

Case C-124/21 P

International Skating Union

v

European Commission and Others

Judgment of the Court (Grand Chamber) of 21 December 2023

(Appeal – Competition – Rules introduced by an international sports association – Skating – Private law entity vested with regulatory, control and decision-making powers, and the power to impose sanctions – Rules on the prior approval of competitions, the participation of athletes in those competitions and the arbitration rules governing conflicts – Parallel pursuit of economic activities – Organisation and marketing of competitions – Article 101(1) TFEU – Decision by an association of undertakings adversely affecting competition – Concepts of anticompetitive ‘object’ and ‘effect’ – Possible justification – Conditions)

1. *EU law – Scope – Pursuit of sport as an economic activity – Included – Rules adopted solely for non-economic reasons concerning questions exclusively of a sporting nature – Not included – Rules issued by sports associations seeking to establish a prior authorisation scheme for sports competitions, covering the participation of athletes in those competitions and imposing an arbitration dispute resolution mechanism relating to them – Rules covering economic activities – Included*

(Arts 45, 49, 56, 63, 101 and 102 TFEU)

(see paragraphs 91-84, 189)

2. *Competition – EU rules – Application by the Commission – Taking into account specific characteristics of the sporting activity – Agreements, decisions and concerted practices – Restriction of competition – Specific characteristics falling within the examination of the economic and legal context*

(Arts 101 and 165 TFEU)

(see paragraphs 95, 96)

3. *Agreements, decisions and concerted practices – Adverse effect on competition – Criteria for assessment – Distinction between restrictions by object and by effect – Restriction by object – Sufficient degree of harmfulness – Sufficient*

(Art. 101(1) TFEU)

(see paragraphs 99, 101-103)

4. *Agreements, decisions and concerted practices – Adverse effect on competition – Criteria for assessment – Content and objective of a cartel and economic and legal context of its development – Distinction between restrictions by object and by effect – Intention of the parties to an agreement to restrict competition – Not a necessary criterion – Infringement by object – Sufficient degree of harmfulness – Criteria for assessment – Need to examine the effects of the anticompetitive conduct on competition – None*

(Art. 101 TFEU)

(see paragraphs 105-108)

5. *Agreements, decisions and concerted practices – Adverse effect on competition – Criteria for assessment – Distinction between restrictions by object and by effect – Restriction by effect – Examination of competition in the absence of the agreement at issue*

(Art. 101(1) TFEU)

(see paragraphs 109, 110)

6. *Agreements, decisions and concerted practices – Adverse effect on competition – Decisions by associations of undertakings – Rules adopted by a sporting association with a view to regulating the pursuit of sporting activities of an economic nature – Justification with regard to legitimate objectives in the public interest – Condition – No restriction by object – Exemption – Conditions*

(Art. 101(1) and (3) TFEU)

(see paragraphs 111-114)

7. *Dominant position – Abuse – Objective according to the statutes of a sports association carrying out economic activities in the field of the organisation and marketing of sports competitions – Power to grant prior authorisation and to determine conditions for the pursuit of those activities in respect of actual or potential competitors – Whether permissible – Condition – Framework such as to prevent the risk of abuse of a dominant position*

(Art. 102 TFEU)

(see paragraphs 125-127)

8. *Agreements, decisions and concerted practices – Adverse effect on competition – Decisions by associations of undertakings – Objective according to the statutes of a sports association carrying out economic activities in the field of the organisation and marketing of sports competitions – Power to grant prior authorisation and to determine conditions*

for the pursuit of those activities in respect of actual or potential competitors – Power capable of having an anticompetitive object or effect

(Art. 101(1) TFEU)

(see paragraphs 128, 129)

9. *Agreements, decisions and concerted practices – Adverse effect on competition – Decisions by associations of undertakings – Objective according to the statutes of a sports association carrying out economic activities in the field of the organisation and marketing of sports competitions – Rules governing prior authorisation, participation and sanctions in the context of international sports competitions – Lack of material criteria and detailed procedural rules ensuring that those rules and sanctions are transparent, objective, precise, non-discriminatory and proportionate – Restriction by object*

(Art. 101(1) TFEU)

(see paragraphs 131-136, 145, 146)

