JUDGMENT OF THE COURT

16 November 2018*

(Freedom to provide services – Article 36 EEA – Directive 2006/123/EC – Professional athletes – Sports associations – Marketing rights – Restriction – Proportionality – Suitability – Necessity)

In Case E-8/17,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (*Oslo tingrett*), in a case pending before it between

Henrik Kristoffersen

and

The Norwegian Ski Federation (*Norges Skiforbund*), supported by **the Norwegian Olympic and Paralympic Committee and Confederation of Sports (*Norges idrettsforbund og olympiske og paralympiske komité*),**

concerning the interpretation of Article 36 of the Agreement on the European Economic Area and Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market,

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Per Christiansen and Martin Ospelt (ad hoc), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Henrik Kristoffersen ("the plaintiff"), represented by Odd Stemsrud, advocate;
- the Norwegian Ski Federation (*Norges Skiforbund*) ("the defendant" or "NSF"), represented by Per Andreas Bjørgan and Anne-Lise H. Rolland, advocates;

* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- the Norwegian Olympic and Paralympic Committee and Confederation of Sports (*Norges idrettsforbund og olympiske og paralympiske komité*) ("the Norwegian Olympic Committee"), represented by Karen Kvalevåg, Secretary General;

- the Norwegian Government, represented by Torje Sunde, advocate, Attorney General's Office (Civil Affairs), and Troels Bjerre Leming, Higher Executive Officer, Ministry of Foreign Affairs, acting as Agents;

- the Government of the Netherlands, represented by Mielle Bulterman, Head of Division, and Pauline Huurnink, staff member, the European Law Division of the Legal Affairs Department, Ministry of Foreign Affairs, acting as Agents;

- the Swedish Government, represented by Anna Falk, Director, and Lina Zettergren, Legal Adviser, Ministry for Foreign Affairs, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, James Stewart Watson and Claire Simpson, members of its Department of Legal & Executive Affairs, acting as Agents; and

- the European Commission ("the Commission"), represented by Hélène Tserepa-Lacombe, Legal Adviser, Luigi Malferrari and Gero Meessen, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the plaintiff, represented by Odd Stemsrud; the defendant, represented by Per Andreas Bjørgan and Anne-Lise H. Rolland; the Norwegian Government, represented by Torje Sunde and Troels Bjerre Leming; the Government of the Netherlands, represented by Pauline Huurnink and Charlotte Schillemans (Counsel, acting as Agent); the Swedish Government, represented by Hanna Shev (Legal Adviser, Ministry for Foreign Affairs, acting as Agent) and Lina Zettergren; ESA, represented by James Stewart Watson and Claire Simpson; and the Commission, represented by Luigi Malferrari and Gero Meessen, at the hearing on 7 March 2018,

gives the following

Judgment

I Legal background

EEA law

1 Article 36 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

1. 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.

2. Annexes IX to XI contain specific provisions on the freedom to provide services.

2 Article 125 EEA reads:

This Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership.

3 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36, and Norwegian EEA Supplement 2014 No 35, p. 210) ("the Services Directive") was incorporated, with certain adaptations, in Annex X to the EEA Agreement at point 1 by Decision No 45/2009 of the EEA Joint Committee of 9 June 2009 (OJ 2009 L 162, p. 23, and Norwegian EEA Supplement 2009 No 33, p. 8) which entered into force on 1 May 2010. The deadline for transposition in the EEA was on the same day.

4 Article 2(1) of the Services Directive reads:

This Directive shall apply to services supplied by providers established in a Member State.

5 Chapter III of the Services Directive is entitled "Freedom of establishment for providers" and comprises Articles 9 to 15. Article 9 of the Services Directive limits the EEA States' right to make the access to or exercise of a service activity subject to an authorisation scheme. Articles 10 and 13 set out the substantive and procedural requirements with which such authorisation schemes must comply.

6 Article 16 of the Services Directive is found in Chapter IV entitled "Free movement of services". Article 16(1) to (3) of the Services Directive reads:

1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

(a) an obligation on the provider to have an establishment in their territory;

(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;

(c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;

(d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;

(e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;

(f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;

(g) restrictions on the freedom to provide the services referred to in Article 19.

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

National law

7 The Main Part of the EEA Agreement has been incorporated as such into Norwegian law by the Act of 27 November 1992 No 109. Moreover, the Services Directive has been implemented in Norway by the Act of 19 June 2009 No 103 on Services (*Lov om tjenestevirksomhet*).

II Facts and procedure

8 According to the referring court, the plaintiff, Mr Kristoffersen, is a 23-year old Norwegian ski racer who is a member of the Norwegian national alpine skiing team. He lives in Salzburg, Austria. He is not an employee of NSF but has signed a standard athlete's contract with NSF in order to be able to participate in the national team.

9 NSF is a sports organisation, which organises activities, amongst others, in the discipline of alpine skiing. NSF is a non-profit organisation whose purpose is, inter alia, to provide the best possible conditions for skiing, at both elite and popular level. According to the referring court, the organisation is financed by public funds and marketing contracts. Marketing revenue accounted for a total of 71 per cent of NSF's total income in 2015.

10 NSF is affiliated to the Norwegian Olympic Committee and the International Ski Federation ("FIS"), and is subject to their regulations. Only FIS and its national federations, such as NSF, organise alpine skiing races of financial value to alpine skiers in the classic disciplines, such as slalom and downhill.

11 Article 200.3 of the FIS International Ski Competition Rules, Joint Regulations for Alpine Skiing provides that:

> *Competitions listed in the FIS Calendar are only open to all properly licensed competitors entered by their National Ski Associations in accordance with current quotas.*

12 Article 204.1 of these rules provides that:

> *A National Ski Association shall not support or recognise within its structure, nor shall it issue a licence to participate in FIS or national races to any competitor who:*
>
> *…*
>
> *permits or has permitted his name, title or individual picture to be used for advertising, except when the National Ski Association concerned, or its pool for this purpose, is party to the contract for sponsorship, equipment or advertisements.*
>
> *…*

13 Section 13-3(3) of the Norwegian Olympic Committee's Statute reads:

> *Entering into contracts and establishing collaboration between the sport and commercial undertakings shall take place in writing. Only organisational entities may be party to such contracts/collaboration unless otherwise specified in Section 14-4(2) of the [Norwegian Olympic Committee's] Statute.*

14 Chapter 14 of the Norwegian Olympic Committee's Statute contains provisions on marketing and rights. The purpose is specified in Section 14-1:

> *The purpose of the provisions of this chapter is to regulate the sport's internal rights as regards event-related and market-related conditions, having regard to the structure and organisation of the sport and considerations of solidarity in the sports organisation.*

15 Section 14-4(1) and (2) of the Norwegian Olympic Committee's Statute states:

> *(1) The right to enter into marketing contracts rests with the organisational entity of the sport. A marketing contract means any agreement that entitles a legal person to exploit an organisational entity and/or its affiliated athletes in its marketing or other activities.*
>
> *(2) An organisational entity may permit that an athlete be given the right to enter into individual marketing contracts within the framework set out by the individual sports federation. This applies both to athletes who are members of a sports club and athletes who participate in a national team or have other representation duties. The organisational entity shall approve such contracts and ensure that it receives a fair share of the income generated by the athletes' own marketing contracts.*

