E-8/17-24

REPORT FOR THE HEARING

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 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

I Introduction

1. By a letter of 25 September 2017, registered at the Court on the same day, Oslo District Court (*Oslo tingrett*) made a request for an advisory opinion in a case pending before it between Henrik Kristoffersen ("the plaintiff") and the Norwegian Ski Federation (*Norges Skiforbund*) ("the defendant"), supported by the Norwegian Olympic and Paralympic Committee and Confederation of Sports (*Norges Idrettsforbund og olympiske og paralympiske komité*) ("the Norwegian Olympic Committee" or "the Committee").

2. The plaintiff is an alpine ski racer who wished to enter into a sponsorship contract with Red Bull GmbH ("Red Bull") for his helmets/headgear. However, the defendant refused permission for such a contract based on its Joint Regulations (*Fellesreglementet*), which state that the defendant has prior control over and may deny individual sponsorship contracts regarding commercial markings on the national team's equipment. The case before the referring court concerns, inter alia, the question whether these rules, and the

defendant's application of them, are in violation of 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" or "the Directive") or, alternatively, Article 36 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA").

II Legal background

EEA Law

3. Article 36 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.*
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> *2. Annexes IX to XI contain specific provisions on the freedom to provide services*.

4. The Services Directive was incorporated, with certain adaptations, into Annex X to the EEA Agreement at point 1 by EEA Joint Committee Decision No 45/2009 of 9 June 2009 (OJ 2009 L 162, p. 23, and 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.

5. Recital 35 in the preamble to the Services Directive reads:

> *Non-profit making amateur sporting activities are of considerable social importance. They often pursue wholly social or recreational objectives. Thus, they might not constitute economic activities within the meaning of Community law and should fall outside the scope of this Directive.*

6. Article 2(1) of the Services Directive reads:

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

7. Article 4 of the Services Directive, as adopted for the purpose of the EEA Agreement, reads:

> *For the purposes of this Directive, the following definitions shall apply:*
>
> *1) 'service' means any self-employed economic activity, normally provided for remuneration, as referred to in Article 37 of the EEA Agreement;*

2) 'provider' means any natural person who is a national of a Member State, or any legal person as referred to in Article 34 of the EEA Agreement and established in a Member State, who offers or provides a service;

3) 'recipient' means any natural person who is a national of a Member State or who benefits from rights conferred upon him by Community acts, or any legal person as referred to in Article 34 of the EEA Agreement and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service;

…

6) 'authorisation scheme' means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;

7) 'requirement' means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;

8) 'overriding reasons relating to the public interest' means, without prejudice to Article 6 of the EEA Agreement, reasons recognised as such in the rulings of the Court of Justice of the European Community, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers; recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;

9) 'competent authority' means any body or authority which has a supervisory or regulatory role in a Member State in relation to service activities, including, in particular, administrative authorities, including courts acting as such, professional bodies, and those professional associations or other professional organisations which, in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof;

…

8. Article 9(1) of the Services Directive reads:

1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

9. Article 10 of the Services Directive reads:

1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;

(b) justified by an overriding reason relating to the public interest;

(c) proportionate to that public interest objective;

(d) clear and unambiguous;

(e) objective;

(f) made public in advance;

(g) transparent and accessible.

…

6. Except in the case of the granting of an authorisation, any decision from the competent authorities, including refusal or withdrawal of an authorisation, shall be fully reasoned and shall be open to challenge before the courts or other instances of appeal.

…

10. Article 13(1) to (4) of the Services Directive reads:

1. Authorisation procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially.

2. Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures.

3. Authorisation procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. The period shall run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time. The extension and its duration shall be duly motivated and shall be notified to the applicant before the original period has expired.

4. Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

11. 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

12. The Services Directive has been implemented in Norway by the Act of 19 June 2009 No 103 on Services.[1]

III Facts and procedure

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

14. The defendant is a non-profit organisation whose purpose is, inter alia, to provide the best possible conditions for skiing, at both elite and popular level. The organisation is partly financed by public funds and partly by marketing contracts. The defendant is affiliated to the Norwegian Olympic Committee and the International Ski Federation ("FIS"), and is subject to their regulations.

15. Article 200.3 of FIS's International Ski Competition Rules ("ICR") 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.*

16. Article 204.1 of FIS's ICR Joint Regulations for Alpine Skiing 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.*
>
> *…*

17. 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*

[1] *Lov om tjenestevirksomhet (tjenesteloven), LOV-2009-06-19-103.*

may be party to such contracts/collaboration unless otherwise specified in Section 14-4(2) of the [Norwegian Olympic Committee's] Statute.

18. 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.

19. 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.

20. The defendant's Joint Regulations permit athletes to enter into individual marketing contracts if the 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.

21. The case before the referring court concerns a dispute between the plaintiff and the defendant relating to the plaintiff's wish to enter into an individual sponsorship contract with Red Bull relating to headgear/helmets. Since 2014, the plaintiff and Red Bull had been seeking to enter into such a contract. Red Bull had previously entered into a corresponding sponsorship contract with another Norwegian alpine skier, Aksel Lund Svindal.

22. Basing itself on its Joint Regulations, the defendant, at the end of April 2016, refused to permit the plaintiff to sign an individual sponsorship contract with Red Bull for helmets/headgear worn in races organised under the auspices of the defendant and FIS.

23. The plaintiff sent a notice of civil action to the defendant on 30 May 2016. Because of the dispute, the signing of the plaintiff's national team contract for the 2016/2017 season was postponed until 1 August 2016. A writ was filed with the Oslo District Court on 17 October 2016. The plaintiff claims in the national legal proceedings that the defendant be ordered to permit the plaintiff to enter into an individual marketing contract with Red Bull for helmets/headgear. In the alternative, the plaintiff has submitted a claim for damages, limited upwards to NOK 15 000 000.

24. According to the request from the referring court, the Norwegian Olympic Committee has intervened in support of the defendant in the pending case before the referring court.

25. The referring court has submitted 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)**
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> > **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?**
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> **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?

IV Written observations

26. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the plaintiff, represented by Odd Stemsrud, advocate;

- the defendant, represented by Per Andreas Bjørgan and Anne-Lise H. Rolland advocates;

- 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 and Pauline Huurnink, head and staff member respectively of 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, and Luigi Malferrari and Gero Meessen, members of its Legal Service, acting as Agents.

V Summary of the arguments and observations submitted to the Court

The plaintiff

27. As a preliminary remark, the plaintiff states that EEA competition law is also applicable in the case at hand, citing case law of the Court of Justice of the European Union ("ECJ"), and invites the Court to give as specific guidance as possible on relevant EEA law.[2] Furthermore, the plaintiff argues that the precondition inserted in the third question in the request for the advisory opinion, i.e. "Provided that a restriction is deemed to exist", is erroneous as no restriction under Article 36 EEA is needed for the Services Directive to apply.

28. The plaintiff submits that there is no doubt that EEA law, both internal market rules and competition rules, applies fully where a sporting activity takes the form of the provision of services (or employment) for remuneration. In this regard, he refers to Article 36 EEA (or Article 28 EEA).[3] The plaintiff further submits that the 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.[4] In this regard, the plaintiff 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.[5]

29. The plaintiff contends that there is a distinction to be made between market rules, such as the rules at issue in the present proceedings, on the one hand, and "rules of the game", i.e. sporting rules, on the other hand. However, the ECJ has decided that "rules of the game" are in principle also subject to EU law.[6] As the present case is related to the multi-billion euro revenue generating activities of marketing agreements, there is no doubt the EEA law is fully applicable to the economic activity of sponsorship services regulated in individual marketing agreements between a professional athlete and his sponsor.

30. The plaintiff argues that the Services Directive covers professional sporting activities and related sponsor services, as the Directive covers all services subject to Article

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2 Reference is made, inter alia, to the judgment in *MOTOE*, C-49/07, EU:C:2008:376, operative part.

3 Reference is made to the judgment *in Olympique Lyonnais*, C-325/08, EU:C:2010:143, paragraph 27 and case law cited.

4 Reference is made to the judgments in *Deliège*, Joined Cases C-51/96 and C-191/97, EU:C:2000:199, paragraph 41 et seq., and *Bond van Adverteers and Others*, Case 352/85, EU:C:1988:196, paragraph 16.

5 Reference is made to the judgment in *Commission* v *Austria*, C-356/08, EU:C:2009:401, paragraph 37.

6 Reference is made to the judgment in *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492.

36 EEA which are not clearly exempted therefrom. This conclusion further follows a contrario from recital 35 in the preamble to the Services Directive.

