

(Coat of arms of Norway)

OSLO DISTRICT COURT

Registered at the EFTA Court under N° E-8/17-1

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L-1499 Luxembourg
Luxembourg

Your reference Our reference Date
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25 September 2017

[REDACTED] – the Norwegian Ski Federation Request for an Advisory Opinion

1 THE CASE IN A NUTSHELL

This case concerns a dispute between the alpine ski racer [REDACTED] ('[REDACTED]') and the Norwegian Ski Federation ('NSF') relating to [REDACTED] wish to enter into an individual sponsorship contract with the company Red Bull GmbH ('Red Bull') relating to headgear/helmets.

Under the legal authority of its Joint Regulations (*Fellesreglementet*), NSF has refused [REDACTED] permission to sign an individual sponsorship contract with Red Bull for helmets/headgear with effect for races organised under the auspices of NSF and the International Ski Federation ('FIS'). [REDACTED] has a contract with Red Bull for advertising on sports bottles.

[REDACTED] argues that the relevant parts of NSF's Joint Regulations, and NSF's concrete enforcement of these regulations by prohibiting an individual sponsorship contract with Red Bull for helmets/headgear, are in violation of the EEA Agreement's competition rules (Article 53 and Article 54) and the Services Directive (alternatively, Article 36 ff EEA), as well as of national provisions implementing these EEA rules in Norwegian law. NSF, for its part, argues that NSF holds the rights to the disputed mark for sponsorship promotion, and that refusing to transfer the Norwegian national alpine skiing team's marketing rights to an athlete is neither covered by the restriction term in the competition rules nor by the rules on services. Moreover, NSF refers to the fact that the rights to helmets/headgear had already been sold to the national alpine skiing team's main sponsor Telenor at the time [REDACTED] made his claim. In NSF's view, this also means that the lawsuit cannot succeed.

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After negotiations between the parties failed, [REDACTED] filed on 17 October 2016 a writ (*stevning*) with Oslo District Court (*Oslo tingrett*). The principal claim in the national legal proceedings is that NSF be ordered to give [REDACTED] the right to enter into an individual marketing contract with Red Bull for helmets/headgear.

In the alternative, [REDACTED] has submitted a claim for damages, limited upwards to NOK 15,000,000. In order to ensure access to Red Bull's support system during the proceedings, [REDACTED] submitted an application for an interim measure against NSF, ordering NSF to approve the sponsorship contract for the duration of the proceedings. In Oslo District Court's order of 15 December 2016, the application for an interim measure was denied.

This request for an Advisory Opinion is limited to the interpretation of the provisions of the Services Directive, alternatively Article 36 ff EEA.

2 PARTIES TO THE CASE

2.1 [REDACTED]

The plaintiff, [REDACTED] ([REDACTED] is a [REDACTED] Norwegian alpine ski racer who is member of the Norwegian national alpine skiing team.

He specialises in slalom and giant slalom, and is the youngest male medallist in the history of Olympic alpine skiing. Before the 2017/2018 season, [REDACTED] has 15 wins and 30 podium places in the FIS World Cup. He won the World Cup season title in both slalom and giant slalom in 2015/2016.

Alpine skiing is [REDACTED] profession, and in the 2015/2016 season, which was his best season so far, he earned approx. NOK 10 million, of which approx. NOK 3 million in prize money and approx. NOK 7 million through sponsorship contracts.

Before [REDACTED] joined the national team, his career was financed and supported by his family, and by his local sports club and voluntary efforts relating to it.

[REDACTED] reason for wanting to enter into the disputed sponsorship contract is, in addition to the financial contribution, that this contract will give him greater access to Red Bull's support system. Reference is made to pages 18 and 19 of this court's order for a more detailed account. [The relevant part of the order reads as follows:

[REDACTED] [REDACTED] father] has explained that a contract with Red Bull gives, inter alia, access to services that provide the opportunity to optimise [REDACTED] program, with regard to physical exercise, medical assistance, physical treatment, and helicopter transport, as important contributions to perform at the absolute highest level. These services will shorten the time of restitution both in competition and training so that [REDACTED] is better prepared for competitions. [REDACTED] also explained that NSF offers a high quality program, but not always with sufficient resources. The alpine Sporting Director Claus Ryste has explained that medical assistance is now of high priority for the national team, and that the need for physical therapists is fully covered. Shorter response time has been emphasised, and a health coordinator was included in the program this season. Based

on the testimonies, the Court finds that the national team has expertise, adequate resources and has previously succeeded with its program, whereas the contract with Red Bull can give [REDACTED] the potential to optimise the national team's program. Based on [REDACTED] results last year with the national team program, and with the improvements made this season, it is not probable that the term "delay poses a risk" [an alternative condition for an interim measure] is satisfied. The financial interest, which is significant, is protected in [REDACTED] claim for damages in the main proceedings.]

[REDACTED] lives in Salzburg, Austria. He is not an employee of the Norwegian Ski Federation, but has signed a standard athlete's contract in order to be able to participate in the national team.

2.2 The Norwegian Ski Federation

The defendant, the Norwegian Ski Federation ('NSF'), is Norway's second biggest sports federation (after the Norwegian Football Association). It organises activities in the disciplines alpine skiing, freestyle skiing, Nordic combined, cross-country skiing, ski jumping and Telemark skiing.

NSF is a non-profit organisation whose purpose is to provide the best possible conditions for skiing, at both elite and popular level. NSF's objective is set out in Section 1 of NSF's Statutes: To lead professional skiing in Norway and work to develop NSF's own activities, organisation, finances and staff so that the federation meets the requirements and challenges of its members, Norwegian sport and international sport, as well as to represent professional skiing internationally. NSF comprises 1,150 clubs and 16 ski districts.

