JUDGMENT OF THE COURT
3 October 2014

(Action for annulment – Television broadcasting – Article 14 of Directive 2010/13/EU – Measures concerning events of major importance for an EEA State – FIFA World Cup – Freedom to provide services – Right to property – Statement of reasons)

In Case E-21/13,

The Fédération Internationale de Football Association, represented by Ami Barav, barrister and avocat, Peter Dyrberg, advokat, and Damien Reymond, avocat,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Maria Moustakali, Officer, Department of Legal & Executive Affairs, acting as Agents,

defendant,

APPLICATION for the partial annulment of EFTA Surveillance Authority Decision No 309/13/COL of 16 July 2013 on the compatibility with EEA law of measures to be taken by Norway pursuant to Article 14 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ 2010 L 95, p. 1) ("the Directive"),

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties and the written observations of the Norwegian Government, represented by Beate Gabrielsen, Adviser, Ministry of Foreign Affairs and Magnus Schei, advokat, Office of the Attorney General (Civil Affairs), acting as Agents; and the European Commission ("the Commission"), represented by Elisabetta Montaguti and Anna Marcoulli, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Fédération Internationale de Football Association ("FIFA" or "the applicant"), represented by Ami Barav; the EFTA Surveillance Authority ("ESA" or "the defendant"), represented by Xavier Lewis and Maria Moustakali; the Norwegian Government, represented by Beate Gabrielsen and Magnus Schei, and the Commission, represented by Elisabetta Montaguti, at the hearing on 14 April 2014,

gives the following

Judgment

I Introduction

1 On 16 July 2013, ESA adopted Decision No 309/13/COL ("the contested decision") in which it approved the inclusion on the Norwegian events list, drawn up pursuant to Article 14(1) of the Directive, of all the matches played in the final stage of the FIFA World Cup ("the World Cup").

2 FIFA – the world governing body of association football – is the organiser and the sole original rights' holder of the World Cup. FIFA considers the final, the two semi-finals and all matches of the national team in the final stage of the World Cup to be "prime matches" and all other matches "non-prime matches". The applicant claims that the contested decision is contrary to EEA law in so far as it approves the inclusion of the non-prime matches on the Norwegian events list.

3 In its application, FIFA seeks the partial annulment of the contested decision, relying on two main pleas. First, the applicant argues that the contested decision is not sufficiently reasoned to satisfy the requirements laid down in Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). Second, it contends that ESA has breached EEA law, in particular Article 14(2) of the Directive and Article 5(2)(d) SCA, by approving the designation of the entire World Cup as an event of major

importance for Norwegian society and as such qualifying for inclusion on the events list pursuant to Article 14(1) of the Directive.

II Legal context

EEA law

4 Article 5(2)(d) SCA reads:

... [T]he EFTA Surveillance Authority shall:

...

(d) carry out the functions which, through the application of Protocol 1 to the EEA Agreement, follow from the acts referred to in the Annexes to that Agreement, as specified in Protocol 1 to the present Agreement.

5 Article 16 SCA reads:

Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.

6 Article 36 SCA reads:

The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

If the action is well founded the decision of the EFTA Surveillance Authority shall be declared void.

7 Pursuant to Decision of the EEA Joint Committee No 109/12 of 15 June 2012 (OJ 2012 L 270, p. 31 and EEA Supplement No 56, p. 31), the Directive was incorporated at point 5p of Annex XI to the EEA Agreement. The Decision entered into force on 1 February 2013.

8 Recitals 48, 49, 52 and 53 in the preamble to the Directive read:

(48) Television broadcasting rights for events of high interest to the public may be acquired by broadcasters on an exclusive basis. However, it is essential to promote pluralism through the diversity of news production and programming

across the Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union.

(49) It is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society, such as the Olympic Games, the football World Cup and the European football championship. To this end, Member States retain the right to take measures compatible with Union law aimed at regulating the exercise by broadcasters under their jurisdiction of exclusive broadcasting rights to such events.

…

(52) Events of major importance for society should, for the purposes of this Directive, meet certain criteria, that is to say be outstanding events which are of interest to the general public in the Union or in a given Member State or in an important component part of a given Member State and are organised in advance by an event organiser who is legally entitled to sell the rights pertaining to those events.

(53) For the purposes of this Directive, 'free television' means broadcasting on a channel, either public or commercial, of programmes which are accessible to the public without payment in addition to the modes of funding of broadcasting that are widely prevailing in each Member State (such as licence fee and/or the basic tier subscription fee to a cable network).

9 Article 14 of the Directive reads:

1. Each Member State may take measures in accordance with Union law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due time. In so doing the Member State concerned shall also determine whether these events should be available by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of 3 months from the notification, the Commission shall verify that such measures are compatible with Union law and communicate them to the other Member States. It shall seek the opinion of the contact committee established pursuant to Article 29. It shall forthwith publish the measures taken in the Official Journal of the European

Union and at least once a year the consolidated list of the measures taken by Member States.

3. Member States shall ensure, by appropriate means within the framework of their legislation, that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters after 30 July 1997 in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with paragraphs 1 and 2 by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.

