



REPORT FOR THE HEARING

in Case E-21/13

APPLICATION to the Court pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

The Fédération Internationale de Football Association (FIFA)

and

EFTA Surveillance Authority

seeking the partial annulment of the EFTA Surveillance Authority's Decision No 309/13/COL of 16 July 2013 on the compatibility with EEA law of measures to be taken by Norway pursuant to Article 14 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (the "Audiovisual Media Services Directive" or the "Directive").¹

I Introduction

1. On 16 July 2013, the EFTA Surveillance Authority ("ESA" or "the defendant") adopted Decision No 309/13/COL ("the contested decision"), in which it decided to approve the inclusion on the Norwegian events list, drawn up pursuant to Article 14(1) of

¹ OJ 2010 L 95, p. 1, as corrected by OJ 2010 L 263, p. 15. The Directive codifies Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 1989 L 298, p. 23), which was substantially amended several times. The original title of the act was "Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities".

the Directive, of all the matches played within the framework of the final stage of the FIFA World Cup™ (the “World Cup”), including the matches other than the final, the two semi-finals and the matches played by the Norwegian team (the “non-prime” matches) played within the framework of that event.

2. The final stage of the World Cup consists of a total of sixty-four matches: in the group round, the thirty-two teams taking part in the World Cup are divided into eight groups of four teams. In each group each team plays three matches. The subsequent rounds consist of knockout matches. Those who accede to the round of sixteen play one match each. Then, the eight teams which remain in the competition play one match each in the quarter-final round. The four teams who won their respective quarter-final match play one match each in the semi-finals round. The two unsuccessful teams in the semi-final round play a match for the third place (“play-off”), and the successful two semi-finalists play the final match.

3. The Fédération Internationale de Football Association (“FIFA” or “the applicant”) – the world governing body of association football – is the organiser and the sole original rights’ holder of, *inter alia*, the World Cup. FIFA considers that, in approving the inclusion on the Norwegian events list, drawn up pursuant to Article 14(1) of the Directive, of the entire final stage of the World Cup, in particular the “non-prime” matches’ competition, ESA has committed a manifest error and disregarded EEA law and the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the “SCA”).

4. In its application, FIFA seeks the partial annulment of the contested decision, relying on two main pleas.

5. By its first plea, the applicant argues that ESA has breached its obligation to give valid or adequate reasons for approving as compatible with EEA law the Norwegian authorities’ view that the entire World Cup is an event of major importance for Norwegian society within the meaning of the Directive which, as such, may be included on a list drawn up pursuant to Article 14(1) of the Directive.

6. By its second plea, which is divided into four branches, FIFA contends that: (i) ESA has violated Article 14(2) of the Directive and Article 5(2)(d) SCA in failing adequately to verify the compatibility of the Norwegian notified measures with EEA law; (ii) ESA has unlawfully relied on recital 49 in the preamble to the Directive for upholding the designation of the entire World Cup as an event of major importance for Norwegian society within the meaning of the Directive; (iii) ESA has unlawfully approved the Norwegian authorities’ claim that the entire World Cup is an event of major importance for Norwegian society and that it has been traditionally broadcast on free-to-air television in Norway, has attracted large Norwegian television audiences and is of significance in Norway, not only to “football fans”, but also to those who do not ordinarily follow

football; (iv) ESA has unlawfully found that the restrictions on the freedom to provide services, on competition and on FIFA's property rights entailed by the inclusion of the "non-prime" matches of the World Cup on the Norwegian events list are proportionate to the objective sought and compatible with EEA law.

II Legal context

A – EEA law

7. Recital 15 in the preamble to the Agreement on the European Economic Area ("EEA Agreement") states:

... [I]n full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;

8. Article 6 of the EEA Agreement reads as follows:

Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.

9. Article 36(1) of the EEA Agreement provides that:

Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

10. According to Article 3(2) SCA:

In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement

and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.

11. Article 5(2)(d) SCA provides that:

... [T]he EFTA Surveillance Authority shall:

...

(d) carry out the functions which, through the application of Protocol 1 to the EEA Agreement, follow from the acts referred to in the Annexes to that Agreement, as specified in Protocol 1 to the present Agreement.

12. Article 16 SCA reads as follows:

Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.

13. The first paragraph of Article 36 SCA provides that:

The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

- B – The Audiovisual Media Services Directive

14. Recitals 48, 49 and 52 in the preamble to the Directive read as follows:

(48) Television broadcasting rights for events of high interest to the public may be acquired by broadcasters on an exclusive basis. However, it is essential to promote pluralism through the diversity of news production and programming across the Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union.

(49) It is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society, such as the Olympic Games, the football World Cup and the European football

championship. To this end, Member States retain the right to take measures compatible with Union law aimed at regulating the exercise by broadcasters under their jurisdiction of exclusive broadcasting rights to such events.

...

(52) Events of major importance for society should, for the purposes of this Directive, meet certain criteria, that is to say be outstanding events which are of interest to the general public in the Union or in a given Member State or in an important component part of a given Member State and are organised in advance by an event organiser who is legally entitled to sell the rights pertaining to those events.

15. Article 14 of the Directive reads as follows:

1. Each Member State may take measures in accordance with Union law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due time. In so doing the Member State concerned shall also determine whether these events should be available by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of 3 months from the notification, the Commission shall verify that such measures are compatible with Union law and communicate them to the other Member States. It shall seek the opinion of the contact committee established pursuant to Article 29. It shall forthwith publish the measures taken in the Official Journal of the European Union and at least once a year the consolidated list of the measures taken by Member States.

3. Member States shall ensure, by appropriate means within the framework of their legislation, that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters after 30 July 1997 in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with paragraphs 1 and 2 by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole

or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.

16. Pursuant to Article 29(1) of the Directive:

A contact committee is established under the aegis of the Commission. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and meet either on his initiative or at the request of the delegation of a Member State.

17. According to Article 29(2)(b) of the Directive, the tasks of the contact committee include the delivery of opinions, on its own initiative or on request from the European Commission (“the Commission”), on the application of the Directive by the Member States.

18. Pursuant to Decision of the EEA Joint Committee No 109/12 of 15 June 2012,² the Directive has been incorporated into the EEA Agreement.

III Facts

Background

19. The Directive lays down framework conditions to ensure that EEA States are given effective means to prevent broadcasters from transmitting, on an exclusive basis, events which are regarded by that EEA State as being of major importance for society, in such a way that deprives a substantial proportion of the public of the possibility of following these events on free television.

20. Each EEA State is entitled to draw up a list of national or non-national events which are seen as being of major importance for society. Although the wording of the Directive gives a certain flexibility to each EEA State in assessing the importance of the event in question, recital 52 in the preamble to the Directive states, however, that events of major importance for society should meet certain criteria, that is to say to be outstanding events which are of interest to the general public in the Union or in a given Member State or in an important component part of a given Member State and are organised in advance by an event organiser who is legally entitled to sell the rights pertaining to those events.

21. A set of guidelines applied by the Commission³ to assess whether an event may be considered to be of major importance to the society offers in general terms, and without

² OJ 2012 L 270, p. 31. EEA Agreement, Annex XI.

prejudice to a case by case evaluation on the basis of the documentation provided by Member States, four reliable indicators which may be retained for an event to be regarded of major importance for society, the fulfilment of any two suffices for including it on a list drawn up pursuant to the Directive: (i) the event and its outcome have a special general resonance in the relevant Member State, and not simply a significance to those who ordinarily follow the sport or activity concerned; (ii) the event has a generally recognised, distinct cultural importance for the population in the Member State concerned, in particular as a catalyst of its cultural identity; (iii) the event involves the national team in the sport concerned in a major international tournament; and (iv) it has traditionally been broadcast on free television and has commanded large television audiences in the Member State concerned.

22. The core purpose of the Directive is the mutual recognition of lists of major events. EEA States must ensure that broadcasters under their jurisdiction respect the lists of other EEA States which are notified to the Commission or to ESA.

23. Pursuant to Article 14(2) of the Directive, EEA States shall immediately notify the Commission or ESA of any measures taken or to be taken to that effect. The Commission or ESA will then verify whether these measures are compatible with EEA law within a period of three months from the notification and after having consulted the contact committee established pursuant to Article 29 of the Directive.

24. Where this evaluation process results in a positive outcome, the measures are published in the Official Journal of the European Union or in the EEA Supplement to the Official Journal.

Administrative procedure

25. The administrative procedure leading to the contested decision consisted of two phases: first, the pre-notification discussions with the Norwegian Ministry of Culture (“the Ministry” or “the Norwegian authorities”), which lasted for almost two years; and, second, the three-month period, starting from receipt of Norway’s formal notification of the draft measures, that ESA has at its disposal, pursuant to Article 14(2) of the Directive, to assess the notified national measures. Within this three-month period, ESA is also required to consult the contact committee.

26. The pre-notification process with the Ministry started in April 2011. In the course of the pre-notification discussions, ESA cooperated closely with the Norwegian authorities and consulted the Commission.

³ European Commission Working Document CC TVSF (97) 9/3, Implementation of Article 3A of Directive 89/552/EEC (as modified by Directive 97/36/EC). Evaluation of National Measures.

27. On 27 June 2011, the Ministry issued a consultation paper on a proposal for introducing amendments to the Broadcasting Regulations (No 153 of 28 February 1997), listing events of major importance for society, pursuant to Section 2-8 of the Act No 127 of 4 December 1992 relating to broadcasting.

28. The proposed amendments consisted in a list of major events for society drawn up in pursuance of the above-mentioned provision, which included all the matches played within the framework of the final stage of the World Cup. They provided that the listed events which, in principle, should be broadcast live in their entirety may, in practice, be broadcast on an exclusive basis only on channels which may be received by, at least, 90% of the population and without payment other than the licence fee and/or the basic tier package fee (the “qualified broadcasters”). Measures concerning the sale of rights by non-qualified broadcasters to qualified broadcasters and the resolution of disputes between them as regards the rights’ price were also envisaged.

29. Interested parties were invited to submit their views on the proposed measures. Accordingly, FIFA presented its observations to the Ministry on 26 September 2011.

30. On 22 April 2013, in accordance with Article 14(2) of the Directive, Norway notified to ESA the proposed draft amendments. On 30 May 2013, at FIFA’s request, it obtained from ESA Norway’s notification. On 28 June 2013, FIFA presented to ESA its observations.

