

An Analysis of the Broader Implications of the European Commission's International Skating Union Case

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Introduction

On 8 December 2017, the European Commission (the 'Commission') decided that the International Skating Union's (ISU) Eligibility Rules (the 'rules') breached European Union competition law.¹ The rules provided that an athlete could be sanctioned for participating in an event not authorised by the ISU. The Commission thus examined whether the rules unlawfully restrict competition under Article 101 of the Treaty on the Functioning of the European Union (TFEU) by establishing a pre-authorisation procedure for third-party organisers and imposing sanctions on athletes who participate in unauthorised events. The Commission concluded that the rules restrict competition by object and effect and ordered the ISU to change its rules.

After setting out the factual and legal background of the case in more detail, this article analyses the Commission's findings. In particular, it argues that, contrary to the decision, the rules do not restrict competition by object or by effect. Additionally, the article questions the Commission's reasoning as to why the restrictions set out by the rules are not exempted from the application of Article 101 of the TFEU, even though such restrictions, in

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1 Case COMP AT.40208, *International Skating Union's Eligibility Rules*, Commission decision of 8 December 2017 (the 'decision').

the authors' view, are inherent to well-recognised legitimate objectives and proportionate to them. The article challenges the Commission's view that the mandatory Court of Arbitration for Sport (CAS) arbitration rules further restrict competition. On the contrary, it is submitted that the CAS arbitration rules comply with EU law and ensure a fair hearing before an independent and impartial judicial body specialised in sports-related dispute resolution. Finally, the article briefly touches upon the proposed remedies in the *ISU* case.

Factual and legal background of the *ISU* case

The case was prompted by a complaint against the ISU's refusal in 2014 to authorise a speed skating event in Dubai, organised by the Korean company Icederby International.² The event had a new format whereby long-track speed skaters would compete side by side with short-track speed skaters in mass-start races and where betting on the outcome of the races would be allowed.³ The ISU refused to authorise Icederby's event, stating that it would violate the prohibition against betting in the ISU Code of Ethics.⁴ The refusal therefore prevented skaters from participating in the event because an athlete could be punished, pursuant to the rules, for participating in unauthorised events with up to a lifetime ban.

Assessing whether the rules represent an agreement in breach of Article 101 of the TFEU requires one to take account of certain specificities of the sport. In particular, skating is characterised by the pyramid structure of competitions from grassroots to elite level, with solidarity mechanisms between the different levels and operators. It is particularly important to regulate the speed and the conditions under which skaters compete to protect the health and integrity of athletes and to promote fairness, openness, certainty and competitive balance in competitions. As in many other sports, skating has one federation that regulates the competition and rules and also organises sporting events, namely the ISU.

The EU courts and other EU institutions have consistently acknowledged the importance of the specificity of sport in judgments, declarations, reports and papers on European law and sport. In particular, Article 165(2) of the TFEU stipulates that 'Union action shall be aimed at... developing the European dimension in sport, by promoting fairness and openness in sporting competitions'.⁵ The EU courts have given due regard to the

2 *Ibid*, para 13.

3 *Ibid*, para 64.

4 *Ibid*, para 65.

5 Article 165(2) of the Treaty on the Functioning of the European Union, OJ 2012 C 326.

specificities of sport in numerous cases. For example, in *Olympique Lyonnais SASP*, the Court of Justice of the European Union (CJEU) held that the restriction under Article 45 of the TFEU in the form of a compensation scheme could be objectively justified on the grounds that it encourages the recruitment and training of young players through the club receiving training fees, provided that the scheme is proportionate to ensuring the attainment of that objective and does not go beyond what is necessary to attain it.⁶ The CJEU also noted, with specific reference to Article 165 of the TFEU, that in assessing whether the scheme imposes competitive restraints account must be taken of the 'specific characteristics of sport in general'.⁷

As a result, the consistent approach under EU law has been that requirements such as the rules' compulsory ex ante recognition system for third-party events comply with EU competition law if any restriction resulting from such recognition system is inherent and proportionate to achieving sport-specific legitimate objectives.