10 Article 29(1) of the Directive reads:

A contact committee is established under the aegis of the Commission. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and meet either on his initiative or at the request of the delegation of a Member State.

III Facts and pre-litigation procedure

The administrative procedure

11 On 27 March 2011, the Norwegian Ministry of Culture ("the Ministry") submitted to ESA data referring to the 2010 World Cup final and semi-finals and the related qualification matches of the Norwegian national team. A pre-notification process with the Ministry started in April 2011.

12 On 24 June 2011, the Ministry issued a consultation paper on a proposal for introducing amendments to Regulation of 28 February 1997 No 153 on Broadcasting and Audiovisual Services ("the national regulation") (*forskrift 28. februar 1997 nr. 153 om kringkasting og audiovisuelle bestillingstjenester*), listing events of major importance for society, pursuant to Section 2-8 of Act of 4 December 1992 No 127 relating to Broadcasting and Audiovisual Services (*lov 4. desember 1992 nr. 127 om kringkasting og audiovisuelle bestillingstjenester)*.

13 The proposal contained a list of major events for society drawn up under Article 14 of the Directive. The list included all the 64 matches played in the final stage of the World Cup, that is, 48 group-stage matches, 8 "round of 16" matches, 4 quarter-finals, 2 semi-finals, the third-place play-off and the final. The proposed amendments provided that the listed events may, in practice, be broadcast on an exclusive basis only on channels which may be received by at least 90% of the population and without payment other than the licence fee and/or the basic tier package fee ("the qualified broadcasters"). Measures concerning the sale of rights by non-qualified broadcasters to qualified broadcasters and the resolution of disputes between them as regards the price of those rights were also envisaged.

14 The Ministry received a total of 29 responses from interested parties, including comments on the draft list. In this context, the applicant presented its observations to the Ministry, arguing that non-prime matches of the World Cup did not fulfil the criteria for inclusion in the list of major events, because they are not played by the national team, do not attract a sufficient number of TV viewers, and it is questionable that these matches have special resonance in Norway. However, in light of the observations submitted by all the interested parties, the Ministry confirmed the listing of the entire final stage of the World Cup.

15 On 31 May and 17 December 2012, the Ministry submitted further data to ESA on the 2002 and 2006 World Cups in support of the listing of the tournament as an event of major importance.

16 On 22 April 2013, in accordance with Article 14(2) of the Directive, Norway notified to ESA the proposed draft amendments. Attached to its notification, the Ministry submitted the consolidated list of the events of major importance, as well as a list summarising the criteria fulfilled for each of the listed events and viewing data.

17 On 30 May 2013, the applicant obtained Norway's notification from ESA. On 28 June 2013, the applicant presented to ESA its observations.

The contested decision

18 The preamble to the contested decision of 16 July 2013 includes the following recitals:

"…

(2) [ESA] verified, within a period of three months from this notification, that such measures are compatible with EEA law, in particular with regard to the proportionality of the measures and the transparency of the national consultation procedure.

(3) In its verification, [ESA] considered the available data on the Norwegian media market.

(4) The list of events of major importance for society included in the Norwegian measures was drawn up in a clear and transparent manner. Furthermore, a far-reaching consultation had been launched in Norway in this regard.

(5) [ESA] was satisfied that the events listed in the Norwegian measures met at least two of the … criteria considered to be reliable indicators of the importance of events for society [as referred to in the Directive].

…

(9) The Men's World Cup … both in [its] entirety and including qualifying games with Norwegian participation, [is] among the most popular sports events in

Norway. The Norwegian public and media take great interest in the Norwegian team's qualifying matches as well as the matches in the final round, especially the final matches. The events have traditionally been broadcast on free-to-air television and have commanded a large television audience. As the matches between other countries in the final round may affect the matches that Norway may play as well as the overall result, they also enjoy a special resonance in Norway.

…

(16) The Norwegian measures appear proportionate to justify, by the overriding reason of public interest in ensuring wide public access to broadcasts of events of major importance for society, the derogation from the fundamental freedom to provide services laid down in Article 36 of the [EEA] Agreement.

…

(18) The general proportionality of the Norwegian measures is supported by several factors. Firstly, the introduction of the 90% threshold of the required potential coverage of the population for qualifying broadcasters increases the proportionality of the measures, in so far as it increases the number of broadcasters who potentially qualify. Secondly, the number of events included in the list is proportionate. Thirdly, a mechanism has been introduced for the resolution of disputes between broadcasters as regards the payment of fair compensation for broadcasting rights. Furthermore, the Norwegian measures provide for appropriate arrangements in situations where the events listed are purchased by non-qualifying broadcasters, in order to ensure a system for relicensing of exclusive rights to qualifying broadcasters. Furthermore, the Norwegian measures anticipate situations in which the rights to the events listed are purchased by a non-qualifying broadcaster, and no request has been received from a qualified buyer, in order to ensure that the non-qualifying broadcaster is able to exercise its rights. Finally, the entry into force of the final Norwegian [measures] is postponed to 1 July 2014 in order to ensure that any contract negotiations made before that date are not adversely effected."