The contested decision

31. On 16 July 2013, ESA took the contested decision, in which it stated that it had verified the notified measures’ compatibility with EEA law, in particular with regard to the proportionality of the measures and the transparency of the national consultation procedure.⁴

32. ESA indicated that it had considered the available data on the Norwegian media market.⁵

33. ESA concluded that the list of events of major importance for society included in the Norwegian measures was drawn up in a clear and transparent manner, after the launch of a far-reaching consultation in this regard.⁶

⁴ Recital 2 in the preamble to the contested decision.

⁵ Recital 3 in the preamble to the contested decision.

⁶ Recital 4 in the preamble to the contested decision.

34. ESA declared that the events listed in the Norwegian measures met at least two of the criteria considered to be reliable indicators of the importance of events for society as referred to in the Directive.⁷

35. In particular, as regards the World Cup, in its entirety and including qualifying games with Norwegian participation, ESA stated that it is among the most popular sports events in Norway, that the Norwegian public and media take great interest in the Norwegian team's qualifying matches as well as the matches in the final round, especially the final matches. ESA added that the events have traditionally been broadcast on free television and have commanded a large television audience. As the matches between other countries in the final round may affect the matches that Norway may play as well as the overall result, they also enjoy a special resonance in Norway.⁸

36. According to ESA, the Norwegian measures appear proportionate to justify, by the overriding reason of public interest in ensuring wide public access to broadcasts of events of major importance for society, the derogation from the fundamental freedom to provide services laid down in Article 36 of the EEA Agreement.⁹

37. As regards the general proportionality of the Norwegian measures, ESA concluded that it was supported by several factors. First, the introduction of the 90% threshold of the required potential coverage of the population for qualifying broadcasters supported the proportionality of the measures, in so far as it increases the number of broadcasters who potentially qualify. Second, the number of events included in the list was proportionate. Third, a mechanism was introduced for the resolution of disputes between broadcasters as regards the payment of fair compensation for broadcasting rights. Furthermore, the Norwegian measures provided for appropriate management in situations where the events listed are purchased by non-qualifying broadcasters, in order to ensure a system for re-licensing of exclusive rights to qualifying broadcasters. In addition, the Norwegian measures anticipated situations in which the rights to the events listed are purchased by a non-qualifying broadcaster, and no request has been received from a qualified buyer, in order to ensure that the non-qualifying broadcaster is able to exercise its rights. Finally, the entry into force of the final Norwegian measures was postponed to 1 July 2014 in order to ensure that any contract negotiations made before that date were not adversely effected.¹⁰

38. ESA therefore decided that the measures to be adopted by Norway pursuant to the Directive, and in particular Article 14(1) thereof, were compatible with EEA law¹¹ and

⁷ Recital 5 in the preamble to the contested decision. See paragraph 21 of the present Report for the Hearing.

⁸ Recital 9 in the preamble to the contested decision.

⁹ Recital 16 in the preamble to the contested decision.

¹⁰ Recital 18 in the preamble to the contested decision.

¹¹ Article 1 of the contested decision.

required Norway to communicate to it the measures as finally adopted. ESA indicated that it would publish these measures in the EEA Supplement to the Official Journal of the European Union, as required by Article 14(2) of the Directive.¹²

39. On 9 August 2013, the Norwegian King in Council adopted, in the light of an Explanatory Memorandum produced by the Ministry, the amendments to the Broadcasting Regulations which have been made available on the government's website from 13 August 2013.

40. The measures as adopted were communicated to ESA on 23 August 2013. Following this communication, the Explanatory Memorandum was transmitted by the Norwegian authorities to ESA on 11 September 2013.

IV Procedure and forms of order sought

41. By application registered at the Court on 4 October 2013, the applicant lodged the present action. ESA submitted a statement of defence, which was registered at the Court on 11 December 2013. The reply from FIFA was registered at the Court on 11 February 2014. The rejoinder from ESA was registered at the Court on 17 March 2014.

42. The applicant, FIFA, requests the Court to:

1. *annul the contested decision in as far as it approves the inclusion of the "non-prime" matches of the [World Cup] on the Norwegian events list;*
2. *order ESA to pay its own costs and the costs incurred by FIFA in connection with these proceedings.*

43. ESA claims that the Court should:

1. *dismiss the application;*
2. *order the applicant to pay the costs.*

V Written procedure before the Court

44. Pleadings have been received from:

- the applicant, represented by Ami Barav, Barrister and *Avocat* of the Paris Bar, Peter Dyrberg, *Advokat* of the Danish Bar, and Damien Reymond, *Avocat* of the Paris Bar;

¹² Article 2 of the contested decision.

- the defendant, represented by Xavier Lewis, Director, and Maria Moustakali, Legal Officer, Department of Legal & Executive Affairs, acting as Agents.

45. Pursuant to Article 20 of the Statute of the Court, written observations have been received from:

- the Government of the Kingdom of Norway, represented by Beate Gabrielsen, Adviser, Ministry of Foreign Affairs and Magnus Schei, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;
- the Commission, represented by Elisabetta Montaguti and Anna Marcoulli, members of its Legal Service, acting as Agents.

VI Summary of the arguments submitted

Admissibility

The applicant

46. According to FIFA, a decision by which an events list drawn up pursuant to Article 14(1) of the Directive is approved constitutes an act which may be subject to judicial review.¹³

47. FIFA submits that such a decision is of direct and individual concern to broadcasting rights' holders and organisers of the listed events, which are therefore entitled to initiate proceedings for the annulment of such a decision.¹⁴

48. FIFA argues that its legal standing to bring proceeding has been expressly recognised.¹⁵

49. Moreover, according to FIFA, the action was lodged within the time-limit laid down in Article 36(3) SCA, Article 19 of Protocol 5 to the SCA on the Statute of the EFTA Court, and Article 76(1)(a) and (b) of the Rules of procedure.

50. FIFA submits therefore that its application is admissible.

¹³ Reference is made to Case T-33/01 *Infront WM AG v Commission* [2005] ECR II-5897, paragraph 111.

¹⁴ Reference is made to *Infront WM AG v Commission*, paragraph 111, cited above, and to the related appeal judgment in Case C-125/06 P *Commission v Infront WM AG* [2008] ECR I-1451, paragraphs 52 and 76-77.

¹⁵ Reference is made to Case T-68/08 *FIFA v Commission* [2011] ECR II-349, paragraphs 38 and 42 and Case T-385/07 *FIFA v Commission* [2011] ECR II-205, paragraphs 42 and 45.

General observations

The applicant

51. FIFA submits that its primary source of revenue, which allows it to discharge its statutory duties, is the sale of broadcasting and marketing rights relating to the World Cup. FIFA claims that in its broadcasting rights' licensing policy it has always strived to reconcile the interest of having the World Cup matches viewed by as large a public as possible, and its vital need to raise revenue to enable it to discharge its statutory duties, to fund and contribute financially to various development programmes. In this regard the matches of the World Cup have traditionally been divided into "prime" and "non-prime" matches.

52. FIFA submits further that it is one of its basic requirements that the "prime" matches have to be broadcast live on free television channels which have nationwide coverage, whether or not they are considered to be events of major importance within the meaning of the Directive.

53. Moreover, FIFA states that it has been its policy and practice to require of its licensees that a significant number of matches, other than the "prime" matches, should equally be broadcast live on free television channels with national coverage.

54. The applicant underlines the fact that, except for the UK and Belgian lists, none of the lists of designated events under Article 14(1) of the Directive submitted to and approved by the Commission includes all the matches of the World Cup.

55. As regards Norway, according to the applicant, the licence agreement for the 2010 World Cup stipulated that at least twenty-two matches had to be broadcast live in their entirety on free television channels with national coverage of at least 95%. For the 2014, 2018 and 2022 World Cups, the licence agreements ensured that forty-six of the sixty-four matches in each of the three future World Cups will be broadcast in Norway by qualified broadcasters.

56. In its reply, the applicant submits, in the first place, that the Norwegian measures as notified to, and approved by ESA, have been subsequently altered, in one significant and consequential respect.

57. Namely, according to the applicant, in an Explanatory Memorandum presented by the Ministry to the King in Council on the very date of the adoption of the Norwegian Regulation, and which the applicant submits not to have been communicated to ESA at the time when the Regulation, as adopted, was notified to it, it is explained that Article 5(4) of the Regulation should be read subject to the proviso that, as regards, *inter alia*, the World Cup, it is for the television channels to select the events to be broadcast. In the draft version notified to ESA and the version adopted by the King in Council and

communicated to ESA, however, Article 5(4) provides that a television channel that has acquired, pursuant to Article 5(3) of the same Regulation, the right to broadcast a listed event shall broadcast the entire event live.

58. Accordingly, the applicant claims that ESA should have refrained from publishing the contested decision.

59. In the second place, FIFA submits that qualified broadcasters are obliged neither to purchase rights to the World Cup nor to exploit them, while no provision is made for the sub-licensing by a qualified broadcaster to qualified or non-qualified broadcasters of rights which it does not wish to exploit.

60. In the third place, according to FIFA, ESA invokes unwarrantedly an allegedly excessively reduced scope of its supervisory task in the matter of verification of measures notified to it under the Directive. FIFA submits that ESA did not examine all the relevant facts of the individual case nor the effects exceeding those which are intrinsically linked to the inclusion of the relevant event on the events list.¹⁶ According to the applicant, ESA should have required the removal of “non-prime” matches of the World Cup from the proposed list as a pre-condition for its approval.

61. In the fourth place, FIFA submits that the distinction between “prime” and “non-prime” matches has been applied by the majority of the Member States whose events lists have been approved by the Commission and was equally adopted by the Norwegian authorities themselves in the past.

62. In the fifth place, FIFA submits that no reliance may be placed on the judgments of the General Court referred to by ESA in the defence, since several of the General Court’s findings concern the basic premise that the World Cup is a single event,¹⁷ a premise which the Court of Justice has rejected. In any event, pursuant to the Directive, each case should be decided on its own merits and it is for each Member State to give substance to the criteria and to assess the interest of the general public in the events concerned, taking account of the social and cultural particularities of society in that Member State.¹⁸

¹⁶ Reference is made to Case C-205/11 P *FIFA v Commission*, judgment of 18 July 2013, not yet reported, paragraphs 21 and 23.

¹⁷ Reference is made to Case T-385/07 *FIFA v Commission*, cited above, paragraph 72, and Case T-68/08 *FIFA v Commission*, cited above, paragraph 70.