The organisation is partly financed by public funds and partly by marketing contracts. Of NSF's turnover (income) in 2015 of approx. NOK 288 million, public grants accounted for approx. 11.5% and marketing revenues from sponsors, TV, partners and other commercial revenues accounted for 71%; see section 4.3.1 below for more details.

NSF is affiliated to the Norwegian Olympic and Paralympic Committee and Confederation of Sports ('NIF') and the International Ski Federation ('FIS'), and is thereby subject to NIF and FIS's regulations.

3 BRIEF OVERVIEW OF THE PROCESS BETWEEN [REDACTED] AND NSF

Since 2014, Red Bull has wanted to enter into a contract with [REDACTED] for the promotion of its brand on the front of [REDACTED] helmet/headgear. Red Bull has previously entered into a corresponding sponsorship contract with another Norwegian alpine skier, [REDACTED]. The background to [REDACTED] contract is described in more detail in the enclosed District Court order, on pp. 16–17. [The relevant part of the order reads as follows:

[REDACTED] has argued that NSF's approval of [REDACTED] Red Bull contract and the subsequent refusal of a similar contract for [REDACTED] constitutes unlawful discrimination.

In 2007, [REDACTED] for the first time requested permission to enter into a sponsorship contract encompassing the marking on the front of the helmet. At that time, a contract had already been concluded with Telenor, in which the marking on the alpine skiers' helmets was included. In the meeting of NSF's Ski Board (*skistyret*) on 1 October 2007, it was discussed whether it should initiate negotiations with Telenor to request the latter to waive its rights to exposure on this helmet. In the meeting, it was informed that this was a policy issue for NSF, and that NSF must treat everyone equally. According to the minutes, the Ski Board was informed that initiating renegotiations with a partner concerning amendments to the contract because of pressure from an individual athlete is inappropriate and would damage NSF's reputation as a contract partner. The Ski Board decided that NSF shall retain all rights to markings on helmets and headgear. The resolution states inter alia that: "NSF will NOT negotiate with Telenor regarding the helmet. It is NSF's property. It must continue to be its property in order to ensure that the Norwegian Ski Federation does not give away significant values, and that it will not lose a lot of money both in short and long term." [REDACTED] request for an individual sponsorship contract encompassing the marking on the front of the helmet, was therefore rejected.

In the next term of the contract, from the season 2010/2011 – 2013/2014, headgear/helmet were held outside the scope of the contract with Telenor based on an expectation that this could generate increased revenue for NSF. NSF's Secretary General, Stein Opsal, explained that NSF at that time was in a situation that required significant changes. The financial situation was difficult after the loss of an average annual revenue of around NOK 55 million from gaming machines. The operation of these was transferred to the Norwegian Lottery (Norsk Tipping) from 1 July 2007. In the period from 2007 to 2009, the Ski Board assessed a future model that would ensure a continued sustainable organisation. From 2009, the committees for the different disciplines (*grenkomiteene*) became responsible for revenues and costs in their own discipline. The Ski Board decided that each discipline, after a resolution from the relevant committee, could license one exposed marking to the athletes. NSF Alpine could then give a license of exposed helmet marking to the athletes, on certain specified conditions. According to Stein Opsal, there were financial hardships at the time when [REDACTED] came with an opportunity to sign a Red Bull contract, and it was considered a win-win situation since there was an available contract.

Three years later, in 2012, only [REDACTED] and another athlete had managed to sell the helmet themselves. The other athlete had managed to sell the helmet for the minimum amount required, set to NOK 250,000. NSF therefore found that sales of headgear did not generate increased revenue, but rather reduced the value of the total product. It was decided to not license helmet/headgear and that the marketing rights would be sold collectively to Telenor. A supplementary contract for the season 2012/2013 was signed, in which Telenor purchased the rights to all helmets, save for [REDACTED] helmet which was already regulated by the contract with Red Bull.

The current contract with Telenor was entered into on 28 August 2013 and expires in 2018. In this contract, Telenor has the right to the marking on helmet/headgear. Since NSF had licensed the marketing right to [REDACTED] the contract does not provide Telenor with the right to exposure on [REDACTED] helmet.

It follows from the above that, in 2007, [REDACTED] was not granted an approval to enter into an individual sponsorship contract that included the helmet. At that time, there was a contract with Telenor that included the right to exposure through the marking on the front of the alpine skiers' helmet. The situation is similar now. There were renegotiations before the Ski Board's meeting on 1 November 2016, but the situation is still that there is a contract with

Telenor that encompasses the right [REDACTED] wants to exploit in a contract with Red Bull. On both occasions, when there is a contract, NSF has rejected requests for individual marketing contracts for the helmet. In the District Court's opinion, this does not constitute discrimination incompatible with competition law. Similar considerations of possible undesirable consequences seem to have been decisive in both cases. When [REDACTED] later was given a license, the situation was different given that there was no other contract regarding the helmet.]

Red Bull has contracts with a number of other athletes, including other alpine skiers ([REDACTED] who promotes Red Bull on sports bottles). The money generated by a contract to promote the brand on the front of [REDACTED] helmet/headgear would be divided between NSF and [REDACTED] and the content of the contract would largely correspond to the one between [REDACTED] and Red Bull.

Pursuant to NSF's Joint Regulations (point 206.2.5) and NSF's standard athlete's contract, such individual marketing contracts are subject to NSF's approval. Between 2014 and 2016, there were various forms of contact between [REDACTED] and NSF Alpine [the alpine branch of NSF], about the possibility of approval, and the feedback from NSF varied with regard to whether such a contract would be approved. Based on informal conversations between the parties, a draft framework contract was drawn up in March 2016. At the end of April 2016, [REDACTED] received oral feedback from NSF, represented by the Alpine Committee (*alpinkomiteen*), that it would not grant approval after all. [REDACTED] sent a notice of civil action (*søksmålsvarsel*) to NSF on 30 May 2016.