19 The operative part of the contested decision reads:

"Article 1

The measures to be adopted by Norway pursuant to the [Directive], and in particular Article 14(1) thereof, notified to [ESA] pursuant to Article 14(2) of the [Directive] on 22 April 2013 and received by [ESA] on 23 April 2013, are compatible with EEA law.

Article 2

Norway shall communicate to [ESA] the measures as finally adopted. [ESA] shall publish these measures in the EEA Supplement to the Official Journal of the European Union in accordance with Article 14(2) of [the] Directive ….

Article 3

This Decision is addressed to Norway."

20 On 9 August 2013, the Norwegian King in Council adopted the amendments to the national regulation, which have been made available on the Government's website from 13 August 2013. On 23 August 2013, the adopted measures were communicated to ESA.

IV Procedure and forms of order sought

21 The applicant lodged the present action at the Registry of the Court on 4 October 2013. ESA submitted a statement of defence, which was registered at the Court on 9 December 2013.

22 On 24 December 2013, the applicant requested and was granted an extension to the deadline for submitting its reply. A new deadline was set for 11 February 2014. The reply from FIFA was registered at the Court on 11 February 2014. The rejoinder from ESA was registered at the Court on 17 March 2014. The parties presented oral arguments at the hearing on 14 April 2014.

23 The applicant requests the Court to:

1. *annul the contested decision in as far as it approves the inclusion of the "non-prime" matches of the [World Cup] on the Norwegian events list;*

2. *order ESA to pay its own costs and the costs incurred by FIFA in connection with these proceedings.*

24 The defendant claims that the Court should:

1. *dismiss the application;*

2. *order the applicant to pay the costs*.

25 On 18 February 2014, the Norwegian Government and the Commission submitted written observations pursuant to Article 20 of the Statute of the Court.

26 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

V Law

Preliminary observations

27 Pursuant to Article 14(1) of the Directive, an EEA State may take measures to ensure that broadcasters under its jurisdiction do not transmit, on an exclusive basis, events which are regarded by that EEA State as being of major importance for society, in a way that deprives a substantial proportion of the public of the possibility of following these events on free television. If such measures are taken, the EEA State is required to draw up a list of designated national or non-national events which it considers as being of major importance for society ("events of major importance"). According to Article 14(2) of the Directive, EEA States shall immediately notify the Commission or ESA of measures taken, or to be taken, to that effect. The Commission or ESA will then verify whether such measures are compatible with EEA law. This assessment must take place within a period of three months from the notification. The contact committee established pursuant to Article 29 of the Directive must be consulted during this period.

28 The designation of an event as being of major importance restricts the freedom to provide services, the freedom of establishment, free competition and the right to property. However, such restrictions are allowed provided that they are unavoidable consequences of the designation. As is apparent from recital 49 in the preamble to the Directive, such obstacles are considered justified by the objective of protecting the right to information and ensuring wide public access to television coverage of those events (compare, to that effect, Case C-201/11 P *UEFA* v *Commission*, judgment of 18 July 2013, reported electronically, paragraph 10; Case C-204/11 P *FIFA* v *Commission*, judgment of 18 July 2013, reported electronically, paragraph 11, and Case C-205/11 P *FIFA* v *Commission*, judgment of 18 July 2013, reported electronically, paragraph 12). Pursuit of that objective is also legitimate since the marketing on an exclusive basis of events of high interest to the public is liable to restrict considerably the access of the general public to information relating to those events.

29 The purpose of the Directive is the mutual recognition of lists of events of major importance. EEA States must ensure that broadcasters under their jurisdiction respect the lists of other EEA States which are notified to the Commission or to ESA.

30 The EEA States have a broad discretion when determining the events which are of major importance pursuant to Article 14(1) of the Directive. Instead of harmonising the list of such events, the Directive is based on the premise that considerable social and cultural differences exist between EEA States as regards their importance for the general public. Recital 49 in the preamble also underlines the discretion accorded to EEA States, in stating that it is essential that they be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of events of major importance (compare, to that effect, *UEFA* v *Commission*, cited above, paragraphs 12 and 13).

31 The extent of that margin of discretion is further apparent from the fact that the Directive does not set out detailed criteria for its exercise. The only criteria laid down are referred to in recital 52 in the preamble, namely that they must be outstanding events which are of interest to the general public in the EEA or in a given EEA State or in an important component part of a given EEA State and are organised in advance by an event organiser who is legally entitled to sell the rights pertaining to that event (compare, to that effect, *UEFA* v *Commission*, paragraph 14).

32 Given their relatively imprecise nature, it is for each EEA State to give substance to the criteria and to assess the interest of the general public in the events concerned, taking account of the social and cultural particularities of society in that State (compare, to that effect, *UEFA* v *Commission*, cited above, paragraph 15).

