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GAME OVER FOR THE REAL BULLIES IN SPORT

Is it fair for an International Sports Federation to impose a life-ban sanction on athletes in order to accomplish its aims and administer the sport: Can the ISU objectively justify this infinite sanction?

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ABBREVIATIONS

CJEU	Court of Justice of the European Union
EAGCP	Economic Advisory Group for Competition Policy
EGBA	European Gaming and Betting Association
EP	European Parliament
ESSA	European Sports Security Association
EU	European Union
IF	International Sports Federation
IOC	International Olympic Committee
ISU	International Skating Union
TFEU	Treaty on the Functioning of the European Union

ABSTRACT

The call for good governance in the sport sector is fairly recent. Sports governing bodies are traditionally regulated through a self-governing network, with its own rules and regulations. However, abusive practices of International Sports Federations, such as the International Skating Union, will not escape the EU Competition Rules. The application of EU competition rules to the activities of the ISU predicates that the ISU and its affiliated associations and clubs will approach their managing strategies more cautiously. This thesis details the competition law complaint lodged by Mark Tuitert & Niels Kertholt against the International Skating Union based on the ground that the ISU Eligibility Rules and its enforcement is in breach of Article 101 and 102 TFEU, because of the life-ban sanctioned faced by speed skaters who take part in ISU unsanctioned competitions. It analyses the abusive conduct that international sports federations have with regard to the organisation of competitions. The anti-competitive nature of these ISU rules only came to the surface recently when Ice Derby International, a potential competitor of the ISU, intended to enter the market for the organisation of international speed skating events. It is yet to be seen whether this competition law case will have a precedent setting value on EU level, and whether the Commission will find the life-ban sanction to be inherent and proportionate to the pursuit of any legitimate objective of the ISU or not.

CHAPTER 1: INTRODUCTION

International Sports Federations (IF) are international non-governmental organisations recognised by the International Olympic Committee (IOC) to administer one or more sports at world level, with the help of national federations affiliated with it to administer those sports on national level.¹ Due to the pyramidal nature of the sport governing structure, these IFs occupy extremely powerful positions in the international sports industry. As an illustration, the International Skating Union (ISU) is the exclusive IF recognised by the IOC to globally administer, regulate and promote figure- and speed skating at world level, and also to organise national and international competitions. It is composed of individual national associations who administer these sports at national level, recognising that all international matters fall under the sole jurisdiction and control of the ISU.²

Certain exclusionary practices are necessary for the proper functioning of specific sports. Moreover, the typical one-IF-per-sport structure establishes a uniform system which is beneficial for the governing body and ultimately for the consumers. However, although this structure is

¹ Official website of the Olympic Movement <<http://www.olympic.org/content/the-ioc/governance/international-federations/>> accessed 7 June 2015.

² International Skating Union Constitution and General Regulations. As accepted by the 55th Ordinary Congress June 2014.

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desirable and sometimes necessary in the sports sector, it could have anti-competitive effects on the relevant market.³ EU Competition law is in place to maintain market competition by regulating anti-competitive conduct by undertakings, for the benefit of consumer welfare. 'Consumers' within the meaning of competition law and for the purpose of this thesis, means the speed skaters, the fans and the entities conducting business with the ISU. Anti-competitive conduct occurs when an undertaking is preventing or restricting competition on the market, consequently harming consumer welfare. For example, consumer welfare will be harmed when efficient competition on the market is eliminated by a dominant undertaking, resulting in low incentives for existing undertakings to innovate and produce better products and services, at a better price for consumers. Article 102 of the Treaty on the Functioning of the European Union⁴ prohibits this exclusionary abusive practices. After the *travaux préparatoires* of Article 102 TFEU was examined it came to the surface that the main intentions of the drafters were to protect consumers by increasing economic efficiency.⁵ The Court of Justice supports this approach⁶ and the same goes for the Commission. It is stated in the Commission's *Guidance on Article 102 Enforcement Priorities*⁷ that it will make sure that the market functions properly and that the consumers benefit from the efficiency and productivity resulting from effective competition between undertakings. It is thus safe to say that the main aim of EU competition rules is to protect an efficient competition process for the benefit of consumers.⁸

The ISU is the only IOC recognised IF to administer, regulate and promote speed skating at world level. Moreover, given that the ISU is composed of national associations and clubs covering most of the world, it enjoys a strong international network. This 'network effect' coupled with the fact that the ISU is the gateway for professional speed skating to reach the Olympics Games, allows the ISU to impose and enforce strict rules. For example, the General Regulations of the ISU threatens speed skaters with a life-ban sanction from all ISU organised competitions, if they take part in events not organised by the ISU. In other words, as a consequence of its regulatory power on the relevant market, the ISU bears the power to determine the 'rules of the game'.⁹

Hence, the fact that the ISU is given the exclusive power in the market for the Olympics and to administer the specific sports discipline, giving it near-total monopoly position in that market, also puts it in a powerful position on the market for the organisation of other speed skating events. Even though the IOC recognises one IF per sport to administer the specific sports

³ T.M.C. ASSER INSTITUUT, DG Internal Policies of the Union, *Working Paper on Professional Sport in the Internal Market*, 2005. 17.

⁴ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

⁵ Richard Whish and David Bailey, *Competition Law*, 7th Edition, OUP, 2012. 196.

⁶ For example in *Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-000, [2011] 4 CMLR 982.

⁷ *Guidance on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct by Dominant Undertakings* OJ [2009] C45/7.

⁸ Erika Szyszczak. *Controlling Dominance in European Markets*. FILJ, (33,6). 2011. 1755.

⁹ Jacques Rogge, "The Rules of the Game" (Conference Report & Conclusions on the Governance of Sport, Brussels, 26 & 27 February 2001). 2.

discipline, the power to organise international speed skating events is not a power exclusively available to the ISU.

In June 2014 two Dutch Olympic speed skaters, Mark Tuitert and Niels Kerstholt, lodged a competition law complaint against the ISU claiming that the ISU Eligibility Rules and its enforcement is in violation of Article 101 and 102 of the TFEU. As briefly mentioned above, the ISU Eligibility Rules entails that speed skaters may not take part in competitions which are not endorsed by the ISU, and if they do participate in these unsanctioned events they will be facing a life-ban from all ISU regulated events. A private entity, Ice Derby International, planned to launch an international speed skating competition for professional speed skaters. The ISU did not endorse this competition, based on the ground that it is 'possibly closely connected to betting'. The possible entry of Ice Derby International on the market of international speed skating events would mean a chance for speed skaters to have a broader range of competitions, with a higher possibility to win more money. Speed skaters were reluctant to participate in Ice Derby events, because in the event of a sole participation in a competition not endorsed by the ISU, the opportunity to take part in the Olympics or World Championships would never exist for such speed skaters ever again.

On 10 March 2015 the European Parliament voted in the European Commission's Annual Report on Competition Policy and a majority vote supported the inclusion of the resolution to '*urge the Commission to look into these restrictive and abusive practices*'.¹⁰ The European Commission is currently looking into this case. The main focus of the complaint is that the sanction for the violation of the ISU prohibition of participation in unsanctioned events in the form of a life-ban from all ISU regulated events is excessive and out of proportion towards the objectives which the ISU aims to achieve. While the fact that the ISU decided not to endorse this event should be taken into context with all other factors, it is important to note that the complainants are not requiring that this decision of the ISU should be denounced. They are tackling the fairness of the life-ban sanction. The ISU also prohibits speed skaters to participate in or support any form of betting or gambling related events, once again threatening them with suspension from all ISU competitions for a definite or indefinite period.

It is alleged that by making it nearly impossible for new organisations to enter the market of the organisation of international speed skating events, the ISU is foreclosing (potential) competitors and accordingly misusing and abusing its dominant position. This is done by creating barriers to entry by way of using its network effect and dominant position on the market. As a consequence of this conduct, efficient competition on the relevant market could be hindered, which will ultimately lead to harm to consumer welfare. Abusive practices of dominant undertakings, like the ISU, are caught by the EU competition rules, in particular Article 102 of the TFEU. Article 102 prohibits the abuse of a dominant position of an undertaking on the internal market, insofar it may affect trade between Member States. Hence, if the requirements of the Article 102 prohibition are met, this practice by the ISU will be illegal. Although the two complainants argue that Article

¹⁰ European Commission's Annual Report on Competition Policy, 2014/2158(INI).

101 and 102 is infringed upon, the thesis will not elaborate on a discussion with regard to Article 101 TFEU, because the main concept addressed is abusive conduct of IF's.

The research question of this thesis is whether the ISU rules sanctioning the violation of the prohibition of participation in ISU unsanctioned events in the form of a life-ban from all ISU regulated events constitutes abusive behaviour, within the meaning of Article 102 TFEU. This will be done by performing the legal analysis under Article 102 TFEU to the facts *in casu*.

At the outset it will be assessed whether a *prima facie* abusive conduct on the side of the ISU can be established. The burden of proof will then fall onto the ISU to put forward arguments that the life-ban sanction can be objectively justified¹¹, by way of showing that the participation of speed skaters in unsanctioned events will threaten the interests of the ISU in such a significant way that a life-ban sanction could be justified. The thesis will elaborate on this point, by using the proportionality test and it will be argued that sole participation in an unsanctioned event cannot possibly justify a lifelong -ban from all ISU competitions. The tools of analysis for the inquiry of an objective justification consist out of the following. Firstly, to apply the efficiency test in order to ascertain whether there are any benefits for consumer welfare, resulting from the alleged abusive conduct of the ISU and to determine whether those benefits outweigh the anti-competitive effects. Secondly, to apply the objective necessity test in order to determine if the life-ban sanction can be considered inherent and proportionate to the pursuit of any legitimate objective (business/public interest), and whether there are less restrictive measures which the ISU can use to fulfill the same objectives. The elements of intent and effect will also be addressed.

I find it truly intriguing to deal with Competition Law and Sports Law simultaneously. The activities of sports federations raise questions of an ethical and a legal nature and these are areas of the law which are relevant for economic welfare. The Tuitert & Kerstholt case is the first case where athletes are challenging restrictions on their participation in unsanctioned events on EU level. Hopefully it will have a precedent setting value, because similar restrictive and abusive measures are also taken by other international sports federations.¹²

¹¹ In Case T-201/04, *Microsoft v Commission II* – 361I, para 12 it was held that ‘*although the burden of proof of the existence of the circumstances which constitute an infringement of Article [102] is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence.*’

¹² For example, in terms of the Rules of Eligibility for the International Gymnastic Federation, gymnasts taking part in unsanctioned competitions may not participate in the Olympic Games.

CHAPTER 2: MARK TUITERT & NIELS KERSTHOLT v INTERNATIONAL SKATING UNION

2.1 Background briefing of the Cornerstone case

Ice Derby International, a private entity originally formed in 2006, planned to organise international speed skating events, where speed skaters compete in cities in grand prix style while spectators can bet on the outcome of the races.¹³ In 2011, Ice Derby International informed the ISU of its intentions to start organising international speed skating events in this fashion. The intentions of Ice Derby International to launch annual international speed skating events without the endorsement of the ISU, and the fact that the competition was to be conducted in a way not in line with the rules of the ISU¹⁴, was an instigator for the ISU to amend its Code of Ethics. The ISU issued a revised Code of Ethics, in 2012, stating that speed skaters should '*refrain from participating in all forms of betting or support for betting or gambling related to any event/activity under the jurisdiction of the ISU*'.

In 2013, Ice Derby International secured a contract with the United Arab Emirates Ice Sport Federation¹⁵ to organise an annual speed skating competition in Dubai, and the first competition, Dubai Ice Derby Grand Prix Exhibition, were to take place in May 2014. Given that Dubai was awarded the organisation of the World Expo in 2020, the idea was that this annual event would be a part of the programme leading up to the World Expo as from 2014. The organisers of this event clarified that, since betting activities are strictly prohibited in Dubai, there would be no on-site betting activities during the intended event in Dubai.¹⁶ However, the betting component is the foundation for the creation of Ice Derby International, and the source of significant prize money to be won by speed skaters. Thus, when the Ice Derby event takes place in a country where betting activities are not prohibited, on-site betting indeed takes place. Hence, having regard to the 2011 revised Code of Ethics, the ISU issued a statement¹⁷ in 2014 stating that it will not endorse any competitions intended to be organised by Ice Derby International, due to the fact that these events are '*possibly being closely connected to betting*.' In clause 4(h) and (p) of the Code of Ethics of

¹³ Jared S Hopkins, 'Is the world ready for Ice Derby? Promoters want to find out' Los Angeles Times (Los Angeles, 30 January 2014) <<http://articles.latimes.com/2014/jan/30/sports/la-sp-sochi-ice-derby-20140131>> accessed on 17 April 2015.