Because of the case, the signing of [REDACTED] national team contract for the 2016/2017 season was postponed until 1 August 2016.

The writ was filed with Oslo District Court on 17 October 2016.

In parallel with receipt of the writ, in an attempt to avoid a prolonged legal dispute with one of its own athletes, NSF reconsidered whether it should allow [REDACTED] to sign a contract with Red Bull concerning the brand on his helmet/headgear. Both NSF's Alpine Committee and employees of the main sponsor Telenor, which has a contract with NSF for the use of the athletes' helmets/headgear for logo exposure, discussed the possibility of an amicable solution. The parties disagree about what an amicable solution would mean in financial terms, and whether Telenor wanted to change its contract. [REDACTED] argues that NSF's Alpine Committee proposed an amicable solution with Telenor that would have given NSF increased sponsorship revenues and enabled the main sponsorship contract with Telenor to continue, while opening for the possibility of individual sponsorship contracts and equal treatment of the athletes' helmet sponsors. NSF contests this. Reference is also made to the enclosed District Court order, at the bottom of page 17.[The relevant part of the order reads as follows:

According to the decision [to refuse [REDACTED] individual sponsorship contract with Red Bull], a list of issues was discussed and elucidated. This list cannot be seen to contain irrelevant considerations. A sketch of financial framework conditions from Telenor was also presented. The testimonies given in the proceeding show that the parties disagree on what financial contributions a contract with Telenor would have yielded. There is also disagreement about whether Telenor wished to amend the contract. [REDACTED] explained that the Ski Board

(*skistyret*) discussed the policy issues, and that particularly two considerations were emphasised in the decision. One was the objective of protecting the the national team model, which has produced good results for Norwegian winter sports. The other was that sponsors should not be put into a situation in which they must make a choice in this type of cases. His opinion was that NSF's product must be the same throughout the contract period, and that its sponsors must know this.]

On 1 November 2016, NSF's Ski Board (*skistyret*) decided by 10 votes to 1 (the Alpine Committee) that [REDACTED] would not be allowed to enter into the contract.

After NSF's decision, [REDACTED] applied, in November 2016, for an interim measure ordering NSF to approve the sponsorship contract with Red Bull. An oral hearing was held in December 2016, and the District Court rendered on 15 December 2016. The application was denied. A copy of the order is enclosed with this request for an Advisory Opinion.

4 ALPINE SKIING: ORGANISATION, REGULATIONS AND FINANCING OF THE SPORT

In the following, an account is given of how alpine skiing is organised and relevant regulations governing the sport.

4.1 Overview

Alpine skiing is organised at both international and national level:

- The International Olympic Committee (IOC) adopts and enforces the Olympic Charter.
- The National Olympic Committees (NOC) enforce the Olympic Charter at the national level, and register athletes for the Olympic Games.
- National sports confederations adopt and enforce sport's national legislation, which is the overriding legislation for all national sports federations affiliated to it.
- International federations (IF) adopt and enforce international competition rules, which are largely based on the Olympic Charter.
- National federations adopt and enforce national competition rules, such as NSF's Joint Regulations. The national rules are based on the international rules. National federations register athletes for the World Championships and World Cup.

In several other sports, professional athletes may participate in competitions organised by different event organisers. In recent years, this has also started to become established in winter sports, such as X Games for snowboarding and Ski Classics for cross-country skiing. In alpine skiing, there are currently no organisers holding competitions equivalent to the World Cup and World Championships organised by the International Ski Federation (FIS) and national member federations. Only FIS and its national federations currently organise alpine skiing races of financial value to alpine skiers in the classic disciplines (slalom – downhill).

4.2 The regulations

4.2.1 FIS regulations

FIS – the International Ski Federation – is the highest governing body for skiing and snowboarding disciplines.

FIS has established competition rules that follow the principles of the IOC and the Olympic Charter. FIS is recognised by the IOC as the international federation responsible for six Olympic disciplines (alpine skiing, cross-country skiing, ski jumping, Nordic combined, freestyle skiing and snowboarding). The rules apply to all international competitions, including World Cup races. As in other sports based on national teams, it is for the national federations to select athletes for the international competitions by issuing a so-called start licence.

The FIS regulations contain a number of requirements that the athletes must meet in order to be granted a start licence, including limitations on prize money, a prohibition against starting fees for athletes, as well as doping rules.

The regulations cover all aspects of the sports events, including marketing contracts and the possibility of promoting sponsors in international competitions. FIS owns the marketing rights to all international competitions organised under FIS. For World Championships, FIS retains these marketing rights itself, while for the World Cup, FIS passes on these rights to the national federations that are awarded events. The national federations award the events [sic] to local organisers.

The FIS regulations limit the athletes' right to enter into individual marketing contracts:

ICR Joint Regulations for Alpine Skiing.

Joint Regulations for all Competitions, art. 200.3 Participation

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

204 Qualification of Competitors

204.1 A National Ski Association shall not support or recognise within its structure, nor shall it issue a licence to participate in FIS or national races to any competitor who: ...

204.1.4 permits or has permitted his name, title or individual picture to be used for advertising, except when the National Ski Association concerned, or its pool for this purpose, is party to the contract for sponsorship, equipment or advertisements.

The IOC has a regulation corresponding to Article 204.1.4 for participation in the Olympic Games.

In other words, NSF cannot give a start licence to athletes who have permitted the use of their own name, title or picture for marketing purposes without such contracts having been entered into with the national federation as a party.