33 However, it may be observed that the Commission has issued guidelines to assess whether an event may be considered to be of major importance to the society in question (European Commission Working Document CC TVSF (97) 9/3, Implementation of Article 3A of Directive 89/552/EEC, as modified by Directive 97/36/EC. Evaluation of National Measures). These guidelines offer four reliable indicators to assess if an event is of major importance for society. The indicators are: (i) the event and its outcome have a special general resonance and have not simply a significance to those who ordinarily follow the sport or activity concerned; (ii) the event has a generally recognised, distinct cultural importance for the population, in particular as a catalyst of its cultural identity; (iii) the event involves the national team in the sport concerned in a major international tournament; and (iv) it has traditionally been broadcast on free television and has commanded large television audiences. Fulfilment of at least two of these indicators should suffice for including an event on the list drawn up pursuant to the Directive.

34 In the examination under Article 14(2) of the Directive, ESA is required, in particular, to verify whether the following conditions are satisfied: (a) the event has been added to the list in accordance with a clear and transparent procedure in due time; (b) such an event may validly be regarded as being of major importance; (c) the designation of the event as being of major importance is compatible with the general principles of EEA law, such as the principles of proportionality and non-discrimination, with the principles of the freedom to provide services and the freedom of establishment, and with the rules of free competition (compare, to that effect, *UEFA* v *Commission*, cited above, paragraph 17).

35 However, ESA's power of review is limited. First, it follows from the extent of the discretion accorded to the EEA States that ESA must limit its assessment to determining whether the EEA State has committed a manifest error in designating an event of major importance. ESA must examine carefully and impartially all the relevant facts of the individual case, facts which support the

conclusions reached (compare, to that effect, *UEFA* v *Commission*, cited above, paragraph 19).

36 Second, the designation of an event as being of major importance inevitably results in obstacles to the freedom to provide services, the freedom of establishment, free competition and the right to property. However, such obstacles have been considered justified in the general interest of protecting the right to information and ensuring wide public access to television coverage of those events (compare, to that effect, *UEFA* v *Commission*, cited above, paragraph 20).

37 Consequently, if an EEA State has designated an event as being of major importance, ESA is required to examine only the effects of that designation on the freedom to provide services and the freedom of establishment, free competition and the right to property which exceed effects which are intrinsically linked to the inclusion of that event in the list provided for in Article 14(1) of the Directive (compare, to that effect, *UEFA* v *Commission*, cited above, paragraph 21).

38 The Court finds it appropriate in the case at hand to consider the plea challenging the contested decision's compatibility with EEA law before examining the plea alleging lack of reasons.

Compatibility of the contested decision with EEA law

Arguments of the parties

39 The applicant submits that ESA has disregarded its obligations under Article 14(2) of the Directive and Article 5(2)(d) SCA in failing adequately to verify the compatibility of the notified measures with EEA law. On this ground, the contested decision should be annulled in so far as it concerns the non-prime matches of the World Cup.

40 The applicant argues that the limited information supplied in the notification, that is, viewing figures only relating to a small number of matches of the World Cups held in 2002, 2006 and 2010 (4, 10 and 10 matches, respectively), could not substantiate the claim that the broadcasting of the World Cup has attracted large television audiences and that the non-prime matches have special general resonance with those who do not ordinarily follow football. Only complete, accurate and reliable evidence allows it to be ascertained whether the conditions required by the Directive are fulfilled. The applicant contends that ESA could not validly approve the inclusion of the entire World Cup on the Norwegian events list on the basis of the fragmentary and partial evidence supplied in the notification and its annexes.

41 The applicant argues that ESA's failure to conduct an adequate verification of the notified measures is compounded by the fact that no viewing data from the 1998 World Cup was included in the notification, and none seems to have been

envisaged by ESA, even though this was the last World Cup in which the Norwegian team participated.

42 The applicant submits further that ESA should have requested copies of the surveys and analysis of the viewing figures in Norway of the World Cup which the applicant mentioned in its observations. These viewing figures contradict Norway's assertions and refute the grounds advanced by the Norwegian authorities. In these circumstances, ESA should have had doubts whether the claims made in the notification were sufficient and sustainable.

43 Furthermore, the applicant submits that ESA has wrongfully relied on recital 49 in the preamble to the Directive when approving the inclusion of the entire World Cup on the events list. Although recital 49 mentions the World Cup as an example of an event of major importance for society, it follows from the case law of the European Union courts that this tournament is, in principle, divisible into different matches or stages, not all of which are necessarily capable of being characterised as an event of major importance. Whether or not the final stage of the World Cup can be included in its entirety as an event of major importance depends on the interest generated by the individual matches in the EEA State concerned.

44 The applicant asserts that ESA has committed a manifest error in holding that the non-prime matches of the World Cup can validly be regarded as events of major importance for Norwegian society.

45 In this regard, the applicant argues that the notification from Norway cannot justify a finding that the World Cup has traditionally been broadcast on free television in Norway. In the 2002 World Cup, only 11 of the 64 matches of the final stage were broadcast on free television in Norway, and only 4 of these live and in full. In examining whether the World Cup matches have been traditionally broadcast on free television in Norway, it cannot be of significance that many of the matches were broadcast on Swedish TV and Canal Digital available to Norwegian viewers.