¹⁴ As will be seen, the fact that Ice Derby International organises events that are related to betting activities, the manner in which the competitions are conducted is not in line with the ISU rules. Moreover, the mere fact that betting activities are involved goes against the ISU rules.

¹⁵ A provisional Member of the ISU: an organisation not meeting all the requirements for Membership, but accepted as a Member by the ISU for a certain period of time. Article 1 of the ISU Constitution and General Regulations as accepted by the 55th Ordinary Congress, June 2014.

¹⁶ Ben Van Rompuy, 'Dutch Speed Skating Duo Files EU Antitrust Complaint Against the International Skating Union' TMC ASSER Instituut (19 November 2014) <<http://www.lawinsport.com/articles/item/dutch-speed-skating-duo-files-eu-antitrust-complaint-against-the-international-skating-union>> accessed on 3 March 2015.

¹⁷ ISU Communication No. 1853.

the ISU¹⁸ the commitments of the skaters regarding participation in betting activities and suspension are addressed, and reads that *'the ISU may suspend a skater for a definite period or forever exclude him/her from all ISU events and activities by a violation of this Code'*.

In the same statement the ISU also pointed out, as a reminder of its General Regulations¹⁹ that *'participation in any international ice skating competition not sanctioned by the ISU will result in loss of eligibility of the participants.'* According to Rule 102(2) of the ISU General Regulations²⁰ the sanction faced by skaters for participating in events not authorized by the ISU, whether they are linked to betting activities or not, is the *'loss of eligible to participate in ISU activities and competitions'*. Moreover, a person who has been declared ineligible or *persona non grata* within the ISU based on the ground of participation in an unsanctioned event cannot be reinstated as an eligible person.

Hence, because of the fact that the sole participation of Tuitert & Kertholt in one of the competitions organised by Ice Derby International would result in an indefinite loss of ISU eligibility of these skaters, these skaters did not participate in this event. Any speed skater would be banned for life from participating in the Winter Olympic Games or any future ISU organised event, putting an end to his/hers sporting career, if such a skater takes part in an unsanctioned event like the Ice Derby.

2.1.1 Issues raised

In 2014, Mark Tuitert and Niels Kerstholt lodged a competition law complaint against the ISU alleging that the ISU Eligibility Rules and its enforcement violate Article 101 and 102 TFEU, based on the argument that the sanction of a lifelong ban cannot possibly be considered inherent and proportionate to the pursuit of any legitimate objective²¹. The alleged infringement of the EU Competition Rules is grounded on the reasons that because the ISU is operating as monopoly, it is restricting competition by way of its restrictive rules and disproportionate sanctions. Mark Tuitert said in an interview, the ISU threat is *"out of all proportion, it's about our livelihood, and also about promoting our sport in a better way globally."*²² Their complaint to the EU Commission is focused mainly on the unfairness of the life-ban sanction faced by athletes if they do not comply with ISU Rules. The fact that the ISU chose not to endorse Ice Derby International events should merely be taken into context with all other factors, because the complainants are not requiring that

¹⁸ ISU Code of Ethics. <<http://static.isu.org/media/117575/1717-isu-code-of-ethics-2011-version.pdf>> accessed on 17 April 2015.

¹⁹ International Skating Union Constitution and General Regulations as accepted by the 55th Ordinary Congress, June 2014, 150.

²⁰ *Ibid.*

²¹ Van Rompuy (n 16).

²² Danielle Rossingh, 'Skater's Lawsuit May End Sports Bodies' Grip on Competition' *BloombergBusiness* (3 December 2014) <<http://www.bloomberg.com/news/articles/2014-12-02/skater-s-lawsuit-may-end-sports-bodies-grip-on-competition>> accessed on 16 April 2015.

this decision by the ISU should be condemned. This thesis is mainly concerned with the alleged abusive practices of the ISU, therefore only focusing on the working of Article 102 TFEU, which condemn abusive practices of dominant undertakings. The alleged abusive conduct looks like exclusionary abuse, due to the barriers of entry the conduct of the ISU is creating. Hence, it should be examined whether Article 102 TFEU is indeed breached by the ISU's conduct, and whether the ISU can objectively justify their alleged abusive conduct.

Forthwith, the legal questions, *in casu*, can be pointed out:

- i) Does the conduct by the ISU, in particular the imposition and enforcement of the life-ban sanction, constitute abusive behaviour, breaching Article 102 TFEU?
- ii) Can the ISU prove that there is an objective justification for this behaviour?

2.2 Legal Framework

i) EU Competition Rules

If the conduct of an undertaking is affecting trade between Member States because of anti-competitive effects on the relevant market, this might cause a restriction or distortion to competition.²³ EU Competition Rules are in place to protect the competitive process on a particular market in order to maximize consumer welfare, and these rules apply to undertakings who engage in economic activity. Even though sports governing bodies play an important non-economic regulatory function, they also regulate the commercial matters,²⁴ therefore the link between EU Competition Rules and the regulation of regulatory aspects of sport.²⁵ Regulatory activities of sports federations comply with EU competition rules if they pursue a legitimate objective, and its restrictive effects are inherent to that objective and proportionate to it.²⁶ EU Competition Rules prohibit the conduct of undertakings which deprive market entry and hinder competition on the market, and *in casu* it needs to be analysed whether the Eligibility Rules of ISU deprive consumers from the benefits which would follow from undistorted competitive market for speed skating.

²³ Whish and Bailey (n 5) 1.

²⁴ T.M.C. ASSER Instituut, 'Working Paper on Professional Sport in the Internal Market' (2005) DG Internal Policies of the Union, 16. See Case C-415/93 *URBSF v Bosman*, [1995] ECR I-4921, para 73 and Case T-193/02 *Laurent Piau v Commission* [2005] ECR I-209, [2005] 5 CMLR 42.

²⁵ Ben Van Rompuy. 'Sport and EU Competition Law: New developments and unfinished business.' (*The ASSER International Sports Law Blog*, 22 May 2015) <<http://www.asser.nl/SportsLaw/Blog/post/sport-and-eu-competition-law-new-developments-and-unfinished-business-by-ben-van-rompuy>> accessed on 8 July 2015.

²⁶ Oliver Budzinski, 'The Institutional Framework for Doing Sports Business: Principles of EU Competition Policy in Sports Markets' (2003) Working Paper Series 11/2003. 3.

ii) Article 102 TFEU

In order to establish if Article 102 TFEU is breached, the wording of this article should first be applied to the circumstances to see if Article 102 TFEU is indeed applicable. Article 102 TFEU prohibits the abuse of a dominant position of an undertaking on the internal market, insofar it may affect trade between Member States. Hence, in the abuse assessment in section 3 the relevant market will be defined, it will be determined whether the ISU is an undertaking bearing a dominant position in this relevant market, whether its conduct has anti-competitive effects thus constituting an abusive behaviour. The sports sector differs significantly from other industries²⁷, and cases on abuse of dominance generally have their own set of facts. This adds complexities in defining abusive conduct. Moreover, there is no all-encompassing definition of what is meant by abusive conduct by a dominant undertaking.²⁸

Nevertheless, when a sports federation is dominant in a relevant market due to its economic strength and it is affecting the competitive process, ultimately harming consumer welfare, the conduct falls within the ambit of Article 102 TFEU. Conduct of the ISU can, however, only be deemed abusive if it has the effect of distorting competition on the market, therefore harming consumer welfare *and* cannot be objectively justified. Hence, after *prima facie* abuse on the side of the ISU is established, the ISU can put forward arguments to counter the allegations of abuse. Subsequently, an assessment will follow whether or not the seemingly abusive conduct of the ISU can be objectively justified. Only then can a finding of abuse be made.

Because the Commission can only make a finding of abuse by a dominant undertaking, after finding that arguments in support of objective justifications cannot prevail,²⁹ Van der Vijver suggests correctly that the term 'plea' instead of 'defence' should rather be used³⁰.

iii) Objective Justification

EU Courts and the Commission both acknowledge that if alleged abusive conduct can be objectively justified, *prima facie* abuse does not violate Article 102 TFEU.³¹ However, there are difficulties, complexities and different opinions regarding the working of the notion objective justification, because Article 102 TFEU does not deploy *per se* illegality.³² Nevertheless, although abusive behaviour under Article 102 TFEU lacks a list of exemptions, like the block exemptions

²⁷ *Ibid* 2.

²⁸ Whish and Bailey (n 5) 197.

²⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article [101] and [102] of the Treaty [2003] OJ L1/1.

³⁰ Tjarda van der Vijver, 'Objective Justification and Article 102 TFEU' [2012] 35(1) *Kluwer Law International*. *World Competition* 55-76, 62.

³¹ Whish and Bailey (n 5) 210-211.

³² Van der Vijver (n 30) 70.

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in Article 101(3) or an efficiency test with regard to EU merger control,³³ the Commission uses these efficiency considerations for the working of 'objective justification'.³⁴ It was held in *Continental Can*³⁵ that Article 101 TFEU and Article 102 TFEU cannot be interpreted in such a way that they contradict each other.³⁶

In brief, 'objective justification' means the juxtaposing of two colliding interests and determining which one is worthier of protection.³⁷ *In casu*, these colliding interests could be the interests of the consumers to have access to the benefits which would follow from undistorted competitive market for speed skating, on the one hand, and the interests of the ISU to protect its commercial interest on the relevant market.

According to the Commission's *Guidance on Article 102 Enforcement Priorities to abusive exclusionary conduct by dominant undertakings*,³⁸ an undertaking's alleged abusive behaviour can be justified, if it can prove that its behaviour is 'objectively necessary' or 'produces substantial efficiencies' which outweigh the particular anti-competitive effects on consumers.³⁹ However, by merely referring to 'objective necessity' and 'efficiencies' in its 2008 *Guidance* paper, the Commission's approach is quite narrow, in fact.⁴⁰ The former requires that the conduct concerned benefits consumers and it entails a proportionality test to see if the exclusionary effect goes beyond what is necessary to attain those advantages for the consumers or not. Moreover, paragraph 29 reads that 'the question of whether conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking',⁴¹ implying that the justification can only function by way of *force majeure*⁴², thus factors from outside forcing an undertaking to act in a way that might be detrimental to consumer welfare. This would mean that a dominant undertaking cannot rely on the legitimate business behaviour justification, because here it is typically internal factors that are forcing the undertaking to act in an exclusionary way. This contradicts with case law, since several legitimate business behaviour justifications have indeed been used in court, either to protect commercial interests of an undertaking⁴³ or an instance

³³ Whish and Bailey (n 5) 212.

³⁴ Paul-John Loewental, 'The Defence of 'Objective Justification' in the Application of Article 82 EC' [2005] 28(4) *Kluwer Law International*, 455-477, 460.

³⁵ Case 7/72 *Continental Can v Commission* [1973] ECR 215, [1973] CMLR 199, para 25.

³⁶ Van der Vijver (n 30) 57.

³⁷ Ekaterina Rousseva, 'The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to modernise the Analysis under Article 82 EC?' [2006] 2(2) *Competition Law Review* 28-72, 71.

³⁸ *Guidance on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct by Dominant Undertakings* OJ [2009] C45/7, Para 28.

³⁹ Whish and Bailey (n 5) 211.

⁴⁰ Van der Vijver (n 30) 63; OJ [2009] C45/7, para 28.

⁴¹ OJ [2009] C45/7, para 29.

⁴² Case T-148/89 *Tréfilunion SA v Commission*, [1995] II – 1067.

⁴³ Case 27/76. *United Brands v Commission* [1978] ECR 207, para 189.

of *force majeure*.⁴⁴ In order to make a solid assessment of whether or not the speed skaters will be successful with their complaint, all possible objective justifications should be ruled out.

This thesis will show in Chapter four that if the wording ‘determined on the basis of factors external to the dominant undertaking’ had to be followed, the ISU would most likely not succeed with their plea, because there is in fact no sign of *force majeure* that is pushing the ISU to impose a life-ban and ultimately foreclose Ice Derby International.

Also the second of the tests provided for by the Commission’s *Guidance – the efficiency test* - is very advantageous for the two speed skaters, because the efficiency test entails an outweighing test, not a proportionality test, to see if the *prima facie* abuse has no *net* harm to consumers.⁴⁵ The Court thus has to determine whether efficiencies which will benefit consumers, such as innovative products and services, outweigh the life-ban. So the ISU would have to prove, with a sufficient degree of probability, and on the basis of verifiable evidence, that (1) its conduct, is ultimately advantageous advantages for consumers or consumer welfare, (2) there exist no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies, (3) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets, and (4) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.⁴⁶ This thesis will show in Chapter four that this would be very unlikely for ISU to prove. It actually would be nearly impossible for the ISU to succeed with this plea, because in the Commission’s *Guidance* it is made clear that conduct of undertakings with market power amounting to that of a near-total monopoly, ‘can normally not be justified on grounds of efficiency gains.’⁴⁷ So if the Commission’s *Guidance* was the law, it would be very advantageous for the two speed skaters.