31. The plaintiff submits that Article 16 of the Services Directive is to be applied only if the centre of gravity of other provisions of the Directive do not apply.[7] He argues, primarily, 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". Article 9 of the Services Directive relates to the legality of an authorisation scheme, as such. In contrast, Article 10 of the Directive presupposes a legal authorisation scheme and addresses the legality of the conditions for the granting of an authorisation. The plaintiff argues that the concept of an authorisation scheme, according to Article 9 of the Services Directive, has a very wide scope, i.e. "any procedure", and that it applies per se to a sports organisation's authorisation scheme, such as that at issue in the main proceedings, for the authorisation of individual marketing/sponsor agreements.[8] Since the key concepts and definitions in Article 10 correspond to those of Article 9, the former provision also applies per se to conditions for the granting of an authorisation such as the one at issue in the main proceedings.

32. In the alternative, the plaintiff argues that Article 16(1) of the Services Directive, mirroring Article 36 EEA, is applicable to the dispute. The plaintiff holds that the notion of "requirement" in Article 16(1) of the Directive is in scope similar, if not identical, to the notion of a "restriction" pursuant to Article 36 EEA.[9] The defendant's authorisation scheme, which defines whether or not, and if so, under what conditions, the plaintiff may offer sponsor services for remuneration, is a "requirement" under Article 16 of the Directive and a "restriction" that impedes the activities of a service provider pursuant to Article 36 EEA. The plaintiff submits that the reference in Article 16 to possible justifications refers neither to the definition in Article 4 of the Services Directive nor to case law. Rather, the justifications found in Article 16 of the Directive are limited to public policy, public security, public health or the protection of the environment. The plaintiff argues that the notion of "public policy", which must be interpreted strictly, does not include cultural or social aspects or any commercial interests that the defendant may have in sponsorship revenues.[10]

33. Furthermore, the plaintiff submits that the defendant's authorisation scheme must be justified by "overriding reasons in the public interest" to be legal. This notion, which is identified in the Services Directive as well as in general EEA law, does not have the same substantive aspects in all situations.

34. With regard to the justification of an authorisation scheme and the conditions for granting an authorisation, the plaintiff argues that Articles 9(1)(b) and 10(2)(b) of the

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[7] Reference is made to Case E-3/12 *Jonsson* [2013] EFTA Ct. Rep 136, paragraph 57 and case law cited.

[8] Reference is made to the judgment in *Deliège*, cited above, paragraph 57.

[9] Reference is made to the judgments in *Commission* v *Portugal*, C-458/08, EU:C:2010:692, paragraph 88, and *Säger*, C-76/90, EU:C:1991:331, paragraph 12.

[10] Reference is made to the judgment in *Église de scientologie*, C-54/99, EU:C:2000:124, paragraph 17.

Services Directive refer to the concept of "overriding reasons in the public interest" as defined in Article 4(8) of the Directive, and developed in the case law. Thus a possible justification includes "cultural policy" objectives. The plaintiff argues that while the inclusion of "rules of the game" can be justified with reference to "cultural policy", purely economic regulations, such as the ones under review, do not qualify as "rules of the game" and cannot be justified on grounds of "cultural policy" or any other justification, including the narrower justifications set out in Article 16 of the Services Directive.[11]

35. The plaintiff submits in addition that a transparency requirement is an integral part of the fundamental principles of EEA law, and, albeit enshrined in Articles 10 and 16 of the Services Directive, it applies irrespective of whether the provisions of the Directive are applicable to the present case.[12] The plaintiff holds that the requirement precludes an authorisation system, such as the one 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. This applies irrespective of whether the Court bases itself on Article 10 or Article 16 of the Services Directive or Article 36 EEA. The plaintiff notes that nothing in the regulations of FIS or the Norwegian Olympic Committee requires the defendant to adopt a scheme with such a discretionary power.

36. The plaintiff argues, furthermore, that the prohibition of discrimination is equally a fundamental principle of EEA law.[13] Admittedly, Article 16 of the Services Directive refers merely to discrimination on grounds of nationality. However, Article 10 of the Directive does not include a similar limitation and must be interpreted as a general prohibition against discrimination. The plaintiff holds that the non-discrimination requirement of Article 10 of the Directive prohibits the application of different rules to comparable situations, such as the defendant granting Aksel Lund Svindal a contract with Red Bull which was similar to the one that the defendant refused authorisation for the plaintiff to enter into.

37. According to the plaintiff, EEA law, particularly Articles 9(1)(c), 10(2)(c) and 16(1)(c) of the Services Directive, prescribes that restrictions in general, authorisation schemes and criteria for granting authorisation must be proportionate.

38. The plaintiff argues that the defendant's authorisation scheme, as such, is subject to the proportionality test under Article 9 of the Services Directive, and in any event Article 16 of the Directive and Article 36 EEA. A scheme which allows a national sports association to collect, at its own discretion, revenue from income generated by athletes to

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[11] Reference is made to the judgments in *Walrave and Koch*, Case 36/74, EU:C:1974:140; *Donà*, Case 13/76, EU:C:1976:115; *Bosman*, C-415/93, EU:C:1995:463; *Lehtonen and Castors Braine*, C-176/96, EU:C:2000:201; *Meca-Medina and Majcen* v *Commission*, cited above; and *Kohll*, C-158/96, EU:C:1998:171, paragraph 41. Reference is also made to the Commission's White Paper on Sport, 11.7.2007, COM(2007) 391 final.

[12] Reference is made to Case E-24/13 *Casino Admiral* [2014] EFTA Ct. Rep. 732, paragraphs 51 and 53.

[13] Reference is made to the judgment in *Lease Plan Luxembourg*, C-390/96, EU:C:1998:206, paragraph 34.

cover its own administrative costs, cannot be proportionate, particularly since it has an unnecessarily excessive effect on the athletes.

39. The plaintiff maintains that the application of the defendant's conditions for granting an authorisation is subject to Articles 10 and 16 of the Services Directive. Applying the proportionality requirement to those articles, whichever one is applicable, would not permit a scheme whereby the national sports association rejects an individual marketing agreement that would otherwise increase the overall revenue to the sports association. The plaintiff adds that reasons invoked by the defendant in order to justify a derogation must be accompanied by an appropriate analysis of the expedience and proportionality of the measure, and precise evidence enabling its arguments to be substantiated.[14]

40. With regard to procedural rules for authorisation schemes, the plaintiff refers to Article 10 and Article 13(1) to (3) of the Services Directive. The plaintiff argues that the defendant's authorisation system is not in line with these provisions and must therefore be null and void. The same result can be reached by reference to Article 10(6) of the Services Directive.

41. The plaintiff moreover refers to Article 13(4) of the Services Directive, arguing that it must be interpreted as meaning that unless the national sports association has rejected an application for an authorisation by way of a fully reasoned decision in accordance with Article 10(6) of the Directive within a reasonable period, an authorisation must be deemed to have been granted.[15] The notion of a "reasonable period" must be assessed in light of the association's need to assess the application and the athlete's need for a reply, but must not exceed three months.

42. The plaintiff proposes that the Court should answer the questions referred as follows:

> *1. Article 9 of Directive 2006/123/EC must be interpreted as meaning that an authorisation scheme such as that at issue in the main proceedings related to a scheme where a national sports association can reject or approve authorisation of an individual market agreement between a self-employed athlete and a sponsor, falls within the scope of that provision.*
>
> *2. An authorisation scheme such as that at issue in the main proceedings can be justified by an overriding reason relating to the public interest, provided that the scheme is non-discriminatory and proportionate. Inherent sporting rules may justify a restriction as part of cultural policy objectives, however, economic objectives cannot justify encroachments on the fundamental freedoms of the internal market.*

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[14] Reference is made to Case E-12/10 *ESA* v *Iceland* [2011] EFTA Ct. Rep. 117, paragraph 57.

[15] Reference is made to the judgment in *Germany* v *Commission*, Case 24/62, EU:C:1963:14, p. 69.

All authorisation schemes adopted by a national sports association such as that at issue in the main proceedings must be accompanied by an appropriate analysis of the expediency and proportionality of the authorisation scheme, and precise evidence enabling the arguments to be substantiated.