¹⁸ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraphs 17 and 21, and Case C-204/11 P *FIFA v Commission*, judgment of 18 July 2013, not yet reported, paragraphs 16 and 20.

63. In the sixth place, FIFA argues that ESA and the Court should pay due regard to the main principles established by the Commission and the European Union courts.¹⁹

64. In the seventh place, FIFA submits that ESA has referred to internal memoranda and confidential information allegedly received from the Commission whose evidentiary value may be doubted.

65. In the eighth place, FIFA's position is that ESA has failed properly to verify the notified Norwegian measures, has committed a manifest error in holding that the criteria allowing for the inclusion of the entire World Cup on the Norwegian events list have been fulfilled. Alternatively, FIFA claims that ESA committed a manifest error in holding that the restrictions on the exercise of various EEA rights and freedoms resulting from its inclusion on the Norwegian events list do not exceed those which are intrinsically linked to that characterisation and do not go beyond those which are necessary for achieving the Directive's objectives.

The defendant

66. In its preliminary observations, the defendant submits at the outset that it did not have to exercise its own power of decision as such, but its power of review, which is restricted and limited to determining whether Norway has committed any manifest errors of assessment in designating events as being of major importance. The contested decision must thus be read in the light of the notified measures.²⁰

67. According to the defendant, EEA law expressly authorises obstacles to the freedom to provide services, the freedom of establishment, the freedom of competition and the right to property, which are an unavoidable consequence of such a designation. Such obstacles are justified by the objective of protecting the right to information and ensuring wide public access to television coverage of those events.²¹

68. Furthermore, the defendant claims that it is for the Member States alone to determine the events which are of major importance and they have a broad discretion in that respect.²²

69. Second, the defendant argues that the distinction between "prime" and "non-prime" matches is an artificial one and does not necessarily reflect the interest generated

¹⁹ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraphs 14-16, 18 and 21-23, and Case C-204/11 P *FIFA v Commission*, cited above, paragraphs 13-15 and 19-22 and to European Commission Working Document CC TVSF (97) 9/3, cited above, pages 3-5.

²⁰ Reference is made to Case C-201/11 P *UEFA v Commission*, judgment of 18 July 2013, not yet reported, paragraph 109.

²¹ Reference is made to Case C-204/11 P *FIFA v Commission*, cited above, paragraph 11.

²² Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraph 14.

by the individual matches in the World Cup. Moreover, if the distinction were to be adopted, only three out of the sixty-four matches of the final round of the World Cup will be broadcast on free television in the event that the Norwegian national team does not qualify.

70. Third, ESA states that its assessment consists, *inter alia*, in checking whether the inclusion of the events in the list of event of major importance is substantiated by viewing figures provided by Norway. This exercise involves looking at the past figures in order to extrapolate trends for the future and it is therefore inherently limited. ESA avers that it followed the Commission's practice and, in the present case, examined all viewing data submitted by the Norwegian authorities in relation to the 2006 and the 2010 World Cups and also as regards a limited number of matches of the 2002 World Cup.

71. Fourth, the defendant argues that the Norwegian list of events of major importance has no retroactive or immediate effect. As it will enter into force on 1 July 2014, it will not affect the rights already acquired and the contracts already concluded at that date. Thus, according to the defendant, the broadcasting rights for the 2014, 2018 and 2022 World Cup events are unaffected by the contested decision and parties engaging in negotiations on the acquisition of future broadcasting rights will be able to take account of the fact that a certain event constitutes an event of major importance in Norway and that the relevant broadcasting rights enjoy a special status.

72. In its rejoinder, the defendant submits, first, that, pursuant to Article 37(2) of the Rules of Procedure of the Court ("RoP"), the plea concerning the alteration of measures should be rejected as inadmissible, since it was not put forward in the application and is not based on matters of law or of fact which came to light in the course of the procedure. In the alternative, ESA avers that it did examine the Explanatory Memorandum which did not entail any deviations from the document notified in the formal notification proceedings.

73. Second, the defendant argues that non-qualified broadcasters are allowed to exploit their exclusive rights if no qualified broadcaster acquires the rights at market price until ten months before the event takes place. Also, qualified broadcasters having acquired the rights to an event of major importance are under the obligation to broadcast the entire event either live or at a deferred time, thus FIFA's argument is unfounded.

74. Third, ESA avers that it complied with all the requirements of the Directive and with the case law of the European Union courts and that it followed the Commission's practice. Consequently, according to the defendant, it did not commit any manifest error of assessment. Moreover, the defendant argues that the claim in relation to the Commission's request for the removal of several events is not only unsubstantiated, but also does not prove that ESA did not comply with the requirements concerning its supervisory and review task in relation to the Norwegian list. Furthermore, the defendant

observes that it did in fact lead the Norwegian authorities to remove other events initially included in the pre-notified list.

75. As regards the fourth, fifth and sixth general observations made by the applicant, the defendant submits that the practice of other EEA States is irrelevant since each case should be decided on its own merits. Furthermore, ESA contends that it proved that the circumstances in Norway, namely the interest generated by the individual matches of the World Cup, justify the inclusion of the entire World Cup in the Norwegian events list.

76. The defendant argues that, in seeking guidance on the interpretation of the Directive, it has taken into consideration the case law of the European Union courts and applied the most stringent criteria for the approval of the Norwegian list. The defendant avers that it did not consider the World Cup a single indivisible event and assessed the interest generated by the individual matches, applying the principles enshrined in the case law.²³

77. In reply to FIFA's seventh general observation, the defendant contends that it demonstrated its carefulness and impartiality throughout its assessment, aligning its practice with that of the Commission.

European Commission

78. According to the Commission, the standard of review applied by the verifying authority is necessarily restricted to one of manifest error on the part of the EEA Member State. Since the national measures have been adopted in the exercise of a wide margin of discretion by the national authorities and the verifying authority has in respect of such national measures the mere role of reviewer, the obligation on the verifying authority to give reasons for a decision verifying the compatibility with EEA law of the EEA Member State measures listing such World Cup matches is also limited.

79. The Commission further notes that the designating State is free to establish criteria and its own methodological approach in which to present the factual assessment as long as this allows the verifying authority to replicate its findings for the purpose of discharging its verifying function under Article 14(2) of the Directive.

80. Moreover, according to the Commission, since the Norwegian authorities have ensured the non-retroactivity of the contested decision, the holders of rights for broadcast of the World Cup are not adversely affected and their legitimate expectations are in no way interfered with.

²³ Reference is made to Case T-68/08 and Case T-385/07 *FIFA v Commission*, both cited above, and Case C-204/11 P and Case C-205/11 P *FIFA v Commission*, both cited above.

First plea: infringement of the obligation to state reasons

The applicant

81. At the outset, the applicant submits that ESA has infringed an essential procedural requirement, which pursuant to the first paragraph of Article 36 SCA constitutes grounds for annulment, in that it disregarded the obligation, pursuant to Article 16 SCA, to provide adequate and sufficient reasons for holding the Norwegian notified measures compatible with EEA law.

82. FIFA argues that the statement of reasons provided in the contested decision for approving the inclusion of the “non-prime” matches of the World Cup on the Norwegian events list is deficient and flawed in several respects. According to the applicant, none of the reasons given in the contested decision is substantiated or supported by evidence, nor warrants the approval of the inclusion of the entire World Cup on the Norwegian events list.

83. In relation to ESA’s obligation laid down in Article 14(2) of the Directive, the applicant submits that ESA fails to give any indication on the course of action it took to verify the proposed measures’ compatibility with EEA law. Similarly, the applicant claims that ESA has not indicated whether it has examined relevant data other than those available concerning the Norwegian media market and, if so, what that data included.²⁴

84. Moreover, according to the applicant, several recitals in the contested decision on the inclusion of the entire World Cup on the Norwegian list merely reproduce unsupported assertions made in the notification.

85. In addition, the applicant observes that the reference contained in recital 6 in the preamble to the contested decision to recital 49 in the preamble of the Directive, which mentions the World Cup as an example of event of major importance for society, is insufficient to consider it an outstanding event as required by recital 52 in the preamble to the Directive, since the World Cup is, in principle, divisible into different matches or stages, not all of which are necessarily capable of being characterised as an event of major importance.²⁵

86. According to FIFA, popularity is not a relevant criterion for an event to be regarded as of major importance for society within the meaning of the Directive. Furthermore, the applicant submits that the broadcasting of “non-prime” matches has invariably attracted very small Norwegian audiences of the public in general and of “non-

²⁴ Reference is made to Case 24/62 *Germany v Commission* [1963] ECR 63, p. 69.

²⁵ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraph 35.

football fans” in particular and the contested decision does not state that the event interests audiences who would not normally follow it.

87. FIFA argues that not all the matches of the World Cup have traditionally been broadcast on free television in Norway and that broadcast “non-prime” matches attracted only small audiences.

88. The applicant further observes that it cannot be validly held that the “non-prime” matches of the World Cup have a “special resonance” in Norway beyond the circle of those who ordinarily follow football since they affect the matches that Norway may play and the overall result. According to the applicant, this conclusion is based on a presumed indivisibility of the World Cup which case law has rejected.²⁶

89. Moreover, the applicant submits that the reasons given do not support the finding that these restrictions are proportionate and that they do not exceed those which unavoidably arise from the very listing.

90. FIFA contends that the reasons for approving the inclusion of the “non-prime” matches of the World Cup on the Norwegian events list given in the contested decision are vitiated by error and violate Article 16 SCA and that, consequently, the contested decision should be annulled.

91. In its reply, the applicant stresses the case law according to which the reasons for a decision must appear in the actual body of it,²⁷ the decision must be self-sufficient,²⁸ and deficiencies in the statement of reasons for a decision may not be remedied subsequently during court proceedings.²⁹ Moreover, according to the applicant, an argument alleging absence or inadequacy of the reasons stated pertains to an issue of infringement of essential procedural requirements which, involving a matter of public policy, must be raised by the Court of its own motion.³⁰

92. The applicant emphasises that the consultation paper was deficient and inadequate information provided on the data on which the inclusion of the entire World Cup in the Norwegian events list was based. According to FIFA, the generality of the statement of

²⁶ Reference is made to Case T-68/08 *FIFA v Commission*, cited above, paragraph 70, and to FIFA’s appeal: Case C-205/11 P *FIFA v Commission*, cited above, paragraph 35.

²⁷ Reference is made to Case T-68/03 *Olympiaki Aeroporia Ypiresies AE v Commission* [2007] ECR II-2911, paragraph 254.

