Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 15 December 2022[1]

Case C-124/21 P

International Skating Union
v

European Commission

(Appeal – Competition – Rules established by an international sports federation which simultaneously makes use of regulatory powers and carries out an economic activity – Rules relating to the authorisation of events, the participation of athletes therein and the arbitration rules governing conflicts – Article 101(1) TFEU – Restriction of competition by object – Justification)

I. Introduction

1. By its appeal, the International Skating Union ('the ISU' or 'the appellant') seeks to have set aside in part the judgment of the General Court of the European Union of 16 December 2020, *International Skating Union* v *Commission* (T-93/18, 'the judgment under appeal', EU:T:2020:610), by which the General Court dismissed in part its action for annulment of Decision C(2017) 8230 final of the European Commission, 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 decision at issue').

2. At the same time, a cross-appeal, also seeking to have set aside in part the judgment under appeal, was lodged by the two athletes whose complaint had led the Commission to initiate proceedings against the ISU, namely Mr Tuitert and Mr Kerstholt, and by the European Elite Athletes Association, interveners at first instance ('the interveners' and 'the cross-appellants').

3. Like Case C-333/21, *European Superleague Company*, in which my Opinion is being delivered on the same day, the present case is central to the issue of the relationship and interplay between competition law and sport, and raises questions which, as well as being in some cases legally unprecedented, are also of major importance from an 'existential' perspective for sports federations.

[1] Original language: French.

II. Background to the dispute

4. The background to the dispute is set out in paragraphs 1 to 37 of the judgment under appeal and, for the purposes of this Opinion, may be summarised as follows.

A. Factual background

5. The ISU is the only international sports federation recognised by the International Olympic Committee ('the IOC') in the field of figure skating and speed skating on ice. It is composed of national skating associations (federations), the members of which are clubs and skaters.

6. The ISU has a dual function in so far as its purpose is, on the one hand, to regulate, organise, govern and promote figure skating and speed skating on ice at worldwide level and, on the other hand, to carry out the economic activity of organising international ice skating events.

7. In the context of its 'regulatory' functions, the ISU has issued a set of regulations, codes and communications, which include the following rules. The ISU General Regulations cover rules identified as 'eligibility rules', which determine the conditions in which athletes may participate in ice skating events. Those eligibility rules provide that such events must, first, have been authorised by the ISU or its members and, secondly, comply with the rules established by that federation.

8. In the version adopted during 2014, those eligibility rules included, inter alia, Rule 102(2)(c), Rule 102(7) and Rule 103(2), from which it followed that, if an athlete participated in a competition not authorised by the ISU or by one of its members, the person concerned would be exposed to a penalty of a lifetime ban from any competition organised by the ISU.

9. The eligibility rules also contained Rule 102(1)(a)(i), according to which 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 [Constitution], and Rule 102(1)(a)(ii), which stated that 'the condition of eligibility is made for the adequate protection of the economic and other interests of the ISU, which uses its financial revenues for the administration and development of … sport disciplines and for the support and benefit of [its] members and their skaters'.

10. In 2016, the eligibility rules were revised.

11. According to Rule 102(7), as revised, the penalties provided for in the event of an athlete's participation in an event not authorised by the ISU are to be determined in accordance with the seriousness of the infringement and include a warning in the case of a first infringement, a ban of up to 5 years in the event of negligent participation in a non-unauthorised event, a ban of up to 10 years for deliberate participation in such an event and a lifetime ban for an infringement deemed to be 'very serious'.

12. In addition, Rule 102(1)(a)(ii), as revised, no longer refers to the adequate protection of the ISU's economic interests and provides instead that 'the condition of eligibility [is] made for adequate protection of the ethical values, jurisdiction objectives and other legitimate respective interests' of that federation, which 'uses its financial revenues for the administration and development of … sport disciplines and for the support and benefit of [its] members and their skaters'.

13. Alongside those various rules, Article 25 of the ISU Constitution, as applicable since 30 June 2006, has provided for the possibility for athletes who wish to challenge a decision on ineligibility concerning them to lodge an appeal against that decision exclusively before the Court of Arbitration for Sport ('the CAS'), established in Lausanne (Switzerland).

14. On 25 October 2015, the ISU published Communication No 1974 ('Communication No 1974'), entitled 'Open international competitions', which sets out the procedure to be followed in order to obtain authorisation to organise an international ice skating competition and is applicable to members of that federation and to third-party organisers.

15. That communication states that all such events must be authorised in advance by the ISU and organised in accordance with the rules established by that federation. The communication also sets out a series of general, financial, technical, sporting and ethical requirements with which any organiser of an ice skating event must comply. Those requirements provide, in particular, that any request for authorisation must be accompanied by technical and sporting information (venue of the event, value of the prizes to be awarded, business plans, budget, television coverage, etc.), that any organiser must submit a declaration confirming that he or she accepts the ISU's Code of Ethics and that the ISU may request further information on those various matters. As is apparent from Article 4(h) of the ISU Code of Ethics, as applicable since 25 January 2012, any organiser must, inter alia, '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.

16. Accordingly, Communication No 1974 authorises the ISU to accept or reject a request for authorisation on the basis of the requirements set out in that communication and on the basis of the fundamental objectives pursued by that federation, as defined, in particular, in Article 3(1) of its constitution. In the event that a request is rejected, an organiser may appeal before the CAS, in accordance with the ISU's procedural rules.

17. Finally, that communication provides that any organiser of an ice skating event is required to pay a solidarity contribution to the ISU, the amount of which is to be determined on a case-by-case basis and which is intended for the promotion and development of the sporting disciplines under the supervision of that federation.

B. The administrative procedure and the decision at issue

18. On 8 December 2017, the Commission adopted the decision at issue, which relates both to the ISU rules adopted during 2014 and to those resulting from the revision which was carried out in 2016.

19. In that decision, the Commission, in the first place, defined the relevant market as the worldwide market for the organisation and marketing of international speed skating events. The Commission also noted that the ISU had the ability to have a substantial impact on competition on that market in its dual capacity as the body with the power to authorise international speed skating events and as the body responsible for organising the most important of those events.

20. In the second place, the Commission considered that the ISU could be regarded as an association of undertakings and that the rules adopted by it constituted a decision by such an association of undertakings within the meaning of Article 101(1) TFEU.

21. In the third place, the Commission considered that the eligibility and authorisation rules established by the ISU had the object of restricting competition within the meaning of Article 101(1) TFEU, on the ground, essentially, that an examination of the content of those rules, their objectives and the economic and legal context of which they formed part showed that those rules could be used to prevent potential organisers of international speed skating events competing with ISU events from entering the relevant market and that those rules were such as to restrict the possibilities for professional speed skaters to take part freely in such events and to deprive potential organisers of such events of the services of the athletes whose participation was necessary for such events to be held.

22. In the fourth place, the Commission noted that there was no need to examine the effects of the rules in question on competition, before setting out its reasons for considering that those rules also had anticompetitive effects.

23. In the fifth place, the Commission found, essentially, that those rules could not be regarded as falling outside the scope of Article 101(1) TFEU on the ground that they constituted restrictions which are inherent in the pursuit of legitimate objectives and are proportionate to those objectives, with the result that they had to be classified, in the light of their anticompetitive object and effects, as a restriction prohibited by that provision.

24. In the sixth place, the Commission considered that the arbitration rules adopted by the ISU did not in themselves constitute a restriction of competition but that, in the present case, those rules nonetheless reinforced the restriction of competition deriving from the eligibility and authorisation rules established by that federation.

25. In the seventh and last place, the Commission found that those eligibility and authorisation rules did not fulfil the cumulative conditions provided for in Article 101(3) TFEU to qualify for exemption under that provision, that those rules affected trade between Member States, that they had effects both within the European Union and within the European Economic Area (EEA) and that the ISU should be required to bring to an end the infringement established on pain of periodic penalty payments, although the Commission did not impose a fine on the ISU in view, in particular, of the absence of any 'precedent' decision in that field.

26. The operative part of the decision at issue includes Article 1, according to which the ISU '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 … 2014 General Regulations and the … 2016 General Regulations, with regard to speed skating'. It also contains Article 2, requiring that federation to bring to an end that infringement and to refrain from repeating it, and Article 4, providing for the imposition of periodic penalties in the event of failure to comply with those requirements.

C. The judicial proceedings and the judgment under appeal

27. By application lodged at the Registry of the General Court on 19 February 2018, the ISU sought annulment of the decision at issue. In support of the form of order sought, the ISU relied on eight pleas in law alleging, in essence, in the first ground of appeal, infringement of the obligation to state reasons; in the second to fifth grounds of appeal, infringement of Article 101

TFEU in so far as that article was applied to its eligibility and authorisation rules;[2] in the sixth ground of appeal, infringement of that article in so far as it was applied to the ISU arbitration rules, and; in the seventh and eighth grounds of appeal, the unlawfulness of the requirements and periodic penalty payments which were imposed on the ISU.