As regards the national team's equipment, FIS decides the technical specifications relating to the size, design and number of advertising markings on the athletes' clothing before each season (hereinafter called 'markings'). For the 2016/17 season, FIS has decided the following:

Clothing

2.4.1 Articles of clothing may carry commercial markings belonging to the manufacturer and/or to other sponsors (as defined in art. 2.6)

2.4.2 The total surface area of all commercial markings on the clothing of one person shall not exceed 450 cm². The maximum surface area for a single marking is 100 cm². Commercial markings of the same sponsor may not appear one above the other or one beside the other. The National Association may decide on the placing of commercial markings.

2.4.3 Roll necks may in addition to the 450 cm² also display the manufacturer's trademark and/or sponsor, which may also be divided into two parts, with a maximum total surface area of 20 cm².

2.4.4 A military symbol (emblem), indicating the national military organisation and similar organisations may be displayed on warm-up suits (not on headgear or race suits), with a maximum size of 20 cm². This symbol is not included within the 450 cm² total surface area of the commercial markings. This applies also to markings of charitable organisations.

2.5 Helmets and Headgear

2.5.1 Helmets and headwear may carry two commercial markings of the manufacturer with a maximum size of 15 cm², one on each side, placed over the ears. The front of helmets and headwear may only be used for the emblems of national teams, and sponsors, subject to art. 2.5.2.

2.5.2 The front (middle) of helmets and all headwear worn in competition and within the competition area, to include flower and prize-giving ceremonies, interviews etc., must carry the identification of the national ski association with a minimum size of 6 cm². A National Association may sign sponsorship contracts for helmet/headwear advertising rights of up to maximum of 50 cm² (which may be divided between 2 identical - same size - logos) with firms who are not suppliers of ski equipment (hardware or outerwear), subject to the Specifications for Competition Equipment Edition 2016/17 - 47 - regulations of each National Association. In such a case, the front of helmets and headwear must carry the identification of the national ski association with a minimum size of 6 cm². The relevant advertising must be placed either to the side of or above the identification of the national ski association. The free space between the national ski association's identification (middle front of headgear) and the sponsors advertising (50 cm²) must be at least 7 cm. For headbands the relevant advertising may be placed at the front of the headband, with the identification of the national ski association to the side. No advertising is allowed on the movable or integrated chin straps of helmets. Additionally it is not permitted to depict a website address which refers directly to the athlete, on headgear or other clothing. Names which appear on equipment or components (skis, bindings, poles, boots, crash-helmets, wax companies, etc.) may not be used on starting bibs and competition suits. In the case a hardware producer also produces outerwear materials this can be allowed if a different brand, not including the original hardware brand, is used.

2.5.3 Helmets and headgear worn in competition may carry the name of an athlete. The athlete name with a maximum size of 20 cm² must be placed at the back of the helmet or, on the rear of a hat/headband for Cross-Country, Nordic Combined, namely when a helmet is not worn. The athlete name can only consist of the full name of the athlete in a standard font and size defined by FIS which is the same for all athletes.

In other words, the FIS regulations contain detailed rules for the design and amount of advertising on national team equipment, which the national ski federations are obliged to follow. It follows from the FIS regulations that the national federations have the rights to these

markings. Athletes' rights to display such markings for their own sponsors in competitions organised by FIS and the national member federation are derived from the federation's rights, and the federation must under all circumstances be party to such contracts, cf. Article 204.1.4.

4.2.2 Regulations of the Norwegian [Olympic and Paralympic Committee and] Confederation of Sports (NIF)

NSF is subject to the NIF Statute. It follows from Section 13-3 (3) that:

Entering into contracts and establishing collaboration between the sport and commercial undertakings shall take place in writing. Only organisational entities may be party to such contracts/collaboration unless otherwise specified in Section 14-4(2) of the NIF Statute.

Chapter 14 of the NIF Statute contains provisions on marketing and rights. The purpose is specified in Section 14-1:

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

Furthermore, Section 14-4 (1) and (2) state:

(1) The right to enter into marketing contracts rests with the organisational entity of the sport. A marketing contract means any agreement that entitles a legal person to exploit an organisational entity and/or its affiliated athletes in its marketing or other activities.

(2) An organisational entity may permit that an athlete be given the right to enter into individual marketing contracts within the framework set out by the individual sports federation. This applies both to athletes who are members of a sports club and athletes who participate in a national team or have other representation duties. The organisational entity shall approve such contracts and ensure that it receives a fair share of the income generated by the athletes' own marketing contracts.

The preparatory works to the Statute's provision state, inter alia, the following:

As is known, it is currently for the sports club/federation to enter into marketing contracts in which the athlete's 'image rights' (the right to his/her own name, picture and signature) form part of the rights the partner is allowed to exploit. The fact that the competence to enter into contracts rests with the organisational entity (and not the athlete) is a result of the solidarity policy in the Norwegian sport model, including cooperation between the elite level and the popular level of the sport [...], and a prerequisite for the financing of the organisational entities' activities at the elite and popular level. The Confederation's Board therefore considers it expedient to clarify this in a new Section 14-4.

4.2.3 NSF's regulations

Sections 6 and 17 of NSF's Statute refer to Chapters 13 and 14 of the NIF Statute, by which NSF is bound. Based on the principle set out in Section 14-4(2) of the NIF Statute, NSF's Joint Regulations permit athletes to enter into individual marketing contracts. It is a prerequisite that the following conditions in point 206.2.5 are met:

(a) the relevant organisational entity has given its written consent for the athlete to initiate negotiations with the partner in question,

(b) the organisational entity approves the contract by co-signing it together with the parties (athlete

and partner), and

(c) the organisational entity receives a fair share of the value that the collaboration agreement represents.

The organisational entity may refuse to accept the athlete's proposal for a contract with the sponsor. Furthermore, an athlete is obliged to participate in the implementation of NSF's or a sport club's marketing contracts, subject to the limitations that follow from Section 14-5 of the NIF Statute.