²⁸ Reference is made to Case T-123/00 *Dr. Karl Thomae GmbH v Commission* [2002] ECR II-5193, paragraph 81.

²⁹ Reference is made to Case 195/80 *Bernard Michel v European Parliament* [1981] ECR 2861, paragraph 22, and Joined Cases T-371/94 and T-394/94 *British Airways & Others v Commission* [1998] ECR II-2405, paragraph 279.

³⁰ Reference is made to Case T-349/03 *Corsica Ferries France SAS v Commission* [2005] ECR II-2197, paragraph 52.

reasons in the contested decision did not allow it to know the grounds on which the defendant approved the inclusion of the entire World Cup on the Norwegian events list nor does it enable the Court to exercise its power of review.

The defendant

93. According to the defendant, the statement of reasons must be adapted to the circumstances of each case. In particular, the defendant submits that the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations must be emphasised. The defendant states that it is not a requirement for the reasoning to go into all the relevant facts and points of law. According to the defendant, whether the statement of reasons meets the requirements of Article 16 SCA must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.³¹

94. The defendant submits that the contested decision, read in its relevant context and taking into consideration the relevant legal rules, is appropriately reasoned in that it fulfils the test under Article 16 SCA.

95. Moreover, ESA points out that the contested decision is closely modelled on Commission Decision 2007/479/EC of 25 June 2007,³² challenged in Case T-385/07 and Case C-204/11 P,³³ and Commission Decision 2007/730/EC of 16 October 2007,³⁴ challenged in Case T-68/08 and Case C-205/11 P.³⁵

96. Given the similarity between the decisions and the deliberate policy of the defendant to adopt, for the sake of homogeneity, the same methodology and a materially similar procedure in dealing with the Norwegian notification as the Commission adopted, and given the similarity of the pleas raised, the defendant contends that it followed the same methodology adopted by the Commission and that has been upheld by the European

³¹ Reference is made to Case E-9/12 *Iceland v EFTA Surveillance Authority*, judgment of 22 July 2013, not yet reported, paragraph 130.

³² Commission Decision 2007/479/EC of 25 June 2007 on the compatibility with Community law of measures taken by Belgium pursuant to Article 3a(1) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 2007 L 180, p. 24).

³³ Reference is made to Case T-385/07 *FIFA v Commission* and the appeal of that judgment in Case C-204/11 P, both cited above.

³⁴ Commission Decision 2007/730/EC of 16 October 2007 on the compatibility with Community law of measures taken by the United Kingdom pursuant to Article 3a(1) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 2007 L 295, p. 12).

³⁵ Reference is made to Case T-68/08 *FIFA v Commission* and the appeal of that judgment in Case C-205/11 P, both cited above.

Union courts. Consequently, ESA submits that the plea of inadequacy of reasons should be similarly dismissed in the present case.

97. The defendant argues further that the reasons given for a measure adversely affecting a person or operator are sufficient if that measure was adopted in circumstances known to that person which enable him to understand the scope of the measure concerning him.³⁶

98. Since the draft Norwegian measures were made public and were the object of a public consultation, according to the defendant, the applicant was fully aware of them and of the data on which they were based and was able to and did actually make representations to the Norwegian authorities.

99. Consequently, the defendant observes that the applicant knew that the final stage of the World Cup was not included in its entirety in a list of major importance irrespective of the interest generated by the individual matches in Norway³⁷ and was in the position to and actually did challenge the lawfulness of the merits of the contested decision.

100. Accordingly, the defendant submits that the first plea concerning the inadequacy of reasons should be dismissed.

101. In its rejoinder, the defendant argues that FIFA's submission relating to the deficiencies of the consultation paper constitutes a new plea which should be rejected as inadmissible pursuant to Article 37(2) RoP. If declared admissible, the Court should reject it as irrelevant, since ESA's task was to review whether the Norwegian authorities had committed a manifest error of assessment in including the World Cup in the list of major events.³⁸

The Norwegian Government and the European Commission

102. In their written observations, the Norwegian Government and the Commission share and support ESA's position. They conclude that the first plea concerning the inadequacy of reasons should be dismissed on the basis that ESA discharged its obligation to state the reasons on which the contested decision was based.

³⁶ Reference is made to Case C-417/11 P *Council v Bamba*, judgment of 15 November 2012, not yet reported, paragraph 54.

³⁷ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraph 41.

³⁸ Reference is made to Case T-68/08 and Case T-385/07 *FIFA v Commission*, both cited above, where the General Court found that the Commission's decisions were adequately reasoned; a finding not reversed by the Court of Justice on appeal.

Second plea: infringement of the EEA Agreement, of the SCA or of any rule of law relating to their application

A – First branch: infringement of Article 14(2) of the Directive and Article 5(2)(d) SCA

The applicant

103. The applicant submits that, in failing adequately to verify the compatibility of the Norwegian measures with EEA law, ESA has disregarded its obligations under Article 14(2) of the Directive and Article 5(2)(d) SCA and, on this ground, the contested decision should be annulled in so far as it concerns the “non-prime” matches of the World Cup.

104. According to the applicant, ESA has endorsed the bare unsupported assertions made by the Norwegian authorities, without assessing the adequacy of the information supplied and without inquiring into the pertinence of the incomplete evidence on which the Norwegian authorities have based the inclusion of the entire World Cup on their events list and, furthermore, did not seek additional information beyond that which was included in the notification.

105. The applicant argues that ESA could not validly approve such an inclusion referring only to the small number of matches and to average viewing figures as provided in the notification and its annexes. According to the applicant, the information supplied could not substantiate the claim that the broadcasting of the World Cup has attracted large television audiences and that it has, especially as regards the “non-prime” matches, special general resonance with those who do not ordinarily follow football.

106. The applicant observes that no viewing data was included in the notification and none appears to have been envisaged by ESA as regards the 1998 World Cup, an event which, in the applicant’s view, was of utmost significance, since this was the last World Cup in which the Norwegian team participated.

107. The applicant submits that ESA disregarded its obligation to verify carefully and impartially the notified measures’ compatibility with EEA law, since, in its observations on the Norwegian notification, FIFA provided it with viewing figures which contradict Norway’s assertions, but ESA did not seek any further clarifications from the Member State.

108. Furthermore, according to the applicant, ESA did not address the matter as to whether unnecessary restrictions are imposed on non-qualified broadcasters, in that such a broadcaster could be legally obliged to sell to a qualified broadcaster the exclusive rights, had it acquired them from FIFA, at a price determined by the Media Authority, even if it deemed such price to be unacceptably low, and even when that price is lower than the price paid by it to FIFA. On the other hand, according to the applicant, a

qualified broadcaster which initially sought to obtain these rights may withdraw its offer if it deems the price determined by the Media Authority to be too high.

109. The applicant concludes that the contested decision should, on this ground, be annulled in so far as it approves the inclusion of the “non-prime” matches of the World Cup on the Norwegian events list.

110. In its reply, the applicant submits that ESA has justified its ratification of Norway’s claims by the latter’s obligation to comply with the duty of loyal cooperation in providing the information relevant to the case.

111. According to the applicant, when as regards the three most recent World Cups, only one was broadcast in its entirety on free television, while of the second only eleven of the sixty-four matches were so broadcast (four live and in full and seven partially and deferred), and of the third forty-eight matches were broadcast on free television (four of which were deferred), ESA’s verification whether the criterion according to which the World Cup has traditionally been broadcast in Norway consisted in an unreserved acceptance of the Norwegian authorities’ unsupported contention in the notification and subsequent unsubstantiated confirmation that this was indeed the case.

112. In order to verify that the broadcast of matches of the World Cup was of significance to those who do not ordinarily follow football, the applicant observes that also the average viewing figures for both “football fans” and “non-fans”, respectively, should have been examined.

113. The applicant submits further that ESA should have insisted that the Norwegian authorities obtained and communicated more comprehensive and pertinent information and fuller appropriate data to enable it to perform a proper verification.

114. In addition, the applicant contends that no evidence was sought or obtained in support of the Norwegian authorities’ claim that the World Cup is among the most popular sporting events in Norway.

115. According to the applicant, ESA did not verify the extent to which, if any, consideration should be given to matches broadcast on Swedish television.

116. Similarly, in verifying whether the restrictions imposed by the Norwegian measures concerning the listed events exceeded those intrinsically linked to listing, the applicant submits that ESA omitted to consider the fact that, whereas a qualified broadcaster is legally entitled to purchase the rights to the World Cup from a non-qualified broadcaster, the latter has no equivalent right to acquire those rights which the qualified broadcaster does not wish to exploit.

The defendant

117. The defendant avers that it exercised its limited power of review and, in that regard, fully complied with its obligation to determine whether Norway committed any manifest errors of assessment in designating events of major importance.

118. According to the defendant, its exercise of scrutiny with regard to the viewing figures available reflects the entire process of verification of the Norwegian measures' compatibility with EEA law. The defendant observes that the outcome of the process of seeking additional information is reflected in the volume of viewing figures provided by the authorities in the course of the procedure, regarding all events listed and in particular viewing figures relating to the World Cup.

119. The defendant submits more specifically that, as confirmed by the Norwegian authorities, the viewing figures provided represent the entirety of viewing figures available to the Norwegian Ministry. According to the defendant, for the 2002 World Cup, all available data were taken into consideration, while for all matches of the 2006 and 2010 World Cups average ratings referring to the entire population were provided as well as average ratings referring to different special groups of viewers for the ten most-watched matches. The defendant observes that of the ten most-watched matches in each of the 2006 and 2010 World Cups only three correspond to "prime" matches whereas the remaining seven most-watched games for each World Cup are spread across all stages of the tournament.

120. According to the defendant, viewing rates referring to the 1998 World Cup were not assessed as they were not available to the Ministry. However, the defendant observes that, given the fact that viewers are generally even more interested in the World Cup when their national team participates, it would seem plausible that the 1998 World Cup attracted an even larger audience in Norway as the Norwegian national football team participated in that tournament.

121. The defendant submits further that the Norwegian authorities confirmed that the World Cup has traditionally been broadcast on free television as was mentioned in the notification, information which was confirmed, moreover, by FIFA's data.

122. The defendant contends, first, that rights already acquired before the entry into force of the Norwegian list are not affected by such list as this will apply only to future rights. Second, procedural provisions and a mechanism for the setting of the market price by an independent authority were established by Norway to prevent unnecessary and unfair restrictions from being imposed on non-qualified broadcasters.

