# JUDGMENT OF THE COURT (Grand Chamber)

21 December 2023 (*)

Table of contents

(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' – Justification – Conditions)

In Case C-124/21 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 February 2021,

**International Skating Union,** established in Lausanne (Switzerland), represented by J.-F. Bellis, avocat,

appellant,

the other parties to the proceedings being:

**European Commission,** represented by G. Meessen, F. van Schaik, H. van Vliet and C. Zois, acting as Agents,

defendant at first instance,

**Mark Jan Hendrik Tuitert,** residing in Hoogmade (Netherlands),

**Niels Kerstholt,** residing in Zeist (Netherlands),

**European Elite Athletes Association,** established in Amsterdam (Netherlands), represented by B.J.H. Braeken, T.C. Hieselaar and X.Y.G. Versteeg, advocaten,

interveners at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal, K. Jürimäe and O. Spineanu-Matei, Presidents of Chambers, J.-C. Bonichot, M. Safjan, L.S. Rossi, I. Jarukaitis, A. Kumin, N. Jääskinen, N. Wahl, J. Passer (Rapporteur) and M. Gavalec, Judges,

Advocate General: A. Rantos,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 11 July 2022,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2022,

gives the following

**Judgment**

1 By its appeal, 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, 'the judgment under appeal', EU:T:2020:610), by which the General Court dismissed in part its action for annulment of 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) ('the decision at issue').

2 By their cross-appeal, Mr Mark Jan Hendrik Tuitert, Mr Niels Kerstholt and the European Elite Athletes Association ('EU Athletes') also seek to have set aside in part the judgment under appeal.

## I. Background to the dispute

3 The factual background to the dispute, as set out in paragraphs 1 to 37 of the judgment under appeal, may be summarised as follows.

### *A. The ISU*

4 The ISU is an association governed by private law which has its headquarters in Switzerland. It describes itself as the only international sports federation recognised by the International Olympic Committee ('the IOC') in the field of figure skating and speed skating ('skating'). Its bodies include a 'legislative body' called 'the Congress, which is the 'highest-ranking body', and an 'executive body', known as 'the Council'.

5 The members of that association are figure-skating and speed-skating national associations, whose members or affiliates are in turn associations and clubs to which, in particular, professional athletes practising those sporting disciplines as an economic activity belong.

6 According to Article 1(1) and Article 3(1) of its Statutes, to which the decision at issue refers, the aim of the ISU is to regulate, administer, govern and promote skating throughout the world.

7 At the same time, it carries out an economic activity, consisting in particular of organising international skating events and exploiting the rights associated with those events. In the field of speed skating, those include, among others, the Speed Skating and Short Track Speed Skating World Cups and various international and European championships. The ISU is also responsible for organising skating events which take place in the context of the Olympic Winter Games.

### *B. The rules issued by the ISU*

8 The ISU has set out and published a set of rules, codes and communications, including inter alia the following rules.

#### *1. The prior authorisation rules*

9 On 20 October 2015, the ISU published Communication No 1974, entitled 'Open International Competitions', which sets out the procedure to follow in order to obtain advance authorisation to organise an international skating competition and which is applicable both to national associations that are ISU members and any third-party entity or undertaking ('the prior authorisation rules').

10 That communication states, first of all, that the organisation of such competitions is subject to prior authorisation by the ISU and must be conducted in accordance with the regulations set out by that association. It states, inter alia, in that regard, that the time limit for submission of an application for prior authorisation is six months prior to the intended starting date of the competition if it is to be organised by a third-party entity or undertaking and three months before that date if the organiser is a national association that is an ISU member.

11 Next, that communication sets out a series of general, financial, technical, commercial, sporting and ethical requirements with which any organiser of a skating competition must comply. It follows from those requirements, in particular, that any application for prior authorisation must be accompanied by financial, technical, commercial and sporting information (including the venue of the planned event, value of the prizes to be awarded, business plan, budget, television coverage), that any organiser must submit a declaration confirming that it accepts the ISU's Code of Ethics and that the ISU may request that further information be submitted to it on those various matters.

12 Lastly, Communication No 1974 authorises the ISU to accept or reject an application for prior authorisation submitted to it on the basis of the requirements set out in that communication and on the basis of the fundamental objectives pursued by that association, as defined, in particular, in Article 3(1) of its Statutes. That communication also provides that, in the event that such an application is rejected, an organiser may lodge an appeal against the ISU's decision before the Court of Arbitration for Sport ('the CAS'), established in Lausanne (Switzerland), in accordance with the rules adopted by the ISU with a view to establishing a dispute resolution mechanism ('the arbitration rules').

### *2. The eligibility rules*

13 The ISU General Regulations include rules identified as 'eligibility rules', which determine the conditions in which athletes may take part in skating competitions. Those eligibility rules provide that such competitions must, first, have been authorised by the ISU or its members and, second, comply with the rules established by that association.

14 In the version adopted in 2014, those eligibility rules also contained inter alia 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 Statutes', 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'.

15 Those rules also contained 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 and/or by one of the national associations that make up its members, the person concerned would be exposed to a penalty of 'loss of eligibility' or 'ineligibility', entailing a lifetime ban from any competition organised by the ISU.

16 In 2016, the eligibility rules were partially revised.

17 Rule 102(1)(a)(ii), as revised, no longer refers to the 'adequate protection of the economic and other interests of the ISU'. Instead, it states that that 'the condition of eligibility is made for adequate protection of the ethical values, jurisdiction objectives and other legitimate respective interests' of that association, 'which uses its financial revenues for the administration and development of the ISU sport disciplines and for the support and benefit of [its] Members and their Skaters'.

18 According to Rule 102(7), following that partial revision, an athlete's participation in an event not authorised by the ISU and/or by one of the national associations that make up its members may give rise to a warning or the penalty of 'loss of eligibility' or 'ineligibility' entailing a ban from any competition organised by the ISU, whether for a specific period or for life.

19 Alongside those different rules, Article 25 of the ISU Statutes provides for the possibility for athletes who wish to challenge a decision imposing a penalty of 'loss of eligibility' or 'ineligibility' on them to lodge an appeal against that decision before the CAS in accordance with the arbitration rules.

## *C. The administrative procedure and the decision at issue*

20 Mr Tuitert and Mr Kerstholt are two professional speed skaters residing in the Netherlands. They belong to the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB), the Royal Netherlands Skating Federation, which is a member of the ISU.

21 EU Athletes describes itself as the leading European association representing athletes and players from different sporting disciplines.

22 On 23 June 2014, Mr Tuitert and Mr Kerstholt submitted a complaint to the European Commission in which they claimed that the prior authorisation and eligibility rules laid down by the ISU infringed Articles 101 and 102 TFEU.

23 On 5 October 2015, the Commission decided to open a procedure in that regard.

24 On 29 September 2016, the Commission sent a statement of objections to the ISU, in which it considered, in essence, that that association was in breach of Article 101 TFEU. The ISU replied to that statement of objections on 16 January 2017.

25 On 8 December 2017, the Commission adopted the decision at issue. As indicated in recital 3 thereof, that decision principally covers the ISU's eligibility rules, as set out in paragraphs 13 to 18 of the present judgment, which allow that association to control the participation of athletes in skating events and to sanction them in the event of their participating in a competition not authorised by it. However, as is apparent from that recital, the decision at issue also covers the rules for prior authorisation of those competitions by the ISU, as set out in paragraphs 9 to 12 of the present judgment. Finally, as set out in recitals 5 and 6 of that decision, it also covers the arbitration rules referred to in paragraph 19 of the present judgment.

26 In recitals 112 and 115 of the decision at issue, the Commission defined the relevant market as the worldwide market for the organisation and commercial exploitation of international speed skating events as well as the exploitation of the various rights associated with those events.

27 In recitals 116 to 134 of that decision, the Commission considered that the ISU had a strong position on the relevant market and had a substantial ability to influence any competition that might exist on that market. The factors that it took into consideration in order to justify that assessment include, in particular, first, the central role occupied by that association in that market, in its capacity as the sole international sports association recognised by the IOC in the field of skating and as an association with the purpose of regulating, administering, governing and promoting that sporting discipline throughout the world and, second, the fact that it organises and commercially exploits in parallel the main international competitions in that field. In its analysis in that regard, the Commission relied, inter alia, on the power held by the ISU to lay down rules imposed on all the national associations which are members and on all international skating competitions, including those organised by the ISU itself, by its members or by third-party entities or undertakings. It also notes, in essence, that those rules concern all matters relating to the organisation, conduct and commercial exploitation of those competitions (including prior authorisation, rules of the discipline, technical requirements, financial conditions, participation of athletes, sale of rights, imposing of sanctions, settlement of disputes) and that they are applicable to all parties entitled to take part in them or to be involved in their organisation or exploitation (including national associations, athletes, organisers, broadcasters, sponsors).

28 In recitals 146 to 152 of that decision, the Commission considered that the ISU should be classified both as an 'association of undertakings' within the meaning of Article 101(1) TFEU, in so far as its members are national skating associations that may themselves be classified as 'undertakings' within the meaning of that provision, in so far as they carry out economic activities consisting of organising and marketing competitions and exploiting the various rights associated with such competitions, and as an 'undertaking' within the meaning of that provision in so far as it too carries out such economic activities. The Commission also considered that the prior authorisation and eligibility rules should be classified as 'decisions of associations of undertakings' within the meaning of that provision.

29 In recitals 162 to 188 of the decision at issue, the Commission stated, in essence, that the prior authorisation and eligibility rules had as their object the restriction of competition on the relevant market, within the meaning of Article 101(1) TFEU, on the ground that an examination of the content of those rules, the economic and legal context of which they form a part, and the aims they pursue showed that those rules allowed the ISU, on the one hand, to prevent potential organisers of international speed skating events in competition with ISU events from entering that market and, on the other hand, to restrict the possibility for professional speed skaters to take part freely in such events and thus to deprive potential organisers of such events of the services of the athletes whose participation is necessary for such events to be held.

30 In recitals 189 to 209 of that decision, the Commission stated that, taking into account the assessments summarised in the preceding paragraph, it was not necessary to examine the effects of the prior authorisation and eligibility rules on competition, before setting out the reasons why it considered that those rules also had the effect of restricting competition on the relevant market.

31 In recitals 210 to 266 of that decision, the Commission stated, in essence, that those rules could not be regarded as falling outside the scope of Article 101(1) TFEU on the ground that they are justified by legitimate objectives and inherent in the pursuit of those objectives.

32 In recitals 268 to 286 of that decision, the Commission considered, in essence, that although they themselves do not constitute a restriction of competition, the arbitration rules should be regarded as reinforcing the restriction of competition resulting from the prior authorisation and eligibility rules.

33 In recitals 287 to 348 of the decision at issue, the Commission found, inter alia, that the prior authorisation and eligibility rules did not satisfy the conditions required by Article 101(3) TFEU in order to benefit from an exemption, that those rules were capable of affecting trade between Member States and that it was necessary to require the ISU to bring the infringement established in that decision to an end, on pain of periodic penalty payments. In particular, in recitals 338 to 342 of that decision, the Commission stated that the measures that it required the ISU to take to bring an end to that infringement should in particular consist of, first, adopting prior authorisation criteria which are objective, transparent, non-discriminatory and proportionate, second, setting up suitable procedures for prior authorisation and sanctions, and third, amending the arbitration rules so as to ensure the effective review of decisions made at the end of those procedures.

34 The operative part of the decision at issue includes Article 1, according to which the ISU ‘has infringed Article 101 [TFEU] … 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, under which the ISU is required to bring to an end to that infringement and to refrain from repeating it, and Article 4, which provides for the imposition of periodic penalty payments in the event of failure to comply with those requirements.