28. On 16 December 2020, the General Court handed down the judgment under appeal, in which it held, in essence, that the decision at issue was not vitiated by illegality in so far as it related to the ISU's eligibility and authorisation rules, but that it was unlawful in so far as it related to the arbitration rules established by that federation.

D. Forms of order sought by the parties

1. The forms of order sought on appeal

29. By its appeal, the ISU claims that the Court should:

– set aside the judgment under appeal in so far as it dismissed in part the action at first instance;

– annul the decision at issue in so far as it has not already been annulled by the judgment under appeal; and

– order the Commission and the interveners to pay the costs incurred both at first instance and on appeal.

30. The Commission contends that the Court should dismiss the appeal and order the ISU to pay the costs.

31. The interveners contend that the appeal should be dismissed.

2. The forms of order sought in the cross-appeal

32. By their cross-appeal, the cross-appellants claim that the Court should:

– set aside the judgment under appeal in so far as it partially annulled the decision at issue;

– dismiss the action at first instance to the extent that it has not already been dismissed by the judgment under appeal; and

– order the ISU to pay the costs incurred at the appeal stage.

33. The Commission claims that the Court should allow the cross-appeal and order the ISU to pay the costs.

34. The ISU contends that the cross-appeal should be dismissed and the interveners ordered to pay the costs.

[2] The appellant's second plea concerned the finding of a restriction by object and the third and fourth pleas concerned the Commission's assessment of whether the restriction of competition is inherent in and proportionate to the pursuit of legitimate objectives.

III. Analysis of the appeal

A. Preliminary observations

35. Before examining the appeal, it seems to me useful to clarify the analytical framework which must be applied when analysing rules issued by sports federations in the light of competition law.

1. The application of Article 101(1) TFEU to rules adopted by sports federations

36. According to the case-law of the Court, sport is subject to the competition rules of the FEU Treaty to the extent that it constitutes an economic activity.[3] It follows that the rules of sports governing bodies such as the ISU are not, in principle, exempt from the application of EU competition law.[4]

37. However, not every measure taken by a sports federation which may have a restrictive effect on competition 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 that measure was taken or produces its effects, and, more specifically, of its objectives.[5]

38. Accordingly, in the context of the application of competition law to rules established by sports federations, references to the specific characteristics of sport in Article 165 TFEU may be relevant, in particular for the purpose of assessing any justifications for restrictions on competition.[6]

39. Therefore, where the restrictive effects which follow from a sports federation's contested regulation can reasonably be regarded as necessary to guarantee a legitimate 'sporting' objective and if those effects do not go beyond what is necessary to ensure the pursuit of that objective, those measures do not fall within the scope of Article 101(1) TFEU.[7]

40. It must be stated in that regard that the analysis of ancillary restraints and the question whether particular conduct falls outside the scope of Article 101(1) TFEU on the ground that it is proportionate to the legitimate objective pursued is separate from the question whether that conduct has as its object or effect the restriction of competition. As is clear from the case-law of the Court, it is only after finding, in the first stage, that a measure is capable of restricting competition within the meaning of Article 101(1) TFEU – but without necessarily reaching an express finding of a restriction of competition by object or effect – that the Court will examine, in the second stage, whether the effects restrictive of competition are inherent in the pursuit of legitimate and proportionate objectives and therefore fall outside the scope of Article 101(1) TFEU.[8]

3 See judgment of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 45 and the case-law cited).

4 See, to that effect, judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission* (C-519/04 P, 'the judgment in *Meca-Medina*', EU:C:2006:492, paragraphs 29 to 34).

5 See judgment of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98, paragraph 97).

6 See judgment of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143, paragraph 40).

7 See judgment in *Meca-Medina* (paragraph 42 and the case-law cited and paragraph 45).

8 See judgments of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98, paragraph 110); of 4 September 2014, *API and Others* (C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, EU:C:2014:2147, paragraphs 43 and 49); and of 23 November 2017, *CHEZ Elektro Bulgaria and FrontEx International* (C-427/16 and C-428/16, EU:C:2017:890, paragraphs 51 and 57).

41. In contrast to the approach adopted by the Commission in the decision at issue, it should be noted that, in the judgment under appeal, the General Court examined the appellant's second plea, concerning the finding that the eligibility rules had the object of restricting competition, together with the third and fourth pleas, relating to the Commission's assessment of whether the restriction of competition is inherent in and proportionate to the pursuit of legitimate objectives. [9]

42. Moreover, application of the concept of 'ancillary restraints' does not require the balancing of pro-competitive and anticompetitive effects, since that analysis can be carried out only within the specific framework of Article 101(3) TFEU. [10] It follows that the theory of ancillary restraints may prove particularly relevant in the case of rules issued by sports federations, in so far as the conditions for exemption under Article 101(3) TFEU appear to be more difficult to satisfy than those referred to in the judgment in *Meca-Medina*. [11] It should be recalled, in that regard, that, in order to benefit from an individual exemption under Article 101(3) TFEU, a measure must fulfil the four cumulative conditions set out in that article and that it is for the party alleged to have infringed the competition rules to demonstrate that pro-competitive effects by way of efficiency gains, linked primarily to economic benefits – such as the creation of additional value through lowering the cost of production or improving and creating a new product – outweigh the restrictive effects of an agreement.

43. Finally, where the restrictions go beyond what is necessary to ensure the attainment of the legitimate objective pursued, the effects on competition must be analysed in accordance with the traditional analysis of Article 101(1) TFEU, without excluding the possibility of any justification under Article 101(3) TFEU. [12]

2. The obligations of a sports federation which has a power of authorisation and a monopoly on the organisation of sports events

44. In the light of the role traditionally conferred on sports federations, they are exposed to the risk of a conflict of interests arising from the fact that, on the one hand, they have regulatory powers and, on the other hand, they carry out an economic activity.

45. Accordingly, when those powers are not subject to restrictions, obligations or review, a sports federation having those powers is capable of distorting competition by denying other operators access to the relevant market by favouring the event(s) which it organises. A system of undistorted competition could be guaranteed only if equality of opportunity were secured as between the various economic operators. [13]

46. In the judgment under appeal, the General Court confirmed the Commission's position concerning the risk of a conflict of interests, the Commission having emphasised the need to make that combined role subject to a series of limits and controls, in particular by establishing a framework of transparent, objective, non-discriminatory and proportionate criteria limiting the ability of a sports federation to use its power of authorisation and its power to impose penalties,

[9] See points 87 to 89 of this Opinion.

[10] See recitals 29 and 30 of the Communication from the Commission on the Guidelines on the application of Article 81(3) of the Treaty (OJ 2004 C 101, p. 97).

[11] See point 40 of this Opinion.

[12] See judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, 'the judgment in *OTOC*', EU:C:2013:127, paragraphs 101 to 103).

[13] See judgment of 1 July 2008, *MOTOE* (C-49/07, 'the judgment in *MOTOE*', EU:C:2008:376, paragraph 51), and judgment in *OTOC* (paragraph 88).

in order to prevent any risk of misuse through favouring the economic activity of the party concerned or disadvantaging the economic activities of its competitors or even excluding any competition. In that regard, the General Court based its analysis primarily on the case-law of the Court of Justice resulting from the judgments in *MOTOE* and *OTOC*.[14]

47. In the present case, since the ISU itself organises events and also has the power to authorise events organised by third parties, it is clear that this situation is likely to give rise to a conflict of interests, which means that the ISU must be made subject to certain obligations in the exercise of its regulatory functions in order not to distort competition.

48. However, it should be pointed out that the mere fact that the same entity performs the functions of both regulator and organiser of sporting events does not in itself entail an infringement of EU competition law. Moreover, it follows from the case-law cited in point 46 of this Opinion, and without there being any need to establish a structural separation between those two functions, that the main obligation of a sports federation in the situation of the ISU is to ensure that third parties are not improperly denied access to the market to the extent that competition on that market is distorted.

49. It follows that sports federations may, under certain conditions, deny market access to third parties, without this constituting an infringement of Article 101(1) TFEU, provided that the denial of access is justified by legitimate objectives and that the measures taken by those federations are proportionate to those objectives.

B. The first ground of appeal and the second ground of the cross-appeal

1. Preliminary observations

50. By the three parts of the first ground of its appeal, the ISU calls into question the part of the judgment under appeal which confirms the existence of an unjustified restriction of competition by object relating to the pre-authorisation system and the exclusivity clause coupled with penalties introduced by its rules. In particular, the ISU criticises the General Court for having:

– by the first part of that ground of appeal, failed to examine the ISU's arguments concerning the Commission's assessment of certain facts underlying the finding of a restriction of competition by object;

– by the second part of that ground of appeal, substituted its factual and legal assessment for that of the Commission, in finding the existence of an infringement different from that found in Article 1 of the decision at issue, on the basis of a misinterpretation of Article 101(1) TFEU;

– by the third part of that ground of appeal, made errors in the overall analysis of the four factors taken into account by the Commission in support of its conclusion that the eligibility rules constituted a restriction of competition by object.[15]

[14] See judgments in *MOTOE* (paragraphs 49 to 52), and *OTOC* (paragraphs 69 to 92).