In addition to the possibility of entering into individual marketing contracts, the athletes are entitled to enter into individual equipment contracts within the federation's skipool arrangement, cf. the description of the standard athlete's contract provided below.

The legality of (i) the free discretion of NSF pursuant to the provision in NSF's Joint Regulations point 206.2.5 and (ii) NSF's concrete exercise of this discretion are at the core of the case before Oslo District Court.

4.2.4 Participation in the national team – the standard athlete's contract

Pursuant to the international regulations, each national federation is responsible for registering athletes for international competitions, and for ensuring that the athletes comply with the laws and regulations that follow from the international regulations. Every season, NSF signs a standard contract with all athletes selected for the national teams. The standard athlete's contract is, in principle, the same for all disciplines and teams, although there are certain adaptations to the different disciplines. The contract regulates sport-related rights and duties, marketing rights, equipment, clothing etc.

Clause 5.3 of the contract regulates marketing rights. The provision refers to Section 13-3(3) of the NIF Statute and reiterates the principle that *'Marketing contracts can only be entered into by an organisational entity affiliated to NSF and NIF, cf. Section 13-3(3) of the NIF Statute; the Athlete may nevertheless enter into individual marketing contracts relating to his/her performance of the sport if the conditions set out in the Joint Regulations point 206.2.5 and this contract are met. ...'*

The procedure for entering into individual marketing contracts is regulated in Clause 5.3.2 of the contract. It follows, inter alia, that NSF shall, at an early stage of negotiations concerning individual contracts, receive the information it needs to be able to clarify whether it can give its consent to the contract. NSF shall also approve the contract by co-signing it, and it shall receive a fair share of the value that the sponsorship contract represents.

Clause 5.4. regulates contracts with equipment providers in NSF's skipool. For equipment contracts, Clause 5.4.1 of the standard contract stipulates that, as regards *'skis, boots, bindings, boots [sic], gloves, helmets, back protectors and goggles, an exception is made to the provision in Clause 5.3.2, so that the Athlete is not subject to the conditions stipulated in 5.3.2 a-d'*.

This means that, for all the equipment the athletes use in the national team context, including in the World Cup, except for the clothing and the above-mentioned FIS markings on their clothing and helmets/headgear, the athletes may enter into individual sponsorship contracts. NSF is not a party to such contracts, nor does it receive a share of the consideration.

Clause 5.5. of the contract regulates the athlete's obligations to the national team's sponsors in more detail. Clause 5.5.1 stipulates that *'NSF has an exclusive right to enter into the marketing contracts that are deemed necessary for the financing of the national team'*.

██████████ has two particular reservations relating to the ongoing dispute. One concerns the legal venue, with the result that the parties agree that Oslo District Court shall be the legal venue for the legal proceedings. In addition, ██████████ included the following reservation when signing the standard athlete's contract: *'I contest NSF's right to refuse me an individual marketing contract with Red Bull relating to my helmet. I believe I am fully entitled to enter into such a contract, with or without NSF's approval, and my signature shall not be understood to mean anything else.'*

4.3 Funding / Finances

4.3.1 NSF – funding of elite sports

In 2015, NSF's turnover – its total income – amounted to approx. NOK 288 million. Public grants accounted for approx. 11.5% of this (NOK 33.1 million). Marketing revenues from sponsors, TV, partners and other commercial revenues accounted for a total of 71% (NOK 204 million), of which sponsorship revenues made up approx. NOK 125 million. Approx. 3% (NOK 9.5 million) consisted of contributions from athletes. Other income, comprising licence fees, VAT compensation and other types of income, made up approx. 14.5% (NOK 41.7 million). Funding sport at popular level is not a matter for NSF centrally, but is part of the efforts at the regional and club level, which are mostly privately funded.

In 2015, NSF Alpine's income amounted to approx. NOK 44.1 million, and its expenses were NOK 43.3 million. Of these expenses, NOK 32.4 million was directly related to running the national team. This means that at least 77% of NSF Alpine's income is spent directly on the national alpine skiing team's activities. There were four national teams in 2016 (two for men and two for women), plus one recruitment/school national team. The expenses are for training gatherings and participation in competitions. The expenses are divided as follows: (i) pay for coaches, NOK 10.8 million, (ii) medical personnel, NOK 3.0 million, (iii) board and lodging/transport, NOK 17.4 million, and (iv) equipment and training expenses, NOK 1.2 million.

Most of NSF Alpine's sponsorship revenues come from three sources: (i) NSF's own contracts: the main sponsorship contract and co-sponsorship contracts; (ii) the pool scheme; (iii) NSF's share of income from individual marketing contracts.

The main sponsorship contract for alpine skiing for the period 2014–2018 was entered into with Telenor ASA. A new main sponsorship contract with Telenor ASA was signed in March 2017, and would apply from and including the 2016/2017 season until and including the 2021/2022 season. Telenor has been the main sponsor for the Norwegian alpine skiing team for many years. Exposure of the Telenor logo has always been part of the sponsorship contracts. The extent of this exposure has increased over the years in step with FIS's expansion of the possibilities for promoting sponsors on the national team's equipment. Under the 2014–2018 contract and the current contract, Telenor has a right to have its logo displayed on all helmets/headgear except ██████████ but ██████████ markings will also be covered by the new contract with Telenor once ██████████ contract with Red Bull expires

in 2018.

NSF's skipool is a pool scheme that is open to selected equipment suppliers. In order to become a member, the supplier must be approved as an equipment supplier by FIS/NSF and pay an annual fee to NSF in accordance with specified rates. Athletes can only enter into agreements with suppliers that are members of the NSF skipool.