16 The NSF Joint Regulations permit athletes to enter into individual marketing contracts if the following conditions in Point 206.2.5 of the Joint Regulations are met:

> *(a) the relevant organisational entity has given its written consent for the athlete to initiate negotiations with the partner in question,*
>
> *(b) the organisational entity approves the contract by co-signing it together with the parties (athlete and partner), and*
>
> *(c) the organisational entity receives a fair share of the value that the collaboration agreement represents.*
>
> *The organisational entity may refuse to accept the athlete's proposal for a contract with the sponsor. Furthermore, an athlete is obliged to participate in the implementation of [the Norwegian Ski Federation's] or a sport club's marketing contracts, subject to the limitations that follow from Section 14-5 of the [Norwegian Olympic Committee's] Statute.*

17 Thus, individual sponsorship agreements are subject to NSF approval. However, an exception from this is laid down in the standard athlete contract. According to that exception the athlete may enter into individual sponsorship agreements with equipment providers in NSF's skipool without requiring the approval of NSF. NSF's skipool is a pool scheme that is open to selected equipment suppliers. In order to become a member, the supplier must be approved as an equipment supplier by FIS/NSF and pay an annual fee to NSF in accordance with specified rates. Athletes can only enter into agreements with suppliers that are members of the NSF skipool.

18 According to the referring court, Mr Kristoffersen has 10 individual sponsorship agreements. These include agreements with equipment providers in NSF's skipool that were entered into without the need for NSF approval, and agreements that NSF has approved under Point 206.2.5 of its Joint Regulations.

19 NSF covers all expenses of members of the Norwegian national alpine skiing team for approximately 200 days a year. Those expenses include board and lodging, transport, equipment, access to the support team, including medical support, insurance and start licences. These athletes pay no contributions to NSF. The athletes do not receive any of the funds that NSF collects from the main and co-sponsors as the athletes' own income.

20 The case before the referring court concerns a dispute between Mr Kristoffersen and NSF relating to his wish to enter into an individual sponsorship contract with Red Bull relating to helmet and headgear worn in races organised under the auspices of NSF and FIS. Since 2014, Mr Kristoffersen and Red Bull had been seeking to enter into such a contract. However, at the end of April 2016, NSF refused Mr Kristoffersen permission to sign the contract.

21 NSF had previously approved an individual sponsorship contract between Red Bull and another Norwegian alpine skier, Aksel Lund Svindal. That approval was based on an expectation that individual sales of sponsorship rights related to helmet and headgear would generate increased revenue to NSF. However, after some years, NSF concluded that this fragmentation of the sponsorship rights reduced the value of the total collective sponsorship product. When Mr Kristoffersen applied for NSF approval of his proposed individual marketing contract with Red Bull, NSF had already decided to include exposure on helmet and headgear in the contract with its main sponsor, Telenor. For that reason, NSF refused to approve Mr Kristoffersen's contract. The referring court's request states that, following the expiry of Mr Lund Svindal's current agreement with Red Bull in 2018, his helmet and headgear will similarly be covered by the agreement with Telenor.

22 Mr Kristoffersen sent a notice of civil action to NSF in May 2016. The dispute delayed the signing of Mr Kristoffersen's national team contract for the 2016/2017 season. When signing that contract, Mr Kristoffersen included a reservation to his signature, which

stated that he contested NSF's refusal to approve his proposed individual marketing contract with Red Bull related to his helmet and headgear.

23 Mr Kristoffersen filed a writ with Oslo District Court on 17 October 2016. In the national legal proceedings he claims that NSF should be ordered to permit him to enter into an individual marketing contract with Red Bull for helmet and headgear. In the alternative, he has submitted a claim for damages, limited to a maximum of NOK 15 million.

24 According to the request for an advisory opinion, the Norwegian Olympic Committee has intervened in support of NSF in the pending case before the referring court.

25 By a letter of 25 September 2017, registered at the Court on the same day, Oslo District Court referred the following questions to the Court:

1. *Which legal criteria shall be particularly emphasised in the assessment of whether a national sports federation's system of prior control and consent for individual sponsorship contracts of this type – before the rights to such markings are transferred from the federation – shall be deemed a restriction on the athlete's freedom to provide services pursuant to Article 36 EEA or Directive 2006/123/EC (the Services Directive)?*

    a) *To what extent is the restriction test previously described by the Court of Justice of the European Union for the regulatory framework governing sports, inter alia, in Case C-51/96, applicable? Does Article 16 of the Services Directive or other provisions of that directive entail changes to the restriction test?*

2. *Which legal criteria shall be particularly emphasised in the assessment of whether a national sports federation's concrete refusal to approve professional national team athletes' individual sponsorship contracts for such markings – so that the rights to such markings remain with the federation – shall be deemed a restriction on the athlete's freedom to provide services pursuant to Article 36 EEA or Directive 2006/123/EC (the Services Directive)?*

    a) *What bearing will it have on the assessment that the national sports federation had already entered into a valid contract with the national team's main sponsor for logo exposure of the marking in question on helmets/headgear? Is this of significance in the assessment of whether a restriction exists, alternatively in the assessment of whether there are objective and sufficient grounds for the refusal?*

Provided that a restriction is deemed to exist;

3. *Can the national sports federation's Joint Regulations (approval scheme) for the potential utilisation by athletes of the marking in an individual contract*

constitute an authorisation scheme within the meaning of Article 4(6) of Directive 2006/123/EC (the Services Directive)?

a) In such case, is the approval scheme regulated by Articles 9 and 10 in Chapter III – on freedom of establishment for service providers – for a Norwegian citizen selected for the national team who engages in financial activity in connection with his participation in the national team subject to the regulatory framework of the national sports federation? Or is the scheme regulated by Article 16; alternatively, what is the legal test for correct classification?

4. *In the assessment of the scheme's lawfulness – either pursuant to Article 36 EEA or Articles 9, 10 or 16 of the Services Directive – must the national court consider the provisions of the regulations and the refusal seen in isolation, or shall it also take into consideration:*

   - *The federation's grounds for retaining the marketing rights, including consideration for funding of the national teams and what the income is otherwise used for?*
   - *The overall possibilities for the athlete to engage in financial activity, including rights to enter into sponsorship contracts with equipment manufacturers and any other marketing contracts?*
   - *Whether, in light of this, the approval scheme or refusal to grant consent appears to be legitimately justified and proportional?*

5. *What bearing does it have on the legality assessment that approval of individual contracts regarding these markings is subject to the free discretion of the federation?*

6. *What procedural requirements, if any, do Article 13 of Directive 2006/123/EC or Article 36 EEA stipulate for the proceedings and the decisions under a national sports federation's approval scheme for individual marketing contracts (sponsorship contracts) for commercial markings, and what is the consequence under EEA law of failure to comply with any such procedural requirements?*

26 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure, and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answers of the Court

Questions 1 and 2

27 By its first two questions, which should be considered together, the referring court essentially asks whether rules, such as those in the NSF Joint Regulations, on prior control and consent for individual sponsorship contracts regarding commercial markings on national teams' equipment, or the application of those rules, constitute a restriction pursuant to Article 36 EEA or the Services Directive.

Observations submitted to the Court

28 The plaintiff, Mr Kristoffersen, submits that both internal market rules and competition rules in the EEA apply fully where a sporting activity takes the form, inter alia, of the provision of services for remuneration. In this regard, he refers to Article 36 EEA (reference is made to the judgment in *Olympique Lyonnais*, C-325/08, EU:C:2010:143, paragraph 27 and case law cited).