[15] More specifically, the ISU maintains that the General Court's examination of the content of the rules it introduced, the legal and economic context of those rules and the objectives they pursue does not demonstrate the degree of harm required for classification as a restriction of competition by object.

51. In the second ground of their cross-appeal, the interveners also call into question the part of the judgment referred to in the third part of the first ground of appeal, from a different perspective, that is to say that the General Court wrongly considered that the ISU's conduct in seeking to protect its own economic interests did not in itself constitute an anticompetitive objective.

52. The main question raised by those grounds of appeal, which have several overlapping elements, is, in essence, whether the General Court gave an interpretation of Article 101(1) TFEU which was untainted by any error of law, in upholding the decision at issue in so far as it found that there was a restriction of competition by object.

53. I shall therefore examine together those grounds of appeal and parts thereof, while indicating in the following analysis, where appropriate, the points specific to certain grounds of appeal or parts thereof.

2. Admissibility

54. Before analysing the first ground of appeal, it is necessary, first of all, to dismiss the objections of inadmissibility raised by the interveners concerning the first part and part of the third part of the first ground of appeal.

55. Contrary to what the interveners maintain, the ISU's line of argument does not constitute a request for a reassessment of the facts presented in the guise of alleged errors of law. That line of argument actually involves a question of law and, more specifically, the General Court's interpretation of Article 101(1) TFEU, in so far as the ISU argues that the General Court applied the wrong legal criterion for application of the conditions relating to a finding of an infringement of competition law.

56. Next, for similar reasons, the objection of inadmissibility raised by the ISU against the second ground of the cross-appeal must be dismissed. The interveners' argument relates not to a question of fact but to a purely legal assessment made by the General Court. As stated in point 102 of this Opinion, the interveners rely on an error of law, criticising the General Court for failing to take into account the fact that the ISU is in a situation different from any other undertaking for which the protection of its economic interests is legitimate.

57. Lastly, the ISU's request that that ground of appeal be declared ineffective must be rejected on the ground that, irrespective of the issues raised by the interveners, the General Court ultimately upheld the Commission's finding concerning the existence of a restriction of competition by object. The second ground of the cross-appeal concerns a question relating to the legal and economic context of the present case and to the more general issue of preventing the risk of a conflict of interests.

3. Substance: the finding of a restriction of competition by object

(a) General observations on the definition of the concept of 'anticompetitive object' within the meaning of Article 101(1) TFEU

58. To be caught by the prohibition laid down in Article 101(1) TFEU, an agreement, a decision by an association of undertakings or a concerted practice must have 'as [its] object or effect' the prevention, restriction or distortion of competition in the internal market.

59. It must be borne in mind, in that regard, that the anticompetitive object and effect of an agreement are not cumulative but alternative conditions for assessing whether such an agreement comes within the scope of the prohibition laid down in Article 101(1) TFEU. Thus, according to the settled case-law of the Court, the alternative nature of that condition, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. [16]

60. According to the settled case-law of the Court, certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. [17] That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition. [18]

61. It is also apparent from the case-law of the Court that it is not necessary to examine the effects of an agreement once its anticompetitive object has been established. [19] Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent. [20]

62. 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. [21]

63. Having clarified that point, it is now necessary to examine the analysis carried out by the General Court, in order to determine whether the latter was right to consider that the ISU rules achieved a degree of harm such that their negative effects on competition could be presumed.

16 See judgment of 18 November 2021, *Visma Enterprise* (C-306/20, EU:C:2021:935, paragraph 55 and the case-law cited).

17 See judgment of 18 November 2021, *Visma Enterprise* (C-306/20, EU:C:2021:935, paragraph 57 and the case-law cited).

18 See judgment of 11 September 2014, *CB* v *Commission* (C-67/13 P, '*the judgment in CB* v *Commission*', EU:C:2014:2204, paragraph 50 and the case-law cited).

19 See judgment of 4 June 2009, *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraphs 28 and 30).

20 See judgment in *CB* v *Commission* (paragraph 52 and the case-law cited).

21 See judgment of 16 July 2015, *ING Pensii* (C-172/14, EU:C:2015:484, paragraph 33 and the case-law cited).

(b) Assessing the existence of a restriction by object in the present case

64. I propose to follow the 'traditional' analysis for a finding of a restriction of competition by object, by examining, first, the General Court's analysis of the content (Section 1) and the objectives (Section 2) of the eligibility rules, which will lead me to a preliminary conclusion (Section 3), before I address, secondly, the arguments put forward by the appellant concerning the errors allegedly made by the General Court in its assessment of the legal (Section 4) and economic context (Section 5), and the refusal to take into account the parties' intention.

(1) The analysis of the content of the eligibility rules

65. It should be recalled, at the outset, that it is clear from the General Court's findings that the ISU rules which were in place prior to the amendments introduced in 2016 and the publication of Communication No 1974 did not provide for any authorisation criterion for competitions that third parties planned to organise and that any participation in third-party events was subject to a penalty of a lifetime ban. The General Court accordingly found that, before the publication of that communication, the appellant had full discretion to refuse to authorise such events. [22]

66. The adoption of Communication No 1974 modified the eligibility rules by defining the procedure to be followed in order for a third-party organiser to be able to obtain authorisation to organise a competition under the pre-authorisation system, introducing, to that end, a number of general, financial, technical, sporting and ethical requirements. [23] Notwithstanding the changes made by that communication, the General Court found that the ISU's discretionary power was not substantially altered. The General Court thus considered that the ISU continued to have a broad discretion enabling it to refuse to grant market access to any competitor on the basis of vaguely described conditions, including for reasons not explicitly provided for in the eligibility rules or in the Code of Ethics, which could lead to the adoption of refusal decisions on grounds which are not legitimate. [24] The ISU could also impose, or at least threaten to impose, severe penalties on skaters participating in unauthorised events organised by competitors.

67. It was on the basis of those findings that the General Court concluded that the eligibility rules constituted a restriction of competition by object, the analysis of the content of those eligibility rules by the General Court having focused, first on the authorisation criteria [25] and, secondly, on the severity of the penalties provided for in those rules, [26]aspects which I shall examine separately below.

(i) The authorisation criteria provided for in the eligibility rules

68. I would point out, in the first place, that, according to the settled case-law of the Court, the essential legal criterion for ascertaining whether there is a restriction of competition by object is the finding that such an agreement reveals in itself *a sufficient degree of harm* to competition for it to be considered that it is not necessary to assess its effects. [27] Such a finding must therefore be

22 See paragraph 86 of the judgment under appeal.

23 See point 15 of this Opinion.

24 See paragraphs 89 and 95 of the judgment under appeal.

25 See paragraphs 84 to 89 and 96 to 98 of the judgment under appeal.

26 See paragraphs 90 to 95 of the judgment under appeal.

27 See judgment of 2 April 2020, *Budapest Bank and Others* (C-228/18, EU:C:2020:265, paragraph 37 and the case-law cited).

limited to those types of coordination that can be regarded, *by their very nature, as being harmful to the proper functioning of normal competition* [28] and whose harmful nature is *easily identifiable*, [29] which requires a restrictive interpretation of the concept of 'restriction of competition by object'. [30]

69. It should also be noted that, in order to justify an agreement being classified as a restriction 'by object', there must be sufficiently reliable and robust experience for the view to be taken that that agreement is, by its very nature, harmful to the proper functioning of competition without it being necessary to examine the actual effects. [31]

70. In the first place, in paragraph 89 of the judgment under appeal, the General Court finds that the anticompetitive object of the ISU rules may be inferred from the fact that the ISU had *broad discretion to refuse events proposed by third parties*, which *could lead* to the adoption of refusal decisions on grounds which are not legitimate. The restriction of competition by object results, therefore, according to the General Court, from the ISU's discretionary power, and thus from the ability of that federation, to reject events organised by third parties.

71. Relying on the judgment in *T-Mobile Netherlands and Others*, [32] the Commission defends that position, arguing that the anticompetitive object may be inferred, in the present case, from the fact that the ISU rules are 'capable' of restricting competition.

72. However, it seems to me doubtful that the *theoretical capability* of undermining competition, on the basis of the *broad discretion* which a sports federation may have, can be considered sufficient to establish an anticompetitive object, in particular where the anticompetitive effects which it should, in principle, be possible to presume are uncertain and, in any event, are not apparent from the analysis carried out by the General Court, which confined itself to an abstract interpretation of the ISU rules in question, without examining any specific example of their implementation.

73. I also note that the very existence of a pre-authorisation mechanism allowing third-party organisers to apply for access to the market – irrespective of the discretionary power of the ISU to refuse such authorisation – should be sufficient, in itself, to raise questions as to whether the ISU rules are sufficiently harmful from the standpoint of competition law. The question whether the mechanism in place is actually sufficient to ensure effective competition in the relevant market or whether it restricts competition can only be established, in my view, on the basis of an analysis of anticompetitive effects.