10. *Appeal – Cross-appeal – Grounds of appeal – Grounds and arguments not put forward at first instance – Inadmissibility*

(Rules of Procedure of the Court, Arts 172, 176 and 178(1) and (3))

(see paragraphs 180-182)

11. *EU law – Direct effect – Individual rights – Safeguarding by the national courts – Requirement of effective judicial review – Scope – Arbitration rules of a sports association – Need for effective review of the EU competition rules by a court authorised to refer questions to the Court of Justice for a preliminary ruling during review of arbitral awards*

(Arts 101 and 102 TFEU; Charter of Fundamental Rights of the European Union, Art. 47)

(see paragraphs 192-198)

12. *Competition – Administrative procedure – Bringing infringements to an end – Commission's powers – Injunctions to undertakings – Observance of the principle of proportionality – Corrective measures imposed in respect of a rule reinforcing the infringement identified – Whether permissible*

(Art. 101 TFEU; Council Regulation No 1/2003, Art. 7(1))

(see paragraphs 227, 228)

The International Skating Union ('ISU'), an association governed by private law with its headquarters in Switzerland, describes itself as the sole international sports federation recognised by the International Olympic Committee (IOC) in the field of figure skating and speed skating. Overseeing the national associations in charge of those two disciplines, which are its members, the ISU set itself the objective, according to its statutes, of regulating, administering, governing and promoting those disciplines worldwide. The ISU also carries out a commercial activity that entails the organisation of various speed skating and figure skating events in the context of international competitions, such as the European and World Championships and the Olympic Winter Games.

In accordance with its objective set out in its statutes, the ISU adopted and published a set of acts establishing its regulations, which include, inter alia, the prior authorisation rules and the eligibility rules. Those rules determine the conditions for the organisation of international skating competitions and the conditions for the participation of athletes in such competitions, respectively. In order to ensure compliance with those rules, the regulations set out by the ISU include, in addition, a set of rules governing sanctions. Lastly, the ISU also adopted rules establishing a mechanism for arbitral dispute settlement ('the arbitration rules'), which confers on the Court of Arbitration for Sport, located in Lausanne (Switzerland), exclusive jurisdiction to hear those disputes.

Following a complaint lodged by two professional skaters, the European Commission found, by decision of 8 December 2017 (1) ('the decision at issue'), that the ISU's prior authorisation and eligibility rules were incompatible with Article 101 TFEU in so far as they had as their object the restriction of competition. By preventing professional speed skaters from taking part freely in international events organised by third parties, they deprived those third parties of the services of athletes which were necessary in order to organise those events. The Commission, consequently, ordered the ISU, on pain of a periodic penalty payment, to put an end to the infringement thus found, without, however, imposing a fine on it. Moreover, that institution found that the arbitration rules reinforced that infringement, in so far as they did not enable the persons concerned to obtain effective judicial review, with regard to the EU competition rules, of decisions adopted by the ISU.

Ruling, by its judgment of 16 December 2020 (2) ('the judgment under appeal'), on the action for annulment brought by the ISU against the decision at issue, the General Court held, in essence, that the decision at issue was not vitiated by illegality in so far as it related to the ISU's prior authorisation and eligibility rules, but that it was unlawful in so far as it related to the arbitration rules.

In that context, the ISU lodged an appeal against the judgment under appeal, seeking that it be set aside in so far as it held that the Commission had correctly classified the prior authorisation and eligibility rules at issue as having as their 'object' the restriction of competition, within the meaning of Article 101(1) TFEU. The two professional skaters who made the abovementioned complaint and the European Elite Athletes Association, for their part, lodged a cross-appeal against that judgment seeking annulment thereof in part, in so far as it annulled the aspects of the decision at issue relating to the arbitration rules.

By its judgment, delivered on the same day as two other judgments (3) concerning the application of EU economic law to the rules established by international or national sports federations, the Court of Justice, sitting as the Grand Chamber, dismisses the main appeal but upholds the cross-appeal and, consequently, sets aside the judgment under appeal in so far as concerns the arbitration rules. Finally, ruling definitively on the part corresponding to the ISU's action before the General Court, the Court of Justice holds that none of the complaints made by the ISU seeking to contest the analysis of those rules on the part of the Commission is successful, with the result that its action must also be dismissed in that regard.

