
**INSIDE THE UCI/ASO CONFLICT ABOUT ORGANIZING CYCLING AS A SPORT:
THE UNIBET CASE**

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INTRODUCTION

Winner of the 2007 Tour de France, Alberto Contador, as well as his Astana teammates Levi Leipheimer, winner of the 2008 Tour of California and ranked third in the 2007 Tour de France, and Andreas Klöden, ranked second in the 2004 and 2006 Tours de France, have been denied participation in the 2008 Tour de France. This results from a decision of the Tour de France organizer, Amaury Sport Organisation (ASO), not to invite the cycling team Astana to the cycling races that it organizes in 2008, including the 2008 Tour de France. ASO's decision is based on the damage caused by this team during the 2007 Tour de France and to cycling in general, both in 2006 and 2007.¹

Prior to the start of the 2006 Tour de France, Astana was excluded from the Tour de France after five of its riders were implicated in a doping scandal. In the 2007 Tour de France, Astana pulled out of the Tour de France after its team leader Alexander Vinokourov tested positive for blood doping on July 24, 2007.

Astana's doping problem is a small piece of a long history of drugs scandals that have tarnished the credit of professional cycling over the last decade. Suffice to remember the highly media covered Festina affair in the 1998 Tour de France where the Festina physician Willy Voet was caught by border officials with large quantities of doping products in his Festina team car, and several members of the team, including the 1997 World Champion Laurent Brochard, were arrested and admitted to taking erythropoietin (EPO).² Suffice also to cite the name of the famous Spanish doping case, Operación Puerto, against Dr. Eufemiano Fuentes, who was accused in May 2006 of administering prohibited doping products to 200 professional athletes, including not only professional cyclists, but also high profile tennis and football stars, to enhance their performance.³ The Landis case, leading to the September 20, 2007 U.S. Anti-Doping Agency (USADA)'s verdict founding Floyd Landis guilty of doping in the 2006 Tour de France and to Landis' historic forfeiture of his Tour de France win,⁴ will be – hopefully – the deepest point in the history of drugs scandals in the cycling world.

Considering that “[t]he Tour de France has values of its own without which it would forfeit not only its sporting credibility but also its unquestionable role at cultural, economic, social and environmental levels” and that the recurring drugs scandals have the potential to damage these essential values, ASO has adopted a Code of Ethics providing the basic rules every cyclist is required to respect for participating in ASO's cycling races, including the Tour de France. One of these basic rules is “Equal chances for competitors”, entailing that “[i]llicitly favouring anyone runs counter to the sporting ethic” and consequently that “doping, too often present at an ordinary social level, is inadmissible in sport.”⁵

Despite a complete shake-up of Astana's team management and significant changes on the team roster, ethics justified ASO's decision not to invite Astana and its riders to compete in the 2008 Tour de France as well as in the other events it organizes in 2008, being the most important cycling races. ASO's decision therefore leaves aside three cyclists widely viewed

¹ ASO's press release (February 13, 2008). See <http://www.letour.fr/2008/TDF/COURSE/us/actus.html#zone12>.

² See BBC's review of the Festina affair available at http://news.bbc.co.uk/sport1/hi/other_sports/988530.stm.

³ See Wikipedia's review of the Operación Puerto case available at

http://en.wikipedia.org/wiki/Operaci%C3%B3n_Puerto_doping_case.

⁴ Floyd Landis has appealed the USADA's verdict to the Court of Arbitration for Sport. A final decision is not expected before June 2008. See <http://www.tas-cas.org/en/infogenerales.asp/4-3-571-1092-4-1-1/5-0-1092-15-1-1/>.

⁵ ASO's Code of Ethics is available at http://www.letour.fr/2008/TDF/COURSE/us/code_ethique.html.

as race favorites – Alberto Contador, Levi Leipheimer, and Andreas Klöden – for the whole cycling season. This decision of denying top cyclists participation in the most prestigious cycling races made speculations circulate about a possible team switch of these riders to compete, and especially to defend their chance in the upcoming Tour de France.⁶

ASO's decision followed the decision of Giro organizer, RCS, not to invite Astana to the season's first grand tour, the 2008 Giro d'Italia, based on similar ethical reasons.⁷ The lead taken by ASO and RCS to exclude Astana strikingly contrasts with Vuelta organizer, Unipublic, to welcome Astana in the season's final grand tour, the 2008 Vuelta a España. Contrary to ASO and RCS, Unipublic emphasized the sporting interest that Astana and its team leader Alberto Contador – who is from Spanish nationality (!) – have in participating in the Spanish grand tour, the Vuelta.⁸

As a result of ASO's decision to exclude its riders from the participation of the 2008 Tour de France, Astana was forced to reshuffle its racing schedule for the 2008 cycling season.⁹ ASO's decision also caused deep disappointment among the cycling fans.¹⁰ The International Cycling Union (UCI), whose aim, as the cycling governing body, is to regulate cycling at international level, strongly disapproved ASO's decision, threatening to expel riders who would take part in the cycling races organized by ASO,¹¹ and promising to back Alberto Contador should he decide to take legal action over his exclusion from this year's ASO races.¹²

In view of Astana's entire reorganization of its structure, and the rigorous doping controls developed by the team – “*New management, new riders, new philosophy. Only the name of the sponsor remained*”, ASO's rationale to exclude Astana from the participation in its cycling events in 2008 may appear to be suspect.¹³ On the ground of ASO's Code of Ethics – invoked by ASO to exclude Astana, it is indeed difficult to justify, at the same time, the participation of teams like the Dutch Rabobank – whose team leader Michael Rasmussen, holder of the yellow jersey during the 2007 Tour de France, was expelled out of the Tour de France for testing positive for doping – and the French Cofidis, which pulled out of the 2007 Tour de France after its rider Cristian Moreni also tested positive for doping – which were, like Astana, involved in doping scandals in the 2007 Tour de France.