Restriction of competition by object

The decision found that the ISU's rules were intended to prevent participation by athletes in unauthorised events by providing severe sanctions, up to a lifetime ban. The decision also found that the rules served to protect the ISU's economic interests, and restricted competition by object in the worldwide market for the organisation and commercial exploitation of international speed skating events. The Commission reached this conclusion,

6 See Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, 16 March 2010, EU:C:2010:143, para 45.

7 *Ibid*, para 40; see also White Paper on Sport and the Commission's Communication, according to which:

'The specific nature of sport, a legal concept established by the Court of Justice of the European Union which has already been taken into account by the EU institutions in various circumstances and which was addressed in detail in the White Paper on Sport and the accompanying Staff Working Document, is now recognised by Article 165 TFEU. It encompasses all the characteristics that make sport special, such as for instance the interdependence between competing adversaries or the pyramid structure of open competitions. The concept of the specific nature of sport is taken into account when assessing whether sporting rules comply with the requirements of EU law (fundamental rights, free movement, prohibition of discrimination, competition, etc.).'

White Paper on Sport, COM(2007), 391 final of 11 July 2007, section 4.1; Communication from the Commission on developing the European Dimension in Sport, COM(2011) final 12 of 18 January 2012, section 4.2; European Parliament Resolution on the European dimension in Sport of 2 February 2012, 2011/2087(INI) (Resolution 2011/2087), para AE.

‘even though the Eligibility rules may at the same time also pursue other objectives such as protecting the integrity of the sport’.⁸

However, the ISU’s rules cannot represent a restriction by object under the established case law of the EU courts. In particular, the CJEU in *Groupement des cartes bancaires* found that restrictions by object apply to such obvious violations in which the analysis of the effects is superfluous, and that restrictions needed to achieve a legitimate objective cannot represent a restriction by object.⁹ Also, in the *Wouters*¹⁰ and *Gøttrup-Klim*¹¹ cases, the CJEU ruled that an association may restrict licensed members from joining other associations if such restriction is needed to achieve a legitimate objective (including protection of its economic interests). In fact, in both cases the CJEU found that participation in third-party associations may be subject to restrictions that pursued legitimate objectives. The reasonable necessity and proportionality test laid down in the *Meca-Medina* case is the standing legal test for the compatibility of rules adopted by sports associations with EU competition law. This test combines sufficient detail and flexibility.¹²

The aforementioned legitimate objectives existed in this case, namely:

- preventing betting-related manipulation of competitions;
- imposing solidarity measures; and
- ensuring safety of athletes and fighting against doping.

Restrictions pertaining to preventing betting-related manipulation of competition is a legitimate objective because ‘the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those

8 Decision, paras 188, 164.

9 See Case C-67/13P, *Groupement des cartes bancaires (CB) v European Commission*, 11 September 2014, ECLI:EU:C:2014:2204, paras 75, 85–88.

10 See Case C-309/99, *J C J Wouters, J W Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, 19 February 2002, ECLI:EU:C:2002:98. In *Wouters*, the CJEU stated at para 97:

‘However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience.’

11 See Case C-250/92, *Gøttrup-Klim ea Grovareforeninger v Dansk Landbrugs Grovareselskab AmbA*, 15 December 1994, ECLI:EU:C:1994:413, paras 35 and 36.

12 See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*, 18 July 2006, ECLI:EU:C:2006:492.

competitions may be in a position to influence their outcome directly or indirectly, and thus increasing its profits'.¹³ This has also been recognised by the European Parliament¹⁴ and the Commission itself.¹⁵ Such protection against manipulation of competition has traditionally been an important role of sport federations. For instance, the International Olympic Committee, owing to its political, social and sporting authority, appears as a key factor in the continuing fight against manipulation in sport because '[t]he impact of international legal instruments, such as the United Nations and Council of Europe conventions, is also limited, since their provisions are not mandatory'.¹⁶

The second legitimate objective that the rules pursued is the imposition of solidarity measures. This objective has also been acknowledged by the Commission¹⁷ and other EU institutions.¹⁸ In particular, in the 1999 *Helsinki Report on Sport*, the Commission recognised that sport operators and large

13 See Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, 8 September 2009, ECLI:EU:C:2009:519, para 71.

14 The European Parliament's Resolution on the European Dimension in Sport (2012) ('calls on the Commission and the Member States to protect betting from unauthorised activities, from unlicensed operators and from suspicions of match fixing, in particular by recognising organisers' property rights with regard to their competitions, guaranteeing a significant contribution from betting operators towards funding mass-participation and grassroots sports and by protecting the integrity of competitions with an emphasis on education for athletes').