123. In view of the above, ESA submits that it fully and adequately discharged its obligation under Article 14(2) of the Directive and Article 5(2)(d) SCA and thus this branch of FIFA's second plea should be rejected.

124. The defendant stresses in its rejoinder that all matches of the 2006 World Cup were broadcast on free television as well as forty-eight matches of the 2010 World Cup. For the World Cups before 1998, the defendant observes that all broadcasts of the tournament were on free television in the absence of any pay-TV channels. According to the defendant, all these factors were sufficient to establish that the final stage of the World Cup was traditionally broadcast on free television.

125. The defendant reiterates that it meticulously examined the average viewing data and the market shares for the World Cup submitted by the Norwegian authorities as well as the equivalent figures submitted by FIFA and found that this event is among the most popular in Norway among both genders and all age groups.

126. As regards the 1998 World Cup, the defendant argues that, according to the Commission's practice, assessing viewing data for two to three seasons of the tournament is sufficient to draw a conclusion about the importance of an event for the society of that State. Second, the defendant submits that viewing figures for the most recent World Cup are of greater importance in order to extrapolate trends for the future. Third, according to the defendant, even if the non-assessment of the figures of 1998 World Cup were considered an error, this error would not have had a decisive effect in the particular circumstances of the case, since ESA would have reached the same conclusion on the inclusion of the entire World Cup in the light of the viewing figures and market shares for the most recent tournaments.³⁹

127. The defendant further submits that all data received regarding Norwegian channels sufficiently demonstrated that the World Cup has been traditionally broadcast on free television in Norway.

128. The defendant observes that, according to the Norwegian measures, a television channel that has acquired an event of major importance for society is under the obligation to broadcast the entire event either live or at a deferred time.

129. In view of the above, the defendant submits that it properly verified the Norwegian measures and correctly concluded that they are in line with EEA law and their effects do not exceed those intrinsically linked to their inclusion on the list.

The Norwegian Government and the European Commission

130. The Norwegian Government reiterates that it is for the EEA States alone to determine the events which are of major importance for their societies. It argues further that the Norwegian authorities did not consider the World Cup as a single and indivisible

³⁹ Reference is made to Case T-126/99 *Graphischer Maschinenbau GmbH v Commission* [2002] ECR II-2427, paragraph 49 and the case law cited therein, and Case C-132/12 *Stichting Woonpunt and Others v Commission*, judgment of 27 February 2014, not yet reported, paragraph 54.

event and provided figures which were related to different stages of the World Cup and which included viewing figures of both “prime” and “non-prime” matches. Third, the Norwegian Government underlines that it did not base the inclusion of the entire final stage of the World Cup in the list of events of major importance on incomplete evidence.

131. That being said, the Norwegian Government stresses that the relevant question for the Court is not whether the entire final stage of the World Cup is of major importance to the Norwegian society, but whether ESA made a manifest error in approving the inclusion of it in the Norwegian list of events of major importance.

132. The Commission considers that there is no reason to assume that ESA did not fully comply with its obligations during the administrative procedure leading to the adoption of the contested decision.

133. Both the Norwegian Government and the Commission submit that ESA fulfilled its obligations under Article 14(2) of the Directive and Article 5(2)(d) SCA.

B – Second branch: unlawful reliance on recital 49 in the preamble to the Directive

The applicant

134. According to the applicant, one of the reasons on which ESA relied for approving the inclusion of the entire World Cup was the fact that recital 49 in the preamble to the Directive mentions this tournament as an example of an event of major importance for society.

135. FIFA submits that in doing so ESA disregarded the case law of the General Court⁴⁰ and of the Court of Justice,⁴¹ which held, on the contrary, that the World Cup must be regarded as an event which is, in principle, divisible into different matches or stages, not all of which are necessarily capable of being characterised as an event of major importance. Moreover, according to the applicant, the final stage of the World Cup cannot validly be included in its entirety in a list of events of major importance irrespective of the interest generated by the individual matches in the Member State concerned. Thus, the applicant observes that the designation of each match as being an event of major importance may differ from one Member State to another.

136. The applicant states that the defendant committed a manifest error of law which should, in this respect, entail the partial annulment of the contested decision.

137. In its reply, the applicant submits further that the weight and relevance accorded by ESA to recital 49 in the preamble to the Directive in approving the inclusion of the

⁴⁰ Reference is made to Case T-68/08 *FIFA v Commission*, cited above, paragraphs 69 and 114.

⁴¹ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraphs 34, 35 and 41.

World Cup on the Norwegian events list are not disclosed. According to the applicant, to the extent that ESA has relied on that recital, it has committed a manifest error.

The defendant

138. The defendant agrees with the applicant that, in view of the statements by the Court of Justice, the process of including the entire final stage of the World Cup in a national list of major events cannot be automatic, unfounded or lacking any justification. On the contrary, the defendant submits that the EEA State has to provide reasons justifying whether the individual matches comprising the World Cup attract sufficient attention.

139. According to the defendant, Norway was correct to refer to the World Cup as a single event in its notification,⁴² since, at the time, the Court of Justice had not yet delivered its appeal judgments.⁴³ In any event, the defendant avers that it found Norway to have communicated the reasons why the entire final stage of the World Cup was included in the list, stating that it is among the most popular sports events in Norway, it has traditionally been broadcast on free television and the different matches are interdependent.

140. Moreover, the defendant argues that the Ministry submitted at its request very analytical data, in particular on the audience ratings, ratings percentages and market shares for the entire population and for several population groups for numerous matches of the World Cup in the years 2002, 2006 and 2010.

141. The defendant avers that, in reaching its conclusion that the Norwegian authorities had not committed a manifest error of assessment when they decided to include the World Cup in its entirety in the Norwegian list of major events, it did not rely on recital 49 alone regardless of the interest generated by the individual matches. On the contrary, according to the defendant, the interest generated by individual (“prime” and “non-prime”) matches was assessed. Thus, the defendant submits that this branch of FIFA’s second plea should be rejected.

The Norwegian Government

142. According to the Norwegian Government, the World Cup must be regarded as an event which is, in principle, divisible into different matches or stages, not all of which are necessarily capable of being characterised as an event of major importance.

143. The Norwegian Government submits that it is relevant to take into account, when interpreting a directive, any statements in the preamble concerning the relevant article.

⁴² Reference is made to Case T-68/08 *FIFA v Commission*, cited above, paragraph 70.

⁴³ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above.

Clearly recital 49 in the preamble to the Directive is relevant to the interpretation of Article 14 of the Directive, as it provides examples of events which may fall within the scope of the Article.

144. According to the Norwegian Government, ESA, in reaching its conclusion that the Norwegian authorities had not committed a manifest error of assessment when including the entire final stage of the World Cup in the Norwegian list of major events, did not rely on recital 49 alone regardless of the interest generated by the individual matches.

European Commission

145. According to the Commission, the fact that the Court of Justice considered the World Cup divisible into different matches or stages requires the Member States to provide evidence that also “non-prime” matches are events of major importance to society. The Commission observes that this should be ascertained with reference to each Member State’s specific situation.

146. Consequently, the Commission states that Member States must provide the reasons why these matches could attract interest amongst their population and it is then for the verifying authority to discharge its obligation, assessing whether the notifying Member State has complied with EU/EEA law in designating the entire final round of the World Cup as an event of major importance for the society of that Member State.

147. The Commission submits that, in the present case, ESA sets out in a comprehensive manner the reasons that led it to approve the Norwegian authorities’ listing of the entire final round of the World Cup and Norway’s qualifying matches as an event of major importance. Despite the fact that, at the time of the notification, the Court of Justice had not yet delivered its appeal judgment,⁴⁴ according to the Commission, ESA did ask the Norwegian authorities to communicate the reasons why the entire event in question was considered of major importance for Norwegian society and Norway did indeed communicate those data.

148. The Commission observes that, on the basis of those data, ESA found that the decision of the Norwegian authorities was based on appropriate data and that those authorities did not commit a manifest error in their appreciation. Therefore, according to the Commission, the contested decision was based on an actual assessment of the measures notified by Norway and not on the mere interpretation of recital 49 in the preamble to the Directive.

C – Third branch: manifest error in holding that the “non-prime” matches of the World Cup satisfy the requirements justifying their characterisation as events of major importance for Norway’s society and their inclusion on the Norwegian events list

⁴⁴ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above.

The applicant

149. FIFA reproaches ESA for committing a manifest error of assessment in holding that the criteria on which the Norwegian authorities based the inclusion of the entire World Cup on the events list have been fulfilled.

150. The applicant submits at the outset that the defendant has failed properly to conduct the verification of the notified measures' compatibility with EEA law and to comply with the principle of good administration. Rather than basing its decision on the information and data which the Norwegian authorities alleged to have been the only such available and which it wrongly found both sufficient and adequate, in the applicant's view, ESA should have required the Norwegian authorities to supply information, data and evidence demonstrating that the criteria upon which the entire World Cup was included on the events list were fulfilled, and withhold its decision until such data and information had been provided.

151. Moreover, FIFA submits that the "non-prime" matches of the World Cup do not satisfy the criteria of events of major importance for Norwegian society within the meaning of Article 14(1) of the Directive, and may not be regarded as outstanding events which are of interest to the general public in Norway.

152. In the first limb of the third branch of the second plea, FIFA submits that ESA has committed a manifest error in holding that the World Cup has traditionally been broadcast in Norway on free television.⁴⁵

153. According to FIFA, the statistical data contained in the notification could not have allowed ESA to reach the conclusion that the matches of the World Cup have been traditionally broadcast on free television in Norway.

154. FIFA submits that, of the three World Cups considered in the contested decision, only the 2006 World Cup was broadcast in its entirety on free television channels in Norway.

155. FIFA observes that, of the sixty-four matches played within the framework of the 2002 World Cup, only eleven matches were broadcast on free television in Norway, and only four of these live and in full. Except for the three "prime" matches and the opening match, the other seven matches were subject to only a partial and deferred broadcast in Norway.

156. Moreover, according to the applicant, the reference to the matches which were broadcast on Swedish television channels⁴⁶ is misleading, unsubstantiated and is of no

⁴⁵ Reference is made to recital 9 in the preamble to the contested decision.

