervision by CONI was to ensure that public funds granted to sporting federations were not diverted for purposes other than those properly authorised rather than to determine the general policy or programme of the sporting federation.

38 The Commission also notes that CONI enjoys a wide power of control over the sporting associations affiliated to the federations, which constitute an important part of the activities of the latter. According to the Commission, the statutes of CONI provide that the national council of CONI establishes, in order to guarantee the smooth running of the sports championships, the criteria for verifications carried out by the federations with respect to their affiliates in order to check their financial stability. These verifications are exercised by the federations by virtue of a delegation of powers from CONI, which can replace the federations if it is established that the verifications performed by the latter are inadequate. The delegation to the federations of the supervisory power over affiliates confirms, according to the Commission, that CONI has decisive influence over the general policy of the federations and therefore has control over them. For my part, however, I do not agree. I cannot envision how the fact that CONI has delegated certain powers of external control, particularly financial control, to sporting federations over their affiliates grants, per se and without any other particular evidence, CONI the power to determine the general policy or programme of the sporting federations concerned.

39 See Article 15(3) of Legislative Decree 242/1999 and, for example, Article 30(3)(d) of the statutes of FIG.

40 See Article 7(5)(l) of the Statute of CONI.

in the same activity' laid down in paragraph 20.15 of Annex A to the ESA Regulation. These powers are thus irrelevant when deciding whether government controls a sporting organisation which is an NPI and a non-market producer for the purpose of paragraph 20.15 of Annex A to the ESA Regulation.⁴¹

52. The Commission also considers that the power of CONI to place federations into administration in the event of serious irregularities in their management or serious violations of sports law, where it is established that their governing bodies cannot operate or in cases where the proper organisation and running of national sports competitions cannot be guaranteed,⁴² as well as the power to revoke the recognition for sporting purposes granted to federations, in the event that the criteria of recognition are no longer fulfilled⁴³ must be taken into account for the purpose of paragraph 20.15(b) of Annex A to the ESA Regulation.

53. Once again, however, I take a different view. I consider that such powers, which are exercised on a once-off basis in the event that a sporting federation fails to comply with the most important rules and obligations imposed in order for it to function in a correct manner, are powers akin to or a corollary of the power of recognition of CONI of such a federation⁴⁴ and are thus not relevant for the purpose of paragraph 20.15 of Annex A to the ESA Regulation. Such powers do not grant CONI the power to determine the general policy or programme of the sporting federation concerned.

54. I am of the view, therefore, that the terms 'control of an NPI is defined as the ability to determine the general policy or programme of the NPI', contained in paragraph 20.15 of Annex A to the ESA Regulation, must be interpreted as referring to the ability to manage or influence in a decisive manner the management of an NPI and do not refer to any powers of external supervision in the form of general regulations applicable to all units working in the same activity. Only the five specific indicators of control referred to in subparagraphs (a), (b), (c), (d) and (e) of that paragraph may be employed in order to determine whether an entity has the ability to determine the general policy or programme of the NPI.

D. The third question: the exact interpretation of the concept of 'degree of financing' and 'principal financing' and the relevance of 'membership fees' for the purposes of establishing the capacity of self-determination of the non-profit entity

55. The referring court accepts that the evidence does not establish the requisite degree of control in respect of the specific indicators enumerated at sections (a), (b), (c) and (e) of paragraph 20.15 of Annex A to the ESA Regulation, namely, the appointment of officers, the obligations contained in the statutes of FIG and FISE, contractual agreements or risk exposure. The issue raised by the referring court instead concerns the interpretation of paragraph 20.15(d) of Annex A to the ESA Regulation, namely, the degree of financing and whether the revenue FIG and FISE receives from its own

41 The Commission also notes that CONI has the power to define the fundamental principles that apply in the statutes of the federations, such as the principle of separation of powers between the primary organs of the federations (assembly, federal council, federal president and college of auditors); the principle of internal democracy governing the voting rights of affiliated societies and associations and athletes within the federation; the principle of eligibility for federal office which governs the election, term and renewal of the terms of office of elected representatives, as well as the incompatibility between certain functions; the principle of athlete representation in national governing bodies. According to the Commission, this power confers on the public entity CONI the capacity to influence the internal structure of the federations and, therefore, can be considered as an indication of its capacity to determine the general policy of the federations or as a form of public control. I do not agree. In my view, such powers once again fall under the concept of 'public intervention in the form of general regulations applicable to all units working in the same activity' laid down in paragraph 20.15 of Annex A to the ESA Regulation.