15 'Betting related match fixing is a specific type of fraud that goes against the interests of sport organisations, sportspeople, players (consumers) and regulated gambling operators. Match fixing runs contrary to the principle of fairness in sporting competitions, which is one of the objectives of EU action in the field of sport (Article 165 TFEU)'; Communication from the Commission towards a comprehensive European framework for online gambling, COM(2012), 0596 final, section 2.5. See also Resolution 011/2087.

16 European Commission Briefing, 'Match-fixing: Issues and policy responses', April 2016, [www.europarl.europa.eu/RegData/etudes/BRIE/2016/580891/EPRS_BRI\(2016\)580891_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580891/EPRS_BRI(2016)580891_EN.pdf) accessed 2 April 2020.

17 Case IV/36583 *SETCA-FGTB/FIFA*, 30 May 2002 (FIFA's commitment included creation of solidarity mechanisms that would redistribute a significant proportion of income to clubs involved in the training and education of a player, including amateur clubs); the Commission's White Paper on Sport (2007), Staff Working Document, Section 3.4 ('The preservation of... essential social and cultural benefits of sport which contribute to stimulating production and economic development is supported through arrangements which provide for a redistribution of financial resources from professional to amateur levels of sport (principle of solidarity)').

18 European Parliament resolution of 8 May 2008, on the White Paper on Sport, point 84 ('The European Parliament... Supports strengthening of solidarity between professional and amateur sport so as to encourage small clubs, promote school sports and develop the relevant local infrastructures; welcomes the Commission's acknowledgement of the particular challenges faced by amateur and non-profit sport and by sport dependent on volunteering and calls for this to be reflected in all economic aspects of future sports policy').

clubs that leave federations in order to maximise profits may jeopardise the principle of solidarity between professional and amateur sport.¹⁹ The CJEU has held that the preservation of solidarity is a legitimate objective that may justify restrictions on the freedoms guaranteed by the TFEU outside the sports context. For example, a requirement to participate in a national insurance scheme is a justified restriction on the freedom to provide services owing to the need to ensure the principle of solidarity and the financial interests of the national insurance scheme.²⁰

Finally, the rules aimed at ensuring the safety of athletes and fighting against doping. This is a legitimate objective that is particularly apparent where event organisers do not guarantee athlete safety,²¹ and the central role of sports federations in ensuring such objective has been widely recognised.²² Article 165(2) of the TFEU proclaims that ‘Union action shall be aimed at... developing the European dimension in sport... by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen’. The Commission has also recognised that certain sporting rules, such as anti-doping rules, based on their legitimate objectives, would not be anti-competitive if they are inherent and proportionate to them.²³ The same stance was taken in *Meca-Medina*, where the CJEU found that anti-doping rules, even if considered a restriction of competition, were justified as they pursued a legitimate objective of protecting athletes’ health.²⁴

Restriction of competition by effect

In addition to finding that the rules restrict competition by object, the Commission concluded that the rules are restrictive on competition by effect. In particular, the decision found that the rules had the effect of preventing

19 Report from the Commission with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework – Helsinki Report, COM(1999), 644 final of 10 December 1992, p 4; see also Communication stating that it is important to redistribute income between professional and amateur sport, recommending sport organisations to create and maintain solidarity mechanisms. In the *German Triathlon* case, the Higher Regional Court of Düsseldorf stated that a regional triathlon organisation was empowered to refuse authorising private triathlon sports events if they had not paid the required fee (OLG Düsseldorf. Beschluss vom 2 April 2013. AZ. VI – U (Kart) 9/13).

20 Case C-350/07 *Kattner Stahlbau*, CJEU judgment of 5 March 2009, ECLI:EU:C:2009:127.

21 Opinion of Advocate General Kokott in Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, 6 March 2008, ECLI:EU:C:2008:142, para 90.