The present case allows the Court of Justice to provide clarification as to the obligations imposed on sports federations in the light of Article 101(1) TFEU, where they have established, in the exercise of the powers they hold under their statutes, rules governing authorisation and control, subject to sanctions, relating to the

organisation of sporting competitions, while in parallel pursuing an economic activity in the field. On this occasion, the Court specifies in particular that the fundamental requirement that such rules must be capable of being subject to effective judicial review entails, in a situation involving provisions that confer mandatory and exclusive jurisdiction on an arbitration body for the purpose of settling disputes concerning the application of the rules at issue, ensuring that the court called upon to review the awards made by that body are capable, first, of ensuring compliance with the public policy provisions of EU law, which include the competition rules and, second, of referring questions, if necessary, to the Court of Justice for a preliminary ruling under Article 267 TFEU.

Findings of the Court

The main appeal

Before examining the ISU's complaints challenging the interpretation and application of the concept of restriction of competition by 'object' referred to in Article 101(1) TFEU in respect of the prior authorisation and eligibility rules at issue, the Court defines the subject matter of the appeal before it. In that regard, it observes that it is not disputed that the ISU must be classified, in the light of Article 101 TFEU, as 'an association of undertakings' pursuing, moreover, an economic activity consisting in organising and marketing international skating competitions. Furthermore, it is not disputed that those prior authorisation and eligibility rules constitute 'a decision by an association of undertakings' which may 'affect trade between Member States', within the meaning of that article. Lastly, nor has any challenge on appeal been made to the findings to the effect that that decision by an association of undertakings, on the assumption that it is caught by the prohibition laid down in Article 101(1) TFEU, does not satisfy the various conditions required in order to benefit from an exemption under Article 101(3) TFEU.

Having specified the above, the Court points out, first, that, in so far as the practice of sport constitutes an economic activity, it is subject to the provisions of EU law applicable to such activity, except for certain specific rules adopted solely on non-economic grounds and which relate to questions of interest solely to sport per se. Apart from those specific rules, the rules issued by sporting associations and, more broadly, the conduct of the associations which adopted them therefore come within the scope of the FEU Treaty provisions on competition law where the conditions of application of those provisions are met. That is particularly true of the rules establishing a system of prior authorisation for sporting competitions, on the one hand, and rules governing the participation of athletes in such competitions, on the other hand, since the organisation and marketing of sporting competitions and the practice of sport as a professional or semi-professional constitute economic activities.

That being so, in so far as the sporting activity, even when pursued as an economic activity, undeniably has specific characteristics, the Court of Justice points out that, when applying Article 101 TFEU, the categorisation of the existence of conduct having as its 'object' the prevention, restriction or distortion of competition may involve taking into account, along with other elements and provided that they are relevant, characteristics such as, for example, those connected with the nature, organisation or functioning of the sport concerned, in accordance with how professionalised it is.

Next, the Court recalls the elements categorising the existence of conduct having as its 'object' the prevention, restriction or distortion of competition, and stresses, at the outset, the strict interpretation that must be given to that concept, taking into account the particular legal and evidentiary rules applicable to it. Accordingly, that concept must be understood as referring exclusively to certain types of coordination between undertakings or decisions by associations of undertakings that reveal, by their very nature, a sufficient degree of harm to competition so as to exclude the need to examine their effects. In order to determine, in a given case, whether the conduct at issue reveals such a degree of harm, it is necessary to examine, first, the content of the agreement,

decision or practice in question, second, the legal and economic context of which it forms a part and, third, its objectives, in the context of an assessment based on taking into consideration all of the abovementioned elements. By contrast, no analysis of its effects is required, not even of potential positive effects on competition.

Furthermore, the Court notes that it follows from settled case-law that certain specific types of conduct such as ethical or principled rules adopted by that association are liable not to be caught by the prohibition laid down in Article 101(1) TFEU even if they have the inherent effects of restricting competition, provided that they are justified by the pursuit of legitimate objectives which are not per se anticompetitive in nature and that the necessity and proportionate nature of the means used for that purpose have been duly established. It states however that that case-law does not apply in situations involving a degree of harm that justifies the view that they have as their very 'object' the prevention, restriction or distortion of competition.