### *D. The action before the General Court and the judgment under appeal*

35 By application lodged at the Registry of the General Court on 19 February 2018, the ISU brought an action for annulment of the decision at issue. In support of that action, the ISU relied on eight pleas in law alleging, in essence, in the first plea in law, infringement of the obligation to state reasons; in the second to fifth pleas in law, infringement of Article 101 TFEU in so far as that article was applied to its prior authorisation and eligibility rules; in the sixth plea in law, infringement of that article in so far as it was applied to the arbitration rules; and; in the seventh and eighth pleas in law, the unlawfulness of both the requirements and periodic penalty payments which were imposed on the ISU.

36 By documents lodged at the Court Registry on 1 June 2018, Mr Tuitert, Mr Kerstholt and EU Athletes applied for leave to intervene in support of the form of order sought by the Commission.

37 By order of 12 September 2018, the President of the Seventh Chamber of the General Court allowed those applications to intervene.

38 On 20 December 2019, the General Court referred the case to a Chamber sitting in extended composition.

39 On 16 December 2020, the 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 prior authorisation and eligibility rules, but that it was unlawful in so far as it related to the arbitration rules.

40 In that regard, in the first place, the Court held, in paragraphs 52 to 63 of the judgment under appeal, that the first plea in law, alleging that the decision at issue was vitiated by contradictory reasoning, was not well founded.

41 In the second place, the Court observed, in paragraphs 64 to 123 of the judgment under appeal, that the second and fourth pleas in law of the ISU did not permit the view that the Commission's findings that the prior authorisation and eligibility rules had as their object the restriction of competition within the meaning of Article 101(1) TFEU were incorrect.

42 In that regard, the Court held, in essence, first of all, in paragraphs 69 to 76 of the judgment under appeal that, even though the regulatory, control and decision-making powers and the power to impose sanctions of the ISU had not been delegated to it by a public authority, the rules laid down by that association, in its capacity as the sole international sports association in the field of skating must be understood in the light, in particular, of the case-law 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 market (judgments of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, and of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127). In that context, the General Court also observed that the prior authorisation and eligibility rules concerned the organisation of the most important and lucrative international speed skating events, and in particular the prior authorisation of those events and the participation of athletes therein.

43 Next, that court found in paragraphs 77 to 121 of the judgment under appeal that, given the content of the prior authorisation and eligibility rules, the aims pursued by those rules and the economic and legal context of which they form a part, the Commission had been duly able to find that those rules had as their object the restriction of competition, within the meaning of Article 101(1) TFEU.

44 Finally, the General Court held, in paragraph 123 of the judgment under appeal, that, consequently, it was not necessary also to examine the remainder of the arguments submitted by the ISU in the context of its third plea in law, in order to challenge the Commission's assessments relating to the actual or potential effects of those rules on competition.

45 In the third place, the General Court held in paragraphs 124 to 130 of the judgment under appeal that, contrary to what the ISU asserted in its fifth plea in law, the Commission had not misconstrued the territorial scope of Article 101 TFEU by taking into account, in the decision at issue, the ISU's refusal to authorise a planned speed skating event to be held in Dubai (United Arab Emirates), thus in a third country. In that regard, that court considered, in essence, that that institution had referred to that element to illustrate the application of the prior authorisation rules issued by the ISU, while demonstrating, moreover, that those rules were likely to produce immediate, substantial and foreseeable effects in the European Union.

46 In the fourth place, the General Court, after finding, in paragraphs 134 to 140 of the judgment under appeal, that the sixth plea in law raised by the ISU, which concerned the Commission's assessment of the arbitration rules in the decision at issue, was effective, upheld that plea in paragraphs 141 to 164 of that judgment.

47 In the fifth and last place, the Court held, consequently, in paragraphs 165 to 178 of the judgment under appeal that the seventh and eighth pleas in law of the ISU, relating to the legality of the requirements and periodic penalty payments set out in the decision at issue, should be partially upheld, in so far as those requirements and periodic penalty payments related to the arbitration rules. At the same time it rejected the remainder of the pleas in law.

48 In the light of all those findings, the General Court annulled in part Articles 2 and 4 of the decision at issue and dismissed the action as to the remainder.

## II. Forms of order sought by the parties

49 By its appeal, the ISU claims that the Court of Justice 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 to the extent that it has not already been annulled by the judgment under appeal; and

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

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

51 Mr Tuitert, Mr Kerstholt and EU Athletes contend that the Court should dismiss the appeal.

52 By their cross-appeal, Mr Tuitert, Mr Kerstholt and EU Athletes claim that the Court should:

– set aside the judgment under appeal in so far as it annulled in part 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.

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

54 The ISU contends that the cross-appeal should be dismissed and Mr Tuitert, Mr Kerstholt and EU Athletes should be ordered to pay the costs.

## III. The appeal

55 In support of its head of claim seeking that the judgment under appeal be set aside in part, the ISU relies on two grounds of appeal alleging infringement of Article 263 TFEU in conjunction with Article 101(1) TFEU.

56 It asks the Court, furthermore, to decide on the substance of the dispute and to rule thereon.

### *A. The first ground of appeal*

#### *1. Arguments of the parties*

57 By its first ground of appeal, which is divided into three parts, the ISU complains that the General Court, in essence, failed to discharge its duty as the arbiter of the legality of decisions adopted by the Commission

under the competition rules and infringed the concept of restriction of competition by 'object' referred to in Article 101(1) TFEU.

58 Before setting out that ground of appeal, the ISU presents three contextual factors in order, in its view, to facilitate its examination.

59 First, it notes that, for nearly a century (1892-1990), the eligibility rules covering the participation of athletes in skating competitions applied solely to amateurs, before it was decided, in line with developments within the IOC, to allow professional athletes also to participate in those competitions. It adds that following that change the prior authorisation rules applicable to those competitions were introduced, for the purpose of ensuring that those competitions, whether organised by the ISU or by a third-party entity or undertaking, would be conducted in accordance with those rules on a worldwide basis.

60 Second, the ISU maintains that the decision at issue is focused on speed skating, which is a niche sporting discipline representing a turnover for the ISU of 5 million Swiss francs (CHF) (approximately EUR 5.1 million at the current exchange rate) for 2016, of a total of approximately CHF 32 million (approximately EUR 32.7 million at the current exchange rate), of which the outstanding amount derives from the better-known sporting discipline of figure skating. It adds that that niche sporting discipline has merely limited appeal for the general public and this explains why no third-party entity or undertaking has ever sought to organise an international competition in that field, until that referred to in the decision at issue. By contrast, it received 20 applications of that kind in the field of figure skating over the last 20 years, which were all approved. The ISU also submits that the refusal to authorise the sole application made to it on two occasions (namely in 2011 and then in 2014) in the field of speed skating was based on the central role that the organiser of the planned international competition intended to give to betting. That planned event, moreover, was eventually authorised in 2016 in the Netherlands in a format which did not include betting.

61 Third, the ISU maintains that, while the Commission classified the prior authorisation and eligibility rules as a restriction of competition by 'object' and 'effect' in the decision at issue, it nonetheless abandoned its initial opposition in principle expressed in its statement of objections with regard to those rules, by focusing on their arbitrary and disproportionate nature in the present case. This moreover explains why the ISU implemented the requirements set out in Article 2 of the decision at issue, by means of, inter alia, a communication seeking to amend those rules and not to abolish them.

62 While asserting that the ISU does not claim that there has been any distortion of the facts before the Court of Justice and therefore the facts to which the judgment under appeal refers must therefore be regarded as definitively established, the Commission disputes the accuracy of contextual elements presented by the ISU in the appeal. In particular, it submits, first, that the 20 international figure skating competitions that were approved by the ISU were not in fact organised by third-party entities or undertakings but by members of that association. Second, the planned speed skating event that the ISU approved in 2016 was also taken over, in the intervening period, by a national association that was a member of the ISU. Third, the ISU's refusal to approve that plan, as initially conceived by a third-party undertaking, took place when that association knew perfectly well that no betting was planned in that context.

63 Furthermore, the Commission asserts that the examination of the appeal should be made, in line with the decision at issue and the judgment under appeal, taking into account the effect of the rules laid down by the ISU not only on athletes, whom they prevent from freely offering their services to potential organisers of international events other than that association and its members, but also on those operators themselves, whom they prevent from freely organising international competitions both directly (the prior authorisation rules) and indirectly (the eligibility rules).

64 Mr Tuitert, Mr Kerstholt and EU Athletes support those arguments.

***(a) The first part***

65 By the first part of its first ground of appeal, the ISU complains that the General Court rejected as unfounded or ineffective or failed to examine certain arguments and items of evidence that it had submitted at first instance in the context of its second plea in law, alleging infringement of Article 101(1) TFEU, with a view to challenging the assessments relied on by the Commission in concluding that there was a restriction of competition by 'object'.

66 In that regard, it submits, first of all, that, in the decision at issue, the Commission, in practice, assessed the adoption and enforcement of the prior authorisation and eligibility rules, then classified those two elements as a restriction of competition by 'object', as the General Court moreover recognised in paragraphs 57 and 126 of the judgment under appeal.

67 Next, the ISU maintains that it invited the General Court, by its second plea in law, to reject that legal categorisation and to condemn the manifest errors of assessment that led the Commission to that conclusion. In particular, the ISU submits that it challenged, at first instance, the various findings of the Commission contained in recitals 174 to 179 of the decision at issue relating to the application of the prior authorisation and eligibility rules, as illustrated, as regards speed skating, by its allegedly intentional and anticompetitive refusal to authorise the sole planned international event by a competitor which was submitted to it in the preceding 20 years, in its initial version, and, as regards figure skating, by the parallel authorisation of 20 or so international events organised by third parties.

68 Lastly, it claims that the General Court failed to discharge its duty under Article 263 TFEU by rejecting its arguments and evidence in that regard, in paragraphs 116, 117, 121 and 127 of the judgment under appeal, on the ground that they were unfounded, ineffective or even irrelevant in so far as they concerned either matters of intention and implementation which did not need to be taken into account in order to establish the existence of a restriction of competition by 'object', or a sporting discipline other than that constituting the market concerned by that restriction. In addition, that court did not address other arguments or items of evidence adduced before it, in particular those relating to the matter of betting. In that regard, the ISU maintains that, despite not actually being part of the third-party planned international event that had been submitted to it, betting nevertheless lay at the heart of the concept that the organiser of that event intended to promote.

69 The Commission, supported by Mr Tuitert, Mr Kerstholt and EU Athletes, disputes all of those arguments.

***(b) The second part***

70 By the second part of its first ground of appeal, the ISU claims that the General Court substituted its factual and legal assessment for that of the Commission in finding the existence of an infringement differing from that found in Article 1 of the decision at issue, in disregard of its duty under Article 263 TFEU and relying on a misinterpretation of Article 101(1) TFEU.

71 In that regard, the ISU maintains, in the first place, that the General Court not only focused on conduct that was partially different from that called into question by the Commission (singling out the very existence of the prior authorisation and eligibility rules, and not their adoption and enforcement), but also classified that conduct differently. With regard to that second aspect, the General Court found exclusively that there was a restriction of competition by 'object', not only on the basis of the factors on which the Commission had relied in Section 8.3 of the decision at issue (entitled 'Restriction of competition by object') but also those referred to in Section 8.5 of that decision (entitled 'The Eligibility rules are within the scope of Article 101 [TFEU]'). The latter section concerns a separate matter, however.

72 In the second place, the ISU asserts that that rewriting of the decision at issue is itself based on a legally incorrect interpretation of Article 101(1) TFEU.