22 Nice European Council Declaration on the specific characteristics of sport of December 2000, Art 8.

23 See Commission 2007 White Paper on Sport.

24 See Case C-519/04, *Meca-Medina*, para 45.

athletes from participating in international speed-skating events other than events organised or specifically authorised by the ISU and that they were creating a quasi-insurmountable entry barrier for competing organisers of international speed-skating competitions. Moreover, the Commission found that the rules had a negative impact on several parameters of competition, including output, consumer choice and innovation.²⁵

According to the well-established case law of the EU courts, whether the particular decision or practice of undertakings restrict competition by effect is to be determined by assessing 'the competition in question... within the actual context in which it would occur in the absence of the agreement, decision of an association of undertakings or concerted practice at issue'.²⁶

However, in its decision, the Commission assumed that the ISU's decision represented a refusal to authorise a third-party skating event on illegitimate grounds, without giving due regard to the legitimate objectives that the rules pursue. The decision established restriction of competition by effect on the premise that in the absence of the rules 'the athletes' commercial freedom would not be restricted and they would be able to offer their speed skating services to competing organisers of international speed-skating events even if those events have not specifically been authorised by the ISU'.²⁷ A restriction of athletes' or third-party events' freedom of action is not necessarily a restriction of competition. The counterfactual for the effects analysis is not whether athletes' commercial freedom has been restricted (as such restrictions are entirely permissible under case law discussed previously), but whether there would have been competing organisers of events that would have complied with the objectively required criteria imposed by the rules. The decision does not contain such analysis. Indeed, the Commission failed to consider the fact that the only instance of the rules denying authorisation for a third-party speed-skating event (ie, Icederby) was one having betting as a central component. It was approved once Icederby submitted a revised event proposal without the betting component.

In particular, any analysis of effects must capture the impact that a given measure has on the different markets that the organisation of sports events involves, such as athletes, clubs, broadcasters, advertisers and operators of venues. Sports tournaments are multi-sided markets where 'each type of market participant who deals with organizers/managers of international [sports competitions] has specific demand parameters, and therefore the relationships of such organizers/managers with each of those participants

25 Decision, para 203.

26 See Case T-111/08, *MasterCard Inc and Others v Commission*, 24 May 2012, ECLI:EU:T:2012:260.

27 Decision, para 199.

are in separate product markets'.²⁸ By way of example, a third-party event organiser may cherry-pick the most commercially attractive athletes or clubs, which in turn may undermine competition between athletes and clubs and the competitive balance and fairness and openness in other events where such athletes or clubs participate.²⁹ Such analysis does not feature in the decision where the Commission took the view that 'the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions... is not relevant for the purpose of this Decision'.³⁰

In that regard, by not examining the specificities of the sport and the objectives the rules pursue, the Commission failed to assess the effects that the rules have on competition in accordance with the practice of EU courts, namely within the actual context in which the competition would occur, but for the rules.

Is an ex ante authorisation system inherent in the pursuit of legitimate objectives?

The Commission's third claim was that an ex ante authorisation system is not inherent in the pursuit of legitimate objectives. More specifically, the statement of objections alleged that a compulsory ex ante authorisation system, combined with a general prohibition for athletes to participate in unauthorised events, exceeded what is inherent to achieve the objectives of the protection of the athletes' health and safety, the protection of the integrity of sport, and the organisation and proper conduct of sport. The statement of objections rather seemed to be in favour of a voluntary ex post authorisation system or in other words shifting on to the athletes the burden

28 Case M.6380 *Bridgepoint/Infront Sports & Media*, Commission decision of 20 December 2011, para 9. See also Case COMP/M.4066 CVC/SLEC, Commission decision of 20 March 2006.