3. Article 10 (1) and (2) and Article 13 (1) of Directive 2006/123/EC must be interpreted as meaning that conditions for the granting of authorisation pursuant to an authorisation scheme such as that at issue in the main proceedings related to a national sports association authority to reject or approve an individual market agreement between a self-employed athlete and a sponsor, must preclude the competent authorities from exercising their power of assessment in an arbitrary manner. Thus, Article 10 (1) and (2) and Article 13 (1) of Directive 2006/123/EC precludes authorisation schemes where the exercise of the authority is at the discretion of the national sports association. All conditions for the granting of authorisation enforced by a national sports association such as that at issue in the main proceedings must be accompanied by an appropriate analysis of the expediency and proportionality of the conditions, and precise evidence enabling the arguments to be substantiated.

4. The concept of non-discrimination enshrined in Article 10 (2) precludes, such as the case is in the main proceedings, the application of different rules to comparable situations; the granting of authorisation by a national sports association to the athletes to individually use particular logo exposure must be applied in a uniform manner.

5. A breach of Article 9 or Article 10 has the legal consequence that the scheme or the rejection for an authorisation is null and void.

6. The requirement that rejections shall be fully reasoned in Article 10 (6) of Directive 2006/123/EC and the principle of EEA law that rejection decisions that enforce an encroachment on the fundamental freedoms must set out, in a concise but clear and relevant manner, the conditions for the granting of authorisation, the issues of fact upon which the decision is based and which are necessary in order that the reasoning which has led the competent authority to its decision may be understood. Where the conditions for the granting of authorisation or the relevant issues of fact are not included in the rejection decision at all, such a decision is null and void.

7. Article 13 (4) of Directive 2006/123/EC must be interpreted as meaning that, unless the national sports association has rejected an application for an authorisation by way of a fully reasoned decision in accordance with Article 10 (6) within a reasonable period, an authorisation shall be deemed to have been granted. The notion of a 'reasonable period' must be assessed in light of the association's

need to assess the application and the athlete's need for a reply, but shall in no event exceed three months.

43. In the alternative, the plaintiff proposes that the Court should answer the questions referred as follows:

1. Article 16 (1) of Directive 2006/123/EC in conjunction with Article 36 EEA must be interpreted as meaning that an authorisation scheme such as that at issue in the main proceedings can be only be justified for reasons of public policy, public security, public health or the protection of the environment. A justification based on public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society, which would only exceptionally be relevant for justifying sporting rules. Economic objectives cannot justify encroachments on the fundamental freedoms of the internal market. All authorisation schemes adopted by a national sports association such as that at issue in the main proceedings must be accompanied by an appropriate analysis of the expediency and proportionality of the authorisation scheme, and precise evidence enabling the arguments to be substantiated.

2. Article 16 (1) in conjunction with Article 36 EEA must be interpreted as meaning that conditions for the granting of authorisation pursuant to an authorisation scheme such as that at issue in the main proceedings related to a national sports association authority to reject or approve an individual market agreement between a self-employed athlete and a sponsor, must preclude the competent authorities from exercising their power of assessment in an arbitrary manner. Thus, Article 16 (1) of Directive 2006/123/EC precludes authorisation schemes where the exercise of the authority is at the discretion of the national sports association. All conditions for the granting of authorisation enforced by a national sports association such as that at issue in the main proceedings must be accompanied by an appropriate analysis of the expediency and proportionality of the conditions, and precise evidence enabling the arguments to be substantiated.

3. A breach of Article 16 (1) in conjunction with Article 36 EEA has the legal consequence that the scheme or the rejection for an authorisation is null and void.

4. The principle of EEA law that rejection decisions that enforce an encroachment on the fundamental freedoms must set out, in a concise but clear and relevant manner, the conditions for the granting of authorisation, the issues of fact upon which the decision is based and which are necessary in order that the reasoning which has led the competent authority to its decision may be understood. Where the conditions for the granting of authorisation or the relevant issues of fact are not included in the rejection decision, such a decision is null and void.

5. To give effect to Article 16 in conjunction with Article 36 EEA, the provisions are to be interpreted as meaning that, unless the national sports association has rejected an application for an authorisation by way of a fully reasoned decision within a reasonable period, an authorisation shall be deemed to have been granted. The notion of a 'reasonable period' must be assessed in light of the association's need to assess the application and the athlete's need for a reply, but shall in no even exceed three months.

The defendant

44. As a preliminary observation, the defendant states that it owns the right for marking on the helmets/headgear of the Norwegian national skiing team. This is a right which the defendant can dispose of according to FIS rules. Accordingly, the defendant 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.

45. The defendant argues that the plaintiff's demands for the marking have no basis in EEA law. 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.[16] The rejection at issue is not based on "free" discretion, but on the defendant's ownership and freedom of contract. The defendant adds that if the plaintiff were to succeed in his claims, that would, in principle, also entail that a football player on a national team could claim that the back of the national team's football uniform should be for personal sponsors instead of the national team's sponsors.

46. The defendant submits that 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 necessary support that skiing at the highest level requires. The direct costs of operating the four national teams were in 2015 NOK 32.4 million and in 2016 NOK 36.5 million. The teams do not receive any public funding, nor do they share prize money or revenue from the skiers' personal contracts with equipment manufacturers. Thus, the teams are almost entirely financed by their own sponsors and the markings are crucial to give the sponsors the exposure they seek.

47. The defendant 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 the defendant, provide athletes with numerous opportunities to exercise economic activity, including to promote individual sponsors through personal sponsor agreements for all their equipment. Furthermore, athletes can enter into individual

[16] Reference is made to the Opinion of Advocate General Jacobs in *Bronner*, C-7/97, EU:C:1998:264, paragraph 56.

sponsorship agreements with companies other than the manufacturers of equipment. For such contracts, the practice of the defendant has always been to approve individual contracts to the largest extent possible. Individual contracts would only be rejected if they violate other sponsors' rights or run contrary to the sports association's rules.

48. The defendant notes that the plaintiff has several sponsorship agreements, including an agreement to promote Red Bull on his drinking bottle, and the defendant 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, including the integrity of sport.

49. With regard to the first and second questions, the defendant reiterates that it falls within its property rights and freedom of contract to reject giving away its own marketing rights. Such a rejection is not a restriction on free movement, neither within the meaning of Article 36 EEA nor as regards the Services Directive, as the individual team member has no right to the economic activity that rests on the exploitation of the rights of the national team. Moreover, the right to free movement does not include a right of expropriation. The fact that the defendant's ownership is granted by the FIS rules does not provide a basis for considering the required transfer of the rights to be a regulatory as opposed to a property issue.

50. Furthermore, the defendant submits that case law concerning rules and practices of sports associations distinguishes between limitations of individual conduct and restrictions on free movement.[17] The case at hand concerns a single rejection by the defendant to a demand from an individual member for a sponsor contract that rests on the association'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 the profession of professional skiing, or ancillary economic activities such as advertisements for sponsors.

51. The defendant emphasises that professional skiing and World Cup competitions are of a special nature since, inter alia, access to such competitions rests firmly on a nationality requirement, which has not been held directly discriminatory.[18] The number of participants to any given national team is strictly limited, usually to what the available financial resources of the association can cover. Moreover, the selection of national team members is based on many factors and entails considerable discretion for the national team management. This special nature is also present in extensive FIS regulations on advertising.

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[17] Reference is made to the judgment in *Donà*, cited above, and *Deliège*, cited above.

[18] Reference is made to the judgments in *Walrave and Koch*, cited above; *Donà*, cited above; *Bosman*, cited above; *Lehtonen and Castors Braine*, cited above; *Wouters and Others*, C-309/99, EU:C:2002:98; *Meca-Medina and Majcen* v *Commission*, cited above, paragraph 42; and *Deliège*, cited above, paragraphs 59 and 64-69. Reference is also made to the Opinion of Advocate General Cosmas in *Deliège*, cited above, EU:C:1999:147, points 75 and 76.

52. With regard to the third question, the defendant submits that questions concerning the interpretation of the Services Directive are of limited significance for the case at hand for several reasons. The plaintiff 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 the defendant's rules. Therefore, the plaintiff has not exercised his freedom of establishment and Chapter III of the Services Directive, including its Articles 9 and 10, does not apply to the present proceedings.

53. Furthermore, the defendant 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, i.e. from a Norwegian perspective to inbound/incoming services. The limitation in the defendant's rules concern, however, outbound services. That situation is regulated by Article 36 EEA.

54. The defendant states that, while some activities of sports associations might, in principle, fall under Article 4(6) of the Services Directive, its application must be assessed with a view to the special character of sports. For example, Articles 14 and 20 of the Directive, which prohibit nationality based difference in treatment, do not apply to the access rules for the profession of World Cup skiing which is nationality based. Clear and unambiguous provisions of the Directive must be interpreted in line with existing case law and do not alter or amend any basic principles of the EEA agreement, as is confirmed by Article 3(3) of the Directive.