74. Moreover, when one examines more closely the elements taken into account by the General Court in analysing the content of the eligibility rules in order to establish the discretion enjoyed by the ISU, it seems to me to be debatable whether those elements can have the harmful nature required by the case-law of the Court of Justice in order to establish a restriction of competition by object. [33] I would point out, in that regard, that, in analysing the content of the eligibility rules, the

[28] See judgment in *CB* v *Commission* (paragraph 50), and Opinion of Advocate General Wahl in *CB* v *Commission* (C-67/13 P, EU:C:2014:1958, point 39).

[29] See Opinion of Advocate General Wahl in *CB* v *Commission* (C-67/13 P, EU:C:2014:1958, point 56), and Opinion of Advocate General Bobek in *Budapest Bank and Others* (C-228/18, EU:C:2019:678, point 42).

[30] See judgment of 2 April 2020, *Budapest Bank and Others* (C-228/18, EU:C:2020:265, paragraph 54 and the case-law cited).

[31] See judgment of 2 April 2020, *Budapest Bank and Others* (C-228/18, EU:C:2020:265, paragraph 76 and the case-law cited), and Opinion of Advocate General Bobek in *Budapest Bank and Others* (C-228/18, EU:C:2019:678, points 54 and 63 to 73).

[32] Judgment of 4 June 2009 (C-8/08, EU:C:2009:343, paragraph 31).

[33] See point 68 of this Opinion.

General Court took into account, in addition to the penalties, the absence of a direct link between, first, the eligibility rules and, secondly, legitimate objectives or an event or series of events organised by the appellant.

75. For example, the fact that a sports federation does not define the objectives pursued in those rules in a sufficiently precise manner, by merely using 'vague expressions', or that it does not provide for an exhaustive list of the requirements for authorisation of a third-party event (by reserving the right to request additional information from the organisers in relation to the various requirements referred to above), as the General Court found in paragraphs 85 and 87 of the judgment under appeal, may indeed be indicative of the broad, or excessive, scope of the eligibility rules and of the broad discretion enjoyed by that federation, but it by no means reveals harmfulness to competition or an anticompetitive object. [34] The same is true of the findings of the General Court in paragraph 97 of the judgment under appeal concerning the absence of a link between the appellant's eligibility rules and an event or series of events organised by the appellant.

76. In the second place, it must be noted, as the ISU also asserts, that the General Court primarily relied on the case-law of the Court of Justice in cases relating to restrictions of competition by *effect* in order to find a restriction of competition by *object*.

77. More specifically, the General Court found, in paragraph 88 of the judgment under appeal, that Communication No 1974 did not contain 'authorisation criteria that are clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring the organisers of events effective access to the relevant market' for the purposes of the case-law deriving from the judgment in *OTOC*. [35] The absence of such criteria in the ISU rules is, in the General Court's view, a relevant factor in finding the existence of a restriction of competition by object.

78. Nevertheless, it must be noted that although the Court, in the judgment in *OTOC*, held that failure to lay down the foregoing criteria may result in a restriction of competition, it concluded not that the absence of such criteria would automatically result in the classification of a restriction of competition by object but rather that their absence would be an indication of the restrictive effects which could follow from rules that did not lay down such criteria. [36]

79. However, despite the fact that the General Court itself expressly acknowledged, in paragraph 72 of the judgment under appeal, that the rules at issue in the case giving rise to the judgment in *OTOC* had been classified by the Court of Justice as a restriction by effect, it nevertheless held that that fact did not prevent that line of authority (and that deriving from the judgment in *MOTOE*) from being applied in the case of an analysis of a restriction by object. In justifying its approach, the General Court relied on *Generics (UK) and Others*, [37] in particular on paragraph 84 thereof, which, according to the General Court, provides authority for the view 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.

[34] Those elements may, however, be taken into account in the context of the analysis of ancillary restraints to illustrate the disproportionate nature of the ISU rules.

[35] See judgment in *OTOC* (paragraph 99).

[36] See judgment in *OTOC* (paragraphs 70 to 100).

[37] Judgment of 30 January 2020 (C-307/18, EU:C:2020:52).

80. While it is not disputed that, depending on its context, an agreement may restrict competition by object in certain cases, whereas in other cases its effects should be analysed, this does not mean that the criteria derived from the judgment in *OTOC* (or from the judgment in *MOTOE*) can be directly applied to the present case in order to establish a restriction of competition by object.

81. In the present case, the General Court explains neither which 'particular context' might justify the classification of a restriction of competition by object nor, in particular, the way in which that context differs from that at issue in the case giving rise to the judgment in *OTOC* in order to justify a different classification of the restriction found.

(ii) The severity of the penalties provided for in the eligibility rules

82. As regards the provisions on penalties set out in the eligibility rules, the ISU argued that the level of the penalties imposed on skaters participating in an event organised by a third party is, in itself, irrelevant for the purpose of determining whether or not its eligibility rules have the object of restricting competition, since those penalties can produce adverse effects on competition only if the refusal to authorise that event is based on grounds which are not legitimate.

83. However, contrary to what the appellant maintains and notwithstanding the fact that penalties may, at a later stage, be justified by legitimate objectives (which could exclude them entirely from the scope of Article 101 TFEU), the fact remains that the repressive nature of rules and the magnitude of the penalties applicable if they are breached are particularly relevant factors in analysing the content of the eligibility rules, since they are capable of producing adverse effects on competition. As the General Court rightly found in paragraphs 91 and 95 of the judgment under appeal, the severity of the penalties laid down may dissuade athletes from participating in events not authorised by the appellant, and, consequently, could prevent market access to potential competitors who are deprived of the participation of athletes that is necessary in order to organise a sporting event.

84. Nevertheless, the impact on competition of the severity of those penalties cannot be analysed in the abstract without taking into account the overall context of which the provisions on penalties form part. As the General Court rightly found in paragraphs 89 and 95 of the judgment under appeal, the alleged anticompetitive object of the ISU rules cannot be inferred solely on the basis of an isolated assessment of the severity of the penalties, but should rather be assessed in the (more general) context of the finding that the ISU 'had broad discretion' to refuse to authorise events proposed by third parties. [38]

85. I consider, in the light of the foregoing, that the matters relied on by the General Court in its analysis of the content of the eligibility rules cannot support the conclusion that a restriction by object exists with regard to the ISU's eligibility rules

[38] See paragraphs 89 and 95 of the judgment under appeal.

(2) The analysis of the objectives pursued by the eligibility rules

86. With regard to the objectives pursued by the ISU rules, I would recall that the General Court's analysis focused, on the one hand, on the protection of legitimate objectives [39] and, on the other hand, on the protection of the ISU's economic interests, [40] matters which I shall examine separately below.

(i) The issue of the protection of the legitimate interests pursued by the ISU

87. It should be noted at the outset that, in the second part of the first ground of its appeal, the ISU complains that the General Court found a new infringement consisting in a restriction of competition by object different from that identified in the decision at issue. More specifically, the ISU argues that the General Court substituted its own reasoning for that of the Commission, relying largely on the elements discussed in Section 8.5 of the decision at issue (entitled 'The eligibility rules are within the scope of Article 101 of the Treaty'), although those elements were not included in Section 8.3 of that decision (entitled 'Restriction of competition by object'), which concerned the finding of the existence of an infringement by object.

88. The appellant relies, inter alia, on the fact that the issue of the protection of the ISU's legitimate interests was not examined in detail by the Commission in the context of its analysis of the restriction by object (Section 8.3 of the decision at issue), [41] but was addressed in Section 8.5 of that decision, in which the Commission examined whether the eligibility rules fell within the scope of Article 101 TFEU.

89. In contrast to the Commission's approach of distinguishing between those two analytical frameworks, the General Court considered it appropriate, as it states itself in paragraph 64 of the judgment under appeal, to examine together the second plea (relating to the finding of a restriction by object) and the third and fourth pleas (relating to the Commission's assessment concerning whether the restriction of competition inherently pursues and is proportionate to the objective of protecting the integrity of speed skating from sports betting). [42] In doing so, the General Court incorporated consideration of objectives of general interest into the examination of the restriction of competition by object.

90. The question therefore arises as to whether the General Court was able, without committing an error of law, to carry out a 'combined' or 'parallel' analysis both of the existence of a restriction of competition by object and of the absence of objective justification for and proportionality of that restriction.

91. First of all, it must be noted that that approach of the General Court is the source of some confusion since it does not make clear the nature of the analysis followed. Thus, the General Court initially followed the traditional approach of identifying a restriction of competition by object, by first analysing the content of the eligibility rules. However, when subsequently examining the objectives of those rules, the General Court appears to assess them in the light of

[39] See paragraphs 100 to 104 of the judgment under appeal.

[40] See paragraphs 105 to 114 of the judgment under appeal.