Nevertheless, unfortunate for the complainants at first glance, these justifications as determined by the Commission’s *Guidance* are not the only justifications available. According to Phillip Lowe, DG Competition, and in line with European case law, three types of objective justifications can be identified.⁴⁸ First, the argument could be put forward that the alleged abusive conduct by an undertaking constitutes **legitimate business behaviour**. Second, the dominant undertaking could argue that its behaviour served a **legitimate public interest objective**. Third, it could argue that its conduct produced **efficiency gains** that outweigh the anti-competitive effects. Both Loewental and Van der Vijver uses Lowe’s model as a guideline to determine whether possible objective justifications exist for dominant undertakings accused of abusive conduct. Lowe’s model does not only fall within the framework of EU case law, but its scope is also broad in contradiction with the *Guidance*, making it a very useful tool for the undertakings accused of

⁴⁴ Case T-148/89 *Tréfilunion SA v Commission*, [1995] II – 1067.

⁴⁵ OJ [2009] C45/7, Para 30.

⁴⁶ OJ [2009] C 45/7, para 30.

⁴⁷ *Ibid.*

⁴⁸ Loewental (n 34) 464; As stated by Director General Lowe of DG Competition at the 30th Annual Conference on International Antitrust Law and Policy.

abusive conduct. Hence, following the footsteps of Loewental and Van der Vijver, in the objective justification analysis of this thesis, the model of Lowe will be mirrored. Furthermore, Van der Vijver suggests that, depending on the objective justification that the dominant undertaking will put forward, there are four elements to be considered in order to meet the desired requirements of the particular objective justification. These relevant elements are namely; intent, proportionality, necessity and effect.⁴⁹

The previous paragraphs have already suggested that this thesis will show the unlikelihood of success of both the efficiency plea and legitimate public interest plea. As a result, we now only have to deal with the legitimate business behaviour plea⁵⁰. For the analysis of this justification and *in casu*, the elements of proportionality and necessity, deserves the most attention.

2.3 The incentives and *rationale*

(i) Why do the speed skater have an interest to participate in events not authorized by the ISU?

Although the complaint is mainly focused on the abuse of the ISU's dominant position, because of the disproportionate life-ban sanction imposed, and not because of the decision by the ISU not to endorse the Ice Derby events, it is imperative to look at the interests of speed skaters in participating in ISU unendorsed events. Only then can we fully understand the impact that the life-ban sanction will have on the speed skaters, and ultimately consumer welfare.

The ISU, being the IOC recognized IF for the organisation of international speed skating events, not only administers speed skating at world level, but also determines when and how competitions take place and the amount of prize money to be won. The speed skating season of the ISU is generally between November and March and consists typically out of 21⁵¹ international speed skating events. According to the ISU's *Communication on Prize Money* for the season of 2014/15⁵², the prize money to be won by speed skaters, after the respective ISU Member deducts ten per cent of the prize money, are as follows: At the World All Round Speed Skating Championship, the winner will win \$20,000, the runner up \$12,000, and the second runner up \$8,000. The prize money decrease naturally down until the last place. Another indication of prize money amounts to be won is the European Speed Skating Championships where, also in the same

⁴⁹ Van der Vijver (n 30) 69.

⁵⁰ It should be noted that the objective justifications described by the Commission are objective necessity and the efficiency test. Lowe's model mirrors the Commission's test in the Guidance – the only slight difference is that Lowe added the legitimate business behaviour plea, because objective necessity entails mostly factors from outside the undertakings control, like health. Whereas the legitimate business behaviour objective plea entail factors form inside the undertaking. Nevertheless the addition by Lowe is small and has also been used in Courts.

⁵¹ Thirteen long track and eight short track. <<http://www.isu.org/en/news-and-events/calendar-of-events>> accessed 21 July 2015.

⁵² International Skating Union Communication No. 1924 Prize Money ISU Championships (This Communication replaces Communication no 1509). 11.

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fashion as the former example, the winner will win \$5,000, the runner up \$3,000 and the second runner up \$2,000. In comparison with earnings of other sports, such as football where some professional players earn up to \$100,000 per week, the prize money to be won at speed skating events is limited and to receive additional earnings is a legitimate interest of speed skaters. Although speed skaters, in particular Olympic speed skaters, predominately make money through sponsorships or endorsements, these ISU regulated competitions are the 'bread and butter' for them.

However, one cannot reach a conclusion that the earnings of the speed skaters are limited, by simply comparing the prize money to be won by speed skaters with earnings of other athletes in professional sports. This is a very generalized comparison because, the fact that a football player is 'professional' does not necessarily imply that he earns a huge salary, there are clubs and leagues in some countries which are also seen as professional but the players cannot afford to feed themselves, so each case should be dealt with on its own merits. What is certain though is that the low prize money to be won by speed skaters is caused by the distorted competition on the market for organisation of speed skating events. Moreover, should it happen that the speed skaters were excluded from ISU competitions, the option of receiving a sponsorship or endorsement would also not be available anymore. Hence, if the speed skaters take part in the Ice Derby event the option of receiving endorsements and sponsorship money via the ISU would not be possible anymore. If the speed skaters do not take part in Ice Derby events, they will indeed receive endorsements and sponsorships because of the strong network of the ISU on the market, however, the prize money will be low because of the distortion of effective competition on the market. Due to the fact that incentives to innovate and improve products and services, on the side of the ISU, will be low in that case. This is thus a lose-lose situation for the speed skaters.

The benchmark for making a living is relative concept because people have different needs and interest, nevertheless in a broad sense to make a living implies that a person earns enough income to support himself and his family, but 'enough income' can have one meaning for A but another meaning for B. However, poverty thresholds can be used as guidelines. For instance, in the Netherlands the socio-cultural planning office puts the poverty line at €1,040 a month for a single person.⁵³ In the unlikely event of a short-track speed skater, such as Niels Kerstholt, winning all of the ISU sanctioned international competitions in that category during a season, such a skater would earn approximately only \$31,900 for the entire season.⁵⁴ It is highly unlikely for a speed skater to win all the gold medals in a season, and even then, the income would place just above the poverty line. Prize money to be won by a speed skater by this out-of-season single event would be much more than the approximate \$31,900 to be won in an entire season. 'In Dubai the competitors would win minimum of 30,000 euro and a maximum of 100,000 euro at one Ice Derby

⁵³ '1.2 million Dutch households below poverty line, 11% of children are poor', *DutchNews.nl* (Netherlands, 2013) <http://www.dutchnews.nl/news/archives/2013/12/12_million_dutch_households_be/> accessed on 4 Augustus 2015.

⁵⁴ Van Rompuy (n 16).

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event.⁵⁵ Ice Derby promoters envisioned a speed skating competition where spectators could bet on the outcome of the races, increasing profit and thereby providing elite speed skaters a post-Olympic career.⁵⁶

If these speed skaters cannot 'make a living', how can other, not so prominent speed skaters do it. Thus, although difficult to precisely determine the benchmark for making a living, it is clear that there is a demand for more international speed skating events in addition to those sanctioned by the ISU. The fact that prominent speed skaters, like Tuitert and Kerstholt, are considering to participate in the Ice Derby events somewhat illustrates the demand for more international speed skating events. This shows that competition on the market for the organisation of international speed skating events is constrained. In chapter four it will be assessed whether this limitation can be objectively justified by the ISU.

Sports competitions are by nature unpredictable and there is no certainty that an athlete will be successful in an event, moreover, the number of competitions per year is limited. The competitions offering the highest prize money are typically held annually or even once every four years. When an athlete does indeed win or place, it only makes sense that the prize money should be reasonable in order for athletes to provide for the unpredictable and inconsistent future needs. If this is not the case, speed skaters will naturally opt for alternative ways to make a living and the Ice Derby International was seen by Tuitert and Kerstholt as a competition with an innovative competition format and a way to 'make a living'.

(ii) Why the strict regulations on participation and betting?

It is important to understand the possible motives on the side of the ISU for imposing and enforcing the prohibition against participation of unsanctioned events, in order to establish what the goal is that it is pursuing, and whether such a goal is legitimate and brings about efficiencies. Only then can the question be addressed of whether a life-ban sanction is proportionate with respect to these goals it wishes to achieve.

For an international competition to be defined as an ISU International Competition it must entail the a few characteristics, namely that the competition should be conducted in accordance with the Rules of the ISU and that television and advertising agreements must be authorised by the ISU Director General to avoid conflicts with ISU contracts.⁵⁷ It is for this reason why certain competitions cannot be endorsed by the ISU, because certain competitions, for example Ice Derby, are conducted in ways different from the manner in which the ISU organises events. It is thus apparent why the ISU would put restrictions on participation of unsanctioned events⁵⁸.

⁵⁵ Mark van Driel, 'Schaatsers dagen ISU om wedstrijdmonopolie', *deVolkskrant* (26 June 2014).

⁵⁶ Hopkins (n 13).

⁵⁷ ISU General Regulations (n 19), rule 107.

⁵⁸ *Ibid*, rule 201.

Nevertheless, is it really necessary to impose a life-ban sanction in order to discourage participation in these 'different' events? Why does the ISU have such a disapproving attitude towards the participation on other unsanctioned events?

The ISU explicitly states in its Code of Ethics that Members should '*refrain from participating in all forms of betting or support betting or gambling related to any event or activity under the jurisdiction of the ISU.*' The reasons for the ISU not to sanction Ice Derby events, all lead to the betting component. The risks involved in betting related competitions are the main justification for the prohibition of participation on betting related activities.

Most countries consider placing a bet with an unregistered bookmaker as illegal and against the spirit of sports.⁵⁹ But, more and more EU countries are engaging in a review of their own gambling legislation due to the absence of EU harmonisation in light of gambling. A national prohibition of certain types of sports bets would make sports events less vulnerable for betting related match fixing, because then this activity can be regulated. However, it will be hard to meet the regulatory, societal and technical challenges related to gambling in the EU if countries are acting individually.

Individual EU countries cannot provide individuals with effective protection with mere national legislation in place, due to the nature of the online environment and the often cross-border dimension of online gambling.⁶⁰ Hence, not only is gambling a risky activity on its own with multi-dimensions, but the way it is regulated is also shaky, and in the event of illegal betting, there is also no channel of appeal for a gambler who has lost some money. The risk that betting activities hold in for the sport sector is that betting might harm the integrity of the game and might be the cause of match-fixing or race-fixing. However, according to a study conducted by Van Rompuy, so far, there is no solid link between live or side betting and betting-related match fixing that would justify a prohibition of these bet types.⁶¹ And although some sports, like Keirin racing, have faced scrutiny for race fixing, stricter rules on those sport helped regulate it better.⁶²

Betting in the sports sector creates commercial and promotional opportunities. In horse racing, gambling is a major part of the sport and in 2008 this sport generated a world-wide market worth around \$115 billion. There are also other successful betting competitions which are helping to make a living for athletes. Keirin racing, as an example, involves cycling races run on loops

⁵⁹ Puneet Pal Singh, 'How does illegal sports betting work and what are the fears?', *BBC News* (Singapore, 19 February 2013).

⁶⁰ The EP has urged EU Member States to ban live betting, side bets, and betting on youth competitions 'as these have proved to be very vulnerable to match fixing', <http://ec.europa.eu/growth/sectors/gambling/index_en.htm> accessed on 21 August 2015.

⁶¹ Ben Van Rompuy, 'The Odds of Match Fixing – Facts & Figures on the integrity risk of certain sports bets' (TMC Asser International Sports Law Blog, 2015) 39. This is according to an analysis done by Ben van Rompuy.

⁶² Hopkins (n 13).

where gambling is an essential ingredient to help generate millions so that Japanese cyclists can subsequently make a career out of this into their older years.⁶³

French, Hungarian and Polish legislation have now legally recognized a right to consent to bets. Another development, after Sochi, was the Memorandum of Undertakings which was signed by the IOC together with the European Gaming and Betting Association and the European Sports Security Association. The Memorandum will allow ESSA and the EGBA Members to share data with the IOC, if there is any issue related to betting integrity at the Olympic Games or competitions organised by the IFs.⁶⁴ It seems as though there are slow but sure developments in the regulatory area of gambling in sports, and these developments will ultimately help contribute towards clean sport, free from fraudulent and illegal practices.