29 Fairness and openness, as well as a competitive balance, are legitimate objectives that may be pursued by a sports federation. According to Art 165(2), para 7 of the TFEU, 'Union action shall be aimed at... developing the European dimension in sport, by promoting fairness and openness in sporting competitions'. The CJEU's case law, the Commission's decisional practice, and the EU policy documents have emphasised the legitimate nature of the objective to maintain a competitive balance and to preserve a certain degree of equality and uncertainty as to results. See, eg, Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, 15 December 1995, ECLI:EU:C:1995:293; Helsinki Report, p 4; Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, 13 April 2000, ECLI:EU:C:2000:201, para 106; *Lehtonen*, para 54; COMP/C.2-37.398, *Joint selling of the commercial rights of the UEFA Champions League*, 23 July 2003, para 165; COMP/37.806 *ENIC/UEFA*, 25 June 2002.

30 Decision, fn 54.

of reviewing the compliance of events with the federation's rules prior to participation. In its decision, however, the Commission eventually stated that it did not need 'to take a view on the question of whether a pre-authorisation system is inherent in the pursuit of legitimate objectives'.³¹ The decision only found that the ISU's authorisation system was disproportionate to achieving those legitimate objectives.

In light of previous case law, the ex ante mandatory pre-authorisation of events by a sports federation does not in principle violate EU competition law. First, in *Wouters*³² and *Gøttrup-Klim*,³³ the CJEU upheld an association's absolute right to restrict its members from joining other associations in all circumstances regardless of whether such other associations complied with certain standards or not. Second, even in the sports context, in the *MOTOE* case,³⁴ the CJEU found that the Greek federation's rules requiring its ex ante authorisation for other events complied with EU law to the extent that decisions concerning such approval could be appealed to the appropriate review body. Having an ex ante mandatory authorisation scheme in place is efficient and suitable for achieving a number of benefits, including:

- preventing illegitimate betting and match fixing, by averting spill-over effects and curtailing betting-relating cheating in all events during the season;
- guaranteeing health and safety (including anti-doping) by curtailing doping in all events during the season;
- implementing solidarity mechanisms, which apply to every third-party organiser; and

31 Decision, para 254.

32 See Case C-309/99, *J C J Wouters, J W Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, 19 February 2002, ECLI:EU:C:2002:98. In *Wouters*, the CJEU stated at para 97 that:

'However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience.'

33 See Case C-250/92, *Gøttrup-Klim ea Grovvaareforeninger v Dansk Landbrugs Grovvaarelskab Amba*, 15 December 1994, ECLI:EU:C:1994:413, paras 35 and 36.

34 See Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, 1 July 2008, ECLI:EU:C:2008:376.

- assessing whether participation in a third-party event would undermine a competitive balance and fairness and openness of the other competitions where such athletes participate.

This is especially so since the federation has the powers, expertise and information to enforce compliance with health, anti-doping and betting rules.

Conversely, the existence and enforcement of an ex post voluntary authorisation scheme would be inefficient and unsuitable for a number of reasons. First, it would be inappropriate for preventing illegitimate betting and match-fixing and would be unable to avoid spillover effects, since an athlete engaged in betting-related cheating in one event would be likely to be prone to cheating in another event. Second, it would be unsuitable for guaranteeing health and safety (including anti-doping) and preventing spillover effects because doping taken in one event may have an effect on another event. Importantly, individual athletes may lack the sufficient resources and incentives to self-police compliance with health, anti-doping and betting rules. Third, an ex post voluntary authorisation scheme would not be suitable for implementing solidarity mechanisms, which are impossible to implement if they are dependent on voluntary opt-in by the third-party organiser. Finally, a compulsory ex ante authorisation system represents the only means for the federation to safeguard a competitive balance and fairness and openness in its competitions.

The Commission's review of legitimate objectives

In its decision, the Commission took the opportunity to review other legitimate objectives relating to the organisation of sport. In the *Meca-Medina* case, the CJEU held that, similar to the ISU rules, the rules relating to the organisation of sport are generally subject to EU competition law.³⁵ In this context, such rules may fall outside the application of Article 101 of the TFEU in certain circumstances, depending on:

- the overall context in which the rules were taken or where they produce their effects and objectives;
- whether consequential effects restrictive of competition are inherent in the pursuit of the objectives; and
- whether the rules are proportionate to the objectives pursued.