29 The Court of Justice of the European Union ("ECJ") has held that sporting activities, in particular a high-ranking athlete's participation in an international competition, are capable of involving a number of separate, but closely related, services which may fall under the scope of the Treaty on the Functioning of the European Union ("TFEU"), even if some of those services are not paid for by those for whom they are performed (reference is made, inter alia, to the judgment in *Deliège*, C-51/96 and C-191/97, EU:C:2000:199, paragraph 56 and case law cited).

30 In this regard, Mr Kristoffersen notes that the marketing rights of athletes rest with the athletes themselves and not with the sports associations. A different conclusion would make the EEA's internal market and competition rules void and of no effect in relation to regulatory regimes adopted by professional bodies (reference is made to the judgment in *Commission* v *Austria*, C-356/08, EU:C:2009:401, paragraph 37).

31 He further submits that the ECJ has decided that "rules of the game" are in principle subject to EU law (reference is made to the judgment in *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492). As the present case is, according to Mr Kristoffersen, related to the multi-billion euro revenue generating activities of marketing agreements, there is no doubt that EEA law is fully applicable to the economic activity of sponsorship services regulated in individual marketing agreements between a professional athlete and a sponsor.

32 Mr Kristoffersen argues that the Services Directive covers professional sporting activities and related sponsorship services, as it covers all services subject to Article 36 EEA that are not clearly exempted therefrom. This conclusion also follows a contrario from recital 35 of the Services Directive.

33 He further submits that Articles 9, 10 and 13 of the Services Directive are applicable to the dispute, as the issue at hand relates to an "authorisation scheme". In the alternative,

he argues that Article 16(1) of the Services Directive, mirroring Article 36 EEA, is applicable to the dispute. NSF's authorisation scheme defines whether, and if so, under what conditions, an athlete may offer sponsorship services for remuneration. This is a "requirement" within the meaning of Article 16 of the Services Directive and a restriction that impedes the activities of a service provider pursuant to Article 36 EEA.

34 The defendant, NSF, submits that it owns the right for marking on the helmet and headgear of the Norwegian national skiing team. This is a right which NSF can dispose of according to FIS rules. Accordingly, NSF has sold the right to advertisement on the specific marking at issue to the national alpine teams' main sponsor, Telenor. The marking in question may only be sold to one sponsor.

35 NSF argues that Mr Kristoffersen's demands for the marking have no basis in EEA law, since neither the provisions on free movement nor the competition rules provide for such a transfer of property. The rules on free movement do not give any priority to certain economic operators for access to property, or provide any basis for expropriation of acquired rights of other legal entities (reference is made to the Opinion of Advocate General Jacobs in *Bronner*, C-7/97, EU:C:1998:264, point 56). It falls within NSF's property right and contractual freedom to refuse to give away its own marketing rights. Such a refusal is not a restriction on free movement, neither within the meaning of Article 36 EEA nor as regards the Services Directive.

36 The FIS rules concerning marketing rights are intended to ensure several, and possibly conflicting, interests, the overriding one being the integrity of the sport. Another basic objective is to ensure that national associations are provided with financial means to give the athletes the support that skiing at the highest level of competition requires.

37 NSF moreover observes that, even though athletes do not have the rights to the marking on the outfits, this does not mean that they are excluded from sponsorship. FIS rules, as implemented by NSF, provide athletes with numerous opportunities to exercise economic activity, including promoting individual sponsors through personal sponsorship agreements for all their equipment. Furthermore, athletes can enter into individual sponsorship agreements with companies other than the manufacturers of equipment.

38 NSF notes that Mr Kristoffersen has several sponsorship agreements, including an agreement to promote Red Bull on his drinking bottle, and NSF has not rejected any of his previous agreements. The assessment and approval of such contracts involves an element of discretion that is inherent in the effective protection of the aforementioned interests.

39 Furthermore, NSF submits that case law concerning rules and practices of sports associations distinguishes between limitations of individual conduct and restrictions on free movement (reference is made, inter alia, to the judgment in *Deliège*, cited above). The case at hand concerns a single rejection of a demand from an individual member for a sponsorship contract that rests on NSF's rights to the marking. Such a rejection is inherent in the system of allocation of marketing rights and is based on the legitimate

interests of the national team. The rejection does not affect the member's access to professional skiing, or ancillary economic activities such as advertisements for sponsors.

40 Questions concerning the interpretation of the Services Directive are of limited significance for the case at hand, since Mr Kristoffersen is a Norwegian national on the Norwegian national team, and the economic activity in question is ancillary and directly connected to, regulated by and exercised under NSF rules. Therefore, he has not exercised the freedom of establishment and Chapter III of the Services Directive, including its Articles 9 and 10, does not apply to the present proceedings.

41 Finally, NSF argues that the Services Directive does not regulate services where the association in the service provider's EEA State of establishment restricts his provision of cross-border services in other EEA States. It follows from the wording of Article 16 of the Services Directive that it applies to service providers established in another EEA State, that is, from a Norwegian perspective, to inbound or incoming services. The limitation in the NSF rules concerns, however, outbound services. That situation is regulated by Article 36 EEA.

42 The Norwegian Olympic Committee states that it fully concurs with the arguments presented in the written observations of NSF. It adds that the principles laid down in its statutes are common across the organised sport movement. The model ensures, inter alia, that national sports federations have a financial basis to provide the necessary support for their athletes, as well as to recruit and develop new athletes. It is a manifestation of the overriding principle of solidarity between the athletes and the national teams. The model ensures that sponsorship agreements comply with rules and regulations, and with basic ethical principles.

43 The Norwegian Government submits that, as established by the FIS rules, the right of advertising belongs to either FIS or NSF. The Government draws attention to the possibilities that Mr Kristoffersen has for entering into different advertising contracts and states that he has entered into ten private partnership or sponsorship contracts.

44 Furthermore, Mr Kristoffersen is established in Norway and not in Austria. His participation in skiing competitions is based on a national quota. NSF provides him with the necessary infrastructure and equipment. The economic activity under consideration is carried out by means of a stable infrastructure based in Norway.

45 Moreover, the Norwegian Government submits that two different activities are at stake, the main economic activity being the skiing activity. That activity is of an economic nature since he receives grants, prizes and the possibility of entering into lucrative sponsorship contracts on that basis (reference is made to the judgment in *Deliège*, cited above, paragraphs 49 to 59). The other activity is the marketing activity, which, according to the Government, is ancillary to, and must therefore be assessed as part of, the main activity.

46 The Norwegian Government submits that the contested measure concerns a rule adopted by the sports federation in Mr Kristoffersen's EEA State of establishment. It should

therefore be assessed under the rules on the freedom of establishment. As regards the freedom to provide services, case law shows that, if a restriction on one freedom is an inevitable consequence of a restriction on another freedom, there is no room for a separate assessment of the former (reference is made, inter alia, to the judgment in *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraph 32).

47 Under the restriction analysis, inter alia with regard to Article 31 EEA, the Norwegian Government submits that the relevant question is whether the measure at hand restricts an athlete's access to or the exercise of his sporting activities (reference is made to the judgment in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 32). The particular nature of sports and sporting competitions may give rise to special considerations when assessing a measure in the area of sports under the free movement provisions (reference is made, inter alia, to the judgment in *Deliège*, cited above, paragraphs 43, 61 and 65).