73 According to the ISU, that provision distinguishes restrictions of competition by 'object' and 'effect', the first of those two classifications being applicable only to conduct that may be considered, by its very nature, harmful to competition. In the present case, the General Court did not explain how the different

elements to which it referred in paragraphs 87 to 89, 91 to 93 and 101 to 110 of the judgment under appeal justified such a classification. On the contrary, it merely examined the wording of the prior authorisation and eligibility rules and their aims in an abstract manner without context, then concluded, following that examination, that there was a possibility or risk that those rules could be used for anticompetitive purposes, given the discretionary power they confer on the ISU.

74 In addition, the ISU argues that the case-law relied on by the General Court in order to carry out that analysis (judgments of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, and of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127) is only relevant in the presence of restrictions of competition by 'effect' and cannot therefore be applied by analogy in order to rule on the potential existence of restrictions of competition by 'object', as the General Court did in paragraphs 72 and 88 of the judgment under appeal.

75 The Commission, supported by Mr Tuitert, Mr Kerstholt and EU Athletes, disputes all of those arguments.

***(c) The third part***

76 By the third part of its first ground of appeal, the ISU complains that the General Court erred in law in upholding the findings that led the Commission to classify the prior authorisation and eligibility rules as a restriction of competition by object.

77 In that regard, it claims, in the first place, that the General Court was wrong to acknowledge that the content of those rules may be relied on in support of such a classification.

78 Contrary to what the Commission found in recitals 162 and 163 of the decision at issue and as the General Court stated in paragraphs 91 and 95 of the judgment under appeal, the ISU asserts that the fact that those rules provide for the possibility, for the ISU, to apply a set of severe penalties to athletes taking part in unauthorised international speed skating events is, in itself, insufficient to establish a restriction of competition by object. It therefore remains necessary that the examination of their effects makes it possible to establish that they were applied to athletes who took part in events for which authorisation was refused on illegitimate grounds.

79 Next, according to the ISU, contrary to what is apparent from recital 163 of the decision at issue and to the General Court's findings in paragraphs 85 to 89 of the judgment under appeal, the fact that the prior authorisation and eligibility rules do not refer to specifically identifiable objectives, that they do not contain clearly defined criteria and that the ISU therefore has discretionary power or a least too much discretion to apply them cannot, in itself, make it possible to establish that there is a restriction of competition by object either. The specific effects of those rules must also be assessed in this case.

80 In addition, contrary to what the Commission set out, inter alia, in recitals 164 and 165 of the decision at issue, the fact that those rules referred, in the version adopted in 2014, to the protection of the ISU's economic interests cannot, per se, lead to the conclusion that there is a restriction of competition by object, which the General Court moreover recognised in paragraphs 98 and 109 of the judgment under appeal.

81 Lastly, contrary to what the Commission found in recital 166 of the decision at issue, as the General Court acknowledged in paragraph 97 of the judgment under appeal, the fact that those rules may be applied to athletes participating in a third-party international event not authorised by the ISU, irrespective of any scheduling conflict between that event and an event organised or authorised by the ISU, is irrelevant, in so far it is not the existence of a scheduling conflict but rather the promotion of betting that led that association to refuse, in the initial version, the planned third-party international competition to which the decision at issue refers.

82 In the second place, the ISU maintains that the General Court made three errors in law in analysing the aims pursued by the prior authorisation and eligibility rules.

83 First, according to the ISU, the General Court recognised, in paragraph 109 of the judgment under appeal, that the ISU was entitled to seek to protect its own economic interests, contrary to what the Commission stated in recital 169 of the decision at issue, but it failed to infer that that institution could not conclude that there was an anticompetitive object from that fact alone.

84 Next, the ISU claims that the General Court sought to compensate for that error and the consequential impossibility of basing arguments on the aims pursued by the prior authorisation and eligibility rules in order to justify the classification of an anticompetitive object by inferring, in paragraph 111 of the judgment under appeal, the existence of such an object from other elements, taking into account the allegedly vague, arbitrary and disproportionate nature of those rules. In so doing, that court substituted its own assessment for that of the Commission, which had relied on those elements, in the decision at issue, for purposes other (recitals 255 to 258) than the establishment of a restriction of competition by object (recitals 162 to 187).

85 Lastly, according to the ISU, it follows from the case-law that those elements are relevant solely in order to assess the effect of conduct liable to restrict competition (judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 69).

86 In the third place, the ISU claims that the General Court erred in law in reviewing the findings of the Commission relating to the economic and legal context surrounding the prior authorisation and eligibility rules. First, that court wrongly rejected, in paragraphs 115 to 117 of the judgment under appeal, its arguments relating to the authorisation of many third-party international events in the field of figure skating on the ground that that discipline did not form part of the relevant market in the present case. It follows from the case-law that elements relating to a market other than the market concerned may be taken into consideration in the examination of that context (judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 78 and 79). Second, the General Court wrongly rejected, in paragraph 119 of the judgment under appeal, several established examples of the authorisation of third-party events on the ground that, according to that court, the Commission had correctly considered that there was a possibility or likelihood that the prior authorisation and eligibility rules would be applied in an arbitrary manner.

87 The Commission, supported by Mr Tuitert, Mr Kerstholt and EU Athletes, disputes all of those arguments.

### *2. Findings of the Court*

88 By the three parts of its first ground of appeal, the ISU complains of different aspects of the way in which the General Court reviewed the legality of the decision at issue and of the result it reached following that review. In essence, it claims that, given, first, the meaning and scope of Article 101 TFEU and, second, the way in which that provision was applied by the Commission in the decision at issue, the judgment under appeal should be set aside on account of errors of law concerning (i) the General Court's having substituted its own assessment for that of the Commission in finding that there was an infringement other than that identified by that institution (second part), (ii) the General Court's incorrectly acknowledging that that infringement many be regarded as having the restriction of competition as its 'object' (second and third parts), and (iii) the General Court's having failed to discharge its duty in rejecting certain arguments and evidence adduced before it in order to challenge that classification (first and third parts).

89 Given the way in which that ground of appeal is structured, it is necessary to examine the various parts together, after recalling the meaning and scope of the provisions of Article 101 TFEU, in the light of which an assessment of whether they are well founded may be made.

90 In that regard, it is necessary, at the outset, to recall that no challenge has been made to the statements of the Commission and the General Court to the effect that the ISU must be classified, in the light of Article 101 TFEU, as 'an association of undertakings' carrying out, moreover, an economic activity consisting of organising and marketing international speed skating events, or the statements to the effect that the prior authorisation and eligibility rules constitute a 'decision by an association of undertakings'

within the meaning of that article. Nor have the statements to the effect that that decision by an association of undertakings is liable to 'affect trade between Member States', within the meaning of Article 101(1) TFEU, been disputed. Finally, there has been no challenge, even in the alternative, to the findings that that decision does not satisfy the various conditions required to benefit from an exemption under Article 101(3) TFEU.

***(a) The applicability of Article 101 TFEU to sport as an economic activity***

91 In so far as it constitutes an economic activity, the practice of sport is subject to the provisions of EU law applicable to such activity (see, to that effect, judgments of 12 December 1974, *Walrave and Koch*, 36/74, EU:C:1974:140, paragraph 4, and of 16 March 2010, *Olympique Lyonnais*, C-325/08, EU:C:2010:143, paragraph 27).

92 Only certain specific rules which were adopted solely on non-economic grounds and which relate to questions of interest solely to sport per se must be regarded as being extraneous to any economic activity. That is the case, in particular, of those on the exclusion of foreign players from the composition of teams participating in competitions between teams representing their country or the determination of ranking criteria used to select the athletes participating individually in competitions (see, to that effect, judgments of 12 December 1974, *Walrave and Koch*, 36/74, EU:C:1974:140, paragraph 8; of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraphs 76 and 127; and of 11 April 2000, *Deliège*, C-51/96 and C-191/97, EU:C:2000:199, paragraphs 43, 44, 63, 64 and 69).

93 Apart from those specific rules, the rules issued by sporting associations and, more broadly, the conduct of the associations which adopted them come within the scope of the FEU Treaty provisions on competition law where the conditions of application of those provisions are met (see, to that effect, judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraphs 30 to 33), which means that those associations may be categorised as 'undertakings' within the meaning of Articles 101 and 102 TFEU or that the rules at issue may be categorised as 'decisions by associations of undertakings' within the meaning of Article 101 TFEU.

94 That may be the case, in particular, regarding rules on a sporting association's exercise of powers governing prior approval for sporting competitions, the organisation and marketing of which constitute an economic activity for the undertakings involved or planning to be involved therein, including such an association (see, to that effect, judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 28). The same may also apply to rules that seek to cover the participation of athletes in such events, which constitutes an economic activity where they practise the sport concerned as a professional or semi-professional.

95 That being so, a sporting activity undeniably has specific characteristics which, whilst relating especially to amateur sport, may also be found in the pursuit of sport as an economic activity (see, to that effect, judgment of 13 April 2000, *Lehtonen and Castors Braine*, C-176/96, EU:C:2000:201, paragraph 33).

96 The specific characteristics of an economic sector may potentially be taken into account, along with other elements and provided that they are relevant, in the application of Article 101 TFEU and more especially when examining the question whether a particular type of conduct should be considered as having as its 'object' or, failing that, 'effect', the prevention, restriction or distortion of competition, in the light of the economic and legal context of which it forms a part and the 'actual conditions' or 'actual context' that characterise the structure and functioning of the sectors or markets concerned (see, to that effect, judgment of 15 December 1994, *DLG*, C-250/92, EU:C:1994:413, paragraph 31). Such an assessment may involve taking into account, for example, the nature, organisation or functioning of the sport concerned and, more specifically, how professionalised it is, the manner in which it is practised, the manner of interaction between the various participating stakeholders and the role played by the structures and bodies responsible for it at all levels, with which the Union is to foster cooperation, in accordance with Article 165(3) TFEU.

***(b) Article 101(1) TFEU***

97 Under Article 101(1) TFEU all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are incompatible with the internal market.

*(1) The categorisation of the existence of conduct having as its 'object' or 'effect' the prevention, restriction or distortion of competition, within the meaning of Article 101(1) TFEU*

98 In order to find, in a given case, that an agreement, decision by an association of undertakings or a concerted practice is caught by the prohibition laid down in Article 101(1) TFEU, it is necessary to demonstrate, in accordance with the very wording of that provision, either that that conduct has as its object the prevention, restriction or distortion of competition, or that that conduct has such an effect (see, to that effect, judgments of 30 June 1966, *LTM*, 56/65, EU:C:1966:38, page 249, and of 29 June 2023, *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraph 31).

99 To that end, it is appropriate to begin by examining the object of the conduct in question. If, at the end of that examination, that conduct proves to have an anticompetitive object, it is not necessary to examine its effect on competition. Thus, it is only if that conduct is found not to have an anticompetitive object that it will be necessary, in a second stage, to examine its effect (see, to that effect, judgments of 30 June 1966, *LTM*, 56/65, EU:C:1966:38, page 249, and of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraphs 16 and 17).

100 The analysis to be made differs depending on whether the conduct at issue has as its 'object' or 'effect' the prevention, restriction or distortion of competition, with each of those concepts being subject to different legal and evidentiary rules (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 63).

*(i) The categorisation of the existence of conduct having as its 'object' the prevention, restriction or distortion of competition*

101 According to the settled case-law of the Court, as summarised, in particular, in the judgments of 23 January 2018, *F. Hoffmann-La Roche and Others* (C-179/16, EU:C:2018:25, paragraph 78), and of 30 January 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52, paragraph 67), the concept of anticompetitive 'object', whilst not, as follows from paragraphs 98 and 99 of the present judgment, an exception in relation to the concept of anticompetitive 'effect', must nevertheless be interpreted strictly.

102 Thus, that concept must be interpreted as referring solely to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects. Indeed, certain types of coordination between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (see, to that effect, judgments of 30 June 1966, *LTM*, 56/65, EU:C:1966:38, page 249; of 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, paragraph 78; and of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 67).