[41] Although the Commission refers in recital 163 of the decision at issue to the absence of a direct link between the ISU rules and legitimate objectives, an element which was mainly analysed in the context of the examination of the content of those rules, recital 171 of that decision leaves no doubt as to the Commission's approach of excluding consideration of legitimate objectives at the stage of analysing the anticompetitive object.

[42] See paragraphs 99 to 114 of the judgment under appeal.

the criteria laid down by the judgment in *Meca-Medina*, in finding that the objective put forward by the ISU that the rules aim to protect the integrity of skating against betting, if it is indeed legitimate, does not justify the restrictions found, which are not inherent in the pursuit of that objective and are found to be disproportionate. Accordingly, the finding that the ISU rules are disproportionate to the objectives sought results, in the General Court's view, both in the inapplicability of the 'ancillary restraints exception' and in their [automatic] classification as a restriction by object.

92. Before taking a view on the approach adopted by the General Court, it should be recalled that, in the context of Article 101(1) TFEU, the objectives pursued by an agreement or a decision by an association of undertakings may play a role in the analysis in two respects.

93. On the one hand, the objective aims of an agreement are relevant and seek to determine whether it falls within the prohibition set out in Article 101(1) TFEU.[43] Those objective aims, which must be clear from the measures in question, must not be confused with the subjective intentions of whether or not to restrict competition or with any legitimate objectives pursued by the undertakings in question.[44] In that regard, it should be noted that it follows from the settled case-law that the fact that a measure is regarded as pursuing a legitimate objective does not preclude that measure from being regarded as having an object restrictive of competition.[45] Thus, in the context of a finding of a restriction of competition by object, the analysis of the objectives seeks to establish (in support of other elements such as the content of an agreement and its legal and economic context) the anticompetitive and sufficiently harmful aim or character of an agreement. Legitimate objectives are therefore not taken into account at that stage of the analysis, although they may be taken into account, where appropriate, for the purposes of obtaining an exemption under Article 101(3) TFEU.

94. On the other hand, the objectives pursued by an agreement also play a role in the context of the analysis of ancillary restraints, which seeks to determine whether the effects restrictive of competition resulting from a given measure are inherent in and proportionate to the pursuit of a legitimate objective. Where those conditions are fulfilled, the agreement including the measure in question falls entirely outside the scope of Article 101(1) TFEU. In that context, the identification of that objective and the recognition of its legitimacy constitute the first step in that analysis.

95. Although some aspects of those two, as a rule separate, analyses may overlap, the fact remains that the examination of the objectives of the measures in question differs conceptually in the two situations. The same is true of the consequences to be drawn from those two analyses.

96. Accordingly, contrary to what the General Court seems to argue, the fact that a measure is disproportionate to a legitimate objective does not automatically lead to the classification of a 'restriction of competition by object'. More precisely, the fact that a measure does not fulfil the criteria of the test laid down by the judgment in *Meca-Medina* means only that that measure must be (or remain) subject to the 'traditional analysis' under Article 101 TFEU, including an examination of a possible exemption under Article 101(3) TFEU. Consequently, while it is indeed likely that a measure classified as a 'restriction of competition by object' will be, by its nature, disproportionate to a legitimate objective pursued, the contrary is not necessarily true.

[43] See judgment in *CB* v *Commission* (paragraph 53 and the case-law cited).

[44] See Opinion of Advocate General Wahl in *CB* v *Commission* (C-67/13 P, EU:C:2014:1958, point 117).

[45] See judgment of 2 April 2020, *Budapest Bank and Others* (C-228/18, EU:C:2020:265, paragraph 52 and the case-law cited).

97. In the light of the foregoing, I consider that the General Court erred in law in finding, in paragraphs 110 and 111 of the judgment under appeal, that the ISU pre-authorisation system could be regarded as a restriction of competition by object because it goes beyond what is necessary to pursue the objective of ensuring that sporting competitions comply with common standards.

98. It should be noted, however, that while the elements discussed by the General Court in concluding that the eligibility rules are disproportionate to the legitimate objectives pursued cannot serve as a basis for a finding of a restriction by object, they might nevertheless be relevant to a finding of a restriction by effect if they are used unjustifiably to exclude third-party organisers of events, as the Court of Justice stated in the judgments in *Meca-Medina* [46] and *OTOC*. [47]

99. Finally, I note that the General Court's position, both as regards the interpretation of the content of the ISU rules and its assessment that the disproportionate nature of the ISU rules in relation to the objectives sought is a sufficient basis for a finding of a restriction of competition by object, would extend the concept of 'restriction of competition by object', which would be contrary to the established case-law of the Court of Justice requiring a restrictive interpretation of that concept. [48]

(ii) The issue of the protection of the ISU's economic interests

100. It should be recalled, first of all, that, contrary to what the Commission had found in recital 169 of the decision at issue, the General Court held, in paragraphs 108 and 109 of the judgment under appeal, that, even if it were established that the eligibility rules adopted in 2016 also pursue an objective of protecting the appellant's economic interests, the fact that a federation seeks to protect its own economic interests is not in itself anticompetitive.

101. That assessment by the General Court is challenged by the interveners in the second ground of the cross-appeal, which I propose to examine at this stage of my analysis for the reasons given in point 52 of this Opinion.

102. More specifically, the interveners complain that the General Court erred in law in concluding that the ISU's pursuit of its own economic interests is not in itself anticompetitive. According to the interveners, the principle that an undertaking is, in general, entitled to pursue its economic interests cannot be applied to the ISU in view of its particular situation. Indeed, the dual role of the ISU, which is both a regulator and an economic entity, should prohibit it from pursuing economic interests connected with its role as regulator, that is to say from authorising or rejecting events organised by third parties to the detriment of its competitors. The essence of the present case thus lies in the fact that the eligibility rules allow the ISU to refuse to grant market access to competitors. Consequently, those rules and the resulting decisions on ineligibility also have an adverse impact on the (economic) interests of professional speed skaters and third-party organisers of events. It is in the light of those facts that the General Court should have determined, according to the interveners, whether an undertaking could legitimately pursue its own economic interests. That view is also shared by the Commission.

[46] Paragraph 47 of that judgment.

[47] Paragraph 70 to 100 of that judgment.

[48] See point 68 of this Opinion.

103. For the following reasons, I am of the view that the General Court's analysis is not vitiated by an error of law and that the arguments raised by the interveners in support of the second ground of the cross-appeal should be rejected.

104. As discussed in points 44 to 49 of this Opinion, while certain obligations are imposed on sports federations in order to restrict their powers and review the proper exercise of those powers, the protection of the economic interests of a sports federation such as the ISU is problematic from the standpoint of competition law only if that federation *unjustifiably* deprives a competitor of market access.

105. To accept the interveners' interpretation would be tantamount to prohibiting any economic activity by sports federations which are in the same situation as the ISU, a position which is difficult to reconcile with the fact that, notwithstanding their particular characteristics, such federations are also undertakings for which, as for any other undertaking, the pursuit of economic objectives is inherent in their activity. Moreover, the economic activities pursued by those federations are in several cases not only connected but also interdependent with their sporting activities and are therefore inseparable.

106. In the light of the foregoing, it must be stated that the pursuit by a sports federation, such as the ISU, of its own economic interests is not in itself anticompetitive and cannot therefore be used as an indication of an anticompetitive objective in the context of the assessment of a restriction of competition.

107. I note, finally, that the General Court itself recognised that the ISU rules pursued legitimate objectives as regards the protection both of the appellant's economic interests and of those relating to the sport, which should have led the General Court to call into question its finding that the object of those rules is, by its very nature, harmful to the proper functioning of normal competition. [49]

(3) Preliminary conclusion concerning the analysis of the content and objectives of the eligibility rules

108. The foregoing analysis of the content of the eligibility rules and of the objectives pursued by them is, in itself, a sufficient basis for concluding that the General Court erred in law as regards its classification of the ISU's eligibility rules as a restriction or restrictions of competition by object, without it being necessary to examine the arguments put forward by the appellant to contest the General Court's analysis, first, of the legal and economic context and, secondly, of the parties' intention. Nevertheless, for the sake of completeness, I shall briefly state my views on those two points raised by the ISU, in particular in the light of their possible relevance to the analysis of the anticompetitive effects potentially created by the ISU rules.

(4) The analysis of the legal and economic context of the eligibility rules

109. The General Court held, in paragraphs 115 to 123 of the judgment under appeal, that the examination of the legal and economic context of which the ISU's eligibility and authorisation rules form part was not such as to call into question the Commission's conclusion relating to the

[49] See judgment in *CB* v *Commission* (paragraph 75).

existence of a restriction of competition by object, within the meaning of Article 101(1) TFEU, with the result that it was not necessary to examine, in addition, the actual or potential effects of those rules on competition.