46 Furthermore, the applicant contends, the broadcasting of the non-prime matches of the World Cup on free television has not commanded large television audiences in Norway. According to surveys and analysis the applicant has commissioned of the viewing figures of the 2006 and 2010 World Cups, the non-prime matches attracted on average less than 10% of the potential viewing public. The applicant submits that the same pattern can be seen also in respect of the 1998 and 2002 World Cups. Thus, there is nothing to support the claim that the non-prime matches have attracted large television audiences.

47 The applicant also contests ESA's finding that the non-prime matches have a special general resonance in Norway and are not simply of significance to those who ordinarily follow football. According to the applicant, the available viewing figures do not support a finding that "non-football fans" follow football to a greater extent during the World Cup than what is otherwise the case.

48 The applicant submits further that ESA has erred in holding that the designation of the entire World Cup as an event of major importance was compatible with EEA law and that the restrictions on EEA rights and freedoms entailed by the notified measures were appropriate and proportionate for attaining the legitimate objective sought. The applicant argues that the Norwegian measures are disproportionate in that they impose no obligation on qualified broadcasters to acquire rights to the listed events in general and to the World Cup in particular. The measures also unduly and severely infringe upon the applicant's property rights, its freedom to provide services and upon free competition. The effects of the approval of the measures are therefore, as far as the non-prime matches are concerned, disproportionate and exceed those which are intrinsically linked to their inclusion on the Norwegian events list.

49 ESA, whose submissions are essentially supported by the Norwegian Government and the Commission, stresses that it is for the EEA States to determine the events of major importance for their society and thus to be included in their national lists. The EEA States have broad discretion in this regard. ESA argues that its power to review is limited to determining whether an EEA State has committed any manifest errors of assessment in designating events of major importance. In order to make this assessment, ESA needs to examine carefully and impartially all the relevant facts of the case which support the conclusions reached.

50 ESA argues that it complied fully with this obligation both in the pre-notification phase as well as within the three-month period following formal notification. It avers that it sought additional information from the Norwegian authorities several times during the pre-notification phase.

51 As regards the viewing figures provided for the matches considered, ESA observes that the viewing figures represented all the viewing figures available to the Ministry, as confirmed by the Norwegian authorities. For the 2002 World Cup, all available data were taken into consideration. Furthermore, all matches of the 2006 and 2010 World Cups were taken into account, as average ratings referring to the entire population and to different special groups of viewers were provided for those two World Cups. In addition, average ratings for each tournament's 10 most-watched matches were provided.

52 In relation to viewing rates concerning the 1998 World Cup, ESA indicates that they were not assessed as they were not available to the Ministry. Having regard to the Commission's practice, ESA did not consider that including 1998 viewing rates would have enabled it to make a better projection for the future. However, given the fact that viewers are even more interested in the World Cup when their national team participates, ESA considered it plausible that the 1998 World Cup attracted an even larger audience in Norway as the national team participated in that tournament.

53 According to ESA, the observations submitted by the applicant in the course of the administrative procedure, including the viewing data provided, were carefully

assessed. ESA's conclusion regarding the viewing figures provided was that for the 2006 and 2010 World Cups, the average of some 10% of the viewing population for the non-prime matches was fairly high and did not support the applicant's assertion that these matches did not attract large audiences.

54 ESA agrees with the applicant that including the entire final stage of the World Cup in a national list of major events cannot be automatic, unfounded or lacking any justification. Thus, the EEA State has to provide reasons justifying whether the individual matches comprising the World Cup attract sufficient attention. Accordingly, ESA did not only rely on recital 49 of the preamble to the Directive, but conducted an examination of the detailed information provided by the Norwegian authorities. ESA found Norway to have communicated the reasons why the entire final stage of the World Cup was included in the list.

55 ESA maintains the finding that the non-prime matches of the World Cup can validly be regarded as an event of major importance for Norwegian society. It avers that it received confirmation from the Norwegian authorities that the final stage of the World Cup has traditionally been broadcast on free television in Norway. According to ESA, all viewing figures and ratings provided to it concern broadcasts on free television. The lack of viewing figures from the 2002 World Cup is due to the fact that this particular World Cup was transmitted on pay TV to a large extent. Consequently, the year 2002 was an exception to the rule that the World Cup has traditionally been broadcast on free television in Norway.

56 Furthermore, ESA contends that both the prime and non-prime matches attracted large television audiences in Norway. The inclusion of non-prime matches in the national list of events of major importance for society does not require that these matches draw the same number of viewers as prime matches. When determining whether the individual matches of the World Cup attracted large television audiences, ESA relied on Commission practice approving the inclusion of the World Cup in its entirety in the national list of events of major importance of another EEA State when the average viewing shares ranged from 4.7% to 30.1% for the individual matches (both prime and non-prime) when the national team of that EEA State was playing and from 1.8% to 9.9% for individual matches (both prime and non-prime) not involving the national team.