103 The types of conduct that must be considered to be so include, primarily, certain forms of collusive conduct which are particularly harmful to competition, such as horizontal cartels leading to price fixing, limitations on production capacity or allocation of customers. Those types of conduct are liable to lead to price increases or falls in production and, therefore, more limited supply, resulting in poor allocation of resources to the detriment of user undertakings and consumers (see, to that effect, judgments of 20 November 2008, *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraphs 17 and 33; of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51; and of 16 July 2015, *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 32).

104 Without necessarily being equally harmful to competition, other types of conduct may also be considered, in certain cases, to have an anticompetitive object. That is the case, inter alia, of certain types of horizontal

agreements other than cartels, such as those leading to competing undertakings being excluded from the market (see, to that effect, judgments of 30 January 2020, *Generics (UK) and Others* C-307/18, EU:C:2020:52, paragraphs 76, 77, 83 to 87 and 101, and of 25 March 2021, *Lundbeck* v *Commission*, C-591/16 P, EU:C:2021:243, paragraphs 113 and 114), or certain types of decisions by associations of undertakings aimed at coordinating the conduct of their members, in particular in terms of prices (see, to that effect, judgment of 27 January 1987, *Verband der Sachversicherer* v *Commission*, 45/85, EU:C:1987:34, paragraph 41).

105 In order to determine, in a given case, whether an agreement, a decision by an association of undertakings or a concerted practice reveals, by its very nature, a sufficient degree of harm to competition that it may be considered as having as its object the prevention, restriction or distortion thereof, it is necessary to examine, first, the content of the agreement, decision or practice in question; second, the economic and legal context of which it forms a part; and, third, its objectives (see, to that effect, judgments of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53, and of 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, paragraph 79).

106 In that regard, first of all, in the economic and legal context of which the conduct in question forms a part, it is necessary to take into consideration the nature of the products or services concerned, as well as the real conditions of the structure and functioning of the sectors or markets in question (judgments of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53, and of 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, paragraph 80). It is not, however, necessary to examine nor, a fortiori, to prove the effects of that conduct on competition, be they actual or potential, or negative or positive, as follows from the case-law cited in paragraphs 98 and 99 of the present judgment.

107 Next, as regards the objectives pursued by the conduct in question, a determination must be made of the objective aims which that conduct seeks to achieve from a competition standpoint. Nevertheless, the fact that the undertakings involved acted without having a subjective intention to prevent, restrict or distort competition and the fact that they pursued certain legitimate objectives are not decisive for the purposes of the application of Article 101(1) TFEU (see, to that effect, judgments of 6 April 2006, *General Motors* v *Commission*, C-551/03 P, EU:C:2006:229, paragraphs 64 and 77 and the case-law cited, and of 20 November 2008, *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 21).

108 Lastly, the taking into consideration of all of the aspects referred to in the three preceding paragraphs of the present judgment must, at any rate, show the precise reasons why the conduct in question reveals a sufficient degree of harm to competition, such as to justify a finding that it has as its object the prevention, restriction or distortion of competition (see, to that effect, judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 69).

*(ii) The categorisation of the existence of conduct having as its 'effect' the prevention, restriction or distortion of competition*

109 The concept of conduct having an anticompetitive 'effect', for its part, comprises any conduct which cannot be regarded as having an anticompetitive 'object', provided that it is demonstrated that that conduct has as its actual or potential effect the prevention, restriction or distortion of competition, which must be appreciable (see, to that effect, judgments of 28 May 1998, *Deere* v *Commission*, C-7/95 P, EU:C:1998:256, paragraph 77, and of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 117).

110 To that end, it is necessary to assess the way the competition would operate within the actual context in which it would take place in the absence of the agreement, decision by an association of undertakings or concerted practice in question (judgments of 30 June 1966, *LTM*, 56/65, EU:C:1966:38, page 250, and of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 118), by defining the

market(s) in which that conduct is liable to produce its effects, then by identifying those effects, whether they are actual or potential. That assessment itself entails that all relevant facts must be taken into account.

*(2) The possibility of considering that certain specific conduct does not come under Article 101(1) TFEU*

111 According to the settled case-law of the Court, not every agreement between undertakings or decision of an association of undertakings which restricts the freedom of action of the undertakings party to that agreement or subject to compliance with that decision necessarily falls within the prohibition laid down in Article 101(1) TFEU. Indeed, the examination of the economic and legal context of which certain of those agreements and certain of those decisions form a part may lead to a finding, first, that they are justified by the pursuit of one or more legitimate objectives in the public interest which are not per se anticompetitive in nature; second, that the specific means used to pursue those objectives are genuinely necessary for that purpose; and, third, that, even if those means prove to have an inherent effect of, at the very least potentially, restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition. That case-law applies in particular in cases involving agreements or decisions taking the form of rules adopted by an association such as a professional association or a sporting association, with a view to pursuing certain ethical or principled objectives and, more broadly, to regulate the exercise of a professional activity if the association concerned demonstrates that the aforementioned conditions are satisfied (see, to that effect, judgments of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 97; of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraphs 42 to 48; and of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraphs 93, 96 and 97).

112 More specifically, in the area of sport, the Court of Justice was led to observe, in view of the information available to it, that the anti-doping rules adopted by the IOC do not come within the scope of the prohibition laid down in Article 101(1) TFEU, even though they restrict athletes' freedom of action and have the inherent effect of restricting potential competition between them by defining a threshold over which the presence of nandrolone constitutes doping, so as to safeguard the fairness, integrity and objectivity of the conduct of competitive sport, ensure equal opportunities for athletes, protect their health and uphold the ethical values at the heart of sport, including merit (see, to that effect, judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraphs 43 to 55).

113 By contrast, the case-law referred to in paragraph 111 of the present judgment does not apply either in situations involving conduct which, far from merely having the inherent 'effect' of restricting competition, at least potentially, by limiting the freedom of action of certain undertakings, reveals a degree of harm in relation to that competition that justifies a finding that it has as its very 'object' the prevention, restriction or distortion of competition. Thus, it is only if, following an examination of the conduct at issue in a given case, that conduct proves not to have as its object the prevention, restriction or distortion of competition that it must then be determined whether it may come within the scope of that case-law (see, to that effect, judgments of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 69; 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, paragraph 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, 53, 56 and 57).

114 As regards conduct having as its object the prevention, restriction or distortion of competition, it is thus only if Article 101(3) TFEU applies and all of the conditions provided for in that provision are observed that it may be granted the benefit of an exemption from the prohibition laid down in Article 101(1) TFEU (see, to that effect, judgment of 20 November 2008, *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 21).

115 It is in the light of all those considerations that the various arguments put forward by the ISU must be assessed.

***(c) The infringement found in the present case***

116 As regards the ISU's arguments according to which the General Court substituted its own assessment for that of the Commission by considering that there was an infringement other than that described by that institution, it must be noted, in the first place, that, in paragraphs 57 and 126 of the judgment under appeal, the General Court held, in essence, that the Commission had found the existence of an infringement consisting, for the ISU, of having adopted and enforced, on the worldwide market for the organisation and commercial exploitation of international speed skating events and the exploitation of the various rights associated with those events, the prior authorisation and eligibility rules, in the versions adopted in 2014 and 2016, as the ISU moreover asserts in its appeal. The General Court also indicated, in the first of those two paragraphs, that the Commission had classified that conduct as an infringement of Article 101(1) TFEU on the grounds that it had the 'object' and 'effect' of restricting competition.

117 In the second place, the General Court, in paragraphs 77 to 120 of the judgment under appeal, went on to review the findings that had led the Commission to classify the fact of having adopted and enforced the prior authorisation and eligibility rules as conduct having the 'object' of restricting competition, by examining, first, those relating to the content of those rules, second, those concerning the aims pursued by those rules and, third, those relating to the context of which those rules form a part, in accordance with the settled case-law of the Court of Justice, to which the General Court, moreover, refers in paragraphs 66 and 67 of the judgment under appeal. Following its review, the General Court found, in paragraphs 121 to 123 of the judgment under appeal, that the Commission had not committed any of the errors of law or manifest errors of assessment complained of by the ISU, with the result that the classification of conduct having the 'object' of restricting competition did not appear unfounded and there was therefore no need to rule on the ISU's arguments concerning the alternative and subsidiary classification of conduct having the 'effect' of restricting competition.

118 In the third and last place, it follows from the case file before the Court of Justice that the identification of the conduct at issue in the present case and the classification attributed thereto, in the judgment under appeal, correspond to the content of the decision at issue in all respects. Article 1 of that decision, according to which the ISU infringed Article 101(1) TFEU by adopting and enforcing the prior authorisation and eligibility rules, must be read in the light of recitals 161 to 188 thereof, in which the Commission considered that, having regard to their content, the aims that they seek to achieve and the economic and legal context of which they form a part, those rules should be regarded as having as their 'object' the restriction of competition before adding separately and independently, in recitals 194 to 209 of that decision, that those rules also had the 'effect' of restricting competition.

119 In particular, as those various findings show, the Commission did not make a legal classification 'combining' the alternative concepts of anticompetitive 'object' and 'effect', as the ISU claims. On the contrary, it made, in parallel, two legal classifications that were separate and independent of one another, of which either, if well founded, would serve to justify the operative part of the decision at issue.

120 In those circumstances, the General Court did not rule, contrary to what the ISU asserts, on an infringement differing from that identified by the Commission. On the contrary, it merely held that the first of the two legal classifications made by that institution was not vitiated by any of the errors alleged by the ISU.

121 Moreover, although it is true that the sections of the judgment under appeal that concern the review of the merits of that classification in the light of the content (paragraphs 81 to 98), the aims (paragraphs 99 to 114) and the economic and legal context (paragraphs 115 to 120) of the prior authorisation and eligibility rules make no mention at any time of the way in which they were enforced by the ISU, it must be held that that approach is the same as that used by the Commission in the decision at issue. Nor do the sections of the decision at issue in which the content (recitals 162 to 167 and 180 to 187), the aims (recitals 168 to 171) and the economic and legal context (recitals 172 and 173) of those rules are examined address such an issue, which is solely examined in different sections, such as those relating to the 'intention' of the ISU (recitals 174 to 179) or the 'effect' of those rules on competition (recitals 199 to 205).

122 Consequently, the ISU's arguments to the effect that the General Court found an infringement other than that identified by the Commission in the decision at issue, by substituting its own assessment for that of that institution, must be rejected as unfounded.

***(d) The existence of conduct having as its 'object' the restriction of competition in the present case***

123 The ISU's arguments that the General Court incorrectly interpreted Article 101(1) TFEU and wrongly held, on the basis of that interpretation, that the Commission had been correct in its classification of the prior authorisation and eligibility rules as conduct having as its 'object' the restriction of competition are principally of three kinds.

124 In essence, the ISU claims that the General Court, first, incorrectly interpreted the concept of anticompetitive 'object' in finding, as did the Commission, that, given the type of conduct that was at issue in the present case, the examination of its content, the aims that it sought to achieve and its legal and economic context should be carried out in the light of the judgments of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376), and of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, EU:C:2013:127). Second, the General Court wrongly held that that conduct should be classified as an infringement of Article 101(1) TFEU on the ground that it had as its 'object' the restriction of competition and that it followed from the Commission's assessments relating to the content, aims and economic and legal context of the prior authorisation and eligibility rules. At the same time, that court failed to rule on other essential elements such as the intention attributed by the Commission to the ISU and the effects of those rules on the relevant market and on the related market of figure skating. Third, while carrying out a joint examination of the second and fourth pleas in law which concerned the concept of anticompetitive 'object' within the meaning of Article 101(1) TFEU and the case-law of the Court of Justice according to which certain conduct may be regarded as falling outside the scope of that provision (judgment of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98), the General Court committed additional errors of law consisting, in essence, of 'merging' those two separate questions and substituting, in so doing, its own assessment for that of the Commission.