110. The appellant argues, in that connection, that the General Court erred in law in its analysis of the relevant market with regard to its context. In particular, the appellant takes the view that the General Court erred in refusing to take into account the figure skating events which it had authorised. More specifically, it complains that the General Court declined to apply the case-law deriving from the judgment in *CB* v *Commission*, which provides 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. [50]

111. It should be recalled, in that regard, that the General Court considered that, while, in the case which gave rise to that case-law, there were interactions between the relevant market and a different related market, such elements had not been established in the present case. According to the General Court, the fact that the appellant 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 appellant's eligibility rules allow 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. [51]

112. The Commission submits that the argument relating to the alleged misinterpretation of the judgment in *CB* v *Commission* is ineffective, since *even* if the General Court confused what the Court of Justice had presented in that judgment as an example of a specific situation, in which it is relevant to take into account an element relating to a market other than the relevant market, with a general rule, this does not call into question the decisive line of reasoning set out in the preceding point of this Opinion.

113. In that regard, I consider that, contrary to what the Commission claims, if it is accepted – if only on a theoretical level as the General Court has done – that the ISU could have authorised independent figure skating events, that fact is capable of raising questions as to the classification of 'restriction of competition by object'.

114. While it is true that the Court of Justice's analysis in the judgment in *Cartes Bancaires* forms part of a particular factual context (that is to say the existence of interactions between the two facets of a two-sided system, and between the relevant market and a different related market), the fact remains that the ISU's decision-making practice in the context of figure skating may be relevant when analysing the legal context of the rules in question.

115. As the General Court found in paragraph 117 of the judgment under appeal, it should be noted, on the one hand, that those two disciplines (namely figure skating and speed skating), notwithstanding their characterisation as separate markets by the Commission, a definition of the market which is not challenged by the appellant, are governed by the same regulatory framework – and therefore the same rules on pre-authorisation and disciplinary sanctions apply

[50] See judgment in *CB* v *Commission* (paragraph 78).

[51] See paragraphs 118 and 119 of the judgment under appeal.

to both disciplines – and, on the other hand, that the same body, namely the ISU, is responsible for authorising or refusing to authorise the organisation of independent events for those two disciplines.

116. That element could constitute a particular circumstance which may cast doubt on the alleged harmfulness of the ISU rules if it were established that the ISU had authorised independent figure skating events. Accordingly, I consider that if, when examining the legal and economic context of an agreement alleged to have an anticompetitive object, there are elements which raise doubts as to the degree of harmfulness required or appear contradictory, an analysis of the effects of that agreement becomes necessary.

117. While it is true that, in order to establish the existence of a restriction of competition by object, the analysis of the economic and legal context of which a measure forms part must be limited to what is strictly necessary, without including an analysis of the effects of the measure in question, [52] it seems to me that taking into account the decision-making practice of the ISU, in the wider context of the analysis of its role and the powers attributed to it, would not go beyond the limits of the analytical framework for a restriction of competition by object.

118. That said, it should be pointed out, in the present case, that consideration of the ISU's decision-making practice on the figure skating market will depend on an assessment of the factual circumstances, concerning which the Court of Justice has neither the duty nor the necessary elements to rule, since those elements have not been assessed by the General Court. [53]

(5) The analysis of the parties' intentions

119. Referring to the settled case-law of the Court of Justice, according to which elements of intentionality are not necessary to establish the existence of a restriction of competition by object, [54] and considering, moreover, that the existence of a restriction of competition by object was sufficiently substantiated by the examination of the content and objectives of the eligibility rules and of their context, the General Court held, in paragraph 121 of the judgment under appeal, that the arguments put forward by the appellant against that part of the examination of restriction by object are ineffective.

120. The appellant refutes that assessment both in the first part of its first ground of appeal and in one part of the third part of that ground of appeal, criticising the General Court, in essence, for failing to examine any of its arguments challenging the Commission's assessment of the facts supporting the finding of a restriction of competition by object, as set out in the decision at issue.

121. It should be pointed out, in that regard, that the factual elements on which the Commission based its analysis and which the General Court failed to examine – which the appellant also contests, though without alleging a distortion of the facts – all relate to examples of independent events which, according to the Commission, demonstrate the ISU's intention to refuse to grant competitors entry to the relevant market. [55]

[52] See judgment of 20 January 2016, *Toshiba Corporation* v *Commission* (C-373/14 P, EU:C:2016:26, paragraph 29).

[53] It should be noted, in that regard, that the information concerning the figure skating events which the ISU authorised is the subject of differing interpretations by the Commission and the ISU.

[54] See judgment of 6 April 2006, *General Motors* v *Commission* (C-551/03 P, EU:C:2006:229, paragraph 77).

[55] See recitals 175 to 177 of the decision at issue.

122. In the light of the foregoing analysis, by which I propose that the first ground of appeal be upheld and the judgment of the General Court be set aside as regards the finding of a restriction of competition by object, I am of the view that those factual elements may be relevant to the analysis of the effects of the ISU rules. In the light of the foregoing considerations, which concern the substance of the statement of reasons, I also consider that it is no longer necessary to examine the ground of appeal alleging a failure to state reasons.

4. Conclusions on the first ground of appeal

123. In the event that a restriction by object is not clearly established, a fully fledged effects analysis must be carried out for the purposes of Article 101(1) TFEU. The objective of that analysis is to determine the impact that the agreement may have on competition in the relevant market. In the present case, only an examination of the way in which the rules are interpreted and applied in practice by the ISU will make it possible to determine whether those rules may harm competition. In other words, it is necessary to analyse whether, under the discretionary power of the ISU, that federation has been able to restrict competition by refusing access to the relevant market, an examination which can, in principle, be carried out only where the (actual) *effects* of the measure in question are taken into account.

124. In view of the foregoing, the first ground of appeal must be upheld.

C. The second ground of appeal

125. By its second ground of its appeal, the ISU submits that the General Court erred in law by not examining the fourth plea of its application, in which the ISU claimed that its decision not to approve a third-party event known as the 'Icederby', which was to be held in Dubai (United Arab Emirates) ('the Dubai event'), did not fall within the scope of Article 101 TFEU since that decision pursued, in the appellant's view, a legitimate objective consistent with its Code of Ethics, which prohibits any form of support for betting.

126. It is necessary, first, to reject the objection of inadmissibility raised by the interveners, according to which, while formally alleging the existence of errors of law, the ISU is in fact asking the Court, in an inadmissible manner, to reassess the facts without claiming that the General Court distorted them. It seems to me that, by its second ground of appeal, the ISU is criticising the General Court for a failure to state reasons, inasmuch as it failed to respond to a central part of its line of argument. [56]

127. On the substance, it should be noted, first, that, in the second ground of its appeal, the ISU argues not that the eligibility rules do not fall within the scope of Article 101 TFEU, but only that its decision not to authorise the Dubai event should be excluded from the scope of that provision because that decision pursued a legitimate objective.

128. However, it must be pointed out that neither the decision at issue nor the judgment under appeal specifically refers to the refusal decision relating to the Dubai event. Although the refusal relating to that event appears to be the reason for the investigation launched by the Commission (following the complaint lodged with it by Mr Tuitert and Mr Kerstholt), which led to the decision at issue – and although that refusal appears to have been used, along with other examples of

[56] See judgment of 11 April 2013, *Mindo* v *Commission* (C-652/11 P, EU:C:2013:229, paragraph 41).

events, to illustrate how those rules were applied in practice – the fact remains that the decision at issue nevertheless relates to the eligibility rules which were adopted by the ISU and their compatibility with Article 101 TFEU. The General Court accordingly found that those rules were in themselves sufficient to support the conclusion that they were problematic from the standpoint of competition law, irrespective of the specific event in question. [57]

129. It should be noted in that regard that, contrary to what the appellant submits, the inclusion of the term 'enforcing' in Article 1 of the decision at issue cannot be interpreted as referring to the Dubai event but rather results from the Commission's finding of a restriction of competition both by object and by effect (which is set out in Sections 8.3 and 8.4 of the decision at issue). [58]

130. Secondly, contrary to what the appellant maintains, the General Court did not fail to examine the fourth plea in law of the application since it examined it together with the second and third pleas in law, in paragraph 64 et seq. of the judgment under appeal. [59]

131. As regards the more general issue of whether the eligibility rules can fall outside the scope of Article 101 TFEU as ancillary restraints, having recognised, first, the legitimacy of the objectives pursued by the ISU – and in particular that relating to the protection of the integrity of speed skating from the risks associated with betting [60] – and whether a pre-authorisation system intended to ensure that any organiser respects common standards, was a suitable mechanism to achieve objectives relating to the specific nature of the sport, [61] the General Court considered, secondly, that the arbitrary and disproportionate nature of the eligibility rules and in particular of the penalties established in the present case by the ISU went beyond what was necessary to achieve those objectives within the meaning of the case-law on ancillary restraints and in particular the judgment in *Meca-Medina*. [62]

132. Lastly, the appellant's argument that the Commission and the General Court failed to take account of legislative developments in Korea (the country of origin of the Icederby concept) in relation to betting must be rejected as irrelevant to the assessment of the compatibility of the ISU rules with EU competition law. I therefore consider that the General Court was right to disregard it.