The third category of sponsorship revenues come from athletes' individual marketing contracts, in other words contracts of the type that this case concerns. It is stated in NSF's Joint Regulations point 206.2.5 letter c) that NSF shall also receive a 'fair share' of the income from individual marketing contracts.

4.3.2 The financial situation of the athletes: [REDACTED] individual contracts

The athletes do not receive any of the funds that NSF collects from the main and co-sponsors as own income. Athletes must therefore get their income either (i) from equipment suppliers that are members of the skipool scheme, or (ii) from individual marketing contracts where the sponsorship revenues are divided between NSF and the athlete. However, athletes who are members of the national alpine skiing team have all expenses covered for approx. 200 days a year, including board and lodging, transport, equipment, access to the support team, including medical support, insurance, start licence etc. The athletes do not pay any contributions to NSF.

Since FIS/NSF is the only organiser of alpine skiing events for professional athletes, the athletes' income is completely regulated by the set of rules governing the sport and NSF's enforcement of the set of rules. [REDACTED] has a total of ten private partners/sponsors. These include Rossignol, Oakley, Sweet Protection, Komperdell, Snowlife, Confsport, DHL Express, Dunderwerk, Product Line and Red Bull. As mentioned above, the contract with the latter party concerns sponsor promotion on sports bottles.

Some of the contracts are equipment contracts that [REDACTED] himself negotiates and is party to in accordance with the regulations described above. The other contracts are individual marketing contracts, which, pursuant to the regulations, can only be entered into with NSF's consent. For [REDACTED] NSF has so far only refused to consent to the change in the Red Bull contract to also cover his helmet/headgear. Under [REDACTED] contracts, the athlete keeps the compensation in full. In other words, NSF's 'fair share' is set to zero. However, these contracts are worth less than a Red Bull contract that includes the helmet/headgear. From the Red Bull contract in question, under which the amount paid to [REDACTED] would depend on his performance (1/3 fixed amount and 2/3 bonus) up to a maximum of approx. EUR 400,000, NSF would have received a fixed annual amount of approx. NOK 2 million.

4.4 NSF's review of the funding model

NSF appointed a committee in September 2015. The reason for appointing the committee was described as follows in the resulting report:

[NSF] and the elite sports initiative in [NSF] are based on a collective model where marketing rights are largely centralised and benefit everyone. The rights to the national teams are owned and sold by the central level of NSF. The revenue generated is not just spent on the best possible sporting scheme for the elite athletes, but also on recruitment, education, children's and recreational sports. In recent

years, this model has been challenged by athletes, managers, teams, commercial parties and others who want a larger share of the marketing rights and income. The discussion with Petter Northug has been the most high-profile case and it has attracted enormous media attention. However, NSF has also had a stream of other cases in which its ownership of marketing rights has been challenged. There is no reason to expect this trend to abate in the years ahead.

The committee did not recommend releasing sponsor markings to the athletes, particularly not the marking on the headgear/helmet.

The exposure of sponsor markings is [NSF]'s most important source of income. Licensing of exposed sponsor markings to the athlete would therefore result in a reduction in the federation's marketing revenues. The headgear/helmet markings are the most visible of the exposed sponsor markings, and they therefore have the highest market value. For this reason, the committee will not recommend licensing the headgear/helmet to the athletes.

The committee's summary and recommendation were:

A model whereby athletes take over marketing rights and are given responsibility for selling themselves is theoretically conceivable. However, experience shows that, in the vast majority of cases, sponsorships are more valuable if sold together. With the exception of the biggest stars, most athletes will find it very difficult to obtain sufficient income from sponsors. An arrangement whereby athletes have preferential rights to selling themselves and NSF takes what is left will also lead to a significant reduction in the income potential of national teams. The biggest stars are most valuable and will be able to sell themselves; the sponsors want exposure on the best athletes, and uncertainty for sponsors about which athletes are covered by a sponsorship will further reduce its value. A transfer of marketing rights will be at the expense of funding for recruitment, and can only be implemented if combined with high contributions from all the athletes themselves. Even if such an arrangement were given a social profile with progressive contributions from the athletes, younger athletes without great market potential will probably find it difficult to fund a career as elite athletes. It will be difficult to introduce a model based on the transfer of marketing rights unless it is combined with a system whereby private teams take over the work on elite sports activities. Several athletes could then join forces to fund a private team through their joint marketing revenues. In the committee's opinion, this would be a highly undesirable solution. As mentioned above, NSF's activities comprise much more than the 28 elite-level teams. It will not be possible to fund national recruitment teams without a sound income base from the elite teams' sponsors. The sporting considerations mentioned above come in addition to this. The committee is therefore of the opinion that the national team model must be maintained, including the fundamental principle that the central level of NSF owns and manages all marketing rights.

NSF argues that the national team model committee and its report of February 2016 provide a satisfactory review of NSF's sponsorship model and the choice between alternative solutions. [REDACTED] argues that the report is limited to giving an account of NSF's model and illustrating alternative models used in other disciplines and in alpine skiing in other countries, but that it does not contain an assessment of the arguments for and against NSF's model that justifies and demonstrates why it is preferable. The importance and relevance of this report is disputed in the case before the national court.

4.5 Control over logo exposure on helmets/headgear in other sports and other countries

Generally speaking, most countries have an arrangement similar to Norway's, that is, with marketing rights for the national teams being centralised to the national ski federation.

However, it is common in many countries, also in other EEA/EFTA States, including in big alpine skiing nations such as Switzerland, Austria, France and Germany, that the logo

exposure on the headgear/helmets is licensed to the athletes. A varying proportion of these sponsorship revenues go back to the federation as commission, while in some countries, the athletes keep the income in full.