*(1) The applicability in the present case of the case-law arising from the judgments of 1 July 2008, MOTOE (C-49/07, EU:C:2008:376), and of 28 February 2013, Ordem dos Técnicos Oficiais de Contas (C-1/12, EU:C:2013:127)*

125 It follows from the case-law of the Court of Justice that the maintenance or development of undistorted competition in the internal market can be guaranteed only if equality of opportunity is ensured as between undertakings. To entrust an undertaking which exercises a given economic activity the power to determine, *de jure* or even de facto, which other undertakings are also authorised to engage in that activity and to determine the conditions under which that activity may be exercised gives rise to a conflict of interests and puts that undertaking at an obvious advantage over its competitors, by enabling it to deny them entry to the relevant market or to favour its own activity (see, to that effect, judgments of 13 December 1991, *GB-Inno-BM*, C-18/88, EU:C:1991:474, paragraph 25; of 12 February 1998, *Raso and Others*, C-163/96, EU:C:1998:54, paragraphs 28 and 29; and of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 38, 49, 51 and 52) and, also, in so doing, to prevent the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation.

126 Consequently, such a power may be conferred on a given undertaking only on condition that it is subject to restrictions, obligations and review, irrespective of whether that power originates from the grant, by a Member State, of exclusive or special rights placing the undertaking on which it is conferred in a dominant position on the relevant market (see, to that effect, judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 50 and 53), from the autonomous behaviour of an undertaking in a dominant position, enabling that undertaking to prevent potentially competing undertakings from accessing that market or related or neighbouring markets (see, to that effect, judgment of 13 December 1991, *GB-Inno-BM*, C-18/88, EU:C:1991:474, paragraphs 17 to 20 and 24), or even from a decision by an association of undertakings, a fortiori where the association which issued that decision must be considered, at the same time, an 'undertaking' on account of the economic activity it carries out on that market (see, to that effect,

judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraphs 39, 44, 45, 59, 91 and 92).

127 This is why the Court of Justice previously held that, unless it is subject to restrictions, obligations and review such as to prevent the risk of abuse of a dominant position, such a power, where it is conferred on an undertaking in a dominant position, infringes, by its very existence, Article 102 TFEU, read, as appropriate, in combination with Article 106 TFEU (see, to that effect, judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 50 and 53).

128 In the same way, since Articles 101 and 102 TFEU, while they pursue distinct objectives and have distinct scopes, can apply simultaneously to the same conduct where the respective conditions for their application are satisfied (see, to that effect, judgments of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro*, 66/86, EU:C:1989:140, paragraph 32; of 16 March 2000, *Compagnie maritime belge transports and Others* v *Commission*, C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 33; and of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 146), and since those articles must therefore be interpreted consistently, in the light, however, of their specific characteristics, it must be held that 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.

129 Even if that is not the case, that power may, at least, be regarded as having the 'effect' of preventing, restricting or distorting competition, as the Court of Justice has already held (see, to that effect, judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 69).

130 For those reasons, the General Court was correct to find, in essence, in paragraphs 68 to 76 of the judgment under appeal, as the Commission did in recitals 172 and 173 of the decision at issue, that, given the type of conduct at issue in the present case, that is to say, a decision by an association of undertakings conferring on that association responsible for a sporting discipline regulatory, control and sanctioning powers enabling it to authorise or prevent access on the part of potentially competing undertakings to a given market, on which that association itself is economically active, the examination of that conduct, and more particularly of its content, the aims it seeks to achieve and the economic and legal context of which it forms a part, must be carried out in the light of the case-law established in the judgments of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376), and of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, EU:C:2013:127).

*(2) The classification of the conduct at issue in the present case*

131 In order to rule on whether a decision by an association of undertakings conferring on that association regulatory, control and sanctioning powers enabling it to authorise or prevent access on the part of potentially competing undertakings to a given market, on which that association itself is economically active, must be regarded as having as its object or, failing that, effect the prevention, restriction or distortion of competition, it is relevant to determine, first of all, whether that power is circumscribed by substantive criteria which are transparent, clear and precise (see, to that effect, judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraphs 84 to 86, 90, 91 and 99), preventing it from being used arbitrarily. In addition, those criteria must have been clearly set out in an accessible form, prior to any implementation of the powers that they are intended to circumscribe.

132 Those criteria may include, inter alia, criteria that promote, in an appropriate and effective manner, the holding of sporting competitions based on equality of opportunity and merit.

133 Where that is the case, those criteria must, then, be such as to ensure that such a power is exercised without discrimination (see, to that effect, judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 99) and that any sanctions that may be imposed are objective and proportionate (see, to that effect, judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraphs 48 and 55). In order that those criteria may be regarded, in general, as non-discriminatory, they must not subject the organisation and marketing of third-party

competitions and the participation of athletes in those competitions to requirements that either differ from those applicable to competitions organised and marketed by the decision-making entity, or are identical or similar but impossible or excessively difficult to fulfil in practice by an undertaking that does not have the same status as an association or does not have the same powers at its disposal as that entity and which is therefore in a different situation to it. As regards, more particularly, criteria governing the determination of sanctions that may be imposed, they must, furthermore, ensure that they are determined, in each specific case, in accordance with the principle of proportionality taking into account, in particular, the nature, duration and severity of the infringement found.

134 Finally, those criteria must be capable of being subject to effective review (see, to that effect, judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 99).

135 Furthermore, the powers 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 are not likely to be to the detriment of potentially competing undertakings by preventing them from effectively accessing the market (see, to that effect, judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraphs 86 and 92) and, ultimately, from accordingly limiting production.

136 In the light of the case-law referred to in the five preceding paragraphs of the present judgment, it must be noted, in the present case, first, that, contrary to what the ISU submits, the General Court did not 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 that association from being used in an arbitrary, discriminatory or disproportionate manner.

137 In particular, the General Court did not commit any error of law, during the specific examination of the content of those rules, in finding, in paragraphs 85 to 89 and 118 of the judgment under appeal, that they were not justified, in a verifiable manner, by any specific objective and that they did not govern the ISU's discretion to authorise or refuse to authorise the organisation and implementation of planned speed skating events that could be submitted to it by third-party entities or undertakings on the basis of transparent, objective, non-discriminatory and, consequently, reviewable criteria, with the result that that association had to be regarded as having discretionary power.

138 It must be added that those findings, which sought, as is apparent from paragraphs 83 and 84 of the judgment under appeal, to address arguments specifically put forward by the ISU to challenge certain findings made by the Commission in the decision at issue, cannot be regarded, essentially, as new in relation to that decision. In recital 173 of that decision, the Commission made general reference to the need for discretion such as that enjoyed by the ISU to be subject to obligations, restrictions and review, before stating more particularly, in recitals 163 and 185 of that decision, that that was not the situation in the present case, since there was no link between that power and those specific and verifiable objectives.

139 Likewise, the General Court did not err in law in holding, in essence, in paragraphs 91 to 95 and 97 of the judgment under appeal that the sanctions that could be imposed by the ISU on athletes participating in speed skating events not subject to prior authorisation by it were not governed by criteria such as to ensure that they are objective and proportionate and were a relevant factor in determining whether the prior authorisation and eligibility rules had the 'object' of restricting competition on the relevant market. Nor can those findings, which also sought, as is apparent from paragraphs 83, 90 and 96 of the judgment under appeal, to address the arguments put forward by the ISU in support of its action for annulment, be regarded as concerning new matters in relation to those addressed in recitals 162, 163, 166 and 186 of the decision at issue.

140 Second, while referring, in the manner recalled above, to the case-law cited in paragraphs 125 to 128 of the present judgment, the General Court's findings in that regard were stated in the context of the overall legal reasoning aimed at determining, in accordance with the settled case-law referred to in paragraphs 105

to 108 of the present judgment and as is clear in particular from paragraphs 68, 76, 80 and 120 of the judgment under appeal, whether the Commission had correctly concluded that the prior authorisation and eligibility rules should be considered, taking into account their context, the aims they seek to achieve and the legal and economic context of which they form a part, as having the object of restricting competition on account of the sufficient degree of harm that they present to competition.

141 The ISU does not dispute the merits of that overall legal reasoning.

142 It merely submits, first of all, that certain factors taken into consideration in that reasoning, such as the discretionary nature of the power of prior authorisation conferred on it by the prior authorisation and eligibility rules, the disproportionate nature of the sanctions that those rules entitle it to impose on athletes participating in unauthorised speed skating events, or even the fact that those rules referred, at least until 2014, to an aim consisting in ensuring the protection of the ISU's economic interests, are not sufficient, on their own, to justify the finding of the General Court that those rules were correctly considered to have the object of restricting competition. However, such a line of argument is not such as to call that finding into question, since it is based on an overall assessment.

143 Next, the ISU maintains, in essence, that that finding is vitiated by an error of law in so far as it relies, ultimately, on the possibility or risk, inherent in the content and the general scheme itself of the prior authorisation and eligibility rules, that they may be used for anticompetitive purposes consisting in preventing entities or undertakings that may be in competition with that association from accessing the relevant market and in favouring competitions organised by the latter.

144 However, such as finding, as set out in paragraphs 95, 118 and 119 of the judgment under appeal, is consistent with the case-law of the Court of Justice. Although it follows from that case-law that a sports association such as the ISU may adopt, apply and ensure compliance with, by means of sanctions, rules relating to the organisation and conduct of international competitions in the sporting discipline concerned (see, to that effect, judgments of 11 April 2000, *Deliège*, C-51/96 and C-191/97, EU:C:2000:199, paragraphs 67 and 68; of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 44; and of 13 June 2019, *TopFit and Biffi*, C-22/18, EU:C:2019:497, paragraph 60), those considerations do not in any event make it possible to regard rules which, like the prior authorisation and eligibility rules, are not subject to suitable restrictions, obligations and review as legitimate.

145 On the contrary, such rules must be regarded, in the light of the case-law referred to in paragraphs 125 to 128 of the present judgment, as having as their object the restriction of competition. They confer on the entity that adopted them and that is empowered to implement them the power to authorise, control and set the conditions of access to the relevant market for any potentially competing undertaking, and to determine both the degree of competition that may exist on that market and the conditions in which that potential competition may be exercised.

146 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, they 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 underpinning the sporting discipline concerned. Ultimately, they are such as to completely deprive spectators and viewers of any opportunity to attend those competitions or to watch a broadcast thereof.

147 Lastly, the ISU disputes, in essence, the summary rejection, without examination, by the General Court of its various arguments and items of evidence relating to the intention that led it to adopt the prior authorisation and eligibility rules (paragraph 121 of the judgment under appeal) and to the application and effects of those rules on the relevant market and the related market of figure skating (paragraphs 115 to 117 of the judgment under appeal). However, that line of argument must be rejected in the light of the case-law referred to in paragraphs 98, 99, 106 and 107 of the present judgment.

148 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 fact that, as the ISU moreover submits, that court carried out a joint examination, inter alia in paragraphs 101 to 104 and 108 of the judgment under appeal, of the separate question of whether those rules could nevertheless be regarded, in the light of the case-law cited in paragraph 111 of the present judgment, as not falling within the scope of that provision, whereas that case-law is irrelevant in situations involving conduct having as its object the restriction of competition, as is apparent from paragraphs 113 and 114 of this judgment has, in any event, no bearing on the merits of the reasoning referred to in paragraph 140 of this judgment.