55. The defendant notes that some provisions of the Services Directive deviate, by their wording, from the case law on free movement by applying narrower concepts. The defendant submits that the narrow justifications prescribed in Article 16 of the Directive cannot be interpreted as precluding justifications based on "the interest of sport", as such an interpretation would ignore the special case law on sports associations' rules and the elevation of sports to Treaty level under the TFEU. If the rules and decisions of sport associations are not restrictions on free movement, they are also not "requirements" under the Services Directive.

56. With regard to the authorisation system pursuant to Article 4(6) of the Services Directive, the defendant reiterates that no team member can under free movement rules claim a right to something which is the property of the defendant. Since the request for marking is not governed by the concept of free movement, the defendant's rules and practices that deny the request cannot constitute an authorisation system under Article 4(6). Further, although a requirement of authorisation for access to or exercise of economic activity is, according to the general case law on free movement, normally considered to constitute a restriction, the same cannot apply to any limitation of an ancillary economic activity within a sports association.

57. As for the fourth question, the defendant holds that it is immaterial whether a justification for a potential restriction is considered under the provisions of the main part of the EEA Agreement or under the Services Directive, as the Directive does not change the restriction test under the fundamental provisions of the EEA Agreement. In both cases, the referring court must assess whether the rules and/or the concrete rejection pursued a legitimate aim, and whether it was necessary and proportionate.

58. The defendant holds that, when considering the approval scheme in question, the national court should take into account the defendant's reasons for rejecting the plaintiff's request. 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 to the pursuit of a legitimate objective. Thus, the first two bullet points of the referring court's fourth question are relevant in assessing justification. In this regard, the defendant reiterates that the interests of the sport are recognised as a legitimate aim in the case law.

59. With regard to the fifth question, the defendant holds that the term "free discretion" is somewhat misleading in this context. The defendant's rules prohibit arbitrary, unreasonable or discriminatory decisions. However, the defendant'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 contracts. Discretion, as such, is not illegal under EEA law. The defendant's discretion is necessary to ensure that its rights are managed in the interest of the sport. If the Court were to disagree with the defendant on this issue, then the defendant would have no choice but to abolish the provisions of its Joint Regulations that allow individual athletes to conclude contracts based on the defendant's general marketing rights.

60. As regards the sixth question, the defendant reiterates that Chapter III of the Services Directive, and thereby its Article 13, does not apply to the present proceedings. Thus, the issue in dispute falls outside the scope of the Services Directive and should in any event be considered under the special case law governing sports associations' rules and practices. The defendant points out that even if Article 13(3) of the Directive were to be considered applicable, the consequences of failing to stipulate a reasonable time limit in advance, would never be that the defendant's property rights would automatically be transferred to another person.

61. The defendant proposes that the Court should answer the questions referred as follows:

> *Questions l, 1a, 2 and 2a:*
>
> *It falls within a national sports association's right of property and freedom of contract to maintain its ownership and reject a transfer of the association's marketing rights to a national team member.*

Limitations that are inherent in legitimate objectives pursued by sports associations, on national team participants' opportunities to conclude personal sponsor agreements, do not constitute restrictions of the free movement of services according to Article 36 EEA or Directive 2006/123/EC.

Questions 3 and 3a:

Rules and practices of a sports association concerning requests from national team members to utilise the association's marketing rights for personal sponsor agreements, do not constitute an authorisation scheme within the meaning of Article 4(6) of the Directive.

Articles 9, 10 and 16 of Directive 2006/123/EC do not apply to rules and practices of the national association rejecting a Norwegian citizen's exercise of ancillary economic activity connected to his participation on the Norwegian national team.

Question 4:

Provided that a restriction is deemed to exist:

In the assessment of whether the restriction is justified, the national court must assess whether the sports association's retainment of its marketing rights pursues an overriding interest capable of justifying restrictions to the national team member's provision of services. ln the assessment of whether the restriction is necessary and proportionate to ensure the overriding interest, the national court must take into account the overall possibilities for the national team members to exercise economic activity.

The sports association's rejection to transfer its marketing rights to the national team member for the exploitation of the rights for a personal sponsor agreement appears to pursue the legitimate interest of the sport and to be necessary and proportionate thereto.

The Norwegian Olympic Committee

62. The Norwegian Olympic Committee states that it fully concurs with the arguments presented in the written observations of the defendant, which is a member of the Norwegian Olympic Committee. All its members must comply with its statutes and decisions, and pass statutes that instruct their members to do the same. If a member organisation has statutes that are in violation of the Committee's statutes, the latter prevail. Pursuant to the Committee's statutes, the right to enter into commercial marketing agreements belongs to the national sport federations and the sports clubs. Athletes may, however, enter into individual commercial marketing agreements within the legal framework set by the relevant national sports federation, which must also approve such agreements.

63. The Norwegian Olympic Committee states 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. The model is a manifestation of the overriding principle of solidarity between the athletes and the national teams. The model ensures that sponsor agreements comply with rules and regulations, and basic ethical principles.

64. The Norwegian Olympic Committee argues that restraining or barring this model will deprive the defendant of its ability to secure a sound and comprehensive basis for financing the programmes and structures that are required to operate, manage and develop the sport.

The Norwegian Government

65. As a preliminary remark, the Norwegian Government submits that, as established by the FIS rules, the right of advertising either belongs to FIS or the defendant. The Government draws attention to the possibilities that the plaintiff has for entering into different advertising contracts and states that the plaintiff has entered into ten private partnership/sponsorship contracts.

66. Furthermore, the Norwegian Government argues that the plaintiff is established in Norway and not in Austria. His participation in skiing competitions is based on a national quota. The defendant provides him with the necessary infrastructure and equipment. The economic activity under consideration is carried out by means of a stable infrastructure, within the meaning of Article 4(5) of the Services Directive, which is based in Norway.

67. Moreover, the Norwegian Government submits that in the case at hand, two different activities are at stake, the main economic activity being the plaintiff's skiing activity. That activity is of an economic nature since he receives grants, prizes and the possibility of entering into lucrative sponsor contracts due to it.[19] The other activity is the plaintiff's marketing activity, which, according to the Government, is ancillary to the main activity and must be assessed as part thereof.

68. The Norwegian Government submits that the contested measure concerns a rule adopted by the sports federation in the plaintiff's EEA State of establishment. Further, the rule forms part of the rules of the competition, which an athlete must accept, in order to be eligible for a starting licence on the national team. According to the Government, this suggests that the measure should be assessed under the rules on the freedom of establishment. This is particularly clear when the rule affects skiing and marketing activities carried out in Norway. As the plaintiff also carries out his activities in other EEA States, and the advertising companies are established in different EEA States, this raises

[19] Reference is made to the judgment in *Deliège*, cited above, paragraphs 49-59.

the question of whether the measure should also be assessed under the rules on the freedom to provide services.[20] The Government submits that this conclusion is not obvious and that 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.[21]

69. Addressing the first and second questions, the Norwegian Government states that it is uncertain whether the freedom of establishment or the freedom to provide services is applicable. Regardless of this, the measure does not constitute a restriction. The Government also refers to its arguments here below concerning the third question.

70. 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.[22] Case law shows that the particular nature of sports and sporting competition may give rise to special considerations when assessing a measure in the area of sports under the provisions of free movement.[23] Further, Article 165(1) TFEU recognises the special nature of sport within the European Union.

71. The Norwegian Government argues that 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.[24] For instance, the measure does not prevent the plaintiff from entering into other advertising/sponsor contracts, for instance with equipment providers. Furthermore, the measure is a result of a need inherent in the organisation of the competition, namely providing financing. Moreover, the marketing rights, which the plaintiff wants to exploit, seem to be the property of the defendant, which the defendant has in fact already sold, thus raising the question of whether they are protected under Article 1 of Protocol 1 to the European Convention on Human Rights and Article 125 EEA.

72. The Norwegian Government submits that if the rules on free provision of services are applicable, the case must be assessed under Article 16 of the Services Directive. That provision only covers "requirements" as defined in Article 4(7) of the Directive. A requirement is only covered by the Directive if it affects the access to or the exercise of a

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[20] Reference is made to the judgments in *Alpine Investments*, C-384/93, EU:C:1995:126, and *Deliège*, cited above.