Some Norwegian winter sport disciplines have also licensed the main markings to the athletes. Biathlon athletes are entitled to sell three exposed markings (right lower arm, rifle sights and ski bindings). Within NSF, the headgear/helmet in the freestyle discipline has been licensed.

5 THE ARGUMENTS OF THE PARTIES BEFORE OSLO DISTRICT COURT

5.1 [REDACTED] arguments – an overview

[REDACTED] invokes in the national lawsuit both the EEA Agreement's competition rules and the internal market rules. This request is limited to matters relating to the interpretation of the application of the Services Directive, alternatively Article 36 EEA. The presentation of [REDACTED] arguments has been limited accordingly.

In brief, [REDACTED] argues that (i) NSF's free discretion to refuse consent for a marketing contract pursuant to NSF's Joint Regulations points 206.2.2 and 206.2.5 (as reflected in Clause 5.3.2 of the athlete's contract) and (ii) NSF's *exercise* of its discretion, are in violation of the Norwegian Services Act (*tjenesteloven*) (Sections 10, 11 and 16) and Article 36 ff of the Norwegian EEA Act. Section 10 of the Norwegian Services Act implements Articles 9 and 10 of the Services Directive, while Section 11 of the Norwegian Services Act implements Article 13 of the Services Directive.

First, [REDACTED] argues that the approval scheme set out in the Joint Regulations constitutes an authorisation scheme as defined in Article 4(6) of the Services Directive. In this connection, [REDACTED] argues that the authorisation scheme does not rest on a rights-based system, and that it can therefore never be legal. Moreover, [REDACTED] argues that none of the conditions set out in Articles 9, 10 or 15 of the Services Directive are satisfied; in brief, on the following basis:

- a) The requirement of non-discrimination: [REDACTED] argues that the different treatment of himself and [REDACTED] during the period for which [REDACTED] contract with Red Bull has been approved constitutes unlawful discrimination. The argument is that, during the period for which [REDACTED] contract has been approved, corresponding contracts must be approved for other athletes if they so wish.
- b) The requirement that the authorisation scheme must be justified by an overriding reason relating to the public interest: First, [REDACTED] argues that a scheme based on free discretion can never be justified by an overriding reason relating to the public interest. Second, he argues that the underlying consideration in the case is of a financial nature (optimisation of NSF's income), and that this does not constitute an overriding reason relating to the public interest. [REDACTED] acknowledges that "the specific nature of sport" (*"idrettens egenart"*) may constitute an overriding reason relating to the public interest. However, in his opinion, this consideration only applies to genuine sporting rules, and not to marketing/sponsorship contracts.
- c) The proportionality requirement: [REDACTED] argues that the alternative negotiated

solution (the counterfactual scenario with a signed Red Bull contract) would have increased NSF's financial income, and that a rejection is therefore not proportional. It is argued that this restriction is also disproportional because there are other less restrictive models for approval of sponsorship contracts. In countries with which it is natural to compare Norway, athletes have their own private sponsors on their helmets. In [REDACTED] opinion, NSF has not substantiated why such a model, which would be less restrictive, cannot be introduced in Norway.

d) The requirement of clarity and unambiguity: [REDACTED] argues that NSF's arrangement allows for completely discretionary assessments that do not meet the requirements.

e)–f) The requirement that criteria must be objective / made public in advance / transparent and accessible: [REDACTED] argues that NSF's arrangement allows for completely discretionary assessments that do not meet the requirements.

Second, [REDACTED] argues that the approval scheme set out in the Joint Regulations also constitutes a restriction pursuant to the rules on services as defined in Article 36 EEA. Moreover, [REDACTED] argues that the restriction does not seek to achieve an objective relating to the public interest, that it is not appropriate or clear, and that it is not proportional. Reference is made to the reasoning above.

Third, [REDACTED] argues that the approval scheme of the Joint Regulations does not comply with the procedural requirements set out in Article 13 of the Services Directive. The factual arguments mostly relate to the time that elapsed from the matter was raised in 2014 until its clarification in 2016, and what [REDACTED] regards as inadequate, unclear and inconsistent feedback received during this period.

[REDACTED] emphasises that the case primarily concerns NSF's implementation and enforcement of the overriding regulations (FIS) and does not concern the overriding regulations as such. [REDACTED] argues that NSF's freedom of action means that it could introduce a rights-based model, but that it has not done so.

5.2 NSF's arguments – an overview

NSF contests [REDACTED] claims and argues that the legal action is unfounded. The disputed right belongs to NSF, and neither the services nor competition rules provide any legal basis for a claim that rights can be taken away from NSF and Telenor, respectively, and transferred to [REDACTED] and Red Bull.

Moreover, the limitation on [REDACTED] right to enter into an individual marketing contract for his helmet/headgear is a restriction on his freedom of action, and not a restriction on free movement. Pursuant to established case law, this type of limitation of freedom of action within the sports system is not deemed to constitute a restriction on free movement.

The legal distribution of marketing rights between athletes and the national team is clear and balanced. The national team has the right to promote sponsors on the 'markings' on the national team's equipment, subject to the limitations stipulated by FIS. Athletes alone have the right to enter into marketing contracts for all equipment, i.e. skis, boots, bindings, poles,

goggles, gloves, helmets and protective equipment. It is also possible for athletes to enter into individual marketing contracts with NSF's consent. An arrangement involving prior control and approval for this category of individual marketing contracts is necessary and legitimate in order to ensure that the contracts are in accordance with the sport's values and other regulations, and that they are not in conflict with the national team's marketing contracts.

In addition, the arguments relating to NSF's competence to exercise discretion are ineffective, since they cannot under any circumstances result in [REDACTED] succeeding with his claim for control over the concrete marking on his helmet/headgear, or compensation for income relating to this marking. It has not been alleged that NSF's own use of the marking by selling it to Telenor is invalid, nor has any other basis for NSF not having such right been invoked.