It is in the light of all those considerations that the Court of Justice examines the ISU's arguments seeking to challenge the classification made in the present case.

In the first place, the Court of Justice holds that the General Court can in no way be criticised for having found, as did the Commission, that, given the type of conduct at issue in the present case, the examination of its object should be carried out in the light of the case-law arising from the judgments in *MOTOE* (4) and *Ordem dos Técnicos Oficiais de Contas* (5) relating to the exercise at the same time, by the same entity, of an economic activity and of the powers likely to be used to prevent entities or undertakings currently or potentially in competition with it from entering the relevant market.

In that regard, it states that, given the conflict of interests inherent in such a situation, such a power, irrespective of its origin, may be conferred on a given undertaking only on condition that it is subject to restrictions, obligations and review, or that power, where it is conferred on an undertaking in a dominant position in any way, would infringe, by its very existence, Article 102 TFEU, read, as appropriate, in combination with Article 106 TFEU. Likewise, such a power may be regarded as having as its 'object' the prevention, restriction or distortion of competition, within the meaning of Article 101(1) TFEU.

In this instance, having found that the type of conduct at issue in the present case consisted in a decision by an association of undertakings conferring on the ISU regulatory, control and sanctioning powers allowing it to authorise or prevent access by potentially competing undertakings to the market for the organisation and marketing of international speed skating competitions, in which the ISU also pursues an economic activity, the General Court inferred, correctly, that the examination of that conduct should be made in the light of the principles arising from the judgments in *MOTOE* and *Ordem dos Técnicos Oficiais de Contas*.

In the second place, as regards the classification of the conduct at issue in the present case, it follows from the case-law referred to above that it is necessary to check whether the power at issue is circumscribed by substantive criteria which are transparent, clear and precise making it possible to avoid any arbitrary use, and which must have been set out in an accessible form, prior to any implementation of that power. In the field of sport, this may concern, for example, criteria that promote, in an appropriate and effective manner, the holding of competitions based on equality of opportunity and merit. That said, even where the appropriate criteria are present, they must be such as to ensure that such a power is exercised without discrimination and that any sanctions that may be imposed are objective and proportionate. Finally, those criteria must be capable of being subject to effective review. Furthermore, the power in question must be subject to transparent and non-discriminatory detailed procedural rules, such as those relating to the applicable time limits for submitting a prior authorisation request and the adoption of a decision on that request, which must not be liable to undermine potentially competing undertakings by preventing them from effectively accessing the market.

The General Court did not therefore err in law, in its examination of the objective of the prior authorisation and eligibility rules, by referring to the question whether those rules were designed in a manner such as to make it possible to prevent the powers of prior authorisation and control and the power to impose sanctions that they confer on the ISU from being used in an arbitrary, discriminatory or disproportionate manner.

In the third place, as regards the General Court's assessment following its examination of the rules at issue in the light of the abovementioned criteria, the Court of Justice holds that the General Court did not err in law in finding that those rules were not justified, in a verifiable manner, by any specific objective and that they granted a discretionary power to the ISU to decide on planned competitions subject to its authorisation, in the absence of transparent, objective, non-discriminatory and, consequently, reviewable criteria. The General Court also correctly held that the sanctions liable to be imposed by the ISU on athletes taking part in competitions that had not received prior authorisation were not subject to criteria such as to ensure that they were objective and proportionate.

In those circumstances, it is apparent that those rules are thus able to be used to allow or exclude from that market any competing undertaking, even an equally efficient undertaking, or at least restrict the creation and marketing of alternative or new competitions in terms of their format or content. In so doing, those rules also completely deprive athletes of the opportunity to participate in those competitions, even where they could be of interest to them, for example on account of an innovative format, while observing all the principles, values and rules underlying the sporting discipline concerned. Lastly, they are ultimately such as to completely deprive spectators and viewers of any opportunity to attend those competitions or to watch a broadcast thereof. Thus, the General Court did not commit any error of law or of legal characterisation of the facts in finding that the Commission had correctly classified the prior authorisation and eligibility rules as having as their 'object' the restriction of competition, within the meaning of Article 101(1) TFEU.