[21] Reference is made to the judgments in *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraph 32; *Libert and Others*, Joined Cases C-197/11 and C-203/11, EU:C:2013:288, paragraph 62; and *Omega*, C-36/02, EU:C:2004:614, paragraph 27.

[22] Reference is made to the judgment in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 32.

[23] Reference is made to the judgments in *Donà*, cited above, paragraph 14; *Bosman*, cited above, paragraph 106; *Meca-Medina and Majcen* v *Commission*, cited above, paragraph 45; and *Deliège*, cited above, paragraphs 43, 61 and 65.

[24] Reference is made to the judgment in *Semeraro Casa Uno and Others*, Joined Cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, 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.

service activity. The Government states that Article 16(1), second and third subparagraphs, and Article 16(2), are not applicable in the case as they apply only to incoming services. Furthermore, Article 16(2)(b) of the Directive is not applicable since no authorisation scheme is at hand. In this regard, the Government also refers to its arguments here below concerning the third question.

73. If the Court nevertheless finds that these provisions apply to the case at hand, then the Norwegian Government submits that Article 16(1) of the Services Directive enshrines the general principle of Article 36 EEA, in line with Article 3(3) of the Directive. The assessment of whether a restriction exists under Article 16(1) of the Directive and Article 36 EEA must be carried out along the same lines as under Article 31 EEA. Based on this, the Government submits that the measure at hand does not constitute a restriction within the meaning of Article 16(1) of the Directive and Article 36 EEA. The Government further states that the existing case law raised by the referring court is relevant to this conclusion.[25]

74. With regard to the third question, the Norwegian Government notes that the wording of Article 4(6) of the Services Directive is very wide. However, the term "authorisation scheme" must be interpreted as only encompassing situations where a decision and the compliance therewith is a prerequisite for the service provider to commence his activity. This is indicated by the last part of recital 39 in the preamble to the Directive and finds also some support in its recital 42.[26] The measure at hand is not a prerequisite for the lawful commencement of the sporting activity. The plaintiff can lawfully carry out the sporting activity with or without the right to display market brands on his helmet/headgear in the relevant competitions, which is an ancillary activity to the main activity. The authorisation scheme at hand is in fact the starting licence for alpine skiing. Rules stipulating that an athlete may not enter into individual sponsorship contracts unless the national sports federation approves of this, are one of the many conditions that athletes must accept to obtain a licence. The Government therefore argues that the measure at hand is not an authorisation scheme within the meaning of Article 4(6) of the Services Directive.

75. As regards the fourth question, the Norwegian Government states that the question is only relevant if the Court has found that the measure constitutes a restriction pursuant to Article 31 or Article 36 EEA or a "requirement" or "authorisation scheme" according to the Services Directive. If the Court considers the measure to be covered by any of the aforementioned rules, the Government submits that it is justified by overriding reasons relating to the public interest. The Government further submits that when assessing what objective is pursued by a measure, any material, from which the intent of the measure can be deduced, must be taken into account.[27]

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[25] Reference is made to the judgment in *Deliège*, cited above.

[26] Reference is made to the Opinion of Advocate General Szpunar in *College van Burgemeester en Wethouders van de gemeente Amersfoort*, Joined Cases C-360/15 and C-31/16, EU:C:2017:397, point 126.

[27] Reference is made to Case E-1/06 *ESA* v *Kingdom of Norway* [2007] EFTA Ct. Rep. 8, paragraph 33, and Case E-8/16 *Netfonds Holding and Others*, judgment of 16 May 2017, not yet reported, paragraph 115.

76. The Norwegian Government submits that the measure at hand aims to finance a sports federation, so that the federation may uphold its activity and responsibility within the sports sector. The Government states that case law has accepted aims as legitimate which bear much resemblance to "financing aims".[28] 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.[29]

77. The Norwegian Government argues that the measure at hand is based on a collective model where marketing rights are largely centralised and benefit everyone. The revenue generated is not only spent on a sporting scheme for elite athletes but also on recruitment, education, children's and recreational sports. The system is based on a solidarity model. The Government adds that this model has been considered by the Commission to represent an important public interest.[30] The Government argues that the solidarity model of sports constitutes an overriding reason relating to the public interest and the measure at hand is thus justified.

78. With regard to the issue of justification under Article 16(1) and (3) of the Services Directive, the Norwegian Government submits that these provisions cannot be interpreted as exhaustively listing the available grounds for justification. In this regard, the Government recalls that the EEA Agreement only refers to three grounds as legitimate justifications regarding freedom of services. However, that does not exclude EEA States from justifying non-discriminatory restrictions with reference to other overriding reasons relating to the public interest. The same should apply to Article 16(1) and (3) of the Directive, which, being secondary law, should be interpreted in light of the EEA Agreement as primary law. Referring to academic scholarship, the Government states that this is further supported by Article 3(3) of the Directive. Moreover, the ECJ has not interpreted said provisions as being exhaustive.[31]

79. The Norwegian Government submits that if the Court is of the opinion that Article 16(1) and (3) of the Services Directive, with regard to justification, are interpreted as being exhaustive, the Court should consider whether the aim pursued by the measure may be assessed as falling under the notion of "public health".[32]

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[28] Reference is made to the judgment in *Decker*, C-120/95, EU:C:1998:167, paragraph 39.

[29] Reference is made to Case E-1/06 *ESA* v *Kingdom of Norway*, cited above, paragraphs 39-40; Case E-2/06, *ESA* v *Kingdom of Norway* [2007] EFTA Ct. Rep. 164, paragraph 80; and Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 47.

[30] Reference is made to COM(2007) 391 final, cited above and the Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework - The Helsinki Report on Sport, 10.12.1999, COM(1999) 644 final.

[31] Reference is made to the judgments in *Rina Services and Others*, C-593/13, EU:C:2015:399; *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraph 116; and to Case E-19/15 *ESA* v *Principality of Liechtenstein* [2016] EFTA Ct. Rep. 437, paragraph 79.

[32] Reference is made to COM(2007) 391 final, cited above.

80. The Norwegian Government proposes that the Court should answer the questions referred as follows:

As to questions 1 and 2:

A rule by a sport federation – according to which an athlete must request the approval of the sport federation before the athlete is allowed to enter into an individual sponsor contract and pursuant to which the athlete in a specific case has been refused such approval – is not a restriction neither on the athlete's freedom of establishment or the athlete's freedom to provide services.

As to question 3:

Such a measure, which is not a prerequisite for the athlete to lawfully commence his sporting activity, does not constitute an authorization scheme according to Article 4 (6) of the Services Directive.

Should the Court consider that the measure constitutes a restriction according to Articles 31 or 36 EEA, or a "requirement" or "authorization scheme" covered by any of the provisions of the Services Directive, the Government asks the Court to answer question 4 in the following way:

Such a measure may be justified in any overriding reason relating to the general interest, in particular the solidarity model of the sport and the supporting of the recruitment, education, children's and recreational sports.

The Government of the Netherlands

81. As a preliminary remark, 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 in so far as a sporting activity takes the form of paid employment or the provision of a remunerated services and thus constitutes an "economic activity".[33] As the rules of the defendant concern sponsorship contracts between individual athletes and their sponsors, they fall under the concept of "economic activities".[34] The plaintiff 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 the plaintiff is established in Austria.

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[33] Reference is made to the judgments in *Walrave and Koch*, cited above, paragraph 4; Donà, cited above, paragraph 12; *Bosman*, cited above, paragraph 73; *Deliège*, cited above, paragraphs 41 and 55-56; *Lehtonen and Castors Braine*, cited above, paragraph 32; and *Meca-Medina and Majcen* v *Commission*, cited above, paragraphs 22-23.

[34] Reference is made to the judgments in *Deliège*, cited above, paragraphs 56-57, and *Société fiduciaire nationale d'expertise comptable*, C-119/09, EU:C:2011:208, paragraph 29.

82. With regard to the first three questions referred, the Government of the Netherlands submits that they should be answered by reference to the Services Directive, i.e. that the measure under review should be examined with reference to Articles 9, 10 and 16 of the Directive. A system of prior control and consent for concluding individual sponsorship contracts, such as the one at issue in the main proceedings, should be recognised as a combination of a "requirement" under Article 16 of the Directive and an "authorisation scheme" under Articles 9 and 10 of the Directive. In this regard the Government submits that the defendant is a "competent authority" pursuant to Article 4(9) of the Directive, as it exercises legal autonomy and regulates the exercise of a services activity.[35]

83. The Government of the Netherlands submits that the rule laid down in Point 206.2.5 of the defendant's Joint Regulations is a "requirement" within the meaning of Article 16 of the Services Directive, since the Directive is applicable to all requirements influencing access to or exercise of a service activity, cf. Article 4(7) of the Directive. More specifically, the rule in question is a requirement as referred to in Article 16(2)(b) of the Directive. In addition, the Government submits that a system of prior control and consent is an "authorisation scheme" pursuant to Articles 9 and 10 of the Directive, as supported by Article 4(6) and recital 57 in the preamble to the Directive. Since Article 16 of the Directive offers less scope to justify a restriction, the Government states that it is not necessary to examine Point 206.2.5 of the defendant's Joint Regulations separately under Article 9 of the Directive. The criteria for the application of such a rule are laid down in Article 10(2) of the Directive.