133. In the light of the foregoing, I am of the view that the second ground of appeal should be rejected.

[57] That finding of the General Court also seems to be confirmed by the Commission's analysis, in recitals 251 to 266 of the decision at issue, of the proportionality of those rules in the light of the objectives pursued, although that analysis does not relate specifically to the Dubai event.

[58] The ISU reiterates, in that regard, the argument raised in the first part and part of the third part of the first ground of appeal that the Commission had relied on the Dubai event to conclude, in Article 1 of the decision at issue, that the ISU infringed Article 101 TFEU 'by adopting and *enforcing* the eligibility rules' (emphasis added).

[59] See point 96 of this Opinion.

[60] See paragraphs 100 to 104 of the judgment under appeal.

[61] See paragraph 108 of the judgment under appeal.

[62] Among the elements taken into consideration by the General Court, it is necessary to note in particular that in paragraph 97 of the judgment under appeal, it held that the eligibility rules allow the appellant 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 appellant.

D. The request for disposal of the case by the Court of Justice and referral of the case back to the General Court

134. Under Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice is to quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

135. It should be noted, in that regard, that the ISU has made an application for the disposal of the case by the Court, taking the view that, if the judgment under appeal is set aside, the Court will be in a position to dispose of the case in its entirety. It must be found, however, that the grounds which justify the setting aside of the judgment under appeal cannot lead to the annulment of the decision at issue in its entirety. Those grounds entail the annulment of that decision only in so far as it finds that the measures in question have as their object the restriction of competition within the meaning of Article 101(1) TFEU. In accordance with the case-law considered in point 123 of this Opinion, it is therefore appropriate to ascertain whether, as the Commission found in the decision at issue, the agreements at issue have as their 'effect' the restriction of competition within the meaning of Article 101(1) TFEU.

136. However, that aspect of the case requires an examination of questions of fact based on elements which were not assessed by the General Court in the judgment under appeal since it had found that such an examination was superfluous – the General Court taking the view that the Commission had not erred in law in concluding, in the decision at issue, that the measures in question had an anticompetitive object. While certain factual aspects were indeed discussed during the written and oral procedure before the General Court, the fact remains that the General Court alone has jurisdiction to assess the facts. Moreover, since the issues relating to the analysis of the effects on competition were not discussed before the Court of Justice, the stage has not been reached where judgment can be given on that point.

137. Consequently, it is necessary to refer the case back to the General Court and to reserve the costs.

IV. Analysis of the first ground of the cross-appeal

138. By their first ground of appeal, composed of two parts, the cross-appellants challenge the part of the judgment under appeal in which the General Court held that the exclusive and binding arbitration mechanism established by the ISU could not be regarded as 'reinforcing' the restriction of competition by object identified by the Commission.

139. More specifically, the cross-appellants argue that the General Court erred in law in holding that the Commission could not conclude, in Section 8.7 of the decision at issue, that the ISU arbitration rules reinforced the restriction of competition by object created by the eligibility rules.[63]

140. In the judgment under appeal, the General Court, on the whole and contrary to the Commission's view in the decision at issue, regarded the rules established by the ISU providing for the use of arbitration in the area of sport[64] – which it examined as an 'aggravating

[63] See paragraphs 131 to 164 of the judgment under appeal.

[64] See paragraphs 154 to 156 of the judgment under appeal.

circumstance' and analysed in terms of the calculation of fines [65] – as legitimate, and considered that athletes suffering damage had sufficient possibility of relying on national courts to claim *ex post* damages or to lodge a complaint before the national competition authorities and the Commission to ensure the effectiveness of the EU competition rules and the right to effective judicial protection. [66]

A. Admissibility and effectiveness of the first ground of appeal

141. It is necessary from the outset to reject the objection of inadmissibility raised by the ISU on the ground that the first ground of the cross-appeal would alter the subject matter of the dispute before the General Court. Although certain elements referred to by the cross-appellants, such as the question of the independence and impartiality of the CAS, are outside the scope of the decision at issue and of the judgment under appeal, and must therefore be excluded from the present analysis, most of the arguments put forward by those parties were discussed during the proceedings before the Commission and the General Court, and are now validly relied upon in order to challenge the judgment under appeal.

142. The ISU takes the view, moreover, that that ground of appeal is ineffective since, as the General Court found in paragraphs 132 and 137 of the judgment under appeal, the Commission confined itself in the decision at issue to concluding for the sake of completeness that the arbitration rules adopted by that federation reinforced the restriction of competition by object arising from other rules introduced by that federation, namely the eligibility and authorisation rules. Accordingly, neither Article 1 of the decision at issue, which finds the existence of an infringement, nor the part of the judgment under appeal which rejects the pleas in law of the ISU relating to that article is based in any way on the assessments of the Commission and the General Court concerning those rules.

143. Nevertheless, it must be noted that, even if those considerations could be regarded as included only for the sake of completeness, in that they were not among those underlying the finding of infringement in Article 1 of the decision at issue, the General Court referred to those assessments (as the ISU itself acknowledges in its observations) in order to annul in part Articles 2 and 4 of the decision at issue, by which the Commission ordered that federation to bring to an end the infringement found by amending its rules (including the rules relating to arbitration) on pain of periodic penalty payments. [67]

144. Therefore, subject to the findings in point 141 of this Opinion, I consider that this ground of appeal should be regarded as admissible and effective.

[65] Paragraphs 142 to 153 of the judgment under appeal.

[66] See paragraphs 157 to 161 of the judgment under appeal.

[67] See paragraphs 138 and 145 of the judgment under appeal.

B. Substance

1. Preliminary observations

145. It should be noted at the outset that the use of the term 'aggravating circumstance' by the General Court to refer to the ISU arbitration rules and the analysis of those rules in terms of the calculation of fines is somewhat confusing.[68] The same is true of the Commission's classification of the arbitration rules, in the decision at issue, as an element which 'reinforced' a restriction of competition.

146. As regards, in the first place, the concept of 'aggravating circumstance' used by the General Court, as it rightly points out in paragraph 144 of the judgment under appeal, the decision at issue does not make use of that concept and makes no reference to the 2006 Guidelines on the method of setting fines.[69] In that context, it is difficult to understand how the General Court could find, in paragraph 148 of the judgment under appeal, that the Commission 'was wrong to consider that the arbitration rules constituted an aggravating circumstance within the meaning of the 2006 Guidelines'.

147. That confusion is also reflected in the parties' submissions. While the Commission criticises the General Court for having conducted its reasoning on the basis of the 2006 Guidelines, even though the Commission did not consider, in the decision at issue, that the arbitration rules constituted an aggravating circumstance within the meaning of those guidelines, the cross-appellants, when referring to the decision at issue, do not use the term element which 'reinforced', as used by the Commission in that decision, but employ the term 'aggravating circumstance' and maintain that the Commission (correctly in their view) classified the arbitration rules as an 'aggravating circumstance'.

148. It should be noted, however, that the term 'aggravating circumstance' is used in point 28 of those guidelines to refer to certain circumstances justifying an increase in the fine imposed on an infringing entity by the Commission, including reoffending, a refusal to cooperate, obstruction of the Commission in carrying out its investigations or the role of leader or instigator played by an entity in the context of an infringement.[70]

149. However, although the list of aggravating circumstances in point 28 of the 2006 Guidelines is not exhaustive, as the General Court rightly found in paragraph 152 of the judgment under appeal, the aggravating circumstances in that list 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. It is therefore difficult to imagine that the inclusion of an arbitration clause in the constitution of a sports federation, the legitimacy of which under competition law is not disputed by the Commission, could fall within that classification.

150. In the second place, the Commission's characterisation of the arbitration rules as an element which 'reinforced' a restriction of competition also raises questions both in terms of substantive law and from a methodological point of view. In particular, the question arises as to why the

[68] See paragraphs 142 to 153 of the judgment under appeal.

[69] 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').

[70] See paragraphs 150 to 152 of the judgment under appeal.

Commission identified elements which are likely to reinforce a restriction of competition and influence its possible justification, but do not constitute an infringement in themselves. I would also question the legal status and purpose of such a classification from the point of view of competition law where it is made merely for the sake of completeness.

151. Furthermore, the Commission's decision to classify the exclusive and binding arbitration mechanism as an element which 'reinforced' the restriction of competition in the context of an analysis isolated and separate from the finding of infringement seems singular at the very least.[71] In that regard, it is possible to wonder why the Commission did not simply include the examination of the arbitration clauses in its analysis of the rules issued by the ISU if it considered that such rules could harm competition in one way or another. This is particularly surprising given that the Commission appears to have analysed all the rules (or the regulatory 'ecosystem') established by the ISU in order to make a finding that they impeded competition.[72]

152. Having clarified that point, it is now necessary to examine whether or not the General Court made an error of law in holding that the exclusive and binding arbitration mechanism could not therefore be classified as a 'reinforcing' element of the restriction of competition found.