As far as the protection of the integrity of sport is concerned, the courts have stated that this may constitute a legitimate objective that justifies a restriction of competition. In the *ISU* decision, the Commission made reference to the *Liga Portuguesa* case, noting that while Member States may restrict or limit the cross-border supply of all or certain types of online gambling services, 'they must nonetheless demonstrate the suitability and necessity of the measures

35 See Case C-519/04, *Meca-Medina*, para 22.

in question and also demonstrate that the public interest objectives they have chosen to ensure are being pursued in a consistent and systematic manner'.³⁶ In this respect, the Commission considered that the ISU did not apply its ethical principles concerning the risks of betting in a consistent and systematic manner.

The protection of health and safety was also held to constitute a legitimate objective that justifies a restriction of competition. The Commission stated in its decision that an outright prohibition of athletes to participate in unauthorised events organised by third parties, combined with severe sanctions, was neither inherent nor proportionate to the protection of health and safety and fighting against doping. It further considered that the ISU's rules were unclear concerning the way in which its health and safety standards were set and applied to third-party events and also concerning the ISU Council's role in assessing whether and how the set standards are met by third parties.

The organisation and proper conduct of competitive sport is another instance that may constitute a legitimate objective that justifies a restriction of competition. This also includes setting the sport calendar.³⁷ The Commission found in the *ISU* decision that the restrictions arising from the contested rules went beyond addressing the unauthorised event's interference with the ISU's official calendar and concluded that the ISU had therefore failed to apply pre-established objective, non-discriminatory and proportionate criteria to protect the good functioning of the calendar.

Finally, on the preservation of solidarity, the Commission considered that some forms of solidarity may justify limited restrictions to the economic freedom of undertakings involved in sport. It split this into horizontal and vertical solidarity, with horizontal solidarity revolving around, for example, the equal distribution of revenues to all the athletes or clubs participating in the same competition, and vertical solidarity concerning the redistribution of revenues from the elite/professional level of a sport to the low/grassroots level. The Commission concluded that a solidarity contribution from third-party organisers should be fair and reasonable, be used to finance grassroots sports activities and not have exclusionary effects. It is worth drawing a distinction between the *ISU* case in this respect and the *Göttrup-Klim* case given that: (1) the *ISU* case did not concern dual membership; and (2) pursuant to ISU rules, athletes could be sanctioned irrespective of the basis on which third party events are not authorised and irrespective of whether participation would have an impact on how well the ISU functions.

³⁶ Decision, para 231.

³⁷ See, eg, C-49/07 *MOTOE*, Opinion of Advocate General Kokott, 6 March 2008, EU:C:2008:142, para 92.

Do CAS arbitration rules aggravate restrictions of competition?

The decision took the view that the CAS arbitration rules, in combination with the rules, reinforce the restriction of athletes' commercial freedom and foreclosure of the ISU's potential competitors. This was so first because judicial recourse against the CAS arbitral awards is possible only before the Swiss Federal Tribunal on a very limited number of grounds and the fact that the Swiss Federal Tribunal cannot refer a question for preliminary ruling to the CJEU. Second, athletes have no real choice but to accept the CAS arbitration rules and CAS exclusive competence, as they are not able to compete in ISU speed-skating events if they reject CAS arbitration.

However, CAS arbitration rules do not restrict competition for a number of reasons. First, EU competition law is a law of public order. EU courts, national courts and antitrust authorities always remain competent to review direct actions and appeals on points of EU competition law.³⁸ Second, CAS awards may also be appealed to the Swiss Federal Tribunal. Grounds for appeal include the violation of public order, and thus of competition law. For example, in the *Guillermo Cañas* case,³⁹ the award was annulled, and the case was sent back to the CAS for the issue of a new award. Finally, the CAS is an independent and impartial international judicial body specialised in sports-related dispute resolution. Created in 1984, it has decided almost 5,000 cases, with more than 600 cases filed in 2016. The CAS arbitration panels are independent from sports federations and national preferences and regularly address issues of EU competition law in their awards. Findings of CAS arbitration panels may be challenged before EU courts, national courts and antitrust authorities on EU competition law grounds, as well as the enforcement stage, if at all relevant.