149 Consequently, the first ground of appeal must be rejected.

### *B. The second ground of appeal*

#### *1. Arguments of the parties*

150 By its second ground of appeal, the ISU complains that the General Court misconstrued and failed to examine the fourth plea in law and the items of evidence submitted in support of it, in disregard of its duty under Article 263 TFEU.

151 In that regard, it maintains, first, that that plea in law had a precise and limited purposeconsisting of claiming that its refusal to authorise the planned international event intended to be held in Dubai, which was submitted to it by a third-party organiser, did not fall within the scope of Article 101(1) TFEU, given that that refusal had a legitimate objective consisting of upholding the ban on betting set out in its Code of Ethics and could not be regarded as intending to exclude a potential competitor from the speed skating market, as the Commission found in the decision at issue.

152 Second, the ISU maintains that the General Court altered the scope of that plea in law by considering, in paragraph 99 of the judgment under appeal, that it entailed settling the general question whether the prior authorisation and eligibility rules were justified by an objective consisting in protecting the integrity of the sporting disciplines governed by the ISU.

153 Third, the ISU complains that the General Court, at the same time, acknowledged, in paragraph 102 of the judgment under appeal, that it was entitled to establish rules intended to prevent betting from distorting international skating events and refused, in paragraph 127 of that judgment, to rule on the lawfulness, in the light of Article 101(1) TFEU, of the application of those rules to the planned international event referred to in the decision at issue, on the ground that that application was not classified as an infringement by the Commission, but merely referred to in order to illustrate the way in which those rules could be applied in practice. It is apparent from the recitals and the operative part of that decision that the application of the prior authorisation and eligibility rules to the planned event in question was classified as an infringement of Article 101(1) TFEU, in the same way as their adoption, and that that legal classification was made by the Commission following an examination mainly, or exclusively, concerning the refusal of the ISU to authorise that planned event. In those circumstances, the General Court should have examined all the arguments and items of evidence submitted to it by the ISU in order to challenge that classification and to establish that its conduct was justified, which that court, however, failed to do.

154 The Commission, supported by Mr Tuitert, Mr Kerstholt and EU Athletes, disputes all of those arguments.

#### *2. Findings of the Court*

155 It must be noted, at the outset, that, even if the General Court was in error about the scope of the fourth plea in law raised by the ISU, in considering incorrectly that it was seised of the general question whether the prior authorisation and eligibility rules were justified by a legitimate objective and not the specific question whether the application of those rules to the international speed skating event referred to by that

association was justified by such a legitimate objective, the present ground of appeal is, in any event, ineffective.

156 As is apparent from the reasoning set out above in the present judgment, the General Court was correct to confirm the merits of the Commission's assessment to the effect that the prior authorisation and eligibility rules, considered as such and therefore independently of their application to specific cases, had as their object the restriction of competition. In addition, the existence of a potential legitimate objective, even if established, is irrelevant in that context, as follows from paragraphs 107, 113 and 114 of the present judgment.

157 Since the two grounds of appeal have been rejected, the appeal must therefore be dismissed in its entirety.

## IV. The cross-appeal

158 In support of their cross-appeal, Mr Tuitert, Mr Kerstholt and EU Athletes rely on two grounds of appeal alleging, in essence, errors of law in the interpretation and application in the present case of Article 101 TFEU.

### *A. The first ground of appeal*

#### *1. Arguments of the parties*

159 By their first ground of appeal, which contains two parts, Mr Tuitert, Mr Kerstholt and EU Athletes, supported by the Commission, claim that the General Court erred in law in finding that the arbitration rules established by the ISU could not be regarded as reinforcing the infringement of Article 101(1) TFEU, referred to in Article 1 of the decision at issue.

160 By the first part of that ground of appeal, Mr Tuitert, Mr Kerstholt and EU Athletes argue that the General Court's finding that the arbitration rules could be justified by a legitimate interest relating to the specific nature of the sport is vitiated by errors of law.

161 In that regard, they submit, in the first place, that it follows from those rules that athletes who are affected by an ineligibility decision adopted by the ISU are required to bring their dispute with that association exclusively before the CAS. They also assert that those athletes are required to accept all rules adopted by the ISU, including those establishing such a dispute resolution mechanism, in order to be capable of being permitted to take part in international skating competitions organised by that association or by national skating associations that are members thereof.

162 In the second place, they maintain that the CAS is an arbitration body established outside the European Union, whose members are appointed by international sporting associations such as the ISU or, in practice, subject to the decisive influence of those associations and that appeals against the awards of that body may be brought exclusively before the Tribunal fédéral (Federal Supreme Court, Switzerland), whose review is limited to confirmation of the observance of public policy within the meaning defined by that court, which excludes EU competition rules.

163 They add that, while the national courts of the European Union theoretically retain a role to play in the enforcement of those awards, the judicial review that they may carry out in respect of those awards in such a context is, first, fragmented and therefore costly (in so far as an athlete must challenge the enforcement of the award concerning him or her in each of the Member States in which he or she intends to take part in a competition), second, belated and even ineffective (in so far as the ruling sought is generally delivered after the competition is held and where the athlete is prevented from applying for protective measures in the intervening period), third, limited or marginal (in so far as a ruling can only be regarded as contrary to EU public policy in the event of a flagrant, effective and concrete breach of the competition rules), and fourth and in any event, lacking actual force (in so far as the ISU has the power to enforce a ruling relating

to a given athlete itself or to require its members to do so, by preventing him or her from taking part in the international events that it or they organise).

164 In the third and last place, Mr Tuitert, Mr Kerstholt and EU Athletes submit that the General Court erred in law in holding, in paragraph 156 of the judgment under appeal, that the mechanism established by the arbitration rules 'may be justified by legitimate interests linked to the specific nature of the sport'.

165 They assert that the General Court, in essence, relied in an overall and abstract manner on the specific nature of sport in general, whereas the rules at issue in the present case apply in the specific context of speed skating as an economic activity. The exclusive and mandatory recourse to arbitration cannot be justified in the same way in both cases. Furthermore, the reasoning of the General Court is all the more problematic since, unlike national courts or the EU Courts, an arbitral tribunal outside the EU court system, such as the CAS, has no obligation to ensure compliance with the EU competition rules, which the CAS interprets and applies, moreover, in a manifestly incorrect way.

166 The Commission, which supports all of those arguments, submits, more generally, that the General Court's reasoning disregards the specific arrangements under the arbitration mechanism established by the ISU. In particular, unlike a contractual arbitration mechanism freely agreed by the parties, the arbitration rules established by the ISU are in practice imposed on athletes unilaterally, exclusively and on pain of a ban on taking part in events organised by the ISU, a ban which equates, ultimately, to it being impossible for the parties concerned to carry out their profession.

167 By the second part of their ground of appeal, Mr Tuitert, Mr Kerstholt and EU Athletes claim that the General Court erred in law in holding, in essence, in paragraphs 157 to 164 of the judgment under appeal, that the arbitration rules were not capable of undermining the effectiveness of the EU competition rules or of making it more difficult for athletes affected by ineligibility decisions adopted on anticompetitive grounds to exercise their right to effective judicial protection, with the result that those rules could not be regarded as reinforcing the infringement identified in Article 1 of the decision at issue.

168 In that regard, in the first place, they submit that the CAS is an arbitration body outside the EU legal order, before adding that its actual independence and impartiality in relation to international sporting associations such as the ISU are doubtful. They also maintain that CAS awards can only be subject to marginal judicial review without the EU competition rules being taken into account in any way, before a court which, moreover, is not entitled to refer questions to the Court of Justice for a preliminary ruling. In addition, they reiterate that the arbitration rules are, in practice, imposed unilaterally on athletes.

169 In the light of those factors, they argue that those rules should have been considered by the General Court to be capable of adversely affecting compliance with Articles 101 and 102 TFEU, and of making it more difficult for athletes to exercise their right to effective judicial protection, thus reinforcing the infringement identified in Article 1 of the decision at issue.

170 In the second place, Mr Tuitert, Mr Kerstholt and EU Athletes claim that the General Court downplayed the effect of those rules on athletes' right to effective judicial protection by referring to the opportunity they have to bring actions for damages before the national courts having jurisdiction in the event that they are affected by an ineligibility decision adopted on anticompetitive grounds. Although such actions may contribute to ensuring *ex post* judicial protection for individuals harmed by an infringement of the competition rules and to enforcing the effectiveness of those rules (judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, and of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204), they cannot compensate for the absence of any legal means for them to obtain an effective *ex ante* remedy.

171 In addition, in the present case, Mr Tuitert, Mr Kerstholt and EU Athletes assert that it is apparent that that remedy consists, first and foremost, for a skater who is subject to an ineligibility decision adopted on anticompetitive grounds, in obtaining its annulment promptly along with the corresponding opportunity to resume his or her professional career and not merely to be awarded damages several years later in order to

compensate for the unlawful ban on carrying out that activity and the loss of career and corresponding income. That is particularly the case since the CAS procedural rules prohibit applicants from seeking protective measures and several national courts have already dismissed actions for damages and the grounds that they should be regarded as falling within the exclusive jurisdiction conferred on that body under the arbitration rules.

172 In the third and last place, the cross-appellants claim that the General Court made a similar error of reasoning in holding that the opportunity for athletes concerned by an ineligibility decision adopted on anticompetitive grounds to lodge complaints before the Commission and the national competition authorities ('the NCAs') is satisfactory. It follows from settled case-law that the Commission and the NCAs have broad discretion to deal with complaints submitted to them and that they cannot therefore be required to investigate by classifying the facts complained of in the light of the competition rules (judgments of 18 October 1979, *GEMA* v *Commission*, 125/78, EU:C:1979:237, and of 19 September 2013, *EFIM* v *Commission*, C-56/12 P, EU:C:2013:575).

173 The Commission supports all those arguments and submits that the General Court also clearly misunderstood the decision at issue, in paragraph 148 of the judgment under appeal, in finding that the reasoning in that decision consisted in classifying the arbitration rules as an 'aggravating circumstance' within the meaning accorded to that expression in the context of determining the fines that may be imposed in respect of an infringement of Articles 101 and 102 TFEU. Irrespective of the fact that no fine was imposed on the ISU in the present case, the Commission asserts that , in its examination of the merits, it merely stated that those rules reinforced the restriction of competition by object deriving from the prior authorisation and eligibility rules, by supporting the possibility that those rules give to that association to exclude all effective competition on the market on which international speed skating events are organised and marketed.

174 In response, the ISU which addresses the two parts of the ground of appeal together maintains, in the first place, that it is ineffective. As the General Court found in paragraphs 132 and 137 of the judgment under appeal, the Commission merely expressed its view on the arbitration rules in the decision at issue for the sake of completeness.

175 In the second place, the ISU maintains, in the alternative, that the ground of appeal should be dismissed as inadmissible in so far as it alters the subject matter of the dispute before the General Court. Neither that dispute nor the decision at issue concerned the very legitimacy of the conferral of exclusive jurisdiction on the CAS. At the very least, some of the arguments put forward in support of that ground of appeal should be rejected as inadmissible, either because they are new (such as those relating to the distinction to be made between the economic and non-economic aspects of the sport, the independence of the CAS or even the detailed rules governing the review of CAS awards by the Tribunal fédéral (Federal Supreme Court), or because they merely reproduced elements featuring in the decision at issue or in the first-instance pleadings without explaining how the General Court erred in law or distorted the facts in the judgment under appeal (such as those relating to the insufficient nature, in the light of the right to effective judicial protection, of the possibility that athletes have to bring actions for damages before the national courts or to lodge complaints before the Commission or the NCAs).

176 In the third and last place, the ISU asserts that that ground of appeal is, in any event, unfounded. Both the Commission, in the decision at issue, and the General Court, in the judgment under appeal, correctly acknowledged that the use of an exclusive and mandatory arbitration mechanism is a generally accepted method of resolving disputes and that it could, in the present case, be justified in the light of the need to ensure the uniform and effective application of the rules established by the ISU for all athletes practising skating.