48 The measure at hand does not restrict an athlete's access to or the exercise of his sporting activity. Furthermore, the measure neither determines the conditions governing access to the market by professional sportsmen nor contains a nationality clause. Rather, the measure seems to have an uncertain and indirect effect on the athlete's sporting activities (reference is made to the judgment in *Semeraro Casa Uno and Others*, C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94, EU:C:1996:242, paragraph 32). The measure does not prevent the plaintiff from entering into other advertising or sponsorship contracts and is a result of a need inherent to the organisation of the competition, namely to provide financing. Moreover, the marketing rights, which Mr Kristoffersen wants to exploit, appear to be the property of NSF, which it has in fact already sold, thus raising the question of whether, as property rights, they are protected under Article 1 of Protocol 1 to the European Convention on Human Rights and Article 125 EEA.

49 The Norwegian Government finally submits that, if the rules on the freedom to provide services are applicable, the case must be assessed under Article 16 of the Services Directive. However, the second and third subparagraphs of Article 16(1) and Article 16(2) are not applicable in the case as they apply only to incoming services.

50 The Government of the Netherlands submits that established case law on freedom of movement, in this case especially the freedom to provide services, is only applicable insofar as a sporting activity takes the form of paid employment or the provision of remunerated services and thus constitutes an economic activity. As the NSF rules concern sponsorship contracts between individual athletes and their sponsors, they fall under the concept of economic activity (reference is made, inter alia, to the judgment in *Deliège*, cited above, paragraphs 41 and 55 to 57). Mr Kristoffersen must thus be seen as a service provider. In accordance with Article 2(1) of the Services Directive, the Directive applies to the present case, as Mr Kristoffersen is established in Austria.

51 The Government of the Netherlands notes that a system of prior control and consent for concluding individual sponsorship contracts, such as the system at issue in the main proceedings, should be considered a requirement under Article 16 of the Services Directive and an authorisation scheme under Articles 9 and 10 of the Services Directive.

In this regard the Government submits that the defendant is a competent authority pursuant to Article 4(9) of the Services Directive, as it exercises legal autonomy and regulates the exercise of a service activity (reference is made to the judgment in *Deliège*, cited above, paragraph 67).

52 ESA submits that the issue of whether the case at hand should be approached from the point of view of the freedom to provide services or the freedom of establishment has, ultimately, no determinative effect on the outcome of the case.

53 ESA argues that the case essentially concerns Mr Kristoffersen's wish to provide marketing services in return for remuneration and access to Red Bull's support system. The primary focus of the legal analysis should therefore be the EEA rules relating to the freedom to provide services as laid down in Article 36 EEA and Chapter IV of the Services Directive.

54 ESA submits that EEA law applies to sports insofar as it constitutes an economic activity. Furthermore, provisions on free movement apply not only to the actions of public authorities, but also extend to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner (reference is made, inter alia, to the judgment in *Deliège*, cited above, paragraph 47).

55 ESA states that the case concerns the right of an athlete to conclude an individual sponsorship agreement with an entity established in a different EEA State. It is clear that the proposed sponsorship agreement with Red Bull falls within the definition of services, cf. Article 2(1) and Article 4(1) of the Services Directive and Article 36 EEA, and therefore under the scope of the Services Directive. In this context, ESA notes that Mr Kristoffersen must be deemed to be established in Norway for the purpose of the application of the Services Directive. Furthermore, the marketing of the Red Bull brand on Mr Kristoffersen's helmet and headgear would be effected through every appearance in competition and associated events which take place throughout the EEA and internationally.

56 ESA argues that the case concerns a restriction on the provision of outgoing services (reference is made to the judgment in *Alpine Investments*, C-384/93, EU:C:1995:126, paragraphs 20 to 22). The first subparagraph of Article 16(1) of the Services Directive encompasses all types of services. The second and third subparagraphs of Article 16(1), as well as Article 16(2) and (3), are only applicable to incoming services. Therefore, only the first subparagraph of Article 16(1) of the Services Directive is applicable to outgoing services such as those in the case at hand. That provision must be interpreted in the light of Article 36 EEA.

57 ESA argues that it is evident that the need to obtain permission prior to entering into an agreement relating to the provision of services restricts the freedom of a service provider to pursue such an economic activity. Both the permission requirement and a concrete

refusal are incompatible with the rule in the first subparagraph of Article 16(1) of the Services Directive.

58 ESA finally submits that the permission requirement laid down in the NSF Joint Regulations, and included in the standard contracts made with individual athletes, does not concern the selection for the national team and, therefore, admission to the sports activity as such (reference is made to the judgment in *Deliège*, cited above, paragraphs 61 and 64). The permission requirement governs access to an economic activity and cannot be deemed inherent to the sporting activity.

59 The Commission submits that the ECJ has already held that sporting activities, in particular a high-ranking athlete's participation in an international competition, are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of Article 56 TFEU, even if some of those services are not paid for by those for whom they are performed. Among those are the provision, by the athletes to their sponsors, of publicity, the basis for which is the sporting activity itself (reference is made to the judgment in *Deliège*, cited above, paragraphs 52 and 55 to 57).

60 Mr Kristoffersen's economic activity is professional skiing, which entails two sources of income, prize money and advertising during the race. Alternatively, it could be considered that his economic activity in the present case is advertising, but the result would be the same.

61 The Commission argues that in the present case Mr Kristoffersen, as a Norwegian national affiliated to the Norwegian national ski team on a long-term basis, is established in Norway. This is unaffected by his residence in Austria, since the centre of his economic activity appears to remain in Norway. In any event, even if he were to be considered established in Austria, that would not affect the legal analysis.

62 The Commission states that Mr Kristoffersen takes part in professional ski races in several EEA States other than his State of establishment and that these races are where he provides his services (reference is made to the judgment in *Deliège*, cited above, paragraph 58). Moreover, an Austrian company, Red Bull, is one of the recipients of the plaintiff's services. There is thus a cross-border element in the present case (reference is made to the judgment in *SETTG*, C-398/95, EU:C:1997:282, paragraph 8).

63 The fundamental freedoms apply not only to the actions of public authorities but extend likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services (reference is made to the judgment in *Walrave and Koch*, 36/74, EU:C:1974:140, paragraph 17). FIS, NSF and its national sister organisations are the only organisers of professional ski competitions in the EEA. The rules of FIS and NSF regulating the individual marketing contracts are binding. Therefore, the rules of FIS and NSF regarding marketing contracts for Mr

Kristoffersen's helmet and headgear and the contested decision fall within the ambit of the freedom to provide services.

64 The Commission argues, moreover, that such rules restrict the freedom to provide services, regardless of who owns the sponsorship rights. The rules make the services activity of skiers, such as Mr Kristoffersen, less advantageous or, if the single helmet advertising is considered as the relevant economic activity, even impossible. The same goes for the contested decision. This conclusion cannot be refuted due to the fact that the barriers at issue ensue from an entity of the EEA State of establishment (reference is made to the judgment in *Alpine Investments*, cited above, paragraphs 30 and 37).