84. With regard to the fourth and fifth question, the Government of the Netherlands submits that rules such as the one under review are, in principle, prohibited. They may, however be justified for reasons of public policy or public health, pursuant to Article 16(1) and (3) of the Services Directive. It follows from recitals 40 and 41 in the preamble to the Directive that the concept of public policy should be understood in the way it has been interpreted by the ECJ in its case law on freedom of movement. In fact, the ECJ has confirmed the considerable social importance of sporting activities.[36] In this regard, reference is also made to recital 35 in the preamble to the Directive.

85. The Government of the Netherlands states that the ECJ has held that rules of professional sports organisations, such as the defendant, can under certain conditions be qualified as justified restrictions on the right to free movement, especially if they are inherent to the organisation of sport competition and thus enable sports to be conducted. Financial measures can be essential for the organisation of sports, as acknowledged in case law.[37] Although the ECJ has never explicitly based the justification in sport cases on the

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[35] Reference is made to the judgment in *Deliège*, cited above, paragraphs 67.

[36] Reference is made to the judgments in *Bosman*, cited above, paragraph 106; *Deliège*, cited above, paragraphs 41-42; and *Lehtonen and Castors Braine*, cited above, paragraphs 32-33.

[37] Reference is made to the judgments in *Bosman*, cited above, paragraph 105-110; *Lehtonen and Castors Braine*, cited above, paragraph 54: *Decker*, cited above, paragraph 39; and *Woningstichting Sint Servatius*, C-567/07, EU:C:2009:593, paragraphs 30-31.

public policy or public health exception, it can arguably be deduced from case law that this exception may apply to matters related to sports.[38]

86. The Government of the Netherlands submits that the defendant'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. The purpose of the system is to organise alpine skiing in Norway, both at a professional and amateur level, which requires considerable funds. This system, as described above, can be justified pursuant to Article 9 and Article 16(1) and (3) of the Directive.

87. Furthermore, the Government of the Netherlands submits that the proportionality of the defendant's system should be examined under Article 16(1)(c) of the Services Directive. The system constitutes a suitable way to safeguard the organisation of the sport at professional and amateur level. Moreover, the Government submits that a situation in which a national sports federation has the exclusive right to seek sponsorship, may not go beyond what is necessary to attain the objectives mentioned above, but this is for the referring court to consider.

88. The Government of the Netherlands states that Article 13 of the Services Directive applies to schemes such as the one under review. It is for the referring court to assess whether the defendant's system complies with the procedural requirement of that provision.

89. The Government of the Netherlands proposes that the Court should answer the questions referred as follows:

> *Questions 1 to 3: A national sports federation's system of prior control and consent for concluding an individual sponsorship contract is a requirement and an authorisation scheme, and as such constitutes a restriction on an athlete's freedom to provide services pursuant to Articles 9 and 16 of the Services Directive and the application of this system should be examined under Article 10 of the Services Directive.*
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> *Questions 4 and 5: A national sports federation's system of prior control and consent for concluding an individual sponsorship contract can be justified for reasons of public policy and public health pursuant to Articles 9 and 16(1) in conjunction with Article 16(3) of the Services Directive, provided that such a system fulfils the criterion of proportionality. It is for the referring court to assess whether NSF's system is proportional and whether the enforcement thereof in the case of*

[38] Reference is made to the judgment in *Bosman*, cited above, paragraphs 115 and 121-137.

Kristoffersen complies with the specific criteria laid down in Article 10(2) of the Services Directive.

Question 6: Article 13 of the Services Directive applies to a national sports federation's system of prior control and consent for concluding an individual sponsorship contract. It is for the referring court to examine whether the NSF's system complies with the procedural requirements of this provision and, if not, what the consequences are of failure to comply.

The Swedish Government

90. The Swedish Government has limited its written observations to the fourth question referred. As a preliminary remark, the Swedish Government states that the entering into sponsorship contracts for remuneration is undoubtedly economic in nature, thereby falling within the scope of EEA law.[39] The value of the markings on the plaintiff's skiing equipment stems, however, from his participation in the defendant's association and thus the national team, in particular since this permits him to take part in competitions organised by the defendant and FIS. The sports marketing services which the plaintiff carries out are an extension thereof, and thus ancillary to his position as a member of the defendant's national team. The facts of the case indicate that the plaintiff is established in Norway. However, the use of the plaintiff's helmet and headgear in competitions in other EEA States presents a cross-border element.

91. The Swedish Government stresses the special characteristics of sports which are recognised under EU law and in ECJ case law.[40] These characteristics are therefore relevant to the interpretation of the Services Directive and the EEA Agreement. It follows from the Joint Regulations of the defendant that it 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.

92. The Swedish Government argues that the lawfulness of the defendant's scheme should be considered by taking into account the reasons of the defendant for retaining the marketing rights in question. The Government submits that nothing in the wording of Article 36 EEA or Articles 9, 10 or 16 of the Services Directive speaks in favour of an interpretation that would exclude considering an approval scheme in light of its context. On the contrary, in order to assess whether an approval system is non-discriminatory and

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[39] Reference is made to the judgments in *Meca-Medina and Majcen* v *Commission*, cited above, paragraphs 22-23 and case law cited, and *Deliège*, cited above, paragraphs 57-58.

[40] Reference is made to COM(2007) 391 final, cited above, and the Declaration of the European Council on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, European Council, Nice, 7-10 December 2000.

proportionate, it is necessary to consider its effects in practice, as well as the existence of possible alternative means to achieve the alleged objectives.[41]

93. The Swedish Government maintains that the defendant's approval scheme is necessary and justified by overriding reasons relating to the public interest, including public health, by reference to the special characteristics of sports mentioned here above. The Government further notes that sports play an important role in enhancing public health. 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. In this regard, the Government argues that marketing revenue is the most important source of income for the defendant. Moreover, these objectives cannot be attained by less restrictive means. In this regard, it is of no relevance that national federations may differ in their approach to athletes' individual sponsorship contracts.[42]

94. The Swedish Government proposes that the Court should answer the fourth question referred as follows:

> *In the assessment of the lawfulness – either pursuant to Articles 36 EEA or Articles 9 and 10 or 16 of the Services Directive – of an approval scheme in a national sports federation's Joint Regulations such as the one in the case at hand, should be considered 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, as well as 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.*
>
> *In light of such an assessment, an approval scheme in a national sports federation's Joint Regulations such as the one in the case at hand appears to be necessary and legitimately justified by the overriding public interests of safeguarding the important role of sport in European society and public health and to be proportionate to these objectives.*

ESA

95. As a preliminary remark, ESA states 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 some technical repercussions, in particular with regard to the applicable rules of the Services Directive, but, ultimately, has no determinative effect on the outcome of the case.

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[41] Reference is made to the judgments in *Hemming and Others*, C-316/15, EU:C:2016:879, paragraph 27, and *Verband Sozialer Wettbewerb*, C-19/15, EU:C:2016:563, paragraph 23 and case law cited.

[42] Reference is made to the judgments in *Pérez and Gómez*, Joined Cases C-570/07 and C-571/07, EU:C:2010:300, paragraph 68, and *Commission* v *Italy*, C-110/05, EU:C:2009:66, paragraph 65 and case law cited.

96. ESA argues that the case essentially concerns the plaintiff'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.

97. ESA notes that the referring court has not provided any specific information that could lead to the conclusion that the plaintiff is operating from "a stable infrastructure", as is required by the definition of "establishment" in Article 4(5) of the Services Directive. ESA argues that, although the plaintiff lives in Austria, his State of establishment for these purposes must be Norway, given the fact that he exercises his profession under a starter licence issued by the defendant, which he can only receive on the basis of his Norwegian nationality. Both the requirement to obtain approval from the defendant to enter into sponsorship agreements regarding helmets and headgear and the defendant's refusal to grant that approval could, in principle, be seen as making the plaintiff's decision to establish himself as a professional skier less attractive.