57 Thus, the viewing rates provided by the applicant concerning the non-prime matches of the 2006 and 2010 World Cups, indicating an average television audience between 9% and 10%, were considered satisfactory for substantiating the inclusion of the World Cup in the Norwegian list. The same consideration applies for the non-prime matches during the 1998 and 2002 World Cups, which attracted 11.3% and allegedly 6.6% of the viewing public, respectively.

58 ESA stresses that it explicitly requested the Norwegian authorities to provide viewing figures for prime and non-prime matches in order to assess the interest generated by the individual matches. Norway provided for the 2006 and 2010 World Cups average viewing figures and market shares for the entire population

as well as for several categories of viewers on the basis of gender and age group. In addition, figures corresponding to the 10 most-watched matches of the 2006 and 2010 World Cups, as well as the equivalent data for certain matches of the 2002 World Cup, were provided. Three of these ten most-watched matches correspond to what the applicant refers to as prime matches. Moreover, according to ESA, the fact cannot be ignored that the remaining seven most-watched games in the 2006 and 2010 World Cups are spread across all phases of the tournament, i.e. at the group stage, the round of 16 and the quarter-finals. It should also be acknowledged, ESA continues, that, whether a match is prime or non-prime, the number of viewers watching it is influenced also by other factors, such as the teams playing and the time of the day that a game is broadcast.

59 In determining whether the non-prime matches have a special general resonance in Norway, not simply being of significance to those who ordinarily follow football, the Norwegian authorities employed a methodology consisting in the provision of average audience ratings and market shares based on television audience measurements. To show the special general resonance of the World Cup in Norway, ESA found that this methodology was not manifestly erroneous; it was reasonable and acceptable. The viewing figures provided show that, in fact, all broadcasts of the 2006 and 2010 World Cups had a special general resonance in all groups of the Norwegian population, irrespective of gender and age.

60 Finally, as regards the alleged disproportionality of the Norwegian measures, ESA submits that the European Union legislature has expressly authorised obstacles to the freedom to provide services and freedom of establishment, free competition and the right to property, which are an unavoidable consequence of such a designation. In ESA's view, the inclusion of the World Cup on the Norwegian list does not entail restrictions on EEA rights and freedoms which exceed those intrinsically linked to its designation as an event of major importance.

Findings of the Court

61 When adopting a decision under Article 14(2) of the Directive, ESA does not exercise its own power of decision as such, but its power of review. This power is limited to determining whether an EEA State has committed any manifest errors of assessment in designating events as being of major importance. In order to verify whether such an error has been committed, ESA must carefully and impartially examine all the relevant facts of the individual case which support the conclusions reached (compare, to that effect, *UEFA* v *Commission*, cited above, paragraphs 19 and 109).

62 For ESA to be able to exercise its power of review, the reasons given by an EEA State to designate an event as being of major importance may be succinct, so long as they are appropriate. It cannot be required, in particular, that the EEA State provide, in the notification of the measures concerned, detailed information and figures regarding each element or part of the event which has been notified to ESA (compare, to this effect, *UEFA* v *Commission*, cited above, paragraph 48).

63 If ESA has doubts in relation to the designation of an event as one of major importance, it is required to seek clarification from the EEA State concerned (compare, to that effect, *UEFA* v *Commission*, cited above, paragraph 49).

64 In the present case, the Norwegian authorities have designated all the matches in the final stage of the World Cup as an event of major importance. The reason is that these matches, including the non-prime matches, have special general resonance at national level, as they arouse great interest amongst the Norwegian public.

65 Moreover, the notification to ESA also stated that the final stage of the World Cup had traditionally been broadcast in Norway on free television channels and commanded large television audiences. The Norwegian authorities considered the final round of the World Cup to be a single event in which matches between other countries also affect the matches that Norway may play and the overall result. The non-prime matches might therefore, depending on the Norwegian team's results in the World Cup, attract a sufficient number of television viewers and have a special resonance in Norway.

66 In providing such information, in accordance with the requirements of Article 14(2) of the Directive, the Norwegian authorities enabled ESA to exercise its power of review and to seek clarification from Norway of the information provided in the notification. ESA requested such clarifications.

67 There is nothing to indicate that ESA did not exercise its limited power of review or that ESA failed to examine whether the Norwegian authorities had committed a manifest error of assessment in designating all matches in the final stage of the World Cup as an event of major importance.

68 It is apparent from recitals 2 and 5 of the contested decision that ESA verified whether the whole of the final stage of the World Cup, thus including non-prime matches, had a special general resonance in Norway, that is to say, whether the matches in that tournament were popular for the general public. It follows from both the case file and recital 3 of the contested decision that ESA considered the available statistical data on the Norwegian market in its verification.

69 In principle, the World Cup is an event divisible into different matches or stages, not all of which are necessarily capable of being characterised as an event of major importance (compare, to that effect, *UEFA* v *Commission*, cited above, paragraph 38). Given this, the EEA State concerned must notify ESA of the reasons justifying the designation of the final stage of the World Cup as such as an event of major importance for the society at issue, rather than a compilation of individual events divided into matches of different levels of interest (compare, to that effect, *UEFA* v *Commission*, cited above, paragraph 44).

