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Advocate General's Opinion in case C-124/21 P | International Skating Union v Commission

Advocate General Rantos proposes that the judgment of the General Court which had confirmed the anticompetitive nature of rules of the International Skating Union should be set aside

He proposes that the case be referred back to the General Court

The International Skating Union ('the ISU') 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). By that judgment, 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. [1] The Commission had declared in its decision of 8 December 2017, that the rules of the ISU providing for severe penalties for athletes participating in speed skating events not recognised by it are contrary to EU competition rules.

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. They 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.

In today's Opinion, Advocate General Athanasios Rantos proposes that the judgment be set aside and the case referred back to the General Court.

The application of competition law to rules issued by sports federations

In his preliminary remarks, the Advocate General clarifies **the analytical framework which must be applied when analysing rules issued by sports federations in the light of competition law.** He considers that the rules of sports governing bodies such as the ISU are not, in principle, exempt from the application of EU competition law. Given that the matter concerns 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.

The Advocate General recalls that, according to the case-law of the Court, [2] 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, those measures do not fall within the scope of Article 101(1) TFEU. That is however on condition

[1] For the background to the dispute see CP 159/20.

[2] See, to that effect, judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission* C-519/04 P (see also CP No 65/06).

that those effects do not go beyond what is necessary to ensure the pursuit of that objective.

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.

The Advocate General points 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, 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. **Sports federations may, under certain conditions, deny market access to third parties, without this constituting an infringement of competition law, provided that the denial of access is justified by legitimate objectives and that the measures taken by those federations are proportionate to those objectives.**

The appeal

The Advocate General analyses whether the General Court correctly interpreted Article 101(1) TFEU in upholding the decision at issue in so far as it found that there was a restriction of competition by object.

The question therefore arises as to whether the General Court was able 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. The Advocate General notes 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. 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 the criteria laid down by the judgment in *Meca-Medina and Majcen v Commission* which concerns the objectively justified nature of the restrictions of competition identified.

The Advocate General states that the General Court's position as regards the interpretation of the content of the ISU rules and its assessment concerning the disproportionate nature of the ISU rules which led it to conclude that there was a restriction of competition by object is not well founded. It would extend the concept of a 'restriction of competition by object' which would be contrary to the settled case-law of the Court requiring a restrictive interpretation of that concept.

Thus, **the Advocate General concludes that the General Court erred in law as regards its classification of the ISU's eligibility rules as a restriction of competition by object and proposes 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.**

The Advocate General states nevertheless that it remains appropriate to ascertain whether the agreements at issue have as their 'effect' the restriction of competition within the meaning of Article 101(1) TFEU. 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. 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. Consequently, **the Advocate General proposes that the case be referred back to the General Court and that the costs be reserved.**

The cross-appeal

The Advocate General examines whether the General Court erred in law in finding that the Commission had wrongly concluded that the ISU arbitration rules reinforced the restriction of competition by object created by the eligibility rules issued by the ISU. He examines whether the Commission was entitled 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, an approach which raises questions, in his view, since the Commission had not considered that the arbitration clause could constitute an infringement in itself.

The Advocate General takes the view that the General Court was fully entitled to recognise 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. He also points out that recourse to arbitration can, in the present case, be justified by legitimate interests linked to the requirement that sporting disputes be submitted to a specialised judicial body.

As regards CAS arbitration, the Advocate General considers that it is not comparable to the arbitration that takes place between Member States and private parties in the context of the bilateral investment treaties at issue in the judgments in *Achmea* [3] and *PL Holdings*. [4] Consequently, the principles deriving from the case-law resulting from those judgments are not capable of being applied to the arbitration at issue in the present case, since the latter is not liable to reduce the full effectiveness and uniformity of EU law

The Advocate General concludes that the General Court did not err in law in holding that the exclusive and binding arbitration mechanism could not be classified as a 'reinforcing' element of the restriction of competition found.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

The full text of the Opinion is published on the CURIA website on the day of delivery.

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Pictures of the delivery of the Opinion are available from 'Europe by Satellite" ✆ (+32) 2 2964106

[3] Judgment of 6 March 2018, Achmea C-284/16, see also CP No 26/18).

[4] Judgment of 26 October 2021, PL Holdings C-109/20, see also CP No 190/21).