The fact that CAS panels are independent and impartial bodies is of particular significance. The rules of the International Council of Arbitration for Sport (ICAS) and CAS provide for the impartial selection of arbitrators. Rule R40.2 of the CAS Code establishes that '[t]he two arbitrators so appointed [by the parties] shall select the President of the Panel by mutual agreement within a time limit set by the CAS Court Office. Failing agreement within that time limit, the President of the Division shall appoint the President of the Panel'.⁴⁰ The composition of CAS panels can be contested in front of ICAS and the Swiss Federal Tribunal. According to Rule R34 of the

38 This has been illustrated in several cases including *Guillermo Cañas* (see C-269/12 P, *Guillermo Cañas v European Commission*, 20 June 2013, ECLI:EU:C:2013:415), *Claudia Pechstein (Mutu and Pechstein vs Switzerland*, Application Nos 40575/10 and 67474/10, ECtHR judgment of 2 October 2018), *David Meca-Medina* (see n 12 above).

39 See *Guillermo Cañas v ATP Tour*, 4P. 172/2006, Swiss Federal Tribunal, 22 March 2007.

40 See Court of Arbitration for Sport Code: Procedural Rules, available at <http://www.tas-cas.org/en/arbitration/code-procedural-rules.html>.

CAS Code, '[a]n arbitrator may be challenged if the circumstances give rise to legitimate doubts over her/his independence or over her/his impartiality'.⁴¹ Further, pursuant to Article 180 of the Swiss Private International Law Act, the independence and impartiality of an arbitrator may also be challenged before the Swiss Federal Tribunal.

The independency and impartiality of CAS panels has been acknowledged by several authorities. The Swiss Federal Tribunal in *A & B v IOC & FIS* considered that it was clear that 'the CAS is sufficiently independent vis-à-vis the IOC, as well as other parties that call upon its services, for its decisions in cases involving the IOC to be considered true awards, equivalent to the judgments of State Courts'.⁴² The German Federal Tribunal in the *Pechstein* case further noted that 'the procedure of drawing up the list of arbitrators of the CAS indicates no structural imbalance impairing the independence and neutrality of the CAS to such an extent that its position as a "true" court of arbitration could be called into question'.⁴³

In this context, it is useful to distinguish the case of *Slovakia v Achmea*,⁴⁴ in which the CJEU found that the bilateral investment treaty (BIT) between the Netherlands and Slovakia on the protection of investment was not compatible with EU law. In that case, the Court stated that:

'arbitration proceedings such as those referred to in Article 8 of the BIT... derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law.'⁴⁵

The CJEU distinguished its ruling from commercial arbitrations, referring to the *Eco Swiss*⁴⁶ and the *Mostaza Claro*⁴⁷ judgments. The CJEU considered that, in relation to commercial arbitration, the requirements of efficient arbitration proceedings justify the review of arbitral awards by national courts being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the CJEU for a preliminary ruling. As stated, points of EU

41 *Ibid.*

42 *A & B v IOC & FIS*, 27 May 2003, para 3.3.4.

43 *Pechstein v International Skating Union*, KZR 6/15, 7 June 2016, para 26.

44 Case C-284/16, *Slovakische Republik (Slovak Republic) v Achmea BV*, 6 March 2018, ECLI:EU:C:2018:158.

45 *Ibid* para 55.

46 See Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV*, 1 June 1999, ECLI:EU:C:1999:269.

47 See Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, 26 October 2006, ECLI:EU:C:2006:675.

competition law contained in a CAS award can always be raised before EU institutions and the EU courts, just as happened in the *Meca-Medina* and the *Cañas* cases.

Proposed remedy in the *ISU* case

Pending its appeal to the General Court, the ISU amended its rules to comply with the Commission's decision. The amendments to its rules include:

- a more detailed authorisation procedure and requirements for third-party event organisers, particularly of the legitimate objectives that the requirements pursue, such as integrity, and health and safety;
- lessened potential sanctions on athletes for participating in unauthorised third-party events; and
- a revised code of ethics applicable to private companies organising events.

The ISU, however, still retains the power to authorise events and may prohibit certain events if, for instance, they upset the international sporting calendar.