However, the reluctance of IFs to approve betting related competitions is not only because of the risk of race-fixing which might occur, but also based on integrity and administration reasons. The network effect of the ISU puts it in a position to mold the 'rules of the game' and if it disapproves of betting related activities, it has the power to delete this activity from international speed skating events, organised under its jurisdiction. However, it also bears the power to exclude any potential competitor on the market, if the competitor conducts its practice in a manner different from the ISU's manner. Hence, it can also indirectly delete betting activities from the market caused by competitions not under its jurisdiction.

In casu, the ISU can use the betting component of Ice Derby events to try and justify the prohibition on participation, however, what about events not linked to betting activities – why is there a life-ban sanction in place to prohibit speed skaters from participating in unsanctioned events? The ISU can put forward that it is aiming to protect the integrity of speed skating and it wants to maintain one set of rules to ensure safety and fairness of competitions. Nevertheless, this must be done in a way that is reasonable.

Whether reason for the prohibition on participation is in place to ward off betting related activities in speed skating in order to protect the integrity and administrative aspects of the game, or whether it is in place to eliminate potential competitors on the relevant market in order to maintain its dominance, the regulations of the ISU need to fulfill the requirements of competition law. It cannot take the law into its own hands by eliminating potential competitors, due to its network effect.

⁶³ *Ibid.*

⁶⁴ 'The IOC and Sports Betting Operators Strengthen Integrity Ties Ahead of Winter Olympics' (European Gaming & Betting Association official website, 06 February 2014) <www.egba.eu> accessed on 31 July 2015.

2.4 Concluding remarks

When the conduct of a dominant undertaking in a relevant market affects the competitive process in that market, ultimately harming consumer welfare, the conduct falls within the ambit of Article 102 TFEU. Tuitert and Kerstholt argue that, due to its economic strength on the market for organisation of international speed skating events, the ISU is in a position to impose restrictive measures that are creating barriers to entry, which forecloses the Ice Derby International. These anti-competitive effects on this particular market, has the potential to harm the competitive process, in this market, and ultimately consumer welfare. Moreover, the conduct of the ISU also directly and manifestly effects the interest of the speed skaters.

The purpose of applying the wording of Article 102 TFEU to the case is to determine whether there are indeed anti-competitive effects on the market effecting trade which might lead to harm to the competitive process and consumer welfare. This needs to be done in order to determine whether the conduct of the ISU falls within the ambit of Article 102 TFEU, thus constituting *prima facie* abuse. However, before the Commission can make a finding that the conduct of the ISU is abusive, thus breaching Article 102 TFEU, the ISU must first put forward clear arguments in its defence. Mirroring Lowe's model of objective justifications, the ISU can either argue that its alleged abusive conduct constitutes **legitimate business behaviour**, or it could argue that its behaviour served a **legitimate public interest objective**. An alternative option could be to put forward the argument that its conduct produced **efficiency gains** which outweigh the anti-competitive effects. Hence, after a step by step application of the wording of Article 102 TFEU, which will be done in the next chapter, an analysis will follow, in chapter four, of the possible objective justifications available to the ISU to counter the allegations of abuse.

Given the negative attitude, based on integrity and administration reasons, towards gambling in the sports sector, it can be assumed that the ISU will most probably put forward the argument that its conduct pursues the goal of protecting the integrity and objectivity of international speed skating competitions. Whether the ISU's goal is to protect the integrity of this sports discipline, objectivity or transparency of the regulatory aspects, or its own commercial interests, the ISU will have to prove that the life-ban sanction is inherent and proportionate to the pursuit of this objective.

CHAPTER 3: THE APPLICATION OF ARTICLE 102 TO THE BEHAVIOUR OF THE ISU

3.1. Article 102 TFEU

Article 102 TFEU prohibits the **abuse** of a **dominant position** of an **undertaking** on the internal **market**, insofar it may **affect trade** between Member States.

3.1.1 Is the ISU an undertaking

For the EU competition rules to apply to the case at hand, it must first and foremost be established whether the ISU can be defined as an undertaking under EU competition rules, since Article 102 TFEU only applies cases of abusive conduct committed by dominant undertakings⁶⁵. An entity can be defined as an undertaking if the entity engages in an economic activity⁶⁶, regardless of the legal status of the entity, the way it is financed⁶⁷ or whether the entity has profit-making intentions or not.⁶⁸ The ISU, being the non-governmental governing body for speed skating and figure skating, also administers, regulates and promotes these sports globally, by making the 'rules of the game' and also by conducting activities like selling broadcasting rights, organising competitions, merchandising and advertising by means of sponsorship. The consumers consist out of *inter alia* the skaters, the fans and also other entities like broadcasting companies, sponsors and buyers of products produced by the ISU.

If the *activities* of the ISU were of pure sporting interest, the activities would not be subject to EU law.⁶⁹ The ISU offers goods and services in the form of 'sporting entertainment' to its consumers 'against payment stemming from admission fees, sponsorships, advertising, merchandising and television broadcasting rights licenses'⁷⁰. The ISU thus engages in economic activity by offering goods and services on the market of, among others, the organisation of

⁶⁵ Whish and Bailey (n 5) 83.

⁶⁶ In line with Cases C-180/98 *Pavlov* etc [2000] ECR I-6451, [2001] 4 CMLR 30, para 75, economic activity can be defined as '*any activity consisting in offering goods or services on a given market*'.

⁶⁷ Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979, [1993] 4 CMLR 306, para 21.

⁶⁸ The Commission pointed out in 2.4.2 in its staff working document annexed to the 2007 White Paper on sport that, regarding the application of EU competition law, non-profit organisations are subject to it if they operate as undertakings because they engage in economic activities by offering goods and services in the common market. Activities of non-profit (sport) organisations are usually undertaken without any profit-making intention or dimension, however, due to the decrease in the amount of donations and government funds and in order to survive, the majority of non-profit sport organisations need to raise revenues from some kind of commercial activity, for instance sponsorships, advertisements and merchandising. Therefore, whether there is profit-making intention or not, most sport associations pursue economic activities in any event.

⁶⁹ Case 36/74 *Walrave & Koch v Association Union Cycliste Internationale* [1974] ECR. 1405.

⁷⁰ Case COMP/37 806: *ENIC/UEFA*, para 25.

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international speed skating competitions.⁷¹ Since the activities of the ISU are of an economic nature, the ISU can be defined as undertakings under EU competition rules.⁷²

Moreover, given the pyramidal nature of sports governing bodies, the ISU is not only an undertaking, but also an association of undertakings and an association of associations of undertakings. Speed skating clubs, under the jurisdiction of the ISU, engage in economic activities and are undertakings, the Membership of the national speed skating associations consists of those speed skating clubs. Therefore, the national speed skating associations are associations of undertakings⁷³ and are also undertakings themselves, in so far as they engage in economic activities⁷⁴. The Members of the ISU are national speed skating associations. Hence, the ISU is an association of associations of undertakings as well as an association of undertakings. The ISU is also an undertaking on its own, because it directly engages in economic activities.⁷⁵

In *Meca-Medina*⁷⁶ it was held that *rules* governing activities of pure sporting interest are indeed subject to EU law, even if the rule has nothing to do with an economic activity⁷⁷. The ISU and its Members have adopted the ISU General Regulations laying down the Eligibility Rules. These rules adopted by this association of associations of undertakings, within the meaning of Article 101(1) TFEU, are indeed subject to EU law.

To conclude, the ISU is an undertaking, an association of undertakings and an association of associations of undertakings and the rules imposed by it are subject to EU competition rules.

⁷¹ See Case *ENIC* COMP/37.806, para 25, where the Commission confirmed that clubs supply 'sporting entertainment by playing matches against other clubs, usually in the context of a championship. These events are made available against payment (admission fees and/or radio and television broadcasting rights, sponsorship, advertising, merchandising, etc.) on several markets'.

⁷² There is a body of case law confirming that sports associations are undertakings within the meaning of EU competition rules, for instance, The Commission held in *Distribution of Package Tours during the 1990 World Cup* that FIFA and other bodies, merely existing to help organize the world cup, were undertakings within the meaning of the competition rules. See also Case C-415/93, *URBSF v Bosman*, [1995] ECR I-4921, paragraph 73 and Case 13/76, *Donà v Mantero*, [1976] ECR 1333, paragraph 12.

⁷³ In Case T-193/02 *Laurent Piau v Commission* [2005] ECR I-209, [2005] 5 CMLR 42 the CFI held that national sporting associations can be both undertakings and associations of undertakings, when carrying out economic activities, for instance by selling broadcasting rights or by the commercial exploitation of a sport event, they are to be considered as undertakings.

⁷⁴ European Commission 2007b: 66-67.

⁷⁵ Case COMP/C.2-37.398, (2003/778/EC) para 106. The Commission held that '*Football clubs engage in economic activities and they are undertakings within the meaning of Article [101(1)] of the Treaty and Article 53(1) of the EEA Agreement. The Membership of the national football associations consists of those football clubs. The national football associations are therefore associations of undertakings within the meaning of Article [101(1)] of the Treaty and Article 53(1) of the EEA Agreement. The national football associations are also undertakings themselves in so far as they engage in economic activities. The Members of UEFA are the national football associations. UEFA is therefore both an association of associations of undertakings as well as an association of undertakings. UEFA is moreover an undertaking in its own right as it also engages directly in economic activities.*'

⁷⁶ Case C-519/04 *Meca-Medina & Majcen v. Commission* [2006] E.C.R. II-3291.

⁷⁷ Still, the so-called sporting rules *sensu stricto* will most definitely continue to fall outside the scope of EU law. For instance rules on fixing the length of matches or the number of players on the field, as listed by the Commission in its staff working document annexed to the 2007 White Paper on sport.

3.1.2 Defining the relevant market

Undertakings bear the possibility of restricting competition due to the market power which it might possess in a certain market, for instance by reducing variety of services or depriving consumers of choice which ultimately causes harm to consumer welfare.⁷⁸ An undertaking can only cause harm to the competition process and consumer welfare when it bears market power, and in order to have substantial market power, the undertaking must be a leader among its competitors, in the same market. Therefore, it is important to determine the relevant market definition in order to establish the framework within which the EU competition rules apply.⁷⁹ According to the Commission's Notice on the Definition of the Relevant Market definition⁸⁰, in line with EU case law, a relevant product market comprises '*all products and/or services which are regarded as **interchangeable or substitutable** by the consumer, by reason of products' characteristics, their **price** and their intended use*'⁸¹. The relevant geographic market comprises '*the **area** in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently **homogeneous** and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.*'⁸²

Since the Court defines the relevant market in terms of substitutability or interchangeability, the relevant market can be defined as the market consisting of products or services which are interchangeable with each other but not with those products or services outside of that market.⁸³ The purpose of this is to identify the actual competitors of undertakings involved in order to establish the boundaries of the assessment whether, for instance, certain behaviour of an undertaking is constraining other undertakings. When defining the relevant market in which a product, or service in this case, is being supplied, two dimensions are used, namely the relevant product market and the relevant geographic market.⁸⁴ Moreover, the concept of 'substitutability' contains three aspects, namely demand, supply and potential competition. The latter will, however, be considered in the following section dealing with the ISU's position in the relevant market.⁸⁵ It is essential to identify the relevant market because it is an important step towards answering the main question of whether the ISU has sufficient market power to occupy a dominant position.⁸⁶

⁷⁸ Whish and Bailey (n 5) 25.

⁷⁹ *Ibid* 27.

⁸⁰ Commission Notice on the Definition of the Relevant Market for the Purposes of [EU] Competition Law [1999] OJ C372/5, [1998] 4 CMLR 177.

⁸¹ *Ibid*, para 7.

⁸² *Ibid*, para 8.

⁸³ Alison Jones & Brenda Sufrin, *EU Competition Law* (4th Edition, OUP, 2011) 64.

⁸⁴ Whish and Bailey (n 5) 27.

⁸⁵ Jones and Sufrin (n 83) 67.

⁸⁶ Jones and Sufrin (n 83) 293.

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Regarding demand-side substitutability, if the speed skaters are likely to switch from one product or service to alternative products or services which are already on offer, these products can be seen as substitutes for one another.⁸⁷ The characteristics, price and use of these products and/or services should be explored. The fact that sport has certain particular features which distinguish it from other economic sectors does not mean that there cannot be a market, or even several markets.⁸⁸ The ISU administers, regulates and promotes speed skating, by making the 'rules of the game' and also by conducting economic activities.