42 Articles 6(f) and 7(5)(f) of the Statute of CONI.

43 Article 21(5) of the Statute of CONI.

44 Thereby constituting 'public intervention in the form of general regulations applicable to all units working in the same activity' laid down in paragraph 20.15 of Annex A to the ESA Regulation.

membership fees can be taken into account in determining the question of supposed governmental control. There are, indeed, essentially two parts to this question, namely, the concept of the degree of financing and the relevance of the membership fees. I propose to consider these issues separately, commencing with the issue of membership fees.

1. The status of the membership fees

56. As can be noted from point 22 above, the main income of FIG and FISE is derived from membership fees, along with other revenue from both national and international competitions, advertising and sponsorship deals. The referring court considers that a high level of membership fees would tend to demonstrate that a sufficiently high degree of financial and management autonomy had been achieved by FIG and FISE, such that it could not be said that they are controlled by a governmental unit such as CONI, the significant financial contribution made by the latter body notwithstanding.⁴⁵

57. The referring court indicated in its order for reference that in the view of ISTAT and the Public Prosecutor the membership fees are, however, contributions of a public and parafiscal nature on account of the monopoly position which FIG and FISE occupy in respect of the Italian golfing and equestrian sports sectors. They both submit that such fees cannot therefore be regarded as relevant in any assessment of the degree of financial autonomy actually enjoyed by those federations.

58. The referring court considers that the argument that such membership income amounted, in effect, to revenue from the public finances should be rejected. For my part, I consider that this approach is entirely correct. It is true that, as the Commission observes in its written submissions to this court, only those registered with FIG and FISE can pursue their sport of interest⁴⁶ so that to that extent they may be regarded as occupying a monopoly position so far as the organisation of the Italian golfing and equestrian sports sectors are concerned. The fact remains, however, that golf and equestrian sports remain voluntary sports⁴⁷ and the membership fees in question represents voluntary payments received from households.⁴⁸

59. The payment, for example, of the membership fee to FIG is no more compulsory in this sense than is, for example, the payment made by a golfer who wished to play at a particular golf course in respect of the access charge (or 'green fee') for that course. As the referring court observes, under Italian law, sports federations are non-profit, membership-based entities governed by the rules of Book 1 of the Italian Civil Code. Membership is therefore a voluntary act by which the member concerned undertakes to comply with a number of internal rules and to pay the membership fee. This payment may be regarded, in essence, as a consequence of the voluntary assumption of a contractual obligation on the part of the member concerned. Such a payment enables the member to take part in the sporting association concerned and, by the payment of the fee, to assist in providing the revenue such as would enable that organisation to pursue its objectives.

60. The payment of the membership fees to sporting organisations such as FIG and FISE is accordingly a purely private, voluntary contractual payment by the member concerned paid in consideration of the services supplied by those organisations. It follows, therefore, that, contrary to the arguments advanced by ISTAT and the Public Prosecutor before the referring court and the Commission before this court, such membership fees cannot realistically be regarded as being in the nature of a public, parafiscal charge. This is because the defining feature of such a parafiscal charge is that payment is imposed and

⁴⁵ It is worth recalling that in accordance with paragraph 20.15 of Annex A to the ESA Regulation even if an NPI is mainly financed by government it may nonetheless be able to determine its policy or programme to a significant extent and would thus not be considered as being controlled by government.

⁴⁶ At least so far as competitive athletes are concerned.

⁴⁷ Whether exercised in an amateur or professional capacity.

⁴⁸ See paragraphs 4.125 and 4.126 of Annex A to the ESA Regulation.

is compulsorily recovered not by reference to any contractual arrangement but rather on the basis of *public law*. Indeed, in some instances, failure to pay a charge may attract administrative sanctions or even criminal penalties. Such a parafiscal charge, furthermore, is not levied by reference to the actual use or the cost of services provided by the organisation in question.⁴⁹

61. There is, moreover, nothing to suggest⁵⁰ that in the event of the non-payment of the fees that FIG or FISE would be entitled to have recourse to recover them other than by reference to standard private law remedies.

62. I therefore consider that income from membership fees of sporting organisations which are purely private, voluntary contractual payments made by members and which are paid in consideration of the services supplied by those organisations must not be taken into account in assessing the degree of financing by government for the purposes of paragraph 20.15(d) of Annex A to the ESA Regulation. The relative importance of such membership fees and other ‘private’ income as compared to financing by government is thus a clear indicator that an NPI is not controlled by government and should thus be classified as an NPISHs.

2. *The annual contributions made by CONI*

63. There remains the issue of the annual contribution made by CONI – a government entity - which, as I have already noted, amounts to some 30% of FIG’s and FISE’s income. The level of this contribution is admittedly significant and I do not exclude the possibility that in some contexts and in some circumstances a contribution of this size might be an indicator of control. Normally, however, a recurring contribution of this kind would *not in itself* be sufficient to establish control.

