1. The day after the 25th anniversary of the landmark ruling in the *Bosman* case, the General Court ruled on the case concerning the International Skating Union's (ISU) eligibility rules.

2. For those who are not familiar with EU law and its relationship with sport sector, it is useful to sum up the basic aspects of the *ISU* case. The ISU is the sole international sports federation recognised by the International Olympic Committee (IOC) as responsible at worldwide level for regulating and administering figure skating and speed skating on ice. The ISU also carries out a commercial activity in so far as it organises the most important international speed skating events, Winter Olympic Games included. In order to regulate and administer figure skating and speed skating on ice the ISU has the power to enact the rules of affiliation. Among those rules, the so-called eligibility rules were at the heart of the Commission's decision C(2017) 8320 final (the contested decision). Very briefly, according to the ISU's eligibility rules:

a) skaters may participate only in events previously authorised by the ISU and/or by its members which are organised by representatives approved by the ISU and under its rules;

b) if skaters participate in an event not authorised by the ISU or by one of its members the skaters will be exposed to severe penalties up to a lifetime ban from any competition organised by the ISU (that is, all major international skating events).

3. On the 8th of December 2017, the European Commission ruled that ISU's eligibility rules breached EU competition law. The Commission found that such rules restrict competition and enable the ISU to pursue its own commercial interests to the detriment of athletes and organizers of competing events.

As announced on the same day of the Commission's decision, on the 19th February 2019 the ISU brought an application under Art. 263 TFEU for annulment the Commission's decision. In support of its action, the ISU put forward 8 pleas in law:

1st plea: the contested decision is vitiated by contradictory reasoning;

2nd and 3rd pleas: the Commission wrongly classified the eligibility rules as a restriction of competition by object and by effects;

4th plea: the Commission wrongly assessed whether the eligibility rules pursue and are proportionate to the objective of protecting the integrity of speed skating from sports betting;

5th plea: the decision to refuse to grant authorisation to organise the Dubai Grand Prix does not fall within the territorial scope of Art. 101 TFEU;

6th plea: ISU's arbitration rules do not reinforce the alleged restriction of competition:

7th plea: the Commission infringed Art. 7 of Regulation No. 172003 by imposing corrective measures not linked to the infringement identified;

8th plea: the Commission was not entitled to impose periodic penalty payments on ISU because remedies imposed are vague and imprecise and they are not linked to the infringement identified.

The General Court partially upheld pleas 6, 7 and 8 and rejected pleas 1, 2, 4 and 5 (while it was not necessary to examine plea 3).

4. The purpose of this blog is not to provide the readers with an exhaustive analysis of the judgment; more simply, the aim is to try to focus on a few fundamental aspects of the ruling.

Firstly, the General Court highlights that, given the specific nature of sport, it is legitimate to consider necessary to ensure that competitions comply with common standards and take place fairly, as well as to protect the physical and ethical integrity of sportspeople (including the risk associated with betting).

Secondly, the General Court points out that the ISU's pre-authorisation system (and the pertinent penalties) is not proportionate to the abovementioned objectives and therefore is

caught by the prohibition laid down in Art. 101 TFUE. In particular, the General Court draws the attention on the following points:

a) until the 2016 amendment the eligibility rules provided for a single and extremely severe penalty consisting of a lifetime ban applicable in all cases;

b) although in 2016 the system of penalties was relaxed, the new penalties with a fixed time of 5 to 10 years are still disproportionate, considering that the average length of a skater's career is 8 years;

c) the requirements imposed to third-party organisers by the pre-authorisation system are not exhaustive and leave the ISU broad discretion to accept or reject an application;

d) the pre-authorisation system does not provide for specific time limits for dealing with requests for authorisation and therefore is likely to give rise to arbitrary treatment;

e) the requirement to disclose a business plan as a whole, instead of a simple planned budget is not necessary in order to achieve the objective represented by the need to ensure that a third-party organiser is in a position to organise a competition.

For these reasons the General Court concluded that, in view of the severe and disproportionate penalties provided for in the event of the participation of skaters in events not authorised by the ISU and the absence of objective, transparent, non-discriminatory and verifiable authorisation criteria, the ISU's eligibility rules prevent skaters from offering their services to organisers of international speed skating events not authorised by the ISU and therefore prevent those organisers from using their services for competing events within or outside the EEA.