These activities can be divided into three categories, namely the exploitation market, the contest market and the merchandising market.⁸⁹ Regarding the exploitation market, the ISU offers goods and services in the form of sporting entertainment to its consumers against payment stemming from sponsorships, advertising, and television broadcasting rights licenses.⁹⁰ The second market is the contest market, 'in which the typical product of professional sport is produced: the sporting contest'⁹¹. The ISU makes money by way of entrance fees and also Membership fees in the case of the ISU. This market and the exploitation market are parallel with each other, since the entertainment is provided by the activity of organising sporting competitions. The third market is the merchandising market where the ISU sells products and services, such as Membership fees and clothing with the ISU emblem on. Looking at the characteristics and use of these services and products, the market which Ice Derby International wants to enter is the exploitation and contest market. The merchandising market can be considered as a subsequent and less significant market.

Supply-side substitutability, is likely to occur where undertakings produce products or services which are similar, although not substitutes for one another from the consumer's perspective.⁹² Even though there are certain differences between the competitions that the ISU and the Ice Derby respectively organise, in the eyes of the consumers, these competitions are organised in the same fashion in the context of the relevant markets at hand. Both are targeting professional speed skaters, to make use of their performances in international speed skating races in order to entertain the public and receive payment in the form of advertising, sponsorships, selling of broadcasting rights, entrance fees and merchandising, for the benefit of the undertaking. Membership fees is a target for the ISU and possibly also for Ice Derby International. Thus, the

⁸⁷ Jonathan Faull & Ali Nikpay, *The EC Law of Competition* (2nd Edition, OUP, 2007) 41.

⁸⁸ See Case ENIC COMP/37.806, para 25. Events are made available against payment (admission fees and/or radio and television broadcasting rights, sponsorship, advertising, merchandising, etc.) on several markets'.

⁸⁹ An Vermeersch, 'All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport', *Journal of Contemporary European Research*. (Vol. 3(3)) 2007:251.

⁹⁰ The Commission identified a separate product market for television rights for sport events in Case M.779 *Bertelsmann v CLT*, OJ 1996 C 364/3, para. 19. In Case M.4066, *CVC v SLEC*, para 33-37, the Commission confirmed that regular major sport events, like sport events that take place throughout the year or throughout a significant time period each year such as Formula One races are not in the same market as major irregular sport events which take place for a few weeks every four years. *In casu*, the ISU organises several events annually from November until March, and the Ice Derby International was planning to organise events annually too. Thus, both undertakings fall within the same market for broadcasting rights as well.

⁹¹ In *Balog*, Advocate General Stix-Hackl emphasized this and that there were three – interconnected – markets.

⁹² Jones and Sufrin (n 83) 76; see also Case IV/M.458, *Electrolux/AEG*.

nature of the activities conducted by both the ISU and Ice Derby International is the same and the same market is targeted.

In the light of temporal markets, it is also not possible for the Commission to find two different temporal markets,⁹³ because this notion entails that consumers can use the same product or service in two different periods. *In casu*, the products and services are not available to the consumers (in particular the speed skaters), on an interchangeable level. They can either be an ISU Member or a speed skater for unsanctioned events. Hence, the possible argument on the side of the ISU that two different temporal markets exist will not suffice.

The geographical market in the light of the sport sector means the territory of the undertaking where the sporting rule apply. The area in which the ISU and Ice Derby International are involved in the supply and demand of their products and/or services and where the rules apply is the international market of organisation of speed skating events. Ice Derby promoters envisioned an annual tour, traveling across the globe in a grand prix style, starting in Dubai and invitations were to start with Olympians at the Winter Olympics in Sochi, Russia. Hence, Ice Derby promoters are also aiming at a world-wide market. The names of the respective undertakings are also self-evident of the nature of the geographic market – *International Skating Union* and *Ice Derby International*.

To conclude, the IOC recognises the ISU as the only IF to administer, regulate and promote speed skating globally, with regard to Olympic Games and World Championships⁹⁴. This means that the ISU can make the rules of the game and also conduct certain activities. Since the ISU is the only recognised IF for speed skating, the power of making the rules is an exclusive power of the ISU, however the activities conducted by the ISU can also be conducted by another undertaking. This alternative undertaking, for instance Ice Derby International, does not have to be under the ISU's jurisdiction when conducting these activities, for instance organising international speed skating competitions. Hence, in the event of Ice Derby International organising an international speed skating competition, the exploitation market and contest market is entered. This causes competitive constraints, because consumers can switch from one product and service to the other. For example, speed skaters can decide to take part in Ice Derby competitions, the support of fans can also be divided between the two entertainments, and more, sponsors and broadcasting companies can approach Ice Derby International. Therefore, the activities of both the ISU and potential competitors, like Ice Derby International, fall within the same relevant product market

⁹³ Ice Derby events are held out-of-season and ISU events in-season.

⁹⁴ It should be noted that, although the ISU is the exclusive IF, recognised by the IOC, to administer and regulate these sports globally, it does not have the exclusive power to organise international speed skating events.

and geographical market, because the products and services provided by both undertakings are substitutable.⁹⁵

For the purpose of this thesis, the relevant market for the ISU can be defined as the market for the organisation of international speed skating events.

3.1.3 Dominant position

After defining the relevant product and geographical market, it has to be determined whether the ISU bears a dominant position in the specified market. The application of Article 102 TFEU, prohibiting the abuse of an undertaking's dominant position, to the case will only be triggered once it can be established that the ISU bears a dominant position⁹⁶. The Court of Justice laid down the dominant position test in *United Brands v Commission*⁹⁷ and it reads as follows: '*The dominant position, referred to by Article 102, relates to a **position of economic strength** enjoyed by an undertaking which enables it to **prevent effective competition** being maintained on the relevant market by affording it the power to behave to an appreciable extent **independently** of its competitors, customers and ultimately of its consumers.'*

There are several factors to be considered by the Court and Competition Authorities when examining the position of economic strength of an undertaking on a relevant market. The larger the market share, the more likely a finding of dominance,⁹⁸ nevertheless market share figures are only a proxy for market power and cannot be the determining factor of a dominant position.⁹⁹ Competition authorities considers all other factors affecting efficient competition on the market.¹⁰⁰ Article 102 TFEU prohibits under an undertaking to act in a way that might result in harm to consumer welfare by excluding rivals, exploiting a restriction of competition, or distorting competition between upstream or downstream firm. In other words Article 102 TFEU prohibits the conduct of an undertaking that is creating a barrier to entry by way of its ability to distort competition on the market. The undertaking will accordingly breach Article 102 TFEU, when the undertaking in question is actually exploiting this ability.¹⁰¹

⁹⁵ If the relevant market is the market for Olympic Games the ISU has a position of a near total monopoly on that relevant market. Hence, these is the non-exclusive market of organisation of international speed skating events and also the exclusive market for organising Winter Olympic Games.

⁹⁶ Whish and Bailey (n 5) 179.

⁹⁷ Case 27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429.

⁹⁸ Whish and Bailey (n 5) 18.

⁹⁹ Whish and Bailey (n 5) 42.

¹⁰⁰ *Guidance on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct by Dominant Undertakings* OJ [2009] C45/7, para 11.

¹⁰¹ Renato Nazzini, 'The Foundations of European Union Competition Law: The Objective and Principles of Article 102, Print publication date' [2011] Oxford Scholarship Online (Jan 2012) 16-17.

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The ISU is the exclusive IF to organise Olympic Games and to administer and regulate the sport of speed skating globally in this regard.¹⁰² It accordingly has the power to impose rules and in effect make the 'rules of the game'. It therefore bears a position of near-total monopoly in the market of organisation of Olympic Games and also to administer and regulate the game, due to its large market share on that market.

The market power of the ISU on the non-exclusive market of organisation of international speed skating events, being the market the potential competitor intends to enter, should however be examined in order to establish whether the ISU is creating barriers to entry for potential competitors by exploiting its possible dominant position on this market. Regarding market share levels, in *Hoffmann-La Roche v Commission*¹⁰³ the Court of Justice said that '*An undertaking with a very large market share and which holds it for some time...is by virtue of that share in a position of strength...*'. It further laid out that market shares over a period of three years ranging from 84 per cent to 90 per cent, prove the existence of a dominant position.¹⁰⁴ The ISU was founded in 1892¹⁰⁵ and has been administering the sport of figure skating and speed skating at world level alone since then.

Hence, the ISU enjoys a large market share on the market for the organisation of international speed skating events, with reference to the exploitation-, event organising- and merchandising markets, since it is the only IF that is regulating and administering speed skating globally. Moreover, the ISU has maintained its economically strong position on these markets for some time. It is common practice in the sports sector that the IOC recognises one IF per sports discipline to administer it at world level, and this IF typically exists for very long periods. Market power of sports governing bodies is thus very durable due to these market dynamics. Sports associations usually have practical monopolies and IF's are normally considered dominant in the market of the organisation of sport events under Article 102 TFEU. Based on a market share evaluation, the ISU bears a dominant position on the market for the organisations of international speed skating events, due to its substantial and durable market power. However, as mentioned, market shares figures are not the decisive factor to determine dominance on a relevant market. There also other crucial factors to be considered.

Not only are IF's typically dominant on the market for organisation of competitions, but they also hold a collective dominant position under Article 102 TFEU to the extent that they present themselves as a 'collective entity *vis à vis* their competitors, their trading partners and

¹⁰² International Skating Union Constitution and General Regulations as accepted by the 55th Ordinary Congress, June 2014. 11.

¹⁰³ Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, [1979] 3 CMLR 211.

¹⁰⁴ Christopher Bellamy & Graham Child, *European Community Law of Competition* (Sweet & Maxwell Ltd, 2001) 704.

¹⁰⁵ ISU General Regulations (n 19) 11.

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consumers¹⁰⁶ as a result of the implementation of rules adopted.¹⁰⁷ In *Piau*¹⁰⁸, the Court of First Instance found that FIFA held a position of collective dominance on the market at issue because of the composition of national associations and the clubs. This decision correlates with the finding of Advocate General Lenz in *Bosman*¹⁰⁹ that the clubs in a professional league are 'united by such economic links' that together they are to be regarded as having a dominant position'.¹¹⁰ The ISU is composed of the individual national associations, who administer speed skating and figure skating at the national level and all international matters are under the sole jurisdiction and control of the ISU.¹¹¹ It has been stated earlier that the ISU is an undertaking, an association of undertakings and an association of associations of undertakings. These separate undertakings are legally and economically in isolation from one another while forming a single economic activity together.¹¹²

Therefore, it can be stated that the ISU enjoys a position of collective dominance on the market for organisation of speed skating events. The ISU's position of collective dominance, allows the ISU to operate independently of its competitors, customers and consumers. The ISU has the power to impose restrictions by their Eligibility Rules, without considering the interests of its competitors, customers or consumers, which can harm these stakeholders and ultimately restrict competition which will amount to consumer welfare harm. Moreover, it is not only the position of collective dominance that is enhancing the ISU's economically strong position on the relevant market. Another essential factor, namely network effect, has to be considered as a possible element that is creating barriers to entry. In *BAT & RJ Reynolds*¹¹³ the Commission stated that advertising and corporate acquisition were the main means of increasing market share, and that since the market was dominated by large entities with considerable resources, there were very high barriers to entry.¹¹⁴

Network effect means the effect that one user of a good or service has on the value of that product to other people. Faull & Nikpay puts network effect simply as the phenomenon whereby customers are attracted to the network with the most users, this network becomes the industry standard.¹¹⁵ Hence, once a firm has won the competitive race, it is difficult for potential competitors to enter that relevant market and gain market share from the leading firm because consumers value the new product less. At that point, network effects may give the leading

¹⁰⁶ Joined case C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA eo. v Commission* [2000] ECR I-1365, para 44. Advertising was of also an element of great importance.

¹⁰⁷ Commission's staff working document annexed to the 2007 White Paper on sport, para 2.1.4.

¹⁰⁸ Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209, para 107-116..

¹⁰⁹ Case C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921, para 285.

¹¹⁰ An Vermeersch, 'All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport' [2007] 3(3) *Journal of Contemporary European Research*, 251.

¹¹¹ ISU General Regulations (n 19) 11.

¹¹² Whish and Bailey (n 5) 573.

¹¹³ Cases 142 & 156/84 *BAT & RJ Reynolds v Commission*, [1987] ECR 4487, [1988] 4 CMLR 24, para 43-44.

¹¹⁴ Bellamy & Child (n 104) 709.