2. The first part of the first ground of the cross-appeal

153. In the first part of their first ground of appeal, the cross-appellants complain that the General Court erred in its analysis concerning the justification for the exclusive jurisdiction of the CAS in disputes relating to the anticompetitive aspects of the ISU's decisions on ineligibility.

154. It should be noted, in the first place, that the cross-appellants' line of argument is based primarily on a distinction which they draw between cases linked to the specific nature of the sport, for which, in principle, CAS arbitration can be justified by legitimate interests, and cases having an economic dimension with no apparent links to the sport, which therefore should not be submitted to the exclusive jurisdiction of the CAS.

155. That reasoning is unconvincing in my view, since it is based on a distinction which seems 'artificial'. While it may be theoretically possible to draw a distinction between 'purely sporting' cases (or those concerning non-economic aspects of sport) and 'purely economic' cases in some situations, that dichotomy is far from clear in practice, since the two aspects are difficult to separate.

156. I shall take the example provided by the cross-appellants in support of their line of argument, namely that of an individual decision on ineligibility against an athlete based on eligibility rules which could be incompatible with competition law. I am not sure that I follow the reasoning of those parties when they argue that such a decision is primarily a matter of competition law and that the fact that the dispute arose in the context of professional sports is merely circumstantial. The fact that rules issued by a sports federation are challenged from the standpoint of competition law does not necessarily mean that an individual decision on ineligibility (adopted

[71] The assessments concerning the arbitration rules appear in a section following the finding of the existence of a restriction of competition, that is to say in Section 8.7 of the decision at issue. 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 eligibility rules.

[72] By way of example, it should be noted that in Commission Decision C(2018) 4761 final of 18 July 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 – Google Android), the Commission examined the elements which 'reinforced' the restriction of competition found in the section of the decision concerned with that finding (recitals 1132 to 1145) and not in a separate section following that finding.

on the basis of those rules) against an athlete does not involve a (purely) sporting issue. Accordingly, the fact that the rules issued by a sports federation governing the organisation and participation of athletes in certain sports events may be disproportionate to the objectives pursued and may have adverse effects on competition does not mean that the 'sporting' objectives pursued are not in themselves legitimate.

157. In the second place, it is important to note that both the Commission, in the decision at issue, and the General Court, in the judgment under appeal, rightly recognised that the use of an exclusive and binding arbitration mechanism was a generally accepted method of resolving disputes and that agreeing to an arbitration clause as such did not constitute a restriction of competition.[73] Moreover, the European Court of Human Rights reached the same conclusion, considering that, in a sporting context, it is legitimate to submit disputes to a specialised international arbitral tribunal, such as the CAS, in so far as such a mechanism guarantees procedural uniformity, legal certainty and rapid and cost-effective decisions, while at the same time recognising the independence and impartiality of the CAS.[74]

158. It would be difficult to imagine the organisation or conduct of any sports discipline or event if each participant (athlete or sports club) had the possibility of challenging some aspect of such an event on any legal basis before national courts or other judicial bodies. This is particularly so in the case of international events which, by definition, would potentially involve a plethora of national jurisdictions, which would automatically lead to a fragmentation of the current system.

159. In the light of the foregoing considerations, I concur with the assessment of the General Court, set out in paragraph 156 of the judgment under appeal, 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 may be justified by legitimate interests linked to the specific nature of the sport. Accordingly, I consider that a non-State mechanism for dispute resolution at first or second instance, such as the CAS, with a possibility of appeal, however limited, before a national court in the last instance, is adequate in the field of international sports arbitration.

160. In view of the foregoing, I am of the view that the first part of the first ground of the cross-appeal should be rejected.

C. The second part of the first ground of the cross-appeal

161. In the second part of their first ground of appeal, the cross-appellants submit that the General Court erred in law in finding that the arbitration rules do not compromise the full effectiveness of EU law and the right to effective judicial protection. In that regard, those applicants raise a number of issues which were discussed during the proceedings before the Commission and the General Court, and which are now relied upon to challenge the judgment under appeal. More specifically, those parties call into question the assessment of the General Court as regards, first of all, the fact that the CAS and the Swiss Federal Court are 'external' to the EU judicial system and the limited ability of those two bodies to take into account EU competition law, next, the de facto binding nature of the arbitration mechanism in question for

[73] See paragraph 154 of the judgment under appeal and recital 269 of the decision at issue.

[74] Judgment of the ECtHR, 2 October 2018, *Mutu and Pechstein* v *Switzerland*, CE:ECHR:2018:1002JUD004057510, §§ 98 and 159.

sportsmen and sportswomen and, finally, the fragmented, limited and, ultimately, ineffective nature of the possibilities of review by national courts of the ISU's disciplinary activity and corresponding arbitration awards.[75]

162. In the first place, I would point out that the EU legal order is based on a judicial system which guarantees consistency and uniformity in the interpretation of EU law. To that end, the national courts and tribunals and the Court ensure the full and effective application of EU law in all Member States and judicial protection of the rights of individuals under that law,[76] including in the field of competition law.[77] In that context, recourse to arbitration may reduce the full effectiveness and uniformity of EU law and the possibility of obtaining effective judicial protection, where the arbitral tribunal is not part of the EU system and is not subject to a full review of compliance with EU law by national courts.[78]

163. It should be noted in that regard that the Court draws a distinction between, on the one hand, treaties concluded with Member States, in which arbitration is imposed on private parties and aims to remove disputes from the jurisdiction of their own courts, and, on the other hand, commercial arbitration, which is the result of the freely expressed wishes of the parties concerned and involves disputes between parties of equal standing.[79]

164. In support of their cross-appeal, the appellants submit that the arbitration in question is not genuine commercial arbitration and must be assessed on the same basis as the *Achmea* and *PL Holdings* cases, in so far as the exclusive jurisdiction of the CAS imposed on athletes is similar to that imposed by Member States on private parties in the context of bilateral investment treaties. However, I am of the view that the reasoning adopted in those cases is in any event not applicable to the arbitration rules in the present case, in particular in view of the disparities between the arbitration procedures.

165. By contrast with the *Achmea* and *PL Holdings* cases, which concerned a (bilateral investment) treaty with a Member State and which related to the principles of mutual trust and sincere cooperation between Member States, preventing those States from allowing private parties to submit disputes to a body which is not part of the EU judicial system,[80] the arbitration at issue in the main proceedings applies in relations between private parties and an international sports federation (and not a Member State). Accordingly, as the General Court stated in paragraph 162 of the judgment under appeal, 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 disputes which may concern the application or interpretation of competition law. Accordingly, an application by analogy of the principles deriving from those judgments must be rejected for the foregoing reasons.

166. In the second place, it should be noted that both the cross-appellants and the Commission criticise the General Court for failing to take into account the practical arrangements of sports arbitration and, in particular, the fact that it is not genuine commercial arbitration, freely agreed

75 See recitals 270 to 286 of the decision at issue.

76 See judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraphs 35 and 36 and the case-law cited).

77 Judgment of 9 February 2022, *Sped-Pro* v *Commission* (T-791/19, EU:T:2022:67, paragraph 91).

78 See judgments of 26 October 2021, *PL Holdings* (C-109/20, EU:C:2021:875, paragraph 45 and the case-law cited), and of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraphs 58 to 60 and the case-law cited).

79 See judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraph 55 and the case-law cited).

80 See judgments of 26 October 2021, *PL Holdings* (C-109/20, EU:C:2021:875, paragraphs 45 to 47), and of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraphs 58 to 60).

by the two parties, but arbitration imposed unilaterally and exclusively by the ISU on athletes, under the threat of a ban on participation in events organised by that federation and therefore of an impossibility for them to exercise their profession.

167. While there may indeed be an 'asymmetry of powers' between a sports federation and athletes, which may suggest that they have no choice but to adhere to the rules of that federation,[81] I am of the view that, provided that, on the one hand, the independence and impartiality of the CAS are not called into question and that, on the other hand, recourse to CAS arbitration can be justified by legitimate interests linked to the requirement that sporting disputes be submitted to a specialised judicial body,[82] such an argument cannot succeed.

168. Therefore, I agree with the General Court that the arbitration rules at issue are not capable, in practice and on their own, of reinforcing the restriction of competition created by the ISU eligibility rules.

169. In the light of the above, I am of the view that the first ground of the cross-appeal should be dismissed.

V. Conclusion

170. In the light of the foregoing considerations, I propose that the Court should:

– set aside the judgment of the General Court of the European Union of 16 December 2020, *International Skating Union* v *Commission* (Case T-93/18, EU:T:2020:610);

– refer the case back to the General Court of the European Union;

– dismiss the cross-appeal;

– reserve the costs.

[81] See judgment of the EctHR, 2 October 2018, *Mutu and Pechstein* v *Switzerland*, CE:ECHR:2018:1002JUD004057510, §§ 113 to 115

[82] See points 157 to 159 of this Opinion.