65 Regarding the application of Article 16 of the Services Directive, the Commission submits that the first subparagraph of Article 16(1) must be read together with the remaining part of that article. If it were taken in isolation, the first subparagraph of Article 16(1) would have no additional normative value compared with Article 36 EEA. The Commission submits that Chapter IV of the Services Directive concerns restrictions that could possibly be imposed on the service provider by the host EEA State, but not by the home EEA State. Therefore, the present case does not fall within the ambit of application of Article 16 of the Services Directive.

Findings of the Court

General remarks

66 This case relates to the area of sport. Sport is subject to EEA law insofar as it constitutes an economic activity (compare the judgment in *Olympique Lyonnais*, cited above, paragraph 27 and case law cited). More specifically, the case concerns a dispute regarding NSF's refusal to allow Mr Kristoffersen, a professional alpine skier, to enter into an individual sponsorship contract with Red Bull regarding commercial markings on helmet and headgear. Such sponsorship contracts entail marketing services which constitute, as such, an economic activity.

67 National measures are capable of falling within the scope of the provisions relating to the fundamental freedoms of the EEA Agreement to the extent that they apply to situations connected with trade between EEA States (see Case E-8/16 *Netfonds Holding and Others* [2017] EFTA Ct. Rep. 163, paragraph 106 and case law cited). The proposed sponsorship contract involves a Norwegian national and an Austrian company. Further, the professional competitions referred to in the present case take place in several EEA States. A cross-border element is therefore present (compare the judgment in *Deliège*, cited above, paragraph 58).

68 The free movement rules of the EEA Agreement do not only apply to the actions of public authorities but can extend to rules of any other nature provided that they are aimed at regulating gainful employment and the provision of services in a collective manner.

It follows that EEA law may apply to rules laid down by sports associations (compare the judgment in *Deliège*, cited above, paragraphs 47 and 48 and case law cited).

69 Next, it must be determined whether the present case concerns the freedom of establishment or the freedom to provide services. To do so, the purpose of the contested rules must be taken into consideration (compare the judgment in *SEGRO*, C-52/16 and C-113/16, EU:C:2018:157, paragraphs 52 and 53). The rules at issue state that NSF may grant or refuse permission to athletes to enter into individual marketing contracts, which will have an impact on Mr Kristoffersen's possibilities to provide marketing services. In contrast, the rules will not, or only remotely, affect athletes' freedom to establish themselves as professional skiers, the activity from which their marketing activity derives. The rules in question thus concern, at least predominantly, the freedom to provide services, as opposed to the freedom of establishment.

70 As to the question of whether Article 36 EEA or Chapter IV of the Services Directive on free movement of services is applicable, it is noted that the latter does not apply to requirements that are imposed on a service provider in his EEA State of establishment. That follows from the wording and structure of Article 16 of the Directive.

71 The service provider is Mr Kristoffersen. He lives in Salzburg, Austria. However, the place of residence is not decisive for the determination of where he is established. Rather, the place of establishment is where a person pursues a professional activity on a stable and continuous basis (see Case E-1/09 *ESA* v *Liechtenstein* [2009-2010] EFTA Ct. Rep. 46, paragraph 28 and case law cited). Mr Kristoffersen's professional activity has its stable and continuous basis in Norway. His activity is joined to the Norwegian national alpine skiing team and he competes in local and international skiing competitions under the Norwegian flag. His participation is under NSF's auspices. NSF is a Norwegian entity and its operation, including the organisation of its members' participation in skiing competitions, is performed in and from Norway. Based on the facts that the national court has provided, Mr Kristoffersen must therefore be considered established in Norway. As Chapter IV of the Services Directive does not apply to requirements imposed on a service provider in his EEA State of establishment, that framework is not applicable in the present case.

72 Consequently, Article 36 EEA is applicable in this case. That provision prohibits restrictions on the freedom to provide services within the EEA. This includes restrictions laid down in the EEA State of establishment when the services are provided for persons established in another EEA State (compare the judgment in *Alpine Investments*, cited above, paragraphs 30 and 31 and case law cited).

The restriction test under Article 36 EEA

73 In determining whether the contested rules in the NSF Joint Regulations – or their application – constitute a restriction under Article 36 EEA, the referring court needs to take account of the fact that measures liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the EEA Agreement are an encroachment upon this freedom (see *Netfonds Holdings and Others*, cited above, paragraph 108).

74 Referring to Article 125 EEA, NSF contends that the marketing rights at issue are the property of NSF and that its rules therefore escape the scrutiny of the fundamental freedoms. According to that article, the EEA Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership.

75 However, that rule does not imply that national measures are exempted from the fundamental rules of the EEA Agreement, including the rules on free movement of services (see Case E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 164, paragraph 62 and case law cited). This applies also when the rules emanate, for example, from a sports association, such as in the present case, where this association aims at regulating gainful employment and the provision of services in a collective manner. Accordingly, Article 125 EEA does not preclude a finding of a restriction on the freedom to provide services pursuant to Article 36 EEA.

76 A system of prior control and consent for individual sponsorship contracts, as described in Question 1, appears liable to make less attractive the exercise of Mr Kristoffersen's marketing activity. In particular, it is settled case law that prior authorisation schemes amount to a restriction on the freedom to provide services (compare Case E-19/15 *ESA* v *Liechtenstein* [2016] EFTA Ct. Rep. 437, paragraph 85 and case law cited). However, this is ultimately for the referring court to determine.

77 It may be added that rules of sporting interest only are generally not considered restrictions (compare the judgment in *Deliège*, cited above, paragraphs 43 and 64). However, the contested rules in the present case do not relate to the conduct of the sport itself but concern sponsorship rights. The restriction test applied in cases such as *Deliège*, as referred to in Question 1(a), is therefore not applicable.

78 Provided that the referring court finds that NSF's system of prior control and consent for individual sponsorship contracts constitutes a restriction, the same will also apply to a concrete refusal to approve an individual sponsorship contract under that system, as described in Question 2.

79 However, a restriction may be justified under certain conditions. The criteria for justification will be addressed below in the answers to the remaining questions. In that context, the Court will discuss the fact, raised in Question 2(a), that NSF had sold the sponsorship rights related to helmet and headgear to its main sponsor ahead of rejecting Mr Kristoffersen's application.

80 Based on the above, the answer to Question 1 is that the legal criterion for the assessment of whether a national sports federation's system of prior control and consent for individual sponsorship contracts constitutes a restriction under Article 36 EEA is whether the system renders less attractive the exercise of an athlete's freedom to provide a marketing service.

81 The answer to Question 2 is that if such a system of prior control and consent for individual sponsorship contracts constitutes a restriction, the same will apply to a

concrete refusal of an application to enter into an individual sponsorship contract under that system.

Question 3

82 By its Question 3, the national court asks whether the system of prior control and consent for individual marketing contracts constitutes an authorisation scheme pursuant to Article 4(6) of the Services Directive. Since the Court has concluded that the Services Directive does not apply in the present case, an answer to this question is unnecessary.

Questions 4 to 6

83 Questions 4 to 6 all concern the issue of whether a restriction can be justified. These questions may therefore be considered together. The questions relate to Article 36 EEA and the Services Directive. However, since the Court does not find the Services Directive applicable in this case, the questions will only be considered in relation to Article 36 EEA.