¹¹⁵ Faull & Nikpay (n 87) 331.

undertaking the ability to restrict effective competition in order to protect its market power. When a network effect is present, the value of a product or service is dependent on the number of others using it.¹¹⁶

There are two kinds of network effect, namely, direct and indirect network effect¹¹⁷. Direct network effects arise when a consumer's valuation of a product increases as the number of users of the product rises. For instance, the valuation of ISU competitions increases as the number of speed skaters that participate in ISU sanctioned events rises, as speed skaters can compete against other professional speed skaters. Also, due to the big network that the ISU has built on the market for organisation of international speed skating events, such as sponsorships, broadcasting contracts, and advertising, this makes the services and products more attractive because of the already significant number of consumers. Indirect network effects arise when a consumer's valuation for a product increases as the function or quality of complementary products or services rises. For instance, the valuation of ISU competitions increases as the number of speed skaters taking part in the Winter Olympic Games rises.

To conclude, due to its position of economic strength in the market of the organising of speed skating events, the ISU bear the power to operate independently of its competitors, customers and consumers, subsequently preventing effective competition to be maintained in this market. Moreover the ISU consists out of national associations and clubs and these separate undertakings are legally and economically in isolation from one another while forming a single economic activity together. Thus, the ISU is an undertaking, an association of undertakings and an association of associations of undertakings and bears a position of collective dominance on the market for organisation of international speed skating events. The fact that the IOC recognizes the ISU as the exclusive IF to administer, regulate and promote speed skating globally, it can also impose strict rules and determine the rules of the game. Moreover, network effect being present, allows for the ISU to impose strict rules without the threat that consumers might substitute its services with services or products of potential competitors. The ISU has built up a network of sponsors, advertising companies, broadcasting companies, fans and speed skaters that it will be nearly impossible for Ice Derby International to enter the relevant market. This network became the speed skating industry's standard.

Hence, the ISU is placed in a position on the market of organisation of international speed skating events, where it has such a powerful position that it can restrict competition by acting in a way independently of its competitors, customers and ultimately of its consumers. Under EU competition law, undertakings having a dominant position have a special responsibility towards the market to refrain from abusive behaviour. Accordingly, sports federations bearing dominant positions have a special responsibility to provide for the needs of competitors, customers and

¹¹⁶ Nazzini (n 101) 20-21.

¹¹⁷ *Ibid.*

consumers by not harming the competitive process. The question forthwith is whether the ISU is exploiting this ability by creating barriers to entry.

3.1.4 Abusive conduct or not

Article 102 TFEU is applicable to both exploitative abuses and exclusionary abuses, as established by the Court of Justice in *Continental Can v Commission*¹¹⁸. Exploitative abuse occurs when a dominant undertaking obtains a benefit by placing an unfair burden upon its customers or consumer, because there is no alternative undertaking which they can turn to for the same supply. Exclusionary abuse occurs when a dominant undertaking restricts competition, changing the structure and dynamic on the market, and thereby limiting entry on that particular market.¹¹⁹ The test for exclusionary abuse is to determine whether conduct of a dominant undertaking causes actual or likely anti-competitive effects on the relevant market and direct or indirect consumer harm.¹²⁰ Barriers to entry are created by the imposition of the life-ban sanction by the ISU, because potential competitors cannot enter the market of the organisation of speed skating events. Hence, the ISU is excluding potential competitors to enter the relevant market due to its exclusionary conduct causing anti-competitive effects due to its strict measures imposed, thus it is conducting an exclusionary abusive behaviour.

Some authors argue that pure exclusion on its own without exploitation should not be found to be abusive conduct in the framework of Article 102 TFEU. However, exclusionary abuse on its own can certainly be anti-competitive in itself. Exclusionary conduct can have anti-competitive effects thus harming the competition process and consumer welfare. An exclusionary abuse of a dominant undertaking can be established when the conduct of the dominant undertaking, for instance limiting services or reducing consumer choice, impair effective competition by foreclosing competitors in an anti-competitive way.¹²¹

In *Irish Sugar*¹²² it was held that an undertaking may individually commit an abuse of a dominant position held collectively with other undertakings, insofar the abuse was committed to protect the collective dominant position.¹²³

3.1.5 Effect on trade

Where an undertaking occupies a dominant position in the common market, it will always be of importance for trade between Member States. Conduct of an undertaking will affect trade if it interferes with the pattern of trade between Member States or with the structure of competition

¹¹⁸ Case 7/72 *Continental Can v Commission* [1973] ECR 215, [1973] CMLR 199.

¹¹⁹ Loewental (n 34) 457.

¹²⁰ Case 85/76, *Hoffmann-La Roche v Commission* [1979] ECR 461, para 55.

¹²¹ Whish and Bailey (n 5) 208.

¹²² Case T-228/97, *Irish Sugar plc v Commission*, [1999] ECR II-2969, para 66.

¹²³ Jones & Sufrin (n 83) 557.

on the internal market.¹²⁴ This notion holds in that there must be a direct or indirect, actual or potential, influence on the pattern of trade between Member States. The concept of 'effect on trade' is the ground of jurisdiction which determines whether the Article 102 TFEU applies to the case.¹²⁵ Because of the fact that the geographical scope *in casu* is international, the rules imposed and enforced by the ISU are applicable in several countries and are likely to affect trade between Member States. Moreover, given the international context of professional sport, rules originating from national sporting federations might also affect trade between Member States.¹²⁶

3.2 Concluding remarks

The ISU offers goods and services on several markets, namely the exploitation market, the contest market and the merchandising market, in the form of entertainment, against payment stemming from sponsorships, advertising, admission fees, sales of television broadcasting licenses, Membership fees and merchandising. These markets can all be defined under one relevant market, namely the market for the organisation of international speed skating events. By offering these goods and services on this market, the ISU is engaging in economic activity, making it an undertaking within the meaning of EU competition rules. Moreover, the ISU is not only an undertaking within the meaning of Article 102 TFEU, but also an association of undertakings and an association of associations of undertakings, having the typical pyramidal structure of a sports governing body. The ISU also enjoys a position of collective dominance on the relevant market, due to the fact that it presents itself and its Members as an entity as a result of the implementation of rules adopted.

The ISU and its Members have adopted the ISU General Regulations laying down the ISU Eligibility Rules, which contains the life-ban sanction. This life ban sanctions discourages speed skaters to take part in unsanctioned events, thus foreclosing competition on the relevant market, because speed skaters are reluctant to take part in unsanctioned events due to the life-ban threat. The fact that the ISU enjoys network effect on the relevant market enables it to impose and enforce strict rules, because consumers are attracted to the network with the most users. The ISU's network of sponsors, speed skaters, fans, advertisers, broadcasters and other consumers became the standard. Thus, not only does the network effect empower the ISU to impose a life-ban sanction causing barriers to entry, but the network itself is also causes a barrier to entry, because in light of demand-side substitutability, consumers will value the products or services of Ice Derby International less. By imposing the life-ban sanction, the ISU is distorting effective competition on the market and this makes the ISU's dominant position and network even stronger.

¹²⁴ Jones & Sufrin (n 83) 269.

¹²⁵ Commission notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [Official Journal C 101 of 27/4/2004].

¹²⁶ Vermeersch (n 110) 251.

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Hence, the exclusionary abuse by the ISU leads to anti-competitive effects on the market for the organisation of international speed skating events. This will potentially affect trade in the internal market, which ultimately harm the competition process and consumer welfare. Although it can be reasonably accepted, after the Article 102 TFEU analysis in this chapter, that a *prima facie* abuse exist, the Commission can only find the conduct of the ISU abusive after considering objective justifications. Hence, to complete the abuse analysis, an examination of possible objective justifications will follow.

CHAPTER 4: IS THERE AN OBJECTIVE JUSTIFICATION FOR THE LIFE BAN?

4.1 Introduction

In this section an examination will be done as to whether the alleged abusive conduct by the ISU can be objectively justified. By defining the three categories of pleas, Lowe¹²⁷ created a relatively simple guideline to follow when addressing pleas of objective justifications in the event of an existence of *prima facie* abusive conduct on the side of a dominant undertaking. There are, as mentioned in chapter two, certain elements to consider, depending on the type of objective justification put forward, when doing an objective justification analysis:

i) Intent

Intent is an important element as seen in case law. In *Michelin II*¹²⁸ the CJEU held that intent can be inferred from effects¹²⁹. However, it must not be overstated because it cannot be the decisive factor of abuse. Abusive of dominance is an objective concept and lack of intent will not be seen as an objective justification, it might also be based on a 'shaky legal presumption' as Van der Vijver names it.¹³⁰ The presence of intent does not necessarily constitute abuse. The element of intent forms a part of the public interest objective plea, not of the efficiency plea, and sometimes in the legitimate business objective plea.

ii) Proportionality

It is believed that the principle of proportionality is the foundation for the concept of objective justification. Rousseva lays out the proportionality test in brief. She says that it entails an assessment of whether public or private measures taken reasonably pursue a legitimate interest at stake or whether it in fact goes beyond what is reasonably necessary in order to pursue the aim. At least two tests are involved in this assessment, namely the suitability test and the necessity test. The former requires that conduct by an undertaking should be suitable to achieve an objective worthy of protection. The latter requires that the conduct by an undertaking should be necessary to achieve the objective *and* whether there are less restrictive ways of reaching the same objective.¹³¹ Rousseva further explains that some authors also define a third element to the proportionality test, namely that the measures taken by the undertaking should not have an excessive effect on the interests in question. Van der Vijver suggests that the proportionality test is a key criterion in the context of objective justification.¹³² It forms part of both the legitimate

¹²⁷ Loewental (n 34) 464. As stated by Director General Lowe of DG Competition at the 30th Annual Conference on International Antitrust Law and Policy.

¹²⁸ Case T-203/01, *Michelin v Commission*, [2003] ECR II-4071.

¹²⁹ Van der Vijver (n 30) 69.

¹³⁰ *Ibid* 71.

¹³¹ Rousseva (n 37) 33.

¹³² Van der Vijver (n 30) 71.

business behaviour plea and the public interest plea, but to a lesser extent to the efficiency plea. The efficiency plea is about the question whether pro-competitive effects outweigh anti-competitive effects, whereas the proportionality test is less about outweighing but weighing up against each other.

iii) Necessity Test

The necessity test requires conduct by an undertaking to be indispensable to the objective pursued *and* it asks whether there are less restrictive ways of reaching the same objective.¹³³ This strict approach of the proportionality test forms part of both the legitimate business behaviour, the public interest plea and the efficiency plea. Undertakings, in the framework of competition law, are subjected to the strictest proportionality requirements¹³⁴. Hence, both balancing of interests and to see if a less restrictive measure is available. Although difficult to second guess alternative practices for undertakings, it is indeed part of the legitimate business objective plea. The purpose of this element in the efficiency test is to determine if the conduct is necessary for the professed pro-competitive outcome.¹³⁵

iv) Effect

This element is particularly relevant when a dominant undertaking raises an efficiency plea,¹³⁶ and less relevant when a public interest plea is invoked, in such an instance the Commission will rather consider the benefit which falls upon the consumers.

4.2 Objective Justifications

The analysis of possible objective justifications will start by examining whether the efficiency plea can succeed or not. Subsequently, the legitimate public interest objective and legitimate business behaviour pleas will be applied as possibilities *in casu*. The network effect of the ISU empowers it to impose the life-ban sanction, which ultimately causes exclusionary effects on the relevant market of potential competitors. This also aids the dominant position of the ISU. Hence, the ISU must either prove that the negative effects on the competitive process and consumer welfare will be outweighed by benefits/efficiencies to the consumers, or that the exclusionary effect pursue a legitimate interest and that it does not go beyond what is reasonably necessary in order to pursue the aim. In other words, whether the life-ban sanction is in proportion towards the aim it wishes to achieve and whether it is necessary in order to enhance consumer welfare or to protect public interest, and that no less restrictive measure could have been used.

¹³³ Rousseva (n 37) 33.

¹³⁴ Wolf Sauter, *Proportionality in EU Competition Law* [2014] 35(7) ECLR, 327-332, 11.

¹³⁵ Van der Vijver (n 30) 74.

¹³⁶ *Ibid* 75.

A. Efficiency Considerations

The efficiency plea is a process of weighing out negative effects on the competitive process and consumer welfare with benefits that the *prima facie* abusive conduct holds in. Even though Article 102 TFEU does not legally have an exemption rule, this should not rule out efficiencies, because Article 102 aims to prohibit distorted competition in the internal market.¹³⁷ In the *Guidance* it is stated that conduct which allegedly hinders or distorts competition on the market, can be defended on efficiency grounds. The 'efficiency defence' mirrors the Article 101(3) TFEU conditions.¹³⁸ When this weighing up test is applied *in casu* it will demonstrate whether the ISU's conduct produces efficiency gains which outweigh possible anti-competitive effects.