98. With regard to freedom to provide services, which should be the primary focus of the legal analysis according to ESA, it is submitted that ECJ case law clearly establishes that EU law, and by implication EEA law, applies to sports in so far as it constitutes an economic activity. This can also be inferred from recital 35 in the preamble to the Services Directive. The ECJ has, however, been careful in delimiting the applicability of EU law in this field by holding that it does not impinge on matters which are "purely of sporting interest".[43]

99. ESA notes that the ECJ has repeatedly held that 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.[44] This approach can also be seen in Article 4(9) of the Services Directive. ESA submits that there is no doubt that the aforementioned rules apply to the defendant and that the defendant is a "competent authority" pursuant to Article 4(9) of the Directive.

100. With regard to the first and second question, 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 sponsorship agreement between the plaintiff and 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 it is irrelevant that the plaintiff lives in Austria, which happens to be the EEA State of establishment of the intended recipient of

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[43] Reference is made to the judgments in *Walrave and Koch*, cited above, paragraph 8; *Donà*, cited above, paragraphs 14 and 19; *Bosman*, cited above; *Lehtonen and Castors Braine*, cited above; *Meca-Medina and Majcen* v *Commission*, cited above; *Deliège*, cited above; and *Olympique Lyonnais*, cited above.

[44] Reference is made to the judgments in *Walrave and Koch*, cited above, paragraphs 17-18; *Bosman*, cited above, paragraphs 82-83; and *Deliège*, cited above, paragraph 47.

the services. As mentioned above, the plaintiff must be deemed to be established in Norway for the purpose of the application of the Directive. Furthermore, the marketing of the Red Bull brand on the plaintiff's helmet and headgear would be effected through every appearance in competition and associated events which take place throughout the EEA and internationally.

101. ESA argues that the case concerns a restriction on the provision of outgoing services.[45] The first subparagraph of Article 16(1) reiterates the basic rule relating to the freedom to provide services and therefore encompasses all types of services. The second subparagraph of Article 16(1) of the Directive reiterates the basic rule in respect of host EEA States. ESA submits that the third subparagraph of Article 16(1) has the same scope as the second subparagraph. The latter two subparagraphs are thus only applicable to incoming services. The same applies to Article 16(2) and (3) of the Directive. Therefore, it is only the first subparagraph of Article 16(1) of the Directive that is applicable in the case at hand.

102. 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 services 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 Directive.

103. ESA submits that, in contrast with certain case law, the permission requirement laid down in the defendant's Joint Regulations, and included in the standard contracts made with individual athletes, does not concern the selection for the national team, and therefore the admission to the sports activity as such.[46] The permission requirement governs the access to an economic activity and cannot be deemed inherent to the sporting activity. Furthermore, ESA submits that nothing in the Services Directive suggests that the restriction test applied under Article 36 EEA has been subject to change. This is confirmed by Article 3(3) of the Directive and recital 30 in the preamble to the Directive.

104. With regard to the fourth question and the second part of the second question, ESA argues that the grounds listed in Article 16 of the Services Directive for justifying restrictions do not apply to outgoing services. If they were to apply, they would not, because of their limited scope, justify the approval requirement under review. The first subparagraph of Article 16(1) of the Directive, read in conjunction with Article 3(3) of the Directive, must be interpreted and applied in light of Article 36 EEA and the case law applicable with regard to outgoing services. Grounds for justification under the EEA Agreement are thus available in this particular context.[47]

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[45] Reference is made to the judgment in *Alpine Investments*, cited above, paragraphs 20-22.
[46] Reference is made to the judgment in *Deliège*, cited above, paragraphs 61 and 64.
[47] Distinction is made with the judgment in *Rina Services and Others*, cited above, paragraphs 36-39.

105. 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.[48] ESA submits that the ultimate aim of the permission requirement in question is to safeguard the financial base of the Norwegian sports model, which 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 the defendant's sources of income and the possibility for the defendant to fulfil the functions for which it was itself established.

106. ESA notes that, 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 Community 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.[49] Further, if absence of control over its main sources of revenue may pose a risk to the defendant's ability to perform its tasks, this might constitute an overriding reason capable of justifying a restriction to the freedom to provide services.[50]

107. 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.

108. ESA argues that the permission requirement is 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.

109. 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, including those referred to by the referring court. According to ESA, the main problem with the permission requirement

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[48] Reference is made to the judgments in *Bosman*, cited above, paragraph 106, and *Olympique Lyonnais*, cited above, paragraphs 39-40.

[49] Reference is made to the judgments in *Donà*, cited above, paragraphs 14-15, and *Meca-Medina and Majcen* v *Commission*, cited above, paragraph 26.

[50] Reference is made, by analogy, to the judgment in *Kohll*, cited above, paragraph 41.

is that the defendant's decisions are purely discretionary. A purely discretionary system of prior authorisation has been held contrary to EU law by the ECJ.[51]

110. ESA, however, notes two factors which 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, which has been recognised to be of a specific nature in case law. Second, although the defendant is a "competent authority" within the meaning of Article 4(9) of the Services Directive, it should be recognised that it is not a disinterested party when making a decision on marketing rights because it 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 the defendant acts as an economic operator, even potentially in competition with individual athletes, rather than as a licensing authority *strictu sensu*. 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.

111. ESA submits that this does, however, not mean that the defendant is exempt from all requirements regarding the decision it takes on receiving an application. It would, inter alia, be required to balance its interests against the athlete in question and communicate its decision in a reasoned manner. Additionally, the decision should be susceptible to review by a body independent from the defendant.

112. ESA states that, although it considers the primary focus of the case to be the freedom to provide services, the permission requirement laid down in the defendant's Joint Regulations might also have an impact on Norwegian professional skiers wishing to establish themselves in that profession in Norway. The permission requirement laid down in the defendant's Joint Regulations could qualify as an "authorisation scheme" within the meaning of the Services Directive. Nevertheless, it may be justified by overriding reasons relating to the public interest of promoting and developing sports activities. In that regard, it would still have to comply with the criteria laid down in Articles 10 and 13 of the Directive.

113. However, ESA submits that the permission requirement should be distinguished from an authorisation scheme within the meaning of Article 4(6) of the Directive, because it is more in the nature of an exclusive right exercised by the defendant as an independent economic operator. It would therefore constitute a "requirement" within the meaning of Article 4(7) of the Directive, which is a broader concept than an authorisation system, and thus comes within the ambit of Article 15 of the Directive.[52] With regard to justifications, Article 15(3) of the Directive establishes a similar test to the one applicable for services

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[51] Reference is made to the judgment in *Watts*, C-372/04, EU:C:2006:325, paragraphs 115-117.

[52] Reference is made to *ESA* v *Principality of Liechtenstein*, cited above, paragraph 73.

and therefore the previously mentioned justifications and procedural safeguards regarding services are applicable mutatis mutandis.

114. ESA proposes that the Court should answer the questions referred as follows:

> *1. The obligation for an individual athlete to seek and obtain the approval of the sports federation of which he is a member in order to be able to enter into an individual sponsorship agreement in respect of helmets and headgear with a third party constitutes a restriction of the freedom to provide services contrary to Article 16 of Directive 2006/123 on services in the internal market. This conclusion is not affected by the restriction test applied by the Court of Justice in its judgment in Joined Cases C-51/96 and C-191/97, Deliège.*
>
> *2. A permission scheme, such as that laid down in the NSF Regulations in respect of the conclusion of individual sponsorship agreements for advertising on helmets and headgear can be justified on the basis of the public interest of promoting and developing sports activity under Article 16(1), first sentence, of the Directive 2006/123 on services in the internal market read in conjunction with Article 3(3) of that Directive and Article 36 EEA, to the extent that a decision on the application of an athlete to enter into such an individual sponsorship agreement is subject to an objective assessment of the interests of both the federation and the athlete concerned and that reasons are communicated to the applicant and review by an independent body is available.*
>
> *3. To the extent that it falls to be examined from the point of view of the freedom of establishment, the obligation for an individual athlete to seek and obtain the approval of the sports federation of which he is a member in order to be able to enter into an individual sponsorship agreement in respect of helmets and headgear with a third party constitutes a restriction which can be justified on the basis of the public interest of promoting and developing sports activity subject to the same procedural safeguards as those applicable regarding services.*

The Commission

115. As a preliminary remark, 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 the activities of which the services consist is the fact that athletes provide their sponsors with publicity the basis for which is the sporting activity itself.[53]

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[53] Reference is made to the judgment in *Deliège*, cited above, paragraphs 52 and 55-57.