84 Question 4 seeks to establish the relevant factors to be taken into account in assessing the lawfulness of the restriction. Question 5 concerns the significance of the fact that the decision on individual sponsorship contracts is subject to the "free discretion" of the sports federation. Question 6 seeks to establish whether EEA law lays down procedural requirements for such decisions, and if so, what the consequences are of a failure to comply with such requirements.

Observations submitted to the Court

85 Mr Kristoffersen submits that regulations that are not "rules of the game" but purely economic, such as the regulations under review, cannot be justified on grounds of cultural policy or any other overriding reason in the public interest (reference is made, inter alia, to the judgment in *Kohll*, C-158/96, EU:C:1998:171, paragraph 41).

86 Furthermore, Mr Kristoffersen submits that a transparency obligation is an integral part of the fundamental principles of EEA law (reference is made to Case E-24/13 *Casino Admiral* [2014] EFTA Ct. Rep. 732, paragraphs 51 and 53). He contends that this precludes an authorisation system, such as the system under review, where an authorisation is based on the discretionary powers of the national sports association and where the criteria for granting authorisation are neither clear nor made public in advance.

87 The prohibition of discrimination is equally a fundamental principle of EEA law (reference is made to the judgment in *Lease Plan Luxembourg*, C-390/96, EU:C:1998:206, paragraph 34). This principle prohibits the application of different rules to comparable situations, such as where NSF has granted Aksel Lund Svindal permission to enter a marketing contract with Red Bull while denying Mr Kristoffersen authorisation to do the same.

88 Mr Kristoffersen argues that NSF's authorisation scheme, as such, is subject to the proportionality test under Article 36 EEA. A scheme which allows a national sports

association to collect, at its own discretion, revenue from income generated by athletes to cover its own administrative costs cannot be proportionate, particularly since it has an unnecessary excessive effect on athletes.

89 NSF submits that the referring court must assess whether the rules and/or the concrete rejection pursued a legitimate aim, and whether it was necessary and proportionate.

90 NSF contends that the national court should take into account NSF's reasons for rejecting Mr Kristoffersen's request when considering the approval scheme in question. Neither the restriction test nor the assessment of justification can be isolated to the specific limitation concerning the ancillary activity. The focus of the assessment under EEA law is whether the limitations are inherent in the pursuit of a legitimate objective, such as the interest of the sport, which is recognised as a legitimate aim in the case law.

91 It is further argued that the term "free discretion" as used in Question 5 is somewhat misleading in this context. NSF's rules prohibit arbitrary, unreasonable or discriminatory decisions. However, NSF's right to reject a transfer of its own rights to the marking is, in principle, "free", as such a freedom is inherent in its property rights and freedom of contract. NSF's discretion is necessary to ensure that its rights are managed in the interest of the sport.

92 The Norwegian Government submits that the restriction is justified by overriding reasons relating to the public interest. When assessing which objective is pursued by a measure, any material from which the intent of the measure can be deduced must be taken into account (reference is made, inter alia, to Case E-1/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 8, paragraph 33).

93 The contested measure aims to finance a sports federation, so that the federation may uphold its activity and responsibility within the sports sector. The Norwegian Government states that case law has accepted as legitimate aims which bear much resemblance to "financing aims" (reference is made to the judgment in *Decker*, C-120/95, EU:C:1998:167, paragraph 39). It cannot be ruled out that the aim of financing a national sports federation may constitute a legitimate public interest objective. Furthermore, that aim also serves other objectives which are clearly not of an economic nature (reference is made, inter alia, to Case E-2/06 *ESA* v *Norway*, cited above).

94 The Norwegian Government argues that the measure at hand is based on a collective solidarity model where marketing rights are largely centralised and benefit everyone. The Government adds that this model has been recognised by the Commission as reflecting important public interests. Consequently, the model constitutes an overriding reason relating to the public interest and the measure at hand is thus justified.

95 The Government of the Netherlands submits that rules such as those under review are, in principle, prohibited. They may, however be justified for reasons of public policy or public health. In this regard, the ECJ has confirmed the considerable social importance

of sporting activities (reference is made, inter alia, to the judgment in *Deliège*, cited above, paragraphs 41 and 42).

96 The ECJ has held that rules of professional sports organisations, such as NSF, can under certain conditions be justified as restrictions on the right to free movement, especially if they are inherent to the organisation of sporting competitions and thus enable sports to be conducted. Financial measures can be essential for the organisation of sports (reference is made, inter alia, to the judgment in *Bosman*, C-415/93, EU:C:1995:463, paragraphs 105 to 110). Although the ECJ has never explicitly based the justification in sport cases on the public policy or public health exception, it can arguably be deduced from case law that this exception may apply to sports interests (reference is made to the judgment in *Bosman*, cited above, paragraphs 121 to 137).

97 The Government of the Netherlands submits that NSF's system of prior control and consent does not differentiate on the basis of nationality or place of establishment of the service provider, and is therefore in accordance with the principle of non-discrimination. This system can be justified under EEA law.

98 The Swedish Government stresses the special characteristics of sports, which are recognised under EU law and which are relevant to the interpretation of the EEA Agreement. It follows from the NSF Joint Regulations that NSF holds the marketing rights in question in order to ensure a solidary financing of the sport for the benefit of all members at different levels. This is justified to ensure the societal, cultural and democratic values, on which the sports federations are based, and which have an important role in enhancing public health in the EEA.

99 The lawfulness of NSF's scheme should be considered by taking into account its reasons for retaining the marketing rights in question. The Swedish Government submits that nothing in the wording of Article 36 EEA supports an interpretation that would preclude evaluating an approval scheme in light of its context. On the contrary, in order to assess whether an approval system is non-discriminatory and proportionate, it is necessary to consider its effects in practice, as well as the existence of possible alternative means to achieve the alleged objectives (reference is made, inter alia, to the judgment in *Hemming and Others*, C-316/15, EU:C:2016:879, paragraph 27).

100 The Swedish Government maintains that the NSF approval scheme is necessary and justified by overriding reasons relating to the public interest, including public health, having regard to the special characteristics of sports. In order to ensure that sports may continue to play an important role in European society and in the promotion of public health, it is necessary that sports federations are guaranteed sufficient financial means. Marketing revenue is the most important source of income for NSF. Moreover, these objectives cannot be attained by less restrictive means.

101 ESA notes that the ECJ has recognised the considerable social importance of sporting activities. In considering whether restrictions are suitable to ensure that the objective pursued is attained and does not go beyond what is necessary to attain it, account must be taken of the specific characteristics of sports in general and of their social and

educational function, as emphasised by Article 165(1) TFEU (reference is made to the judgment in *Olympique Lyonnais*, cited above, paragraphs 39 and 40). ESA submits that the ultimate aim of the permission requirement in question is to safeguard the financial base of the Norwegian sports model. That is based on the solidarity principle and involves the promotion of the sport of skiing and organising activities both at the elite and popular level. There is a direct relationship between the need to exercise control over NSF's sources of income and its possibility to fulfil the functions for which it was established.

102 In general, aims of a purely economic nature cannot justify a barrier to the fundamental principle of freedom to provide services. The ECJ has, however, recognised that where it is difficult to sever the economic aspects from the sporting aspects, the provisions of EU law concerning freedom of movement for persons and freedom to provide services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and the context of certain sporting events (reference is made, inter alia, to the judgment in *Meca-Medina and Majcen* v *Commission*, cited above, paragraph 26). Further, if absence of control over its main sources of revenue could pose a risk to NSF's ability to perform its tasks, this might constitute an overriding reason capable of justifying a restriction to the freedom to provide services (reference is made, by analogy, to the judgment in *Kohll*, cited above, paragraph 41).