The Commission explains that, in order to fulfill the efficiency plea, four cumulative conditions¹³⁹ have to be met by the conduct of the dominant undertaking *in casu*:

- The efficiencies have to be realised, or be likely to be realised, as a result of the conduct in question.
- The conduct has to be indispensable to the realisation of the efficiencies.
- The efficiencies have to outweigh any negative effects on competition and consumer welfare in the affected markets.
- The conduct must not eliminate all effective competition.

With this test the intent of the undertaking is irrelevant, the Commission will rather consider effect on the market.¹⁴⁰ Proportionality may also not be particularly relevant, because the efficiency test is an outweighing procedure of pro-competitive effects and anti-competitive effects.¹⁴¹

As mentioned above, not only does the network effect empower the ISU to impose a life-ban sanction causing barriers to entry, but the network itself is also causing barriers for potential competitors to enter the relevant market. Efficiencies means benefits to effective competition on the market, thus enhancing consumer welfare. The ISU must show that these benefits exist or are likely to be realised and that they outweigh the negative consequences of the exclusionary effect caused by the network effect of the ISU and the life-ban sanction. It must also prove that these benefits can only be realised by the conduct it is using and moreover, that this conduct does not eliminate all effective competition on the relevant market. Possible efficiencies could be improved

¹³⁷ Loewental (n 34) 465.

¹³⁸ Albertina Albors-Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC' [2007] 44:1727-1761, *Kluwer Law International*, 1761.

¹³⁹ Whish and Bailey (n 5) 212.

¹⁴⁰ Van der Vijver (n 30) 71.

¹⁴¹ *Ibid* 72.

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services and products on the market, for example to ensure better quality or bigger choice of services with the best deals for consumers,¹⁴² or sufficient earnings per year.

Ice Derby International is the first undertaking aiming to organise international speed skating events without ISU endorsement. Since this undertaking is currently the only potential competitor on the market of organisation of international speed skating events, and the conduct is causing barriers to entry, this competitor is eliminated from this particular market. Moreover, even other potential competitors aiming to enter this market will be excluded by not only the network effect of the ISU but also by the Eligibility Rules in place. Hence, the fact that the ISU is empowered by its network effect to impose strict rules, prohibiting speed skaters to take part in unsanctioned events, causes an elimination of all effective competition on the market for the organisation of international speed skating events.

As the conditions of the efficiency test are cumulative, the efficiency plea will fail already at the outset. Moreover, if the ISU puts forward that benefits will be the protection of the integrity, objectivity and transparency of speed skating, it has to show that those acclaimed 'efficiencies' completely outweighs the likely negative effects on the competitive process and consumer welfare. Given that an efficiency plea partly depends on the degree of dominance, exclusionary conduct by a super dominant undertaking can normally not be justified on efficiency grounds.¹⁴³ Article 102 TFEU protects the competitive process and ultimately consumer welfare, by ensuring efficient allocation of resources. Moreover, protection of the competitive process has priority over possible efficiency gains, therefore it is highly unlikely that abusive conduct of a super dominant undertaking could be justified on the ground that efficiency gains outweigh anti-competitive effects.¹⁴⁴ When an undertaking is super dominant and also the only undertaking on the relevant market, the incentive to improve services is very low¹⁴⁵, due to lack of pressure from other competitors to innovate. This being the circumstances *in casu*, the ISU after distorting effective competition on the market for organisation of speed skating events, bears even more power to impose any measure it sees fit.

The anti-competitive effects on the market for the organisation of international speed skating competitions is an avoidable result of the life-ban sanction, and pro-competitive effect on the relevant market does not outweigh the negative effects on this market. Therefore, the efficiency plea will not suffice as a justification for the ISU to impose a life-ban sanction.

¹⁴² Robert O'Donoghue & A Jorge Padilla, *The Law and Economics of Article [102] TFEU* (2nd Edition, Hart Publishing, 2006) 230.

¹⁴³ OJ [2009] C45, para. 30.

¹⁴⁴ O'Donoghue & Padilla (n 142) 232.

¹⁴⁵ O'Donoghue & Padilla (n 142) 231.

B. Legitimate Business Behaviour & Public Interest Objectives

Since the efficiency plea is dismissed, the objective justification analysis can move over to the necessity 'defences'. Both the pleas of legitimate business behaviour and public interest objective will be dealt with simultaneously. In doing so the objective justification test as put out in the Commission's guidance is being mirrored in this assessment, along with an added element namely the commercial interest element. Does the life-ban sanction reasonably pursue a legitimate interest at stake or does it go beyond what is reasonably necessary in order to pursue the legitimate objective? The life-ban sanction should be suitable to achieve an objective worthy of protection. The life-ban sanction should also be necessary to achieve the objective *and* must not be less restrictive ways of reaching the same objective.¹⁴⁶ It should also not have an excessive effect on the interests of consumer welfare.

i) Legitimate public interest objective

If the conduct of an undertaking serves a key public interest, this conduct, even though having anti-competitive effects harming consumer welfare, will not be seen as abusive behaviour. Van der Vijver gives as an example, a situation where an undertaking refuses to buy or sell products to undertakings who support child labour.¹⁴⁷ However, the legitimate public interest objective plea doesn't carry much weight, neither by the Courts' standards nor by the Commission's.¹⁴⁸ In *Hilti AG v Commission*¹⁴⁹ it was held that it is not a dominant undertaking's duty to eliminate products on the market which it regards as dangerous, whether it is or not.

Nevertheless, assuming that the ISU might put forward that it is acting in the interest of the public by imposing the life-ban sanction in order to protect the integrity and objectivity of the speed skating, the following questions should be addressed: is the life-ban sanction a reasonable action to pursue the 'legitimate' public interest objective? Is the sanction suitable in achieving the goal? Is the sanction necessary to achieve the goal or are there other less restrictive measure which can be used to achieve the same goal? Does the life-ban have an excessive effect on consumer welfare?

Sole participation in an unsanctioned event cannot reasonably constitute harm to the integrity of speed skating to the extent that it would justify a life-ban sanction. Thus, the conduct of the ISU does not meet the broad proportionality test criteria at first glance. Even in the event of the ISU putting forward an argument that its conduct is to protect public interest concerns due to the fact that it wants to ensure safety and health of its speed skaters in events and/or it wants to protect consumers from the harm that might come from betting related practices, the life-ban

¹⁴⁶ Rousseva (n 37) 33.

¹⁴⁷ Van der Vijver (n 30) 189.

¹⁴⁸ Loewental (n 34) 464.

¹⁴⁹ Case T-30/89, *Hilti AG v Commission* [1991] ECR II-1439, para 118.

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sanction should be objectively justified. It might be noteworthy to mention the *FIA* case¹⁵⁰ where the European Commission was faced with similar restrictive rules imposed by the *Federation Internationale de l'Automobile*. Although the case was closed, due to an agreement by the Commission and FIA, that FIA will no longer prohibit license holders to participate in international events which are not on the FIA calendar¹⁵¹, it can still function as an example that a dominant undertaking should justify *prima facie* abuse to escape the Article 102 TFEU prohibition. The Commission investigated the possible abuse of market power in the licensing of participants in this sports, the acquisition of television rights and the arrangements entered into with broadcasters, promoters and teams. Hence, a sport governing body is capable of infringing Article 192 TFEU by using its regulatory powers to exclude competing organisers from the relevant market.¹⁵²

It is also a relevant example because it is on EU level, like the case *in casu*. The agreement was however conditional that other races should meet the necessary safety requirements and should not be in conflict with FIA's existing events. Furthermore, on national level, competition authorities opened an investigation on the rules of Show Jumping Ireland, because it prohibited show jumpers to participate in unaffiliated show jumping events. The case was also closed, after this rule was amended. Show jumpers can now participate in unaffiliated events, on the condition that those events comply with the Health and Safety Standards.¹⁵³ In *Frankfurt Airport* the airport operator argued that its refusal to deal was justified by a lack of capacity and concerns over safety and quality degradation concerns.¹⁵⁴ However, even after opinions on the reasons for justification was given, the Commission found the refusal to deal not to be justified.

The ISU's reluctance to approve of betting activities is most probably due to the fact that there is no legislation or regulation that standardises betting and gambling throughout the EU, and the ISU's geographic market is world-wide. Keeping up with the legalities of gambling would be a challenge, given the fact that the individual countries are still ultimately responsible for passing their own laws, and this is particularly true when it comes to the gambling industry. The various Members of the ISU each have to comply with their particular national laws, each having its own gambling regulation, this makes it difficult for the ISU to allow the gambling industry to become a part of the sports discipline of speed skating. Nevertheless, it is not up to the ISU to eliminate products on the market which it regards as unsafe or unacceptable,¹⁵⁵ and by doing so it harms consumer welfare.

Hence, whether the ISU aims to protect the safety, health or integrity of speed skating, the measures taken should still be suitable, necessary and non-excessive, in order to comply with the Commissions objective necessity test. If the acclaimed goal that the ISU seeks to achieve is for

¹⁵⁰ Formula One and other four-wheel motor sports, IP/01/1523, 2001.

¹⁵¹ Van Rompuy (n 16).

¹⁵² Bellamy & Child (n 104) 752.

¹⁵³ Van Rompuy (n 16).

¹⁵⁴ O'Donoghue & Padilla, 228.

¹⁵⁵ Case T-30/89 *Hilti AG v Commission*, [1991] ECR II-1439, para 118.

public interest, it must mean that it wants to protect the speed skaters as well, thus a life-ban sanction is doing the opposite. Doping harms the safety, health and integrity of speed skating much more than participation in unsanctioned events does, and the sanction for doping is a mere, conditional, two year ban. Hence, the life-ban sanction is not suitable for the possible acclaimed aim. Moreover, it is not capable of achieving its goals¹⁵⁶ of protecting the integrity of the game, the life-ban sanction is doing the exact opposite by prohibiting speed skaters to compete, because it wants to 'protect' the integrity of speed skating. The athletes' integrity should be protected rather, being the core substance of the sport, and permission to participate does not seem to hinder the integrity of speed skating as much as a prohibition to participate would.

Less restrictive sanctions could certainly be imposed and enforced by the ISU to achieve the same objectives, thus necessity of the life-ban sanction is ruled out. Given that the career of a speed skater is short in time, as it is, a ban of even one year would discourage a speed skater to break the ISU Rules. Moreover, the implications on the speed skaters and consumer welfare is excessive. Sole participation in an unsanctioned events cannot justify a life-ban sanction on a speed skater. Hence, the ISU would not be able to meet the proportionality test or the objective necessity test requirements, because the measures taken by it is not considered inherent and proportionate to the pursuit of a legitimate public interest objective. Moreover, alternative measures could be taken to achieve the same effect of discouraging speed skaters to break ISU Rules.

Therefore, the ISU will most likely not succeed with a public interest objective plea, to counter the abusive conduct allegations by Tuitert and Kerstholt.

ii) Legitimate business behaviour

Assuming that the ISU might put forward that the life-ban is in place in order to protect its legitimate interests, it should prove that: the life-ban sanction is a reasonable measure to pursue a 'legitimate' business behaviour objective. The sanction is suitable in achieving the goal. The sanction is necessary to achieve the goal and there are no alternative, less restrictive, measure which can be used to achieve the same goal. Lastly, that the life-ban does not have an excessive effect on consumer welfare.

In light of the intent element of Lowe's model, there should be a brief elaboration on what the possible goals are that the ISU seeks to achieve by the life-ban sanction. Although abuse of dominance is an objective concept, Loewenthal suggests that conduct by a dominant undertaking cannot be justified if its primary aim is to distort competition on the market, but it is hard to find out what the intent of an undertaking is, and it might be necessary to make risky legal assumptions. It is therefore that Van der Vijver believes that intent may be relevant for contextual purposes, but not as a decisive factor to show an undertaking's aim.¹⁵⁷ By imposing a life-ban on speed skaters

¹⁵⁶ Van der Vijver (n 30) 71.

¹⁵⁷ Van der Vijver (n 30) 71.