116. The Commission submits that the plaintiff'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 the plaintiff's economic activity in the present case is advertising, but the result would be the same.

117. The Commission argues that in the present case the plaintiff, as a Norwegian national affiliated to the Norwegian national ski team on a long-term basis, is thus established in Norway. This is unaffected by his residence in Austria, since the centre of his economic activity seems to remain in Norway. Regardless of this, even if the plaintiff were to be considered established in Austria, that would not affect the legal analysis here.

118. The Commission states that the plaintiff takes part in professional ski races in several other EEA States than his place of establishment and that these races are where he provides his services.[54] Moreover, an Austrian company, Red Bull, is one of the recipients of the plaintiff's services. The Commission submits that there thus is a cross-border element in the present case.[55]

119. The Commission submits that 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.[56] FIS, the defendant and its national sister organisations are the only organisers of professional ski competitions in the EEA. The rules of FIS and of the defendant regulating the individual marketing contracts are binding. Therefore, the rules of the defendant and of the FIS regarding marketing contracts for the plaintiff's helmet and the contested decision fall within the ambit of the freedom to provide services.

120. The Commission argues, moreover, that such rules restrict the free movement of services because they make the services activity of skiers, such as the plaintiff, 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.[57]

121. With regard to the issue of justification, the Commission submits that the special nature of sporting rules, e.g. the distinctive features setting sport apart from other economic activities, such as the interdependence between competing adversaries, must be taken into consideration when assessing the existence of a legitimate objective.[58] The Commission submits that solidarity within sport can be accepted as a legitimate public interest. A

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54 Reference is made to the judgment in *Deliège*, cited above, paragraph 58.

55 Reference is made to the judgment in *SETTG*, C-398/95, EU:C:1997:282, paragraph 8.

56 Reference is made to the judgment in *Walrave and Koch*, cited above, paragraph 17.

57 Reference is made to the judgment in *Alpine Investments*, cited above, paragraphs 30 and 37.

58 Reference is made to the judgment in *Meca-Medina and Majcen* v *Commission*, cited above, paragraphs 43 and 45.

popular level of skiing plays a vital role in social cohesion and health. The fact that less performing athletes can also profit from the added marketing value which ski competitions generate contributes to the thriving of skiing as a sport because their participation is essential for the very existence of the competition. Furthermore, solidarity enables and encourages the recruitment and training of young athletes.[59]

122. However, the Commission argues that other reasons, for example maximising the defendant's profits, can in themselves not be accepted as legitimate public interests because they would be of a purely economic nature and therefore not acceptable under the case law to justify a restriction to a fundamental freedom.[60]

123. Regarding the principle of proportionality, the Commission submits that the defendant's rules in the present case can only be considered to be suitable to attain the objective of solidarity in the sports organisation if the income derived from the defendant's helmet marketing contracts is devoted to the pursuit of solidarity purposes. Furthermore, it should be ascertained whether the cumulative value of the helmet marketing rights for all athletes, if sold together by the defendant, is likely to exceed the cumulative value of the marketing rights if sold through individual contracts. Furthermore, 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.[61]

124. Moreover, the Commission states that the defendant's 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.[62]

125. Furthermore, the Commission argues that it should be verified whether the defendant's 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 the defendant. The Commission submits that it is for the defendant to demonstrate that its regulations are consistent with the principle of proportionality accompanied by appropriate evidence or analysis thereto.[63]

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59 Reference is made to the judgment in *Bosman*, cited above, paragraph 106.

60 Reference is made to the judgments in *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 72, and *Commission* v *Spain*, C-400/08, EU:C:2011:172, paragraphs 74 and 97-98.

61 Reference is made to the judgment in *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 55.

62 Reference is made to the judgment in *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 81.

63 Reference is made to the judgment in *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraphs 53-55.

126. The Commission submits that if the referring court finds that the defendant's 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.

127. Furthermore, the Commission notes that entities which are empowered to take decisions restricting a fundamental freedom may enjoy a margin of discretion in certain instances. However, the discretion must be circumscribed by their obligation to follow objective, non-discriminatory and clear criteria known in advance.[64] This follows from the general principle of legal certainty.[65] If it were confirmed that such criteria do not exist in the present case, the contested decision would be unlawful. Moreover, the procedure for the defendant's dealing with requests, such as the one from the plaintiff, 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.

128. As for the discrimination argument submitted by the plaintiff, arguing that he was discriminated against in comparison to Aksel Lund Svindal, the Commission submits that the circumstances seem not to be comparable. When the plaintiff's application was submitted to the defendant, the defendant had concluded that a bundled sale of the marketing rights for the helmets of the entire ski team would be more financially beneficial, which was not the situation in Svindal's case. Furthermore, at the time when Svindal's marketing contract was allowed, the contract with Telenor was not in place.

129. Regarding the application of Article 16 of the Services Directive, the Commission submits that this provision is not a replica of Article 56 TFEU and Article 36 EEA. The Commission submits that the first subparagraph of Article 16 (1) of the Directive 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 56 TFEU and 36 EEA. The Commission submits that Chapter IV of the Services Directive concerns the restrictions which 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 Directive.

130. The Commission proposes that the Court should answer the questions referred as follows:

> *1) Article 36 EEA is to be interpreted to the effect that a rule such as the rule adopted by the NSF, whereby the right to conclude a marketing contract for the helmet of the skiers affiliated to them is in principle reserved to the NSF and/or can be permitted only by prior control and consent, is a restriction to the cross-border free*

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64 Reference is made to the judgment in *Hartlauer*, cited above, paragraph 64 and case law cited.

65 Reference is made to the judgments in *Église de scientologie*, cited above, paragraph 22, and *Commission* v *France*, C-483/99, EU:C:2002:327, paragraph 50.

movement of services in the EEA because it is liable to make it more difficult or less advantageous or impossible.

2) Article 36 EEA is to be interpreted to the effect that a decision by which a ski federation like NSF denied to one of its affiliated athletes the permission to sign an individual marketing contract for his helmet is a restriction to the cross-border free movement of services in the EEA because it is liable to make it more difficult or less advantageous or impossible.

3) Article 36 EEA does not preclude a rule such as the one adopted by the NSF whereby the right to conclude a marketing contract for the helmet of the skiers affiliated to them must be permitted by the NSF, under the condition i) that it is justified by a legitimate public interest such as solidarity in the sport organization both with regard to athletes within the team(s) and with regard to the amateur sport associations, and ii) that it is proportionate.

4) Article 36 EEA is to be interpreted to the effect that in a case like the present one, where a professional skier is either the marketing right holder or has expressly reserved his right to conclude a separate individual contract, the existence of an on-going contract with another sponsor for the marketing on the helmet for the whole team does not affect the issues of existence, justification and proportionality of the restriction consisting of a rule such as the rule adopted by the NSF, whereby the right to conclude a marketing contract for the helmet of the skiers affiliated to them is in principle reserved to the NSF and/or can be permitted only by prior control and consent.

5) Article 36 EEA is to be interpreted to the effect that it does not preclude a decision by which a ski federation like NSF denied to one of its affiliated athletes the permission to sign an individual marketing contract for his helmet under the condition: i) that it is non-discriminatory, justified on the basis of an overriding reason of public interest and proportionate, and ii) that the discretion enjoyed by the decision-making entity is circumscribed by objective, non-discriminatory and clear criteria known in advance and is exercised by following a transparent, impartial, objective and non-discriminatory procedure known in advance.

6) Article 36 EEA is to be interpreted to the effect that in a case like the present one, where a service provider is either the marketing right holder or has expressly reserved his right to conclude a separate individual contract, the existence of an on-going contract with another sponsor does not affect the issues of existence, justification and proportionality of the restriction consisting of a decision by an entity like the NSF denying him permission for an individual marketing contract for his helmet.

7) Article 36 EEA is to be interpreted to the effect that, in order to determine whether in a case like the present one a professional skier has been discriminated against by an entity like NSF in the treatment of his request for an individual contract marketing for his helmet, relevant factors include the circumstance that the policy on that issue has changed in comparison to the point in time when a positive decision was taken by the NSF with regard to a similar request by another professional skier.

8) A case like the present one, where a non-public entity like NSF located in the Member State which is likely to be the Member State of establishment (a matter for the referring court to assess) restricts the cross-border free provision of services in other EEA States, does not fall into the ambit of application of Article 16 Services Directive.

Páll Hreinsson
Judge-Rapporteur