⁴⁶ Reference is made to Annex A.2 – Annex III relating to the 2002 World Cup.

relevance to the inquiry whether the matches of the tournament were broadcast on free television channels in Norway. FIFA submits that, in all cases, the broadcasting by broadcasters in countries other than Norway cannot be validly taken into account in verifying whether the matches of the World Cup have been traditionally broadcast on free television in Norway.

157. According to the applicant, within the framework of the 2010 World Cup, only forty-eight of a total of sixty-four matches were broadcast on free television channels in Norway. The applicant observes that the statistical viewing data contained in the notification relate to only ten matches. The applicant submits that this could not provide any basis for ESA's holding that the World Cup has traditionally been broadcast in Norway.

158. In these circumstances, according to the applicant, ESA should have had doubts as to the validity of the designation of the entire World Cup as an event of major importance for society by reference to this criterion.

159. Consequently, FIFA submits that the defendant erred in holding that the World Cup has traditionally been broadcast in Norway by free broadcasters. The finding that this criterion has been fulfilled and that, on this ground, the "non-prime" matches of the World Cup have been lawfully included on the Norwegian events list is, according to the applicant, vitiated by manifest error which should entail the annulment of the contested decision in this respect.

160. In its reply, FIFA observes that there is nothing in the arguments advanced by ESA to uphold the factually erroneous finding that the World Cup has traditionally been broadcast on free television in Norway and to justify, on that misrepresented count, the inclusion of this competition in its entirety on the Norwegian events list.

161. In the second limb of the third branch of the second plea, FIFA submits that ESA committed a manifest error in holding that the "non-prime" matches of the World Cup have attracted large television audiences in Norway.⁴⁷

162. According to the applicant, the figures supplied in the notification are not such as to warrant the finding that the broadcasting of the "non-prime" matches of the World Cup on free television has commanded large television audiences in Norway. The applicant submits further that neither market shares and audience ratings by channel, nor the numbers of viewers per age and per gender, also by channel, permit it to be ascertained whether the broadcasting of the matches of the World Cup has attracted large audiences by reference to the potential Norwegian viewing population.

⁴⁷ Reference is made to recital 9 of the contested decision.

163. According to the applicant, only the average viewing figures of the “non-prime” matches of the World Cup, by reference to the potential viewing public in Norway, can allow it to be ascertained whether the broadcast of these matches attracted a large television audience.

164. In this regard, FIFA submits that surveys and analysis of the viewing figures of the two most recent World Cups, which it commissioned from TNS Gallup (Oslo),⁴⁸ demonstrate that the World Cup, especially the “non-prime” matches, have never attracted large Norwegian television audiences.

165. The applicant observes that no viewing figures are given in the notification and its annexes in relation to the 1998 World Cup despite the fact that this was the last time that Norway’s team qualified for, and participated in, the World Cup.

166. Since the final stage of the World Cup cannot validly be included in its entirety in a list of events of major importance irrespective of the interest generated by the individual matches in the Member State concerned,⁴⁹ and the viewing figures of the last four World Cups, from 1998 to 2010, unequivocally demonstrate that the “non-prime” matches of the World Cup, whether Norway has participated in that competition or not, have never elicited large public interest or attracted large television audiences justifying their listing, it is FIFA’s contention that ESA erred in holding that the broadcasting of the World Cup on free channels in Norway has attracted a large television audience. According to the applicant, the finding that this criterion has been fulfilled and that, on this ground, the “non-prime” matches of the World Cup have been lawfully included in the Norwegian events list is vitiated by manifest error which should entail the annulment of the contested decision in this respect.

167. In its reply, the applicant submits that, with a view to justifying the inclusion of the entire World Cup on an events list, the distinction between “prime” and “non-prime” matches is not artificial, although, naturally, the importance accorded to “prime” matches may not be equivalent to that of the “non-prime” matches.⁵⁰ Namely, according to the applicant, when an events list purports to include all the matches of the World Cup, it has to be shown that the broadcasting of both categories of match, “prime” and “non-prime”, has commanded large television audiences. According to FIFA, the viewing figures provided by the Norwegian authorities did not allow it to be ascertained whether that was the case and, consequently, ESA erred in holding that this criterion has been fulfilled.

⁴⁸ The TNS Gallup TV panel is acknowledged to constitute the official TV figures in Norway (see Annex A.2 – Annex III).

⁴⁹ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraph 41.

⁵⁰ *Ibid.*, paragraph 33.

168. In the third limb of the third branch of the second plea, FIFA submits that ESA has committed a manifest error in holding that the “non-prime” matches of the World Cup have a special general resonance in Norway⁵¹, and are not simply of significance to those who ordinarily follow football.

169. According to the applicant, the alleged great interest that the Norwegian public and media take in the World Cup does not cover the whole competition and is limited to the final (“prime”) matches.

170. Moreover, the applicant observes that the special general resonance of “non-prime” matches cannot be inferred from the fact that these matches may affect the matches that Norway may play as well as the overall result. FIFA submits that the pertinence of this consideration has been rejected⁵² and, more generally, Norway’s participation or non-participation in the World Cup has no impact on the number of viewers, especially those who do not ordinarily follow football, of the television broadcast of “non-prime” matches which is, invariably, low.

171. According to the applicant, only the average viewing figures for “non-football fans” compared with “football fans” allows it to be ascertained whether the “non-prime” matches of the World Cup are of significance to those who do not ordinarily follow football and, therefore, that these matches have a special general resonance in Norway. The applicant submits that no such figures are mentioned in the contested decision and none have been included in the notification to ESA.

172. The applicant states that the viewing figures for the 2006 and the 2010 World Cups presented in the TNS Gallup Report that FIFA has submitted are based on a workable distinction of that kind between “football fans” and “non-fans” and clearly disprove any claim that the matches of the World Cup, especially the “non-prime” matches, enjoy a special resonance in Norway, in the sense that they are of significance to those who ordinarily do not follow football.

173. According to the applicant, neither market shares and audience ratings, nor the numbers of viewers per age and per gender⁵³ warrants the finding that “non-prime” matches of the World Cup have a special general resonance in Norway. The applicant observes that the average viewing figures according to gender, provided in the TNS Gallup Report, also invalidate this conclusion.

⁵¹ Reference is made to recital 9 in the preamble to the contested decision.

⁵² Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraphs 32-33, and Case C-204/11 P *FIFA v Commission*, cited above, paragraphs 31-34.

⁵³ Reference is made to Annex A.2 – Annex III.

174. The applicant submits that the assertions made in the notification and the inadequate and fragmentary data provided in its annexes could not have been validly relied upon by ESA in order to approve the designation of the entire World Cup as an event of major importance for Norwegian society.

175. FIFA contends that ESA committed a manifest error in holding that the criteria for including the “non-prime” matches of the World Cup on the Norwegian events list have been fulfilled and that, on this ground, the contested decision should be annulled in this respect.

The defendant

176. Referring to the guidelines developed by the Commission to test whether an event may be considered of major importance for a particular society,⁵⁴ the defendant concludes that the entire World Cup satisfies at least three of those conditions in relation to Norway, first, it has traditionally been broadcast on free television attracting large audiences; second, it has a special general resonance in Norway and, third, it involves the Norwegian national team.

177. Under the first limb of the third branch of the second plea, the defendant avers that on several occasions it received confirmation from the Norwegian authorities that the final stage of the World Cup has traditionally been broadcast on free television in Norway. Moreover, according to the defendant, all viewing figures and ratings provided to it concern broadcasts on free television in the possession of the Norwegian authorities.

178. The defendant contends that it took account of the fact that the tournament, in its entirety or the vast majority of the matches, had traditionally been broadcast on free television channels and commanded large television audiences.⁵⁵

179. According to the defendant, the Norwegian authorities complied with their duty of loyal cooperation and provided all information of relevance to the case. The defendant was therefore in a position to make a definitive assessment of the Norwegian measures.

180. Regarding the submission of the applicant according to which only a limited number of matches of the 2002 World Cup were broadcast on free television, the defendant claims that the 2002 World Cup is an example of the situation that Norway intends to avoid by including the entire final stage of the tournament in the Norwegian list.

⁵⁴ See paragraph 21 of the present Report for the Hearing.

⁵⁵ Reference is made to recital 9 in the preamble to the contested decision and to Case C-205/11 P *FIFA v Commission*, cited above, paragraph 50.

181. According to the defendant, the viewing figures submitted by FIFA for 2006 confirm that the entire World Cup was broadcast on free television (i.e. sixty-four matches) with the figures for the 2010 World Cup confirming that the vast majority of the matches of that tournament (forty-eight of a total of sixty-four games) were also broadcast on free television.

182. The defendant adds that the broadcasting rights for the 2014, 2018 and 2022 World Cups have already been acquired for the Norwegian market. As regards the 2014 World Cup, forty-six of the sixty-four matches will be broadcast on free television.

183. As regards the issue of deferred television coverage, the defendant observes that the contested decision refers to broadcasts on free television and not those that were necessarily broadcast live.⁵⁶

184. The defendant argues further that it did not entertain any doubts on the designation of the World Cup in the Norwegian events list as the data submitted by the Norwegian authorities substantiate the valid inclusion of the World Cup in its entirety in the Norwegian list.

185. The defendant concludes therefore that it did not err in accepting that the World Cup has traditionally been broadcast on free television in Norway and, thus, that FIFA's allegation in this respect should be rejected.

186. In its rejoinder, the defendant reiterates that the pattern of broadcasting the 2006 and 2010 World Cups as well as the future pattern until 2022 World Cup (the year up to which the broadcasting rights have been purchased for the Norwegian market) was sufficient for ESA to establish a "tradition" of broadcasting on free television.

187. The defendant underlines that the matches of the 2002 World Cup broadcast on Swedish channels were not taken into consideration, since ESA was not in a position to know the Swedish broadcasters' identity, character (free or pay TV) and coverage in Norway. The approval of the Norwegian list thus was not based on the broadcasts of the Swedish channels in Norway.

188. Under the second limb of the third branch of the second plea, the defendant avers that, in its assessment of the Norwegian measures, it took into consideration the fact that the World Cup, both the "prime" and "non-prime" matches, attracted large audiences in Norway.⁵⁷

189. The defendant argues that the comparison between "prime" and "non-prime" matches is artificial and irrelevant, since, for the purposes of the inclusion of the "non-

⁵⁶ Reference is made to Case T-385/07 *FIFA v Commission*, cited above, paragraph 103.