103 ESA submits that the permission requirement, in principle, serves a legitimate purpose which is capable of justifying the restriction of the freedom to provide services, to the extent that there is a close link between the funds generated and the objective financed by them. It is also appropriate and necessary to achieve the objectives it pursues, given the fact that the defendant must be in a position to control its income with a view to planning and organising its activities, both in the short and the long term.

104 With regard to proportionality, ESA submits that a number of factors must be taken into account when considering whether the objectives underlying the permission requirement may be achieved by any less restrictive means. The main problem with the permission requirement is that NSF's decisions are purely discretionary. Such a system of prior authorisation has been held contrary to EU law (reference is made to the judgment in *Watts*, C-372/04, EU:C:2006:325, paragraphs 115 to 117).

105 However, two factors might distinguish the case at hand from that of a more standard case of licensing, and thus justify a different approach to the assessment of the permission requirement. The first stems from the fact that the context of the dispute is the world of sports, the specific nature of which has been recognised in case law. Second, it should be recognised that NSF is not a disinterested party when making a decision on marketing rights. The defendant may itself decide to exploit those marketing rights which have been allocated to it through the regulatory context of the international sports world. In that sense, NSF acts as an economic operator, even potentially in competition with individual athletes. Viewed in this light, the decision on granting permission to

enter an individual sponsorship agreement would appear to be more in the nature of the grant of a licence by the holder of an exclusive right.

106 ESA submits that this does, however, not mean that NSF is exempted from all requirements regarding the decision it takes on an application to enter a sponsorship contract. It is required, inter alia, to balance its interests against the interest of the athlete in question and to communicate its decision in a reasoned manner. Additionally, the decision should be susceptible to review by a body independent of NSF.

107 The Commission submits that the special nature of sporting rules, for example the distinctive features setting sport apart from other economic activities, must be taken into consideration when assessing the existence of a legitimate objective (reference is made to the judgment in *Meca-Medina and Majcen* v *Commission*, cited above, paragraphs 43 and 45). Solidarity within sport can be accepted as a legitimate public interest as it enables and encourages the recruitment and training of young athletes (reference is made to the judgment in *Bosman*, cited above, paragraph 106).

108 However, the Commission argues that other reasons, for example maximising NSF's profits, cannot be accepted as legitimate public interests because they would be of a purely economic nature and could therefore under the case law not justify a restriction on a fundamental freedom (reference is made, inter alia, to the judgment in *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 72).

109 Regarding the principle of proportionality, the Commission submits that the NSF rules in the present case can only be considered suitable to attain the objective of solidarity in the sports organisation if the income derived from NSF's helmet marketing contracts is devoted to the pursuit of such purposes. Furthermore, it should be ascertained whether the cumulative value of the helmet marketing rights for all athletes, if sold together by NSF, is likely to exceed the cumulative value of the marketing rights if sold through individual contracts. In addition, a measure that restricts a fundamental freedom is appropriate for ensuring the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (reference is made to the judgment in *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 55).

110 Moreover, the Commission states that the NSF rules can be considered not to go beyond what is necessary only if a fair portion of the income derived from the marketing contracts of the ski team sold together is distributed to the skiers themselves. A fair balance of the different interests involved must be ensured (reference is made to the judgment in *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 81).

111 It should be verified whether the NSF rules at stake can be replaced by less restrictive but equally effective means. It should, for instance, be ascertained whether public or other funding is insufficient to cover the financial needs of the sports activity at professional and amateur level. It should also be ascertained whether the same legitimate objective could be equally achieved by a system whereby each athlete pays a contribution from his individual revenues into a solidarity pool of NSF. The Commission submits that it is for NSF to demonstrate that its regulations are consistent with the

principle of proportionality accompanied by appropriate evidence or analysis (reference is made to the judgment in *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraphs 53 to 55).

112 If the referring court finds that the NSF rules are proportionate, it would then have to verify whether their application in the present case through the contested decision is lawful, on the same grounds as stated above.

113 Finally, the Commission submits that entities which are empowered to take decisions restricting a fundamental freedom may enjoy a margin of discretion in certain instances. However, such discretion must be circumscribed by their obligation to follow objective, non-discriminatory and clear criteria known in advance (reference is made to the judgment in *Hartlauer*, cited above, paragraph 64 and case law cited). This follows from the general principle of legal certainty (reference is made, inter alia, to the judgment in *Église de scientologie*, C-54/99, EU:C:2000:124, paragraph 22). Moreover, NSF's procedure for dealing with requests, such as the request from Mr Kristoffersen, must be transparent, impartial, objective, non-discriminatory, known in advance and taken within a reasonable time, and judicial redress against the decision must be possible.

Findings of the Court

Legitimacy of the aims pursued by the measures at issue

114 A restriction on the freedom to provide services laid down in Article 36 EEA may be justified on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that it is appropriate to secure the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see *Casino Admiral*, cited above, paragraph 49).

115 Aims of a purely economic nature, such as the desire to increase profits, cannot justify a restriction on the freedom to provide services (compare the judgment in *AGET Iraklis*, cited above, paragraph 72 and case law cited). The aim of the measure at hand appears however to be related to ensuring a stable basis for NSF's activities, as a non-profit sports association. In particular, according to the referring court, marketing revenues are by far NSF's most important source of income, as they amount to more than 70 per cent of its resources.

116 According to the request for an advisory opinion, the overall revenue generated is spent not only on a sporting scheme to support the professional athletes but also on a solidarity policy involving cooperation between the elite and popular level of skiing. This includes recruitment, education, and children's and recreational sports. The objective of encouraging recruitment and training of young athletes has been accepted in case law as legitimate (compare the judgment in *Olympique Lyonnais*, paragraph 39 and case law cited).

117 However, rules such as those on prior control and consent for individual sponsorship contracts may only serve as a means, subject to the suitability and necessity assessment,

of ensuring the objective pursued but not as an end in itself. Moreover, it is not sufficient for the restrictive measure to resort to a legitimate aim in the abstract. Rather, it must be assessed whether the measure at issue actually pursues the invoked aim (see *Netfonds Holding and Others*, cited above, paragraph 115 and case law cited). It is for the referring court to identify, in light of the facts of the case, the objectives that are in fact pursued by the contested measure.

Suitability/consistency

118 When a measure constitutes a restriction on the fundamental freedoms of EEA law, it falls to the party imposing the restriction to demonstrate that the measure is suitable to achieve the legitimate objective pursued along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner (see *Netfonds Holdings and Others*, cited above, paragraph 117 and case law cited).

119 The Court notes that it appears to be disputed how the income that NSF receives from advertising contracts, inter alia for advertisements on helmet and headgear, is distributed within the organisation. While it is reasonable that some of the income is dedicated to the professional athletes only, the income generated must benefit the legitimate aims identified above, such as recruitment, education, children's and recreational sports.

120 Provided that a substantial part of the income is actually spent on the objective of encouraging the recruitment and training of young athletes, it appears that rules on prior control and consent for individual sponsorship contracts, such as those laid down in the NSF Joint Regulations, are suitable to achieve that objective.