64. It might, however, be different if there were evidence that the sporting organisation in question had aligned its management and organisational policies and programme to the wishes of the public entity making that contribution by reason of its *de facto* fiscal dependence on that entity. Even in such circumstances, however, for the purposes of demonstrating the existence of control, it would be necessary to show that such fiscal dependence had in effect created a situation where the government entity making the contribution exercised a decisive influence in respect of key management and organisational decisions.

65. Here it must be recalled that paragraph 20.15 of Annex A to the ESA Regulation expressly acknowledges that even if a particular NPI which is ‘mainly financed by government’ remains able to determine ‘its policy or programme to a significant extent then it would not be considered as being controlled by government.’ This is done by examining the other four indicators laid down in paragraph 20.15 of Annex A to the ESA Regulation.⁵¹ In the present cases FIG and FISE are not ‘mainly financed’ by a governmental entity,⁵² and even if they were, it would still be necessary to demonstrate that they no longer maintain their ability to determine their general policy or programme⁵³ in order to establish for this purpose the existence of control by a government entity.

49 See, to that effect, the judgment of 12 September 2013, *IVD* (C-526/11, EU:C:2013:543, paragraph 24).

50 Subject to verification by the referring court.

51 I also consider that even if an NPI is not mainly financed (or, indeed for that matter, financed at all) by governments, it may nonetheless be controlled by a government entity, where, having weighted the five indicators of control in paragraph 20.15 of Annex A to the ESA Regulation, it is established that that entity can determine the general policy or programme of the NPI.

52 i.e., CONI.

53 In this regard, it would appear pursuant to the indicator laid down in paragraph 20.15(d) of Annex A to the ESA Regulation, that FIG and FISE are ultimately controlled by their members. This, however, is ultimately a matter for the national court to verify.

66. It seems implicit in the judgment of the referring court that nothing of the kind has occurred in the present cases. No evidence has been adduced to suggest that FIG or FISE have not retained, through their members, their ability to determine their own programmes and policies, albeit this is ultimately a matter for that court to verify.

67. In any event, it will be a matter for the referring court to determine whether FIG and FISE are *de facto* fiscally dependent on CONI by reason of the size of the latter's annual contribution. Yet even if any such fiscal dependence was ultimately established to the satisfaction of the referring court, it would also be necessary to demonstrate that FIG and FISE had in fact aligned their general policies or programmes to the wishes of CONI by reason, *inter alia*, of any such *de facto* fiscal dependence on that body before a finding of control by a governmental unit could properly be made. Accordingly, in the absence of evidence that CONI manages or influences in a decisive manner the management of FIG and FISE, then the answer must be that in these particular circumstances it has not been demonstrated that FIG and FISE are subject to the control of a government entity within the meaning of paragraph 20.15 of Annex A to the ESA Regulation.

VI. Conclusion

68. In the light of the foregoing considerations, I propose that the Court answer the questions asked by the Corte dei conti, (Court of Auditors, Italy) as follows:

The concept of 'public intervention in the form of general regulations applicable to all units working in the same activity' laid down in paragraph 20.15 of Annex A to Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union which governs the European System of Accounts 2010 ('the ESA Regulation') refers, *inter alia*, to the rules regarding such matters as the recognition of sporting organisations, the protection of the integrity of sporting organisations and the competitions which they organise and the safeguarding of the health and welfare of athletes which are expressly provided for by law and apply indistinctly and generally to all sporting organisations by setting common standards for this purpose. The power to establish such rules is irrelevant when deciding whether government controls a sporting organisation which is a non-profit institution ('NPI') and a non-market producer for the purpose of paragraph 20.15 of Annex A to the ESA Regulation.

The terms 'control of an NPI is defined as the ability to determine the general policy or programme of the NPI', contained in paragraph 20.15 of Annex A to the ESA Regulation, must be interpreted as referring to the ability to manage or influence in a decisive manner the management of an NPI and do not refer to any powers of external supervision in the form of general regulations applicable to all units working in the same activity. Only the five specific indicators of control referred to in subparagraphs (a), (b), (c), (d) and (e) of that paragraph may be employed in order to determine whether an entity has the ability to determine the general policy or programme of the NPI.

Income from membership fees of sporting organisations which are purely private, voluntary contractual payment by members paid in consideration of the services supplied by those organisations must not be taken into account in assessing the degree of financing by government for the purposes of paragraph 20.15(d) of Annex A to the ESA Regulation. The relative importance of such membership fees and other 'private' income as compared to financing by government is thus a clear indicator that an NPI is not controlled by government and should thus be classified as an NPISHs. Moreover, paragraph 20.15 of Annex A to the ESA Regulation expressly acknowledges that even if a particular NPI which is 'mainly financed by government' remains able to determine 'its policy or programme to a significant extent then it would not be considered as being controlled by government'.