### *2. Findings of the Court*

#### *(a) The admissibility and effectiveness of the ground of appeal*

177 An appellant is entitled to lodge an appeal relying on grounds which arise from the judgment under appeal itself and seek to criticise, in law, its correctness (judgments of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission*, C-176/06 P, EU:C:2007:730, paragraph 17, and of 25 January 2022, *Commission* v *European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 77).

178 In the present case, the cross-appellants seek, by their first ground of appeal, to call into question the legal merits of the grounds by which the General Court held, in paragraphs 154 and 156 to 164 of the judgment under appeal, that the Commission had erred in law in finding that the arbitration rules reinforced the restriction of competition by 'object' to which the prior authorisation and eligibility rules gave rise.

179 Furthermore, the grounds of the judgment under appeal referred to in that first ground of the cross-appeal are those that led the General Court to uphold the sixth plea in law and, in part, the seventh plea in law raised at first instance. Therefore, those grounds constitute, as is apparent from paragraphs 171 to 174 and 180 of that judgment, support for the operative part of that judgment in so far as it annulled in part Article 2 of the decision at issue, to the extent that that article refers to the arbitration rules. Consequently, and contrary to what the ISU claims, that ground of appeal is not ineffective.

180 That being so, since the Court of Justice's jurisdiction on an appeal is nonetheless limited to assessing the findings of law on the pleas argued before the General Court, it cannot rule, in this context, on grounds or arguments that were not put forward at first instance (see, to that effect, judgments of 30 March 2000, *VBA* v *VGB and Others*, C-266/97 P, EU:C:2000:171, paragraph 79, and of 25 January 2022, *Commission* v *European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 80).

181 In the present case, the ISU correctly contends that the arguments of the cross-appellants concerning the legal consequences that may arise from a potential lack of independence of the CAS do not form part of the arguments put forward before the General Court or, moreover, of those based on which the Commission adopted the decision at issue.

182 Those arguments must therefore be rejected as inadmissible.

183 By contrast, the other arguments, whose admissibility the ISU disputes, which relate to all the recitals of the decision at issue which the parties challenged at first instance and which the cross-appellants and the Commission complain that the General Court failed to take into account or incorrectly took into account when it ruled on the plea in law put forward by the ISU on the arbitration rules, are admissible.

***(b) Substance***

184 In the first place, it should be noted that, in recitals 268 to 286 of the decision at issue and more particularly in recitals 269 to 271, 277 and 281 to 283 of that decision, the Commission considered that the arbitration rules, while they did not in themselves constitute an infringement of Article 101(1) TFEU, should however be regarded, given their content, their conditions for implementation and their scope, in the legal and economic context to which they belong, as reinforcing the infringement identified previously by the Commission. More specifically, the Commission found in those recitals, in essence, that by making judicial review, in the light of EU competition law, of arbitral awards by which the CAS rules on the validity of decisions adopted by the ISU by virtue of discretionary powers conferred on it by the prior authorisation and eligibility rules more difficult, the arbitration rules reinforced the infringement of EU law connected with the existence of such powers. In particular, the Commission found that that judicial review was entrusted to a court established in a third country, thus outside the European Union and its legal order, and that, according to the case-law of that court, such awards could not be reviewed in the light of the EU competition rules. In so doing, the Commission, ultimately, complained not of the existence, organisation or operation of the CAS as an arbitration body, but rather of the legal immunity enjoyed by the ISU, in its view, in the light of EU competition law, in the exercise of its decision-making and sanctioning powers, to the detriment of persons who may be affected by the lack of a framework for those powers and the discretionary nature which derives therefrom.

185 In the second place, there are, in essence, four grounds that led the General Court to take the view that that reasoning on the part of the Commission was vitiated by errors of law. First, that court held that the Commission had neither called into question the very possibility of recourse to arbitration to settle certain disputes nor considered that the conclusion of an arbitration clause in itself restricted competition (paragraph 154 of the judgment under appeal). Second, it stated that nor had the Commission considered that the arbitration rules infringed the right to a fair hearing as such (paragraph 155 of that judgment). Third, it considered that by conferring binding and exclusive jurisdiction on the CAS to review decisions adopted by the ISU by virtue of its powers in respect of prior authorisation and sanctions, the arbitration rules could be justified by legitimate interests linked to the specific nature of the sport, consisting of enabling a single, specialised court to rule, in a quick, economic and uniform manner, on a multiplicity of disputes, often having an international dimension, to which the exercise of high-level professional sporting activity may give rise (paragraph 156 of that judgment). Fourth, the General Court stressed that athletes and entities or undertakings that plan to organise international speed skating events in competition with those organised by the ISU could not only bring actions for damages before the national courts but also lodge complaints with the Commission and the NCAs for breach of the rules of competition (paragraphs 157 to 161 of that judgment).

186 It must be observed that the first two of those grounds, which are not disputed before the Court of Justice, are not such as to justify the decision to annul in part the decision at issue taken by the General Court since they do not concern the assessments that led the Commission to call into question the arbitration rules and they are therefore not such as to call into question the merits of those assessments.

187 By contrast, the cross-appellants and the Commission are correct in maintaining that the third and fourth of those grounds are incorrect in law.

188 First, the general and undifferentiated assessment 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 the CAS mandatory and exclusive jurisdiction to review decisions that the ISU may adopt by virtue of its powers in respect of prior authorisation and sanctions, disregards, as the cross-appellants and the Commission essentially argue, the requirements that must be satisfied for an arbitration mechanism such as that at issue in the present case to be capable of being regarded, on the one hand, as allowing effective compliance with the public policy provisions that EU law contains to be ensured and, on the other hand, as being compatible with the principles underlying the judicial architecture of the European Union.

189 In that regard, it must be noted that, as is common ground between the parties and as the General Court observed in paragraphs 156, 159 and 160 of the judgment under appeal, the arbitration rules imposed by the ISU concern, in particular, two types of disputes which may arise in the context of economic activities consisting of (i) seeking to organise and market international speed skating events and (ii) seeking to take part in such competitions as a professional athlete. Those rules therefore apply to disputes concerning the exercise of a sport as an economic activity and, on that basis, come under EU competition law. Therefore, they must comply with EU competition law for the reasons set out in paragraphs 91 to 96 of the present judgment, 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 (judgments of 25 November 1971, *Béguelin Import*, 22/71, EU:C:1971:113, paragraph 11; of 27 September 1988, *Ahlström Osakeyhtiö and Others* v *Commission*, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraph 16; and of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 43 to 45).

190 It is, consequently, only the implementation of such rules in the context of such disputes and in the territory of the European Union that is at issue in the present case and not the implementation of those rules in a territory other than the European Union, their implementation in other types of disputes, such as disputes concerning merely the sport as such and therefore not falling under EU law, or, a fortiori, the implementation of the arbitration rules in different areas.

191 Furthermore, as follows from paragraphs 181 and 184 of the present judgment, those rules are at issue, in the present case, not to the extent that they subject the review at first instance of decisions issued by the ISU to the CAS as an arbitration body, but only to the extent that they subject the review of the arbitral awards made by the CAS and the last-instance review of decisions of the ISU to the Tribunal fédéral (Federal Supreme Court), that is to say, a court of a third State.

192 In that regard, the Court of Justice has consistently held that Article 101 and 102 TFEU are provisions having direct effect which create rights for individuals which national courts must protect (judgments of 30 January 1974, *BRT and Société belge des auteurs, compositeurs et éditeurs*, 127/73, EU:C:1974:6, paragraph 16, and of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 24) and which are a matter of EU public policy (see, to that effect, judgment of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraphs 36 and 39).

193 That is why, while noting that an individual may enter into an agreement that subjects, in clear and precise wording, all or part of any disputes relating to it to an arbitration body in place of the national court that would have had jurisdiction to rule on those disputes under the applicable national law, and that the requirements relating to the effectiveness of the arbitration proceedings may justify the judicial review of arbitral awards being limited (see, to that effect, judgments of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 35, and of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraph 34), the Court has nevertheless pointed out that such judicial review must, in any event, be able to cover the question whether those awards comply with the fundamental provisions that are a matter of EU public policy, which include Articles 101 and 102 TFEU (see, to that effect, judgment of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 37). Such a requirement is particularly necessary when such an arbitration mechanism must be regarded as being, in practice, imposed by a person governed by private law, such as an international sports association, on another, such as an athlete.

194 In the absence of such judicial review, the use of an arbitration mechanism is such as to undermine the protection of rights that subjects of the law derive from the direct effect of EU law and the effective compliance with Articles 101 and 102 TFEU, which must be ensured – and would therefore be ensured in the absence of such a mechanism – by the national rules relating to remedies.

195 Compliance with that requirement for effective judicial review applies in particular to arbitration rules such as those imposed by the ISU.

196 The Court of Justice has held previously that, while having legal autonomy entitling them to adopt rules relating, inter alia to the organisation of competitions, their proper functioning and the participation of athletes in those competitions (see, to that effect, judgments of 11 April 2000, *Deliège*, C-51/96 and C-191/97, EU:C:2000:199, paragraphs 67 and 68, and of 13 June 2019, *TopFit and Biffi*, C-22/18, EU:C:2019:497, paragraph 60), sports associations cannot, in doing so, limit the exercise of rights and freedoms conferred on individuals by EU law (see, to that effect, judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraphs 81 and 83, and of 13 June 2019, *TopFit and Biffi*, C-22/18, EU:C:2019:497, paragraph 52), which include the rights that underlie Articles 101 and 102 TFEU.

197 For that reason, rules such as the prior authorisation and eligibility rules must be subject to effective judicial review as is apparent from paragraphs 127 and 134 of the present judgment.

198 That requirement of effective judicial review means that, in the event that such rules contain provisions conferring mandatory and exclusive jurisdiction on an arbitration body, the court having jurisdiction to review the awards made by that body may confirm that those awards comply with Articles 101 and 102 TFEU. In addition, it entails that court's satisfying all the requirements under Article 267 TFEU, so that it is entitled, or, as the case may be, required, 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 (see, to that effect, judgments of 23 March 1982, *Nordsee*, 102/81, EU:C:1982:107, paragraphs 14 and 15, and of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 40).

199 Thus, the General Court erred in law by merely finding, 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, without seeking to ensure that those arbitration rules complied with all the requirements referred to in the preceding paragraphs of the present judgment and thus allowed for an effective review of compliance with the EU competition rules, even though the Commission correctly relied on those requirements in recitals 270 to 277, 282 and 283 of the decision at issue in concluding that those rules reinforced the infringement identified in Article 1 of that decision.

200 Second, that court also erred in law in holding, in paragraphs 157 to 161 of the judgment under appeal, that the effectiveness of EU law was ensured in full, given, on the one hand, 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, on the other hand, the possibility of lodging a complaint with the Commission or an NCA.

201 As essential as it may be (see, in that regard, judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraphs 26 and 27, and of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraphs 25, 43 and 44), the fact that a person is entitled to seek damages for harm caused by conduct liable to prevent, restrict or distort competition cannot compensate for the lack of a remedy entitling that person to bring an action before the relevant national court seeking, as appropriate following the grant of protective measures, to have that conduct brought to an end, or where it constitutes a measure, the review and annulment of that measure, if necessary following a prior arbitration procedure carried out under an agreement that provides for such a procedure. The same applies to persons practising professional sport, whose career may be especially short, in particular where they practise that sport at a high level.

202 In addition, that fact cannot justify that right’s being formally preserved but, in practice, deprived of an essential part of its scope, as would be the case if the judicial review that can be carried out in respect of the conduct or measure in question was excessively limited in law or in fact, in particular because it cannot concern the public policy provisions of EU law.