5. So far, the ruling of the General Court does not add any particular new element in comparison to the settled case-law of the Court of Justice. However, there is a part of the contested decision deserving particular attention. To this regard it must be recalled that one of the aspects of the ISU's pre-authorisation system is represented by the exclusive

jurisdiction of the Court of Arbitration for Sport (CAS) for decisions of the ISU declaring the ineligibility of a skater, official, office holder or other participant in ISU activities. According to the contested decision, the exclusive jurisdiction of the CAS is likely to reinforce the restrictions of competition that are caused by the eligibility rules as it makes difficult to obtain effective judicial protection against ineligibility decisions of the ISU that violate Art. 101 TFEU. To support its conclusion the Commission pointed out that:

i) judicial recourse against CAS awards is possible, but only before the Swiss Federal Tribunal on a very limited number of grounds, such as lack of jurisdiction, violation of elementary procedural rules or incompatibility with public policy;

ii) according to the case-law of the Swiss Federal Tribunal EU competition law does not pertain to international public policy in the sense of the Swiss legal order. The Swiss Federal Tribunal is therefore not likely to annul a CAS arbitral award that confirms an ineligibility decision taken in violation of Art. 101 TFEU;

iii) even if the Swiss Federal Tribunal were to apply the EU competition rules, it cannot refer a question for preliminary ruling to the Court of Justice in case of doubts about the interpretation of those rules;

iv) although CAS awards are enforceable in any court of competent, once an ineligibility decision is imposed by the ISU, there is generally no need for enforcement by national courts because the ISU has the disciplinary power to enforce the decision itself;

v) a national court within the EEA has competence to review whether the recognition and enforcement of the CAS arbitral award (confirming an ineligibility decision) violates EU/EEA competition law only if an athlete brings a civil action triggering an enforcement dispute in a Member State where it is denied participation in an ISU skating event. However, even in such a case the national court of a Member State could under no circumstances annul an anticompetitive ineligibility decision by the ISU or a CAS arbitral award for violation of Art 101 and/or Art. 102 TFEU. A national court could merely refuse recognition or enforcement of the arbitral award for reasons of public policy in that specific Member State.

Contrary to the Commission's reasoning, the General Court underlines that the binding nature of arbitration and the CAS exclusive jurisdiction to hear disputes relating to decisions on ineligibility may be justified by legitimate interests linked to the specific nature of the sport. As recognised by the European Court of Human Rights it is clearly in the interest of disputes arising in the context of professional sport that they could be submitted to a specialised court which is capable of adjudicating quickly and economically. (ECtHR, 2 October 2018, *Mutu and Pechstein v. Switzerland*, CE:ECHR:2018:1002JUD004057510, § 98). Moreover, according to the General Court it must be borne in mind that the Court of Justice has already held that any person is entitled to bring proceedings before a national court and claim compensation for the harm suffered where there is a causal link between that harm and an agreement or practice prohibited under Article 101 TFEU (judgment of 5 June 2014, *Kone and Others*, C-557/12, paragraph 22).

Consequently, while it is true that the arbitration rules do not permit skaters to bring an action before a national court for annulment of an ineligibility decision which infringes Art. 101(1) TFEU, it is not disputed that:

a) skaters may bring an action for damages before a national court;

b) organisers who are third parties may also bring an action for damages where they consider that a decision refusing authorisation infringes Art.101(1) TFEU.

In such cases, the national court is not bound by the CAS's assessment of the compatibility of the ineligibility decision or the refusal of authorisation with EU competition law and, where appropriate, may submit a request for a preliminary ruling to the Court of Justice under Art. 267 TFEU.

Lastly, the General Court makes it clear that skaters and third-party organisers who have been the subject of an ineligibility decision or a refusal to grant authorisation contrary to Art. 101(1) TFEU may also lodge a complaint with a national competition authority or the Commission.

As a consequence, according to the General Court the use of the CAS arbitration system is not such as to compromise the full effectiveness of EU competition law.

6. The positive response on the plea concerning the ISU's arbitration rulesundoubtedly marks a point in favor of the ISU. However, this point is not capable of reversing the final score in favor of the Commission. After all, the General Court confirmed the principle according to which the specificity of sport as such cannot be invoked by sports federations to pretend to govern and administer sports disciplines in a totally autonomous way, especially in cases where the same sports federations also organise sports events and compete on this market with third-party organisers. As recognised by the case-law of the Court of Justice, in such a case the risk of a conflict of interest is manifest and therefore the regulatory power of sports federations must be subject to restrictions, obligations and review in order to prevent sports federations to prevent access by other operators to the market. This basic principle, already affirmed in the *MOTOE* case with reference to Art. 102 TFEU, is now expressly referred also to Art. 101 TFEU, thus confirming the 2013 judgment in the case *Ordem dos Técnicos Oficiais de Contas*.