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who take part in unsanctioned events the ISU is eliminating its possible competitors on the market, thus placing it in the position to impose any rules because it is not threatened with the possibility that speed skaters might substitute it with another undertaking's services.¹⁵⁸ With regard to the protection of its commercial interest, the ISU's powers are divided between regulatory procedures, administering and organisation of events. Ice Derby is not threatening to enter the exclusive market of regulating and administering the sport of speed skating, it seeks to enter the non-exclusive market of organising international speed skating events. The ISU seems to be after the goal of having a grip on the manner in which competitions are conducted, which will assure that the ISU can be in a position to protect its network effect. 'Manner' meaning ethical and administrative ways. Hence, the intent of the ISU might or might not be to distort competition on the market, however, by imposing a life-ban sanction it is benefitting from the fact that it will ultimately be the only undertaking on the relevant market. Even though a dominant undertaking is entitled to protect its commercial interests, it cannot be for the sole purpose of protecting its dominance on the market.¹⁵⁹

Even if certain exclusionary practices are necessary for the proper functioning of a specific sport, these practices can still have anti-competitive effects and ultimately harm the competitive process and consumer welfare.¹⁶⁰ As seen earlier, there are several markets, undertakings and stakeholders involved *in casu*. On the exploitation- and contest market, where speed skating races provide entertainments for viewers, there are several stakeholders and consumers. The number of viewers and advertisements could potentially be decreased in the event of an entrance of a new undertaking on the market of the organisation of international speed skating events. So the question is whether the harm caused by the exclusionary practices of the ISU to several stakeholders can be justified by the ISU on the ground that this conduct is necessary to achieve its business goals. The harm caused to the competitive process, consumer welfare should be in proportion towards these aims. By creating barriers to entry by the life-ban sanction to potential competitors, the ISU is not only harming the interests of fans, speed skaters and other consumers due to a lack of choice of product and innovation, but also to undertaking such as broadcasting companies and advertising companies. Hence, the goals which the ISU seeks to achieve should be an extremely important goal, for the ISU to be able to justify the harm done by its conduct to all these stakeholders. The proportionality test can assist this matter.

¹⁵⁸ Case T-24,26,28/93 *CMBT v Commission*, [1996] ECR II-1201, on appeal, Case C-395/96P [2000] ECR I-1365, para 117-119; although this case regards the matching of prices in order to eliminate the only competitor, it shows that even 'good intentions' on the side of the dominant undertaking, for instance prohibiting participation in unsanctioned events to protect the integrity of the sports and the interests of the speed skaters, could actually be a purposeful elimination of the only competitors in order to maintain power in the relevant market.

¹⁵⁹ Case C-468/06 *Sot. Lelos* [2008] ECR I-7139, [2008] 5 CMLR 1382, para 50.

¹⁶⁰ T.M.C. ASSER ISTITUUT, 'Working Paper on Professional Sport in the Internal Market' (2005) DG Internal Policies of the Union, 17.

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According to Osterud, undertakings causing anti-competitive effects on the market should not be exempted from the scope of Article 102 TFEU, due to its legitimate objective.¹⁶¹ In *Meca-Medina* the Court applied the necessity test and held that ‘it has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of [the] objectives, and are proportionate to them’.¹⁶² Hence, the Court held that ‘the restrictions imposed by the rules must be limited to what is necessary’.¹⁶³ Van der Vijver argues that it is hard to bring the necessity test under the plea of legitimate business behaviour, because it might be hard for the Court or the Commission to second guess the appropriate route for a dominant undertaking to follow in order to achieve its goals.¹⁶⁴ That being said, *in casu*, it can be reasonably assumed that a ban on ISU competitions for a determined period will have the same effect as a life-ban sanction would have, due to the impact on the career of a speed skater. Excluding a competitor is not necessarily an abuse,¹⁶⁵ and competing on the merits does not necessarily mean that there is no abuse.¹⁶⁶ Foreclosure should be justified by meeting the proportionality test and necessity test.

Where an undertaking is competing on the merits, Article 102 TFEU will not be breached.¹⁶⁷ It would mean that the ISU is conducting its business in a normal manner to survive on the market and the Commission cannot condone this behaviour¹⁶⁸. Possible incentives for the life-ban sanction could be integrity based, administration based and/or control based. However, is the protection of these interests with a life-ban competing on the merits or not. The measures taken by the IUS should be proportionate to the aim it wishes to achieve,¹⁶⁹ and this is not the case, thus the life-ban sanction does not seem to meet the proportionality test criteria.

In the light of betting related activities, although the ISU has contract freedom to decide who it wants to deal with, the national legislation of the various Members should determine the consequences faced by undertakings supporting gambling and betting activities, it is not for the ISU to take the law into its own hands and assert moral convictions about the betting aspect of certain events. The right to protect legitimate interests should fit in with the essential goals of competition law of protecting the competitive process for the benefit of consumers.¹⁷⁰ Moreover, the irony regarding integrity and administration in terms of betting related practices is that if the EU for instance adopts a right to consent to bets, as have been called for by several European sports organisers, the integrity of sport could be better protected from betting-related race fixing. A speed

¹⁶¹ Erik Osterud, ‘Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law’ [2010] *Kluwer Law International*, 245-250.

¹⁶² Sauter (n 134) 5; Nevertheless only the necessity test was actually applied, and the proportionality test was in fact not applied to the question whether penalties imposed by the sporting body were excessive.

¹⁶³ *Ibid.*, 5.

¹⁶⁴ Van der Vijver (n 30) 74.

¹⁶⁵ Case 27/76. *United Brands v Commission* [1978] ECR 207, para. 184.

¹⁶⁶ Van der Vijver (n 30) 63.

¹⁶⁷ *Ibid.*

¹⁶⁸ Case 85/76, *Hoffmann-La Roche*, [1979] ECR 461, para 91.

¹⁶⁹ *BBI Boosey & Hawkes: Interim Measures* OJ [1987] L 286/36, [1988] 4 CMLR 67.

¹⁷⁰ Van der Vijver (n 30) 193.

skater accused of doping is still serving the ISU and does not 'substitute' the ISU with another market. According to the Constitution of the ISU, a speed skater accused of doping only gets a *conditional* sanction of two years.¹⁷¹

Ice Derby events, and any other unsanctioned event, will certainly not be conducted in a way similar to the ways of the ISU. Regulations will be different, media rights will be dealt with differently, especially when a betting-aspect is also present. Moreover, objectivity and transparency problems will suffice due to the fact that the ISU will not have enough knowledge about the details of the structure of the events, so it will also have no control regarding competitors or the competition. Nevertheless, this does not justify the ISU to drive competitors out of the market due to the fact that it is conducting practices differently. The fact that the ISU has to impose a life-ban sanction in order to discourage speed skaters to take part in unsanctioned events is not legitimate business behaviour.

Less restrictive measures can be taken by the ISU to achieve the same goals, making the life-ban sanction not inherent in the pursuit of the ISU's objectives, and it is not proportionate to pursuing any legitimate business objectives. Therefore, the ISU will most likely not succeed with this plea either.

4.3 Concluding remarks

Although the ISU is permitted to protect its own commercial interests in promoting ISU regulated competitions, and also to protect the integrity of speed skating, the manner in which it is protecting these interests should not go beyond what is reasonably necessary to achieve these goals. It cannot abuse its power of authorisation of other international speed skating events by imposing and enforcing measures which would ultimately eliminate effective competition on that market and harm consumer welfare. After the juxtaposing of the two colliding interests *in casu*, namely the interests of the ISU and the interests of consumers, was done it became apparent that both these interests are worthy of protection. However, the ISU and its Members, being an undertaking on the market of organisation of speed skating events with a position of collective dominance amounting to a near total monopoly, having the capacity to effect trade and foreclose competitors on this market, ultimately harming the competition process and consumer welfare, have the special responsibility to ensure that its business is conducted in a way which meets the objectives of Article 102 TFEU. The ISU is abusing this powerful position by imposing and enforcing a life-ban sanction on speed skaters who participate in unsanctioned events, resulting in barriers to entry due to its tight grip on the human resources, essential for the existence of its competitors. Harm to consumer welfare is thus caused by the lack of choice of a better quality service.

¹⁷¹ ISU Anti-Doping Rules. ISU Communication No. 1765. Article 9 and 10.

Rules of sports federations will not easily survive the proportionality test should they ever become under scrutiny before the Court,¹⁷² because given that these IF's are so powerful, they often impose overly strict and disproportionate rules. This case is a very important example for other IF's that even though their dominant positions on certain markets might be off-putting for potential competitors to enter the market, once those potential competitors try to enter the market, the IF's rules will be scrutinised. These rules should be proportionate towards the goals it aims to achieve.

The life-ban sanction has the effect of discouraging speed skaters to take part in unsanctioned events, less restrictive measures can surely be used to discourage speed skaters to take part in unsanctioned events, because the life-span of a speed skating career is short as it is. No speed skater will take a risk of getting banned, whether for life or two years, the impact on career growth is too big. It can thus be inferred that the life-ban sanction is unnecessary and unsuitable for the ISU to achieve its goals. Moreover, the life-ban sanction has an excessive effect on consumer welfare. Not only does it harm the commercial interests of the speed skaters and other consumers, due to lack of choice of service, thus harming the competitive process by distortion of effective competition on the relevant market, and ultimately harming consumer welfare - the main interests that Article 102 TFEU seeks to protect. The life-ban sanction also harms the non-commercial interests due to harm to integrity of not earning enough money or not being able to have an Olympic career. Although the procedure to follow when assessing abuse of a dominant undertaking is tricky and sometimes based on shaky legal assumptions, there is at least one benefit stemming from the fact that Article 102 TFEU does not have *per se* illegality. It is that the Court and Commission can maintain that abusive conduct by dominant undertakings can cause serious harm to the competitive process and there should actually never be an exemption for this.

The efficiency plea *in casu* did not meet the required standards of an objective justification, because the loss in effective competition on the market for organisation of speed skating events does not seem to be compensated for by clear efficiency gains, benefiting consumers. Furthermore, *prima facie* abusive conduct by the ISU, due to the imposition and enforcements of the life-ban sanction, can also not be objectively justified by the objective necessity test. The objectives which the ISU seeks to achieve, whether commercial or integrity based, should be inherent and proportionate to the measures it is taking to achieve such goals.

¹⁷² Arnout Geerart, 'Limits to the autonomy of sport: EU law Action for Good Governance in International Sports Organisations', HIVA- Research institute for work and society (KU Leuven) 17.

CHAPTER 5: CONCLUSION

After detailing the competition law complaint lodged by Mark Tuitert and Niels Kertsholt against the ISU and having performed the legal analysis under Article 102 TFEU, the thesis discovered the following. The ISU rules sanctioning the violation of the prohibition of participation in ISU unsanctioned events in the form of a life-ban from all regulated events do indeed constitute an abusive behaviour, within the meaning of Article 102 TFEU. This will potentially affect trade in the internal market, which ultimately harm the competitive process and consumer welfare.

The fact that the ISU has powerful network effect and can be defined as an undertaking with collective dominance on the market for the organisation of international speed skating events, enables it to impose and enforce strict Eligibility Rules which creates barriers to entry on the relevant market. Professional speed skaters are discouraged from taking part in events conducted by undertakings in competition with the ISU, because of the life-ban threat. Potential competitors on the market for the organisation of international speed skating events cannot enter the market without making use of the professional speed skaters. Hence, the imposition of the rules prohibiting participation in unsanctioned events are foreclosing competition and practically eliminating all effective competition on the relevant market. Thus, the exclusionary abuse causing anti-competitive effects on the relevant market, not only harms consumer welfare, but also the direct interests of speed skaters because of the harm done to their professional careers.

Neither the efficiency plea nor the objective necessity plea will be successful *in casu*. Whether the ISU's goal is to protect the integrity of this sports discipline, objectivity or transparency of the regulatory aspects, or its own commercial interests, the ISU will have to prove that the life-ban sanction is inherent and proportionate to the pursuit of this objective. The Eligibility Rules cannot possibly be considered to be inherent and proportionate to the pursuit of any legitimate objective. Less restrictive measures can be taken by the ISU to achieve the same goals.

If the speed skaters were to be successful with their competition law complaint against the ISU, this still pending outcome has the potential to set an important precedent across Europe, because this is the first time that a case on regulatory aspects of a sports federation has been brought before the European Commission, and not merely on National level. It could mean that the game of bullying is over for these powerful undertakings. However, due to the fact that the case is still pending, giving lightweight to the aspects surrounding the incentives of the ISU, the thesis faced limitations regarding the research in light thereof. Moreover, it should also be further investigated or tested how sports betting can be better regulated, since this phenomenon will certainly not just be swept away under the Monopoly™ board of international sports federations.

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The sports sector has been exercising its self-governance without any significant interference from states or other actors, for almost a century¹⁷³, but if the Treaty provisions are in breach and the interests are being harmed, the Court and Competition Authorities will have to step in to steer sports governing bodies in the right direction. It is not fair for International Sports Federations to impose life-ban sanctions on athletes in order to accomplish its aims and administer the particular sport.

¹⁷³ Final report, JENS ALM (ed.), 'Play the Game/Danish Institute for Sports Studies, Action for Good Governance in International Sports Organisations', (Copenhagen, Denmark, 2013) 191.

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