⁵⁷ Reference is made to recital 9 of the contested decision.

prime” matches in the list of events of major importance for society, what is significant is whether the requirement of attraction of large audiences is fulfilled in general terms in the sense that the matches generate interest.⁵⁸

190. The defendant submits that its assessment of the large audience was based on the previous Commission practice in this field and on the viewing figures it received from the latter by way of example in relation to the lists of other EEA States. It thus considered the average viewing rates provided by FIFA satisfactory to substantiate the inclusion of the entire World Cup in the Norwegian list.

191. Moreover, the defendant contends that it assessed the method chosen by the Norwegian authorities for measuring the interest an event generates and thus its importance for society, i.e. the average audience ratings (for the entire population and also by gender and age) and the market shares provided.⁵⁹ The defendant avers that it expressly requested the Norwegian authorities to provide viewing figures for “prime” and “non-prime” matches and that Norway responded to this request, providing for the 2006 and 2010 World Cups average viewing figures and market shares for the entire population as well as for several categories of viewers on the basis of gender and age group, and in addition the figures relating to the ten most-watched games of the 2006 and 2010 World Cups as well as the equivalent data for certain matches of the 2002 World Cup. According to the defendant, those data confirmed that even “non-prime” matches generate significant interest in Norway.

192. ESA submits further that other factors should not be disregarded, such as the teams playing and the time of the day when a match is broadcast, which may influence the number of viewers watching it.⁶⁰

193. On the basis of those data, the defendant concludes that the Norwegian measures were justified in considering the final stage of the World Cup as a unique event which must be regarded in its entirety as being of major importance for Norwegian society and not a compilation of individual events divided into matches of different levels of interest.⁶¹

194. As regards FIFA’s allegation that ESA did not assess data for the 1998 World Cup, the defendant submits, first, that it was not deemed necessary to go back that far in time in order to make a projection for the future; second, the defendant avers that it

⁵⁸ Reference is made to Cases T-385/07 *FIFA v Commission*, cited above, paragraph 105 and T-68/08 *FIFA v Commission*, cited above, paragraph 123.

⁵⁹ Reference is made to Case T-68/08 *FIFA v Commission*, cited above, paragraph 87.

⁶⁰ Reference is made to Case T-68/08 *FIFA v Commission*, cited above, paragraph 129, and Case T-385/07 *FIFA v Commission*, cited above, paragraph 108.

⁶¹ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraph 41.

followed the Commission's practice and thus discharged its task by assessing data from 2006 and 2010 as well as the available data from 2002.

195. Under the third limb of the third branch of the second plea, the defendant reiterates that its obligation was to assess whether the Norwegian authorities had made a manifest error of assessment in suggesting that at least two out of the four indicators that may be retained for an event to be regarded of major importance for society⁶² were satisfied in order to verify whether the inclusion of the World Cup in its entirety in the Norwegian list of events of major importance was in compliance with EEA law. The defendant contends that it took account of the reasons presented, examined the methodology employed and investigated the figures provided by the Norwegian authorities.

196. The defendant avers that it assessed the viewing figures provided and concluded that the methodology employed by Norway to demonstrate the special general resonance of the World Cup in that State was not manifestly erroneous but, on the contrary, was reasonable and acceptable.

197. According to the defendant, the alternative methodology proposed by FIFA was, first, not appropriate and clear for application in measuring the special general resonance of the World Cup in Norway.⁶³ Second, the defendant observes that FIFA's methodology and the data it generated do not provide any grounds to support the contention that the methodology employed by the Norwegian authorities was manifestly erroneous. Third, even under the FIFA methodology, the defendant notes that a large audience was attracted both by "prime" and "non-prime" matches, and that this holds true also for the female population.

198. In its rejoinder, the defendant submits that the mere fact that there might be other methods measuring the special general resonance of the World Cup in a different manner, whether or not produced by specialised media research companies, such as the one commissioned by FIFA and produced for it by TNS Gallup, cannot as such discredit the methodology opted for by the Norwegian Ministry and assessed by ESA.

199. Moreover, according to the defendant, the methodology favoured by FIFA is based on a distinction between "fans" and "non-fans" that could be characterised as arbitrary. Further, its reference to the absolute number of viewers can be misleading by definition as it does not take into consideration the total number of viewers watching television programmes at the time the World Cup matches are broadcast. The defendant contends that circumstances such as the time of the broadcast have significant impact on whether both "fans" and "non-fans" actually opt to watch a match.

⁶² See paragraph 21 of the present Report for the Hearing.

⁶³ Reference is made to Case T-385/07 *FIFA v Commission*, cited above, paragraph 102.

200. The defendant avers that it did not err in not identifying a manifest error in the methodology employed by the Norwegian authorities and in their conclusion that the World Cup has a special general resonance in Norway. Thus, according to the defendant, also the third branch of the applicant's second plea should be rejected.

The Norwegian Government

201. The Norwegian Government maintains that ESA did not manifestly err in approving the inclusion of the entire final stage of the World Cup in the list of events of major importance.

202. The Norwegian Government submits that ESA did not make a manifest error in concluding that the World Cup has traditionally been broadcast on free television in Norway, that it has a special general resonance in Norway and that the "non-prime matches" of the World Cup have attracted large television audiences in Norway.

203. The Norwegian Government agrees with ESA that other factors, such as the teams playing and the time of the day that a game is broadcast, may influence the number of viewers watching it. Moreover, according to the Norwegian Government, it is impossible to know in advance which specific games in a championship will attract large interest and many viewers and to know, at the time the broadcasting rights are sold, how the national team will perform.

204. The Norwegian Government emphasises in addition that the entire World Cup, including both the "prime" and the "non-prime" matches, also involves the national team. According to the Norwegian Government, the fact that the national team has not participated in the final stage of the World Cup since 1998 is not of decisive importance, because the absence of the national team is usually not established until after the list of events of major importance for society has been drawn up and after the television broadcasting rights have been sold for the relevant year.

European Commission

205. The Commission observes at the outset that, according to recital 53 in the preamble to the Directive, the term "free television" extends to public or commercial broadcasts publicly accessible without payment in addition to the widely prevailing funding modes in each Member State. According to the Commission, consideration of broadcast activities originating outside Norway may therefore be relevant to the verification of the notified measures to the extent that these form an integral element of Norwegian television broadcasting.

206. As regards FIFA's assertion that the number of matches considered did not allow ESA to conclude that the World Cup had traditionally been broadcast on free television in Norway, the Commission emphasises that the criterion, which does not follow directly

from the Directive, to the extent it is relied on by the notifying state, is subject to the latter's interpretative discretion within the boundaries of the manifest error test established by the European Union courts. According to the Commission, the applicant did not clearly demonstrate a manifest error by way of appropriate evidence and, as a result, there is no basis for a plea of annulment on these grounds in respect of the number of matches broadcast on free television.

207. As regards the criterion of commanding large television audiences, the Commission observes that FIFA's assertions appear to be contradictory and without relation to the wording of the criterion itself. According to the Commission, audience figures can be expressed either in absolute terms or in relation to another relevant measurement. The Commission finds that ESA's assessment of the numbers presented by the Norwegian authorities in support of their appraisal and of the method chosen by the Norwegian authorities in order to measure the interest an event generates and thus its importance, i.e. average viewings and market shares must be considered correct.

208. As regards the application of the special general resonance test, the Commission contends that FIFA's proposed methodology must be rejected on several grounds. According to the Commission, neither the Directive nor the criteria used as indicators for determining the major importance of an event within the meaning of Article 14(1) of the Directive implies any specific method for assessing this importance. In its view, the data provided by the Norwegian authorities are such as to warrant a finding that the "non-prime" matches do enjoy a special resonance in a wider section of Norwegian society.

209. Moreover, the Commission emphasises the fact that responsibility for the completeness of the notified measures and possible supporting materials resides with the notifying state. In the absence of any manifest error on the latter's behalf, which must lead the verifying authority to reject the notified measures, the Commission states that there is no basis for ESA to go beyond the inherently restricted nature of its power of review.

D – Fourth branch: the approval of the inclusion of the "non-prime" matches of the World Cup on the Norwegian events list entails unnecessary and disproportionate restrictions on the exercise of EEA rights and freedoms which exceed those intrinsically linked to their inclusion on a list drawn up pursuant to Article 14(1) of the Directive

The applicant

210. The applicant submits at the outset that restrictions on the exercise of European and EEA rights and freedoms may be imposed in the pursuit of legitimate objectives in the public interest. According to the applicant, restrictive measures, including those applying indistinctly to national and other Member States' service providers and which are liable to prohibit or impede the activities of the latter, must be non-discriminatory,

necessary and proportionate to the attainment of such objectives and must reflect a genuine concern to achieve such objectives in a consistent and systematic manner.⁶⁴

211. According to the applicant, the Court of Justice has emphasised that the very listing itself entails unavoidable⁶⁵ and inevitable⁶⁶ obstacles to certain European freedoms and rights. It has underlined that the Commission is required to verify, *inter alia*, whether the designation of an event as being of major importance for society is compatible with the general principles of proportionality and non-discrimination, with the principles of the freedom to provide services and the freedom of establishment and with the rules on free competition.⁶⁷ When an event has validly been designated by a Member State as being of major importance, the Commission must inquire whether the effects of that designation on the freedom to provide services, the freedom of establishment, the freedom of competition and the right to property do not exceed those which are intrinsically linked to the inclusion of that event in the list.⁶⁸

212. According to the applicant, the defendant has erred in holding that the designation of the entire World Cup as an event of major importance for Norwegian society was compatible with EEA law and that the restrictions on EEA rights and freedoms entailed by the Norwegian measures were appropriate and proportionate for attaining the legitimate objective sought. On these grounds, the applicant submits that the contested decision should be annulled in so far as it concerns the “non-prime” matches of the World Cup.

213. FIFA contends that the Norwegian measures, as approved by the contested decision, are disproportionate in that they impose no obligation on qualified broadcasters to acquire rights to the listed events in general and to the World Cup in particular. According to the applicant, non-qualified broadcasters will have no incentive to acquire exclusive rights to these events since they will be precluded from exploiting them and constrained to sell them to a qualified broadcaster who offers to buy them, at a price which could be determined by the Media Authority. Moreover, the applicant observes that it is for the qualified television broadcaster which acquired exclusive rights to decide whether, and if so, which matches of the World Cup will be broadcast. According to the applicant, qualified broadcasters do not have a legal obligation to offer to qualified and/or non-qualified broadcasters rights which they do not wish to exploit. In these

⁶⁴ Reference is made to Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55, Case C-153/08 *Commission v Spain* [2009] ECR I-9735, paragraph 38, and Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 51. Reference is also made to Case E-1/06 *ESA v Norway* [2007] EFTA Ct. Rep. 8, paragraph 43, and Case E-3/06 *Ladbroke* [2007] EFTA Ct. Rep. 86, paragraph 53.