70 In the present case, the Norwegian authorities designated the entire final stage of the World Cup as an event of major importance. ESA's decision to approve the Norwegian measures was based on the information provided, and not on a mere

interpretation of recital 49 in the preamble to the Directive. The Court therefore finds no merit in the claim that ESA unlawfully relied on that recital.

71 The applicant claims that ESA erred in its finding that the World Cup has traditionally been broadcast on free television in Norway. The Court notes that it is uncontested that all matches of the 2006 World Cup and a vast majority of matches of the 2010 World Cup were broadcast on free television within the meaning of the Directive. As regards the 2002 World Cup, the majority of matches were also broadcast on Swedish television publicly accessible to Norwegian viewers. The notification to ESA also specifically states that the World Cup has traditionally been broadcast on free television in Norway. In light of the margin of discretion accorded to the EEA States under the Directive, the Court sees no manifest error in ESA's finding that all the matches of the World Cup have traditionally been broadcast on free television in Norway.

72 Turning to the submission that ESA erred in its finding that the World Cup has attracted a large television audience in Norway, the Court observes that ESA relied on the available statistical data provided by the parties. ESA found that the matches of the World Cup with large television audiences could be found in all the phases of the tournament. On average, 59.6% of all television sets in use were tuned to the matches of the final stage of the 2006 World Cup on NRK 1, whereas the same figure in relation to matches broadcast on TV2 amounted to 59.4%. Based on a sample of the 10 most-watched matches broadcast on NRK1 and TV2, consisting also of non-prime games in the group stage, the lowest percentage of television sets in use tuned to a non-prime match was 56.9% (Portugal v Netherlands). As regards the final stage of the 2010 World Cup, on average, 47.4% of television sets in use were tuned to the broadcasts on TV2, whereas the number was 33.6% for broadcasts on Viasat 4. Based on a sample of the 10 most-watched matches on TV2 and Viasat 4, the viewing figures for non-prime matches ranged from 37.9% (Argentina v Mexico) to 51% (Spain v Portugal) and 51.6% (Uruguay v Ghana) of all television sets in use. According to the statistical data provided, the figures mentioned in this paragraph reflect viewing shares ranging from 7.5% to 19.3% of the total population.

73 The applicant has not disputed that these data constituted the basis for the contested decision. Moreover, the data provided by the applicant as regards the average viewings of the 2006 and 2010 World Cups do not demonstrate that the World Cup does not attract a large television audience.

74 For comparison, the Court notes that the 2009 and 2010 Norwegian Men's Football Cup finals attracted an audience share which amounted to 69% and 62.6%, respectively, of all television sets in use tuned to the programme.

75 The viewing figures provided show that also the non-prime matches of the World Cup command large audiences in Norway. Those viewing figures thus confirm the findings set out in recital 18 of the preamble to the contested decision to the effect that matches in the final stage of the World Cup, including non-prime matches, have traditionally drawn large numbers of viewers. Moreover, when

compared to prime matches, the relevant figures for non-prime matches do not show that non-prime matches failed to attract large audiences.

76 As regards the applicant's claim that ESA manifestly erred in its finding that non-prime matches of the World Cup have a special resonance in Norway, the Court finds that the data provided by the Norwegian authorities and applied by ESA, including market shares, audience ratings and the number of viewers in a particular age group or of a particular gender are appropriate to warrant a finding that non-prime matches enjoy a special resonance in a wider section of Norwegian society.

77 The Court thus concludes that ESA did not commit any manifest errors in holding that the entire final stage of the World Cup satisfies the requirements justifying its characterisation as an event of major importance for Norwegian society and its inclusion on the Norwegian events list.

78 The applicant submits that the inclusion of the non-prime matches of the World Cup entails unnecessary and disproportionate restrictions on the exercise of EEA rights and freedoms; in other words, the effects of these restrictions exceed those intrinsically linked to the inclusion of these matches on the list. However, the European Union legislature has expressly authorised obstacles to the freedom to provide services, free competition and the right to property, since these effects are unavoidable consequences of listing events of major importance. Such obstacles are justified by the objective of protecting the public's right to information and ensuring the public wide access to television coverage of those events (compare, to that effect, *UEFA* v *Commission*, cited above, paragraph 10). National measures can therefore be justified, provided that they are appropriate for attaining the objective which they pursue and do not go beyond what is necessary in order to attain it (compare, to that effect, Case T-55/08 *UEFA* v *Commission* [2011] ECR II-271, paragraph 50).

79 ESA is required to carry out a limited review of the proportionality of national measures designating an event as being one of major importance. In particular, ESA needs only to examine the effects of that designation on the freedom to provide services, free competition and the right to property which exceeded those which are intrinsically linked to the inclusion of that event in the list provided for in Article 14(1) of the Directive (compare, to that effect, Case C-201/11 P *UEFA* v *Commission*, cited above, paragraph 21).