The cross-appeal

In the cross-appeal, the Court of Justice examines the complaints concerning the findings based on which the General Court invalidated the Commission's analysis concerning the arbitration rules, that is to say, whether to admit their justification in respect of the existence of legitimate interests linked to the specific nature of the sport.

In that regard, the Court of Justice stresses at the outset that the arbitration rules at issue apply to disputes likely to arise in relation to the exercise of a sport as an economic activity in EU territory. It follows that those rules fall within EU competition law, with the result that they must comply with it, in so far as they are implemented in the territory in which the EU and FEU Treaties apply, irrespective of the place where the entities that adopted them are established.

Furthermore, since Articles 101 and 102 TFEU are provisions having direct effect which create rights for individuals which national courts must protect and which are a matter of EU public policy, the Court, while acknowledging the possibility for individuals to submit their disputes to an arbitration body whose awards are capable of giving rise to limited judicial review, recalls that that review must nevertheless, in any event, be able to cover the question whether those awards comply with those articles. Such a requirement applies, more especially, in a situation involving an arbitration mechanism imposed by one individual on another for the purpose of conferring mandatory and exclusive jurisdiction on an arbitration body.

Given that the rules adopted by sports associations cannot limit the exercise of rights and freedoms conferred on individuals by EU law, prior authorisation and eligibility rules must be subject to effective judicial review. That requirement itself means that the court having jurisdiction to review awards made by an arbitration body may confirm that those awards comply with Articles 101 and 102 TFEU. In addition, that court must satisfy all the

requirements under Article 267 TFEU so that it is entitled, or, as the case may be, required to satisfy the obligation to refer a question to the Court of Justice where it considers that a decision of the Court is necessary concerning a matter of EU law raised in a case pending before it.

In the present case, the Court of Justice holds that the General Court merely found, in an undifferentiated and abstract manner, that the arbitration rules 'may be justified by legitimate interests linked to the specific nature of the sport', in so far as they confer on 'a specialised court' the power to review disputes relating to the prior authorisation and eligibility rules. The General Court did not therefore seek to ensure that the arbitration rules complied with all the requirements referred to above and thus allowed for an effective review of compliance with Article 101 TFEU, even though the Commission correctly relied on those requirements in concluding that those rules reinforced the anticompetitive nature of the ISU's prior authorisation and eligibility rules. In doing so, the General Court committed errors of law.

Moreover, the General Court erred in law in holding that, despite that lack of effective judicial review, the effectiveness of EU competition law was ensured in full given, first, the existence of remedies allowing recipients of a decision refusing to allow them to participate in a competition or of an ineligibility decision to seek damages for the harm caused to them by that decision before the relevant national courts and, second, the possibility of lodging a complaint with the Commission or a national competition authority. Those mechanisms may supplement such review but cannot compensate for its absence.

Consequently, the Court of Justice sets aside the judgment under appeal, in so far as it upheld in part the ISU's claims for annulment.

The action in Case T-93/18

Considering that the part of the action for annulment that remained to be examined following the setting aside in part of the judgment under appeal permits final judgment, the Court decides to give final judgment on that part. In that regard, it points out in particular that, where the Commission finds the existence of an infringement of Article 101 or Article 102 TFEU, it has the power to require, by means of a decision, the undertakings or associations of undertakings concerned to bring an end to that infringement and, to that end, impose on them a corrective measure that is proportionate to that infringement and necessary to bring it to an immediate end. In the present case, given the scope of the requirement of effective judicial review set out above, the Court holds that the Commission was correct in concluding that the arbitration rules reinforced the infringement identified by making judicial review, in the light of EU competition law, of awards of the Court of Arbitration for Sport delivered after the decisions adopted by the ISU by virtue of the discretion conferred on it by the prior authorisation and eligibility rules more difficult. Furthermore, the Commission was correct in requiring the ISU to put an end to that situation.

¹ Commission Decision C(2017) 8230 final of 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).

² Judgment of 16 December 2020, *International Skating Union v Commission* (T-93/18, EU:T:2020:610).

³ Judgments of 21 December 2023, *European Superleague Company* (C-333/21), and of 21 December 2023, *Royal Antwerp Football Club* (C-680/21).

4 Judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376).

5 Judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, EU:C:2013:127).