203 More especially, the possibility of lodging a complaint with the Commission or an NCA cannot be relied on in order to justify the lack of a remedy such as that referred to in paragraph 201 of the present judgment. It must, moreover, be pointed out, as regards the Commission, that, as that institution and the cross-appellants correctly assert, Article 7 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1) does not give a person who lodges an application under that article the right to insist that a final decision as to the existence or non-existence of the infringement he or she alleges be taken (see, to that effect, of 19 September 2013, *EFIM* v *Commission*, C-56/12 P, EU:C:2013:575, paragraphs 57 and the case-law cited).

204 The first ground of appeal is therefore well founded in its entirety. Consequently, the judgment under appeal must be set aside in so far as it annulled in part Article 2 of the decision at issue, to the extent that that article concerns the arbitration rules.

### *B. The second ground of appeal*

#### *1. Arguments of the parties*

205 By their second ground of appeal, Mr Tuitert, Mr Kerstholt and EU Athletes, supported by the Commission, claim that the General Court erred in refusing to take into account, for the purposes of categorising a restriction of competition by object in the present case, the fact that the prior authorisation and eligibility rules aimed, inter alia, to ensure the protection of the ISU’s economic interests.

206 In that regard, they argue, in the first place, that the General Court committed a manifest error or assessment as to the facts in paragraph 107 of the judgment under appeal in refusing to acknowledge that that aim was apparent from those rules both in the version adopted in 2014 and in that adopted in 2016.

207 In the second place, they maintain that the General Court made an incorrect legal classification of the facts, in paragraphs 107 and 109 of the judgment under appeal, in finding that such an aim was not, in itself, anticompetitive in nature. While it is in general permissible for an undertaking or association of undertakings engaged in an economic activity to promote its own economic interests, that court failed to draw the inferences from its own findings and assessments relating to the relevant legal and economic content, inter alia those made in paragraphs 70 and 114 of the judgment under appeal, from which it followed that the ISU combined a monopolistic economic activity on the market for the organisation and marketing of international speed skating events with regulatory, decision-making, control and sanctioning powers which placed it in a situation of conflict of interests requiring appropriate obligations, restrictions and review to be put in place. The General Court should have taken that situation into account and found that, in the light of that situation, the objective at issue in the present case was relevant for the purpose of finding a restriction of competition by object, as the Commission did.

208 The ISU disputes all those arguments.

### *2. Findings of the Court*

209 It should be noted, at the outset, that, while finding, in paragraphs 107 and 109 of the judgment under appeal, that certain of the Commission's assessments were incorrect, the General Court nevertheless ultimately held, in paragraph 111 of that judgment, that those errors had no effect on the legally well-founded conclusion of that institution that the prior authorisation and eligibility rules had as their object the restriction of competition. For that reason, the General Court dismissed the action brought by the ISU, in so far as it was directed against that aspect of the decision at issue.

210 Thus, the present ground of appeal concerns reasons set out in the ground of appeal which are not only for the sake of completeness, but which also form part of the reasoning that led the General Court to dismiss part of the ISU's claim, and thus to give satisfaction, to that extent, to the Commission and Mr Tuitert, Mr Kerstholt and EU Athletes. By that ground of appeal, the latter parties, consequently, seek to obtain a substitution of grounds that is not capable of procuring them any advantage. An application of that kind is inadmissible (judgments of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 42, and of 9 November 2017, *TV2/Danmark* v *Commission*, C-649/15 P, EU:C:2017:835, paragraph 61).

211 That ground of appeal must therefore be rejected as being inadmissible.

212 Therefore the cross-appeal must be upheld to the extent stated in paragraph 204 of the present judgment.

213 Consequently, the judgment under appeal must be set aside to the extent that it annulled in part the decision at issue.

## V. The action in Case T-93/18

214 The first paragraph of Article 61 of the Statute of the Court of Justice of the European Union provides that, if the appeal is well founded and the Court quashes the decision of the General Court, it may in 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.

215 In the present case, given that the Court of Justice has dismissed the appeal brought by the ISU against the judgment under appeal in so far as it rejected its claim seeking annulment of the part of the decision at

issue concerning the prior authorisation and eligibility rules, the action in Case T-93/18 exists only in so far as it is directed against that part of that decision which concerns the arbitration rules.

216 Since the sixth and seventh pleas in law at first instance, alleging infringement of Article 101 TFEU in so far as that article was applied to the arbitration rules, were the subject of an exchange of arguments before the General Court and the examination of those pleas does not require any further measure of organisation of procedure or inquiry to be taken in the case, the state of the proceedings is such that the Court of Justice may give final judgment on those pleas and should do so (see, by analogy, judgments of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 130, and of 2 December 2021, *Commission and GMB Glasmanufaktur Brandenburg* v *Xinyi PV Products (Anhui) Holdings*, C-884/19 P and C-888/19 P, EU:C:2021:973, paragraph 104).

### *A. Arguments of the parties*

217 By its sixth plea in law at first instance, the ISU maintains, in essence, that the Commission erred in finding that the arbitration rules reinforced the anticompetitive nature by object of the prior authorisation and eligibility rules.

218 The ISU asserts that the mandatory use of a contractual arbitration mechanism is a generally accepted method for the settlement of disputes. In addition, in the present case, the CAS plays a fundamental role in the uniform application of sporting rules. Furthermore, the conferral of powers on that body, which took place during the administrative procedure that led the Commission to adopt the decision at issue, constitutes progress in relation to the ISU internal appeals process that existed up to that point. Lastly, the parties concerned have the option of challenging the recognition and enforcement of the awards made by that body before the relevant national courts, which can refer questions to the Court of Justice for a preliminary ruling concerning the interpretation of the EU competition rules.

219 More generally, according to the ISU, the findings of the Commission in that regard are irrelevant, since that institution itself recognises that the arbitration rules do not, in themselves, constitute an infringement.

220 By its seventh plea at first instance, the ISU claims, in essence, that the Commission was not empowered to impose corrective measures on it concerning the arbitration rules, since there was no link between those rules and the prior authorisation and eligibility rules.

### *B. Findings of the Court*

221 As is clear from paragraphs 199 and 204 of the present judgment, the Commission correctly relied, in recitals 270 to 277, 282 and 283 of the decision at issue, on the requirements referred to in paragraphs 188 to 198 of the present judgment to support its finding that, in view of their content, the conditions of their implementation and scope, in the legal and economic context of which they form a part, the arbitration rules reinforced the powers, which are not subject to any obligations, restrictions or appropriate judicial review and which therefore have an anticompetitive nature by object, held by that association under the prior authorisation and eligibility rules.

222 None of the arguments put forward by the ISU permit the view that such a finding is vitiated by any error, or more especially, by a manifest error.

223 In that respect, it is apparent from, on the one hand, the recitals of the decision at issue referred to in paragraph 216 of the present judgment that the arbitration rules subject, exclusively and mandatorily, disputes relating to the implementation of the prior authorisation and eligibility rules to the jurisdiction of the CAS, an arbitration body whose awards are subject to judicial review by the Tribunal fédéral (Federal Supreme Court). The Commission contends, inter alia, that the review that that court can carry out in respect of those awards excludes the question whether they comply with the public policy provisions of Articles 101 and 102 TFEU. In addition, it asserts that the Tribunal fédéral (Federal Supreme Court) is not

a court of a Member State, but a court outside the EU legal system, which is not empowered to refer a question to the Court of Justice for a preliminary ruling on that subject. Lastly, it submits that, according to the case-law of the Tribunal fédéral (Federal Supreme Court), athletes do not, in practice, have any choice other than to accept that disputes between them and the ISU are subject to the jurisdiction of the CAS, unless they no longer take part in any events organised by the ISU or the national skating associations that are its members, and therefore, ultimately, give up their profession.

224 On the other hand, the arbitration rules exclude the possibility, for applicants who have received an ineligibility decision or the entities or undertakings that have received a refusal to grant prior authorisation for a planned international speed skating competition, of seeking protective measures before the competent arbitration body and before the national courts which could be required to rule on the enforcement of awards made by that body. In addition, the Commission states that that enforcement can in general be handled by the ISU and by the national skating associations that are its members, without the need for the intervention of a national court for that purpose.

225 The ISU does not put forward any precise and substantiated argument that can permit the view that those various findings rely on an incorrect factual basis or are vitiated by one or more manifest errors of assessment. It must be held, on the contrary, that some of those findings, such as those relating to the lack of possibility of subjecting CAS awards to judicial review to ensure compliance with the provisions of public policy of EU law, if necessary using the procedure laid down in Article 267 TFEU, are correct, and others, such as those to the effect that the arbitration mechanism at issue in the present case is, in practice, imposed unilaterally by the ISU on athletes, reflect those of the European Court of Human Rights in that regard (ECtHR, 2 October 2018, *Mutu and Pechstein v. Switzerland*, CE:ECHR:2018:1002JUD004057510, §§ 109 to 115).

226 The sixth plea in law is therefore unfounded.

227 As regards the seventh plea in law, it must be noted 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 (see, to that effect, judgment of 2 March 1983, *GVL* v *Commission*, 7/82, EU:C:1983:52, paragraph 23) 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 (judgment of 29 June 2010, *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraph 39).

228 In the present case, the Commission was correct in finding that the arbitration rules reinforced the infringement identified in Article 1 of the decision at issue, by making judicial review, in the light of EU competition law, of CAS arbitral awards 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.

229 In addition, the ISU, which merely relies incorrectly on the absence of a link between those different rules, does not effectively dispute the Commission’s findings relating to the need for the corrective measures imposed by that institution with regard to the arbitration rules.

230 In those circumstances, the seventh plea in law is also unfounded.

231 Accordingly, the action must be dismissed to the extent that it was not already dismissed in the judgment under appeal.

## VI. Costs

232 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded or where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court is to make a decision as to the costs.

233 Under Article 138(1) of those rules, which are applicable to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

234 Under Article 138(2) of those rules of procedure which also applies to appeal proceedings by virtue of Article 184(1) thereof, where there are several unsuccessful parties, the Court is to decide how the costs are to be shared.

235 In the present case, the ISU has been unsuccessful in Case C-124/21 P and in the part of Case T-93/18 referred to by the Court of Justice.

236 Furthermore, Mr Tuitert, Mr Kerstholt and EU Athletes, while unsuccessful in their second ground of appeal, have succeeded in their claim.

237 In those circumstances, the ISU must be ordered to pay the costs, both in Case C-124/21 P and in the part of Case T-93/18 referred to by the Court, in accordance with the forms of order sought by the Commission, Mr Tuitert, Mr Kerstholt and EU Athletes.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the appeal;**

2. **Upholds the cross-appeal;**

3. **Sets aside the judgment of the General Court of the European Union of 16 December 2020, *International Skating Union* v *Commission* (T-93/18, EU:T:2020:610), in so far as it annulled in part Article 2 of Decision C(2017) 8230 final of the European Commission 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);**

4. **Dismisses the action in Case T-93/18 to the extent that it was not previously dismissed in the judgment referred to in point 3 of the present operative part;**

5. **Orders the International Skating Union to pay the costs in Case C-124/21 P and in the part of Case T-93/18 referred to in point 4 of the present operative part.**

| | | |
|---|---|---|
| Lenaerts | Bay Larsen | Arabadjiev |
| Prechal | Jürimäe | Spineanu-Matei |
| Bonichot | Safjan | Rossi |
| Jarukaitis | Kumin | Jääskinen |
| Wahl | Passer | Gavalec |

Delivered in open court in Luxembourg on 21 December 2023.

A. Calot Escobar K. Lenaerts

Registrar President

---

* Language of the case: English.