80 In the present case, it appears that ESA conducted a comprehensive verification of the effects of the listing of the World Cup as an event of major importance and concluded that the effects were compatible with EEA law with regard to the freedom to provide services, property rights and competition law. ESA took account of the fact that the list will have no retroactive effect, and that most of the broadcasting rights for the World Cup in Norway have already been sold until 2022. Consequently, the list will impact on the 2026 World Cup and future World Cups thereafter.

81 Article 14(1) of the Directive gives concrete expression to the ability of the EEA States to derogate from certain EEA rules, such as those governing freedom to provide services, and to adopt measures attaining the objectives of the Directive. Such restrictions are considered to be indispensable for protecting the right to information and to ensure wide public access to television broadcasts of national or non-national events of major importance. As such, they must be considered justified and, therefore, proportionate, subject to compliance by the EEA States with the conditions laid down for drawing up national lists, a matter which ESA is required to verify.

82 As regards the restrictions on free competition, the effects on the number of potential competitors, which are presented as being an unavoidable consequence of the obstacles to the freedom to provide services, cannot be considered to be contrary to the articles of the EEA Agreement on competition (compare, to that effect, Case T-55/08 *UEFA* v *Commission*, cited above, paragraph 164).

83 Also the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives in the public interest and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the right guaranteed (compare, to that effect, Case T-55/08 *UEFA* v *Commission*, cited above, paragraph 180, and the case law cited).

84 It appears that ESA has taken account of the fact that the Norwegian measures make provision for situations in which there could be no qualifying buyers for the events listed, ensuring that a non-qualified broadcaster is able to exercise its rights such as to avoid a situation in which the event listed is not broadcast at all. Similarly, ESA appears to have considered the fact that the Norwegian measures provide for arrangements for the relicensing of exclusive rights by non-qualified broadcasters to the qualified ones and a mechanism for dispute resolution between qualified and non-qualified broadcasters in relation to the price of those rights.

85 Consequently, it appears that those restrictions correspond to objectives in the public interest and, in relation to the aim pursued, do not constitute a disproportionate and intolerable interference, impairing the substance of the right guaranteed. Accordingly, ESA did not err in finding that the Norwegian measures were proportionate.

86 The Court thus finds no manifest error on the part of ESA such as to suggest that ESA should have rejected the notified measures. ESA had no basis to go beyond the inherently restricted nature of its power of review. The plea challenging the substance of the contested decision must therefore be rejected.

Infringement of the obligation to state reasons

Arguments of the parties

87 According to the applicant, the general nature of the statement of reasons in the contested decision did not allow it to know the basis on which ESA verified the inclusion of the entire World Cup on the Norwegian events list nor does it enable the Court to exercise its power of review. The reasons for approving the inclusion of the non-prime matches of the World Cup on the Norwegian events list given in the contested decision are therefore vitiated by error violating Article 16 SCA. Consequently, the contested decision should be annulled pursuant to Article 36 SCA.

88 ESA, with the support of the Norwegian Government and the Commission, submits that the contested decision must be read in its relevant context and taking into consideration the relevant legal rules. ESA submits that the contested decision is appropriately reasoned and fulfils the test required by Article 16 SCA.

Findings of the Court

89 The Court notes that the statement of reasons required by Article 16 SCA must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion the reasoning followed by ESA, in such a way as to enable the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review (see Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 22, paragraph 171, and the case law cited).

90 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case (see Case E-14/10 *Konkurrenten.no AS* v *ESA* [2011] EFTA Ct. Rep. 266, paragraph 43). In particular, what matters is the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.

91 It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 16 SCA must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 172, and the case law cited). When the measure at issue is adopted in a context with which the persons concerned are familiar, summary reasons may be given (compare, to that effect, Case C-201/11 P *UEFA* v *Commission*, cited above, paragraph 108, and the case law cited).

92 As regards decisions under Article 14(2) of the Directive, it should be kept in mind that such decisions mainly concern broadcasters with an in-depth knowledge of the context in which those decisions are adopted, and that ESA's

power of review is limited. In those circumstances, the statement of reasons for an ESA decision adopted pursuant to Article 14(2) of the Directive may be brief. In particular, it is permissible for ESA to indicate only succinct grounds for having considered an event to be of major importance (compare Case C-201/11 P *UEFA* v *Commission*, cited above, paragraph 111).

93 In light of these considerations, ESA's statement of reasons must be considered as sufficient. It follows that the plea alleging infringment of Article 16 SCA must be rejected.

94 As the Court has found all the pleas in law advanced by the applicant unfounded, the application must be dismissed.

VI Costs

95 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. ESA has asked for the applicant to be ordered to pay the costs. Since the latter has been unsuccessful in its application, it must be ordered to do so. The costs incurred by the Kingdom of Norway and the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application.**

2. **Orders the Fédération Internationale de Football Association to pay the costs of the proceedings.**

Per Christiansen Páll Hreinsson Martin Ospelt

Delivered in open court in Luxembourg on 3 October 2014.

Gunnar Selvik
Registrar

Per Christiansen
Acting President