Necessity

121 In the event that the referring court finds that a measure which restricts the freedom to provide services is suitable for attaining a legitimate objective, it must also assess whether it goes beyond what is necessary in order to attain that objective.

122 The necessity test implies that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law (see *Netfonds Holdings and Others*, cited above, paragraph 126). Since the restrictive measure seeks to contribute to ensuring that NSF is able to continue its activities in the field of skiing, it must be assessed whether there are other less restrictive measures that would ensure a similar level of resources.

123 According to established case law, it is for the party that invokes a derogation from one of the fundamental freedoms to show in each individual case that its rules are necessary and proportionate to attain the aim pursued. However, that burden of proof cannot be so extensive as to require the party to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions (see *Netfonds Holdings and Others*, cited above, paragraph 127 and case law cited).

124 The assessment of the system's necessity must take account of the fact that NSF and the athletes are mutually dependent on one another. The market value of the sponsorship

contracts must be attributed to the combined contributions of NSF and the professional athletes. The system must therefore ensure that the athletes receive a fair share of the revenues from sponsorship contracts. If not, that would constitute a disproportionate restriction on the athletes' freedom to provide sponsorship services. This is so, in particular, since it appears that revenue generated from marketing contracts constitutes the most important source of income not only for NSF but also for the athletes themselves.

125 According to the referring court, NSF covers all expenses of members of the Norwegian national alpine skiing team for approximately 200 days a year. Furthermore, the athletes may enter into individual sponsorship contracts with equipment providers in NSF's skipool without NSF approval. Outside the skipool additional contracts may be entered into with NSF approval. It appears that Mr Kristoffersen concluded a number of such contracts. This may have an impact on the assessment of whether the athletes can be considered to receive a fair share of the revenue from the potential market for sponsorship contracts through the system in place. However, that decision is for the referring court.

126 It follows from the foregoing that a system of prior control and consent for individual sponsorship contracts may constitute a justified restriction on athletes' freedom to provide sponsorship services, so long as it pursues a legitimate aim, is suitable and does not go beyond what is necessary to attain the aim.

127 While a system of prior control and consent for individual sponsorship contracts may be justified as such, it does not necessarily follow that every individual decision taken under that system is equally justified. Such individual decisions must pursue the legitimate aims of the system in a suitable and proportionate manner.

128 In this regard, in order to comply with the principle of proportionality, decisions taken under NSF's system of prior control and consent for individual sponsorship contracts must be based on a fair balance between the interests of NSF and the professional athletes. The existence, at the time of the athlete's application for approval, of a collective sponsorship contract with NSF's main sponsor, Telenor, covering helmet and headgear, may be relevant to the assessment of whether the concrete refusal is justified. In that case, the assessment of proportionality may include the issue of whether NSF was aware of Mr Kristoffersen's intention to enter into a separate sponsorship agreement when NSF concluded its collective sponsorship contract as well as the impact of such a collective sponsorship agreement on Mr Kristoffersen's ability to generate income from his profession. Furthermore, the referring court may also take account of the impact of

individual sponsorship contracts on NSF's ability to achieve the legitimate aims invoked.

129 Furthermore, the Court notes that in order to comply with EEA law, the system and the decisions under a national sports federation's approval scheme for individual marketing contracts must satisfy certain procedural requirements.

130 As to the content of such procedural requirements, it should be taken into account that the system at issue is that of a sports federation and not a public authority. Moreover, unlike a public authority operating an authorisation scheme, the federation is itself dependent on sponsorship revenue for the financing of its activities. These features suggest that the system of prior control and consent for individual sponsorship contracts should not be subject to identical requirements as those governing authorisation schemes traditionally operated by public licensing authorities (compare, as regards requirements for public authorities, the judgment in *Watts*, cited above, paragraphs 115 to 117).

131 Nevertheless, any individual decision must provide the grounds on which it is based and be properly communicated to the athlete concerned within a reasonable time. A review of the decision before a body independent of NSF should be available, for example, by a court, such as in the present case.

132 Subject to these procedural guarantees, the sports federation may exercise discretion in the assessment of applications for individual sponsorship contracts.

133 In the proceedings before the Court, NSF stated that its rules prohibit arbitrary, unreasonable or discriminatory decisions. It is for the national court to ascertain the contention and, if verified, whether the refusal to authorise Mr Kristoffersen's contract complies with NSF's own requirements and with the requirements set out in the preceding paragraphs.

134 In the absence of EEA rules governing the matter, the consequences for the legality of an individual decision of a failure on the part of NSF to fulfil the procedural requirements described above are for the national court to determine, subject to the principles of equivalence and effectiveness (see, as regards the content of those principles, Case E-6/17 *Fjarskipti*, judgment of 30 May 2018, not yet reported, paragraph 31).

135 In response to Question 4, the Court concludes that a system of prior control and consent for individual sponsorship contracts – and a concrete refusal under that system – will be lawful provided that the system and the refusal pursue a legitimate aim that is justified by an overriding reason in the general interest, are suitable to attain that aim and do not go beyond what is necessary to attain it. In that assessment, the system and the concrete refusal cannot be considered in isolation but must be seen in light of the overall possibilities for the athletes or athlete to engage in individual marketing activity.

136 The answer to Questions 5 and 6 is that a concrete decision taken under a national sports federation's system of prior control and consent for an individual sponsorship contract

must be based on a fair balance between the interests of the federation and the athlete concerned. The decision must be reasoned and communicated to the athlete within a reasonable time. Moreover, a review procedure before a body independent of the federation should be available. Subject to these procedural guarantees, the sports federation may exercise discretion in the assessment of applications for individual sponsorship contracts. The consequences of a failure to comply with these requirements must be determined by the national court, subject to the principles of equivalence and effectiveness.

IV Costs

137 The costs incurred by the Norwegian Government, the Government of the Netherlands, the Swedish Government, ESA, and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties and intervener to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Oslo District Court hereby gives the following Advisory Opinion:

1. **The legal criterion for the assessment of whether a national sports federation's system of prior control and consent for individual sponsorship contracts constitutes a restriction under Article 36 EEA is whether the system renders less attractive the exercise of an athlete's freedom to provide a marketing service.**

2. **If such a system of prior control and consent for individual sponsorship contracts constitutes a restriction, the same will apply to a concrete refusal of an application to enter into an individual sponsorship contract under that system.**

3. **A system of prior control and consent for individual sponsorship contracts – and a concrete refusal under that system – will be lawful provided that the system and the refusal pursue a legitimate aim that is justified by an overriding reason in the general interest, are suitable to attain that aim and do not go beyond what is necessary to attain it. In that assessment, the system and the concrete refusal cannot be considered in isolation but must be seen in light of the overall possibilities for the athletes or athlete to engage in individual marketing activity.**

4. **A concrete decision taken under a national sports federation's system of prior control and consent for an individual sponsorship contract must be based on a fair balance between the interests of the federation and the athlete concerned. The decision must be reasoned and communicated to the athlete within a reasonable time. Moreover, a review procedure before a body independent of the federation should be available. Subject to these procedural guarantees, the sports federation may exercise discretion in the assessment of applications for individual sponsorship contracts. The consequences of a failure to comply with these requirements must be determined by the national court, subject to the principles of equivalence and effectiveness.**

Páll Hreinsson Per Christiansen Martin Ospelt

Delivered in open court in Luxembourg on 16 November 2018.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President