NSF's income from marketing contracts is used in its entirety to implement NSF's objective of promoting skiing. The income funds, inter alia, the operations of the national teams, thus directly benefiting all the athletes. Securing funding to implement a non-profit objective is not an unlawful financial consideration.

[REDACTED] arguments relating to the Services Directive are also ineffective, since the Services Directive does not entail any change in what shall be considered restrictions on the free movement of services and what shall be considered limitations on freedom of action within the system of sports.

The fact that previous practice allowed alpine skiers to enter into contracts for helmets/headgear does not entail discrimination. NSF has always treated all athletes equally, even though the practice of licensing the marking on helmets/headgear has varied over the years in line with NSF's objective assessment of what, overall, would ensure the best conditions for the national team.

6 THE REASON FOR THE REQUEST

The case raises issues relating to the interpretation of EEA rules on the freedom to provide services in the EEA, cf. Article 36 EEA and Directive 2006/123/EC on services in the internal market (the Services Directive), which has been incorporated into the EEA Agreement. The question is which legal test shall be applied when assessing a national sports federation's discretionary scheme for the approval of individual utilisation of marketing rights by professional alpine skiers who are members of the national team – a right that, under the international and national regulations governing the sport, in principle belongs to the national federation. There is no directly relevant case law. Case law from the Court of Justice of the European Union does state that the rules on free movement apply to economic activities related to sports, but the specific nature of sport has been emphasised in the interpretation, both in the assessment of what constitutes a restriction and in the proportionality test. At the same time, there is no case law that considers the relevance and importance of the Services Directive, including that directive's significance regarding which considerations are relevant to the restriction test, and which considerations are relevant to the assessment of whether a restriction is lawful or not under EEA law.

7 QUESTIONS FOR THE EFTA COURT

Being a professional alpine skier is a special occupation governed by a comprehensive international and national regulatory framework. With respect to sponsor promotion, the FIS regulations regulate in detail the extent and placement of sponsor promotion on what are known as the commercial markings on national teams' equipment. There are four commercial markings that can be used for sponsor promotion on helmets and headgear. Two markings on the side of the helmet can be used to promote the manufacturer of the helmet. The athlete can enter into agreements with the equipment manufacturers. The markings on the front of the helmet are, in principle, for the national sports federation; one for the national team's emblem (flag) and one for the federation's sponsor. Several national ski federations in other countries have a licensing system for the commercial marking on the front of the helmet, and have thereby transferred this right to the athlete in whole or in part. In Norway, the national ski federation has chosen a system involving prior approval and a requirement for consent before any rights are licensed to the athlete. The questions below relate to the legal assessment, pursuant to the rules on free movement of services, of the selected system and the refusal to grant a license.

1. Which legal criteria shall be particularly emphasised in the assessment of whether a national sports federation's system of prior control and consent for individual sponsorship contracts of this type – before the rights to such markings are transferred from the federation – shall be deemed a restriction on the athlete's freedom to provide services pursuant to Article 36 EEA or Directive 2006/123/EC (the Services Directive)?
 - a) To what extent is the restriction test previously described by the Court of Justice of the European Union for the regulatory framework governing sports, inter alia, in Case C-51/96, applicable? Does Article 16 of the Services Directive or other provisions of that directive entail changes to the restriction test?
2. Which legal criteria shall be particularly emphasised in the assessment of whether a national sports federation's concrete refusal to approve professional national team athletes' individual sponsorship contracts for such markings – so that the rights to such markings remain with the federation – shall be deemed a restriction on the athlete's freedom to provide services pursuant to Article 36 EEA or Directive 2006/123/EC (the Services Directive)?
 - a) What bearing will it have on the assessment that the national sports federation had already entered into a valid contract with the national team's main sponsor for logo exposure of the marking in question on helmets/headgear? Is this of significance in the assessment of whether a restriction exists, alternatively in the assessment of whether there are objective and sufficient grounds for the refusal?

Provided that a restriction is deemed to exist;

3. Can the national sports federation's Joint Regulations (approval scheme) for the potential utilisation by athletes of the marking in an individual contract constitute an authorisation scheme within the meaning of Article 4(6) of Directive 2006/123/EC (the Services Directive)?
 - a) In such case, is the approval scheme regulated by Articles 9 and 10 in Chapter III – on freedom of establishment for service providers – for a Norwegian citizen selected for the national team who engages in financial activity in connection with his participation in the national team subject to the regulatory framework of the national sports federation? Or is the scheme regulated by Article 16; alternatively, what is the legal test for correct classification?
4. In the assessment of the scheme's lawfulness – either pursuant to Article 36 EEA or Articles 9, 10 or 16 of the Services Directive – must the national court consider the provisions of the regulations and the refusal seen in isolation, or shall it also take into consideration:
 - The federation's grounds for retaining the marketing rights, including consideration for funding of the national teams and what the income is otherwise used for?
 - The overall possibilities for the athlete to engage in financial activity, including rights to enter into sponsorship contracts with equipment manufacturers and any other marketing contracts?
 - Whether, in light of this, the approval scheme or refusal to grant consent appears to be legitimately justified and proportional?
5. What bearing does it have on the legality assessment that approval of individual contracts regarding these markings is subject to the free discretion of the federation?
6. What procedural requirements, if any, do Article 13 of Directive 2006/123/EC or Article 36 EEA stipulate for the proceedings and the decisions under a national sports federation's approval scheme for individual marketing contracts (sponsorship contracts) for commercial markings, and what is the consequence under EEA law of failure to comply with any such procedural requirements?

Oslo District Court
Kari Lunde (sign.)
Kari Lunde
District Court Judge

Enclosures: Oslo District Court's order of 15 December 2016