⁶⁵ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraph 12.

⁶⁶ *Ibid.*, paragraph 22.

⁶⁷ *Ibid.*, paragraph 19.

⁶⁸ *Ibid.*, paragraphs 23, 126 and 131.

circumstances, the applicant observes that it is possible that listed events, including the World Cup, will not be broadcast at all. The applicant submits that the restrictions entailed by the Norwegian measures, as approved by the contested decision, are therefore not suitable or appropriate for attaining the objective sought by the Directive and do not reflect a genuine concern to achieve it in a consistent and systematic manner.

214. Moreover, according to the applicant, except in special circumstances, none of the matches of the final stage of the World Cup (including those which attract a very small audience) may be broadcast on an exclusive basis by non-qualified broadcasters, whereas all the matches of the qualifying stage of the World Cup played by teams other than the Norwegian team may be broadcast in this way by non-qualified broadcasters (regardless of the size of the viewing audience).

215. The applicant claims that in citing reasons which equally apply to both the “non-prime” matches of the World Cup and to the qualifying matches played by teams other than the Norwegian team, while including on the list only the former, ESA has approved restrictions on the exercise of EEA rights and freedoms by rights holders to the World Cup and by “non-qualified” broadcasters in respect of this entire competition which may not be deemed to genuinely reflect a concern to attain in a consistent and systematic manner the objective of ensuring wide access by the public to television coverage of events of major importance for society.⁶⁹

216. In FIFA’s submission, ESA has committed a manifest error in holding the designation of the entire World Cup, especially the “non-prime” matches, as an event of major importance for Norwegian society to be valid and compatible with EEA law. On the contrary, according to the applicant, the effects of the approval of the Norwegian measures are, as far as the “non-prime” matches of the World Cup are concerned, disproportionate and exceed those which are intrinsically linked to their inclusion on the Norwegian events list.

217. FIFA argues further that its property rights are unduly and severely interfered with. The elimination of any real competition between qualified and non-qualified broadcasters for the acquisition of the broadcasting rights to the World Cup impacts detrimentally on the price which FIFA may be able to obtain for granting broadcasting licences and, consequently, on FIFA’s ability to discharge its various statutory obligations and tasks.

218. As regards the restrictions on the freedom to provide services, according to the applicant, ESA did not go far enough, concluding simply that the Norwegian measures appear proportionate,⁷⁰ whereas, in fact, these restrictions largely exceed the intrinsic

⁶⁹ Reference is made to recital 49 in the preamble to the Directive.

⁷⁰ Reference is made to recital 16 in the preamble to the contested decision.

effects which may be deemed inevitably entailed by the inclusion of the entire World Cup on the Norwegian events list.

219. As for the restrictions on the freedom of competition, FIFA submits that the assessment of the defendant fails to address the crucial issue of the actual total exclusion of non-qualified broadcasters from such a competition, even when qualified broadcasters do not wish to acquire the broadcasting rights to the World Cup.

220. According to the applicant, ESA should have assessed the proportionality of the measures in respect of each restriction and each relevant right or freedom. On the contrary, the applicant observes that the factors alleged to support the general proportionality of the Norwegian measures do not prove that the restrictions on the exercise of EEA rights and freedoms at stake were unavoidable consequences which do not exceed those intrinsically linked to the designation of the entire World Cup as an event of major importance for Norwegian society within the meaning of the Directive.

221. The applicant submits further that the defendant should have given due regard to the practice of those EEA States that have drawn up lists pursuant to the Directive and not included the entire World Cup on their events list.⁷¹

222. FIFA concludes that the contested decision should be annulled in so far as it approves the inclusion of the “non-prime” matches of the World Cup on the Norwegian events list.

The defendant

223. The defendant submits at the outset that the assessment of the possible disproportionate nature of a provision of EEA law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms.⁷² According to the defendant, recitals 48 and 49 in the preamble to the Directive aim to achieve this balancing of interests.

224. Second, the defendant states that the European Union legislature has expressly authorised obstacles to the freedom to provide services, the freedom of establishment, the freedom of competition and the right to property, which are an unavoidable consequence of such a designation.⁷³

⁷¹ Reference is made to Case C-137/09 *Marc Michel Josemans v Burgmeester van Maastricht* [2010] ECR I-13019, paragraphs 36 and 37, Case C-333/08 *Commission v France* [2010] ECR I-757, paragraph 105, and Case C-421/09 *Humanplasma v Austria* [2011] ECR I-12869, paragraph 41.

⁷² Reference is made to Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk*, judgment of 22 January 2013, not yet reported, paragraph 60 and case law cited therein.

⁷³ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraph 12.

225. As regards property rights, the defendant submits that the potential reduction in revenues suffered by sport organisations must be regarded as included within the notion that obstacles to the right to property are an inevitable consequence of the valid designation of the World Cup as an event of major importance for Norwegian society. Moreover, according to the defendant, the protection of the fundamental right to property is not absolute and must be viewed in relation to its social function.⁷⁴ The defendant observes that the Directive aims at drawing a balance between the right to property and the right to information in the form of wide public access to television broadcasts of events, national or non-national, of major importance for society.

226. Furthermore, according to the defendant, the lack of retroactive effect – i.e. the Norwegian authorities will start applying the measures only to agreements which are entered into after the list comes into force – goes further to disproving the arguments put forward by FIFA relating to the violation of its property rights. Since the Norwegian measures do not apply to broadcasting rights already acquired and having an asset value, the defendant submits that the protection of the fundamental right to property guaranteed by EEA law cannot be invoked in relation to commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.⁷⁵ Moreover, according to the defendant, FIFA did not adduce any evidence to substantiate its claim that the obstacles to its alleged property rights exceed those which are intrinsically linked to their inclusion on the Norwegian events list.

227. The defendant submits that the restrictions on the freedom to provide services are justified since they are intended to protect the right to information and to ensure wide public access to television broadcasts of events of major importance to society. Moreover, according to the defendant, these restrictions are also appropriate, necessary and proportionate and are inherently linked to the valid designation of the World Cup as an event of major importance for Norwegian society. Finally, the defendant observes that FIFA did not provide any evidence to substantiate its claim that these restrictions largely exceed the intrinsic effects which may be deemed inevitably entailed by the inclusion of the entire World Cup on the Norwegian events list.

228. As regards freedom of competition, the defendant claims that the purpose of the Directive is to ensure that EEA citizens have access to broadcasts of events of major importance without having to pay additional fees. Moreover, contrary to FIFA's submission, the defendant states that non-qualified broadcasters are not excluded from competing for the rights since they may exercise an exclusive right to a listed event if no requests for resale have been received from any qualified broadcaster within ten months before the event takes place or no qualified television channels are willing to acquire the broadcasting rights at market price.

⁷⁴ Ibid., paragraph 143 and case law cited therein.

⁷⁵ Reference is made to *Sky Österreich GmbH*, cited above, paragraphs 34, 39 and 64.

229. The defendant submits that several factors support and reinforce the proportionality of the Norwegian measures: first, the requirement of potential coverage as opposed to actual national coverage; second, the arrangements providing for the re-licensing of exclusive rights by non-qualified broadcasters; third, the establishment of a dispute resolution mechanism for determining the remuneration for the resale of the rights between non-qualified and qualified broadcasters; fourth, the possibility for a non-qualified broadcaster to sell the rights to parts of an event if it does not receive any offers from qualified broadcasters; and, fifth, the absence of retroactive effect of the list.

230. According to the defendant, the fact that other EEA States have not included the World Cup in its entirety in their national lists of major events is irrelevant, since it is for the Member States alone to determine the events which are of major importance and they have a broad discretion in this respect due to the considerable social and cultural differences that exist across the EEA.⁷⁶

231. The defendant concludes therefore that the inclusion of the World Cup on the Norwegian list of major events does not entail restrictions on EEA rights and freedoms which exceed those intrinsically linked to its designation as an event of major importance.

The Norwegian Government

232. The Norwegian Government maintains that the effects of the designation of the entire final stage of the World Cup, including both the “prime” and the “non-prime” matches, as an event of major importance are intrinsically linked to the inclusion of the event in the list and, thus, are proportionate.

233. The Norwegian Government emphasises that the EEA States enjoy a broad margin of discretion in designating events as being of major importance and, accordingly, ESA is required to carry out a limited review of the national measures. According to the Norwegian Government, ESA should examine only the effects of that designation on the freedom to provide services, the freedom of establishment, the freedom of competition and the rights to property which exceed those which are intrinsically linked to the inclusion of that event in the list provided for in Article 14(1) of the Directive.⁷⁷

234. The Norwegian Government maintains that nothing in this case suggests that the effects on the freedom to provide services and on the freedom of competition go beyond those which are intrinsically linked to the inclusion of the final stage of the World Cup in the list of events of major importance.

⁷⁶ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraphs 14 and 15.

⁷⁷ Reference is made to Case C-205/11 P *FIFA v Commission*, cited above, paragraph 23, Case C-204/11 P *FIFA v Commission*, cited above, paragraph 22, and Case C-201/11 P *UEFA v Commission*, cited above, paragraph 21.

235. According to the Norwegian Government, the applicant's arguments in support of the allegation that the Norwegian measures are disproportionate should also be rejected as unfounded.

236. With regard to the alleged infringement of the applicant's property rights, the Norwegian Government submits that the effects of the designation of the matches in the final stage of the World Cup as an event of major importance were not excessive.

237. The Norwegian Government concludes that ESA's approval of the inclusion of the entire final stage of the World Cup in the Norwegian list of events of major importance does not entail unnecessary and disproportionate restrictions on the exercise of EEA rights and freedoms which exceed those intrinsically linked to their inclusion on a list drawn up pursuant to Article 14(1) of the Directive.

European Commission

238. The Commission submits that ESA's examination of the effect of the listing of the World Cup in its entirety by the Norwegian authorities was conducted properly and confirmed the proportionality and non-discrimination of the measures as regards the principles of the freedom to provide services, the freedom of establishment, the right to property and the competition rules. Therefore, the Commission states that the claims of the applicant should be rejected.

Páll Hreinsson
Judge-Rapporteur