The Astana affair illustrates the conflict – not to say the war – which is currently pitting the UCI and ASO for the team selection in the most important cycling events. In this conflict, both the UCI and ASO use different means (e.g. ultimatum, (threat of) exclusions, boycott) in their attempt to take the lead of the cycling world. While Astana seems to be the “scapegoat” of the ASO/UCI war this year, the Belgian-Swedish team Unibet was at the center of the battle field during the whole 2007 cycling season. Barred from the participation of all ASO cycling races in 2007, Unibet – unlike Astana so far – immediately took legal action in order to challenge ASO's decision and to seek judicial authorization to compete in the races organized by ASO.

Through a description of the Unibet case, this paper will address the issues which currently affect cycling about the team selection in the most important cycling events of the season, showing the open conflict between the International Cycling Federation (UCI) and the

⁶ See e.g. rumors of Contador's team switch, though denied, on VeloNews' website, available at <http://www.velonews.com/article/73823>.

⁷ <http://www.velonews.com/article/71733>.

⁸ <http://www.velonews.com/article/72007>.

⁹ <http://www.velonews.com/article/72278>.

¹⁰ <http://www.velonews.com/article/72091>.

¹¹ <http://www.velonews.com/article/73065>.

¹² <http://www.velonews.com/article/73319>.

¹³ <http://www.velonews.com/article/72252>.

organizers of the cycling events (especially ASO), and the consequences that this conflict has on the organization of cycling as a sport.

1 THE PARTIES INVOLVED IN THE UNIBET CASE

1.1 THE INTERNATIONAL CYCLING UNION (UCI)

The UCI is the cycling governing body which is responsible for regulating cycling at international level. The UCI represents the interests of more than 170 national cycling federations, 1,200 professional riders, 600,000 licensed riders, millions of cycling athletes who train regularly and more than a billion users.¹⁴ The UCI was founded on April 14, 1900, by the Belgian, French, Italian, Swiss and United States national cycling federations in Paris (France). Its headquarters are located in Aigle (Switzerland) and it is currently chaired by former Irish professional rider Pat McQuaid.

The UCI means to develop and promote all aspects of cycling.¹⁵ In particular, “[t]he purposes of the UCI are:

- a) *to direct, develop, regulate, control and discipline cycling under all forms worldwide;*
- b) (...);
- c) *to organize, for all cycling sport disciplines, world championships of which it is the sole holder and owner;*
- d) (...);
- e) *to promote sportsmanship and fair play;*
- f) (...);
- g) *to cooperate with the International Olympic Committee, in particular as regards the participation of cyclists in the Olympic Games.”* (Article 2 of the UCI Constitution)

From Article 2 of the UCI Constitution, it results that the UCI is only responsible for the organization of the cycling world championships and – in cooperation with the International Olympic Committee – for the participation of the cyclists in the Olympic Games. By virtue of its Constitution, the UCI therefore has not explicitly the authority to organize other cycling races. As it appears clearly from the UCI Cycling Regulations, organization of races is the entire and exclusive responsibility of the organizers.¹⁶ However, to be recognized as an official international cycling event in which teams are authorized to participate, races must – in principle – be included on the UCI’s world calendar.¹⁷

1.2 AMAURY SPORT ORGANISATION (ASO)

ASO is a commercial company specialized in the creation, promotion, and organization of sports events, not only in the field of cycling, but also in the fields of motor sports (the Dakar), athletics (the Paris marathon), equestrian sports, and golf. ASO is part of the French media group Éditions Philippe Amaury (EPA) which owns (among others) the leading French sports newspaper L’Equipe.

¹⁴ See <http://www.uci.ch/templates/UCI/UCI1/layout.asp?MenuId=MTI2NjQ>.

¹⁵ <http://www.uci.ch/templates/UCI/UCI5/layout.asp?MenuId=MTI2NDU>.

¹⁶ The UCI Cycling Regulations are available at <http://www.uciprotour.com/Modules/BUILTIN/getObject.asp?MenuId=MTcxNw&ObjTypeCode=FILE&type=FILE&id=34033&> (Part 1 – General Organisation of Cycling as a Sport) and at <http://www.uciprotour.com/Modules/BUILTIN/getObject.asp?MenuId=MTcxNw&ObjTypeCode=FILE&type=FILE&id=34028&> (Part 2 – Road Races).

¹⁷ Section 1.2.019 UCI Cycling Regulations.

With respect to cycling, ASO organizes among the season's most prestigious races, including in France the Tour de France, Paris-Nice, and Paris-Roubaix, and in Belgium the Flèche Wallonne and Liège-Bastogne-Liège.¹⁸

Most of the cycling races organized by ASO exist for several decades. Until 2004, ASO's cycling races were all included on the UCI's world calendar.

1.3 UNIBET

Unibet was a Belgian-Swedish cycling team which was mainly sponsored by the online gambling company Unibet.com. Unibet employed 55 people and its team roster was composed of 27 riders.¹⁹ Unibet's investment in its cycling team represented an amount of USD 42 million over four seasons.²⁰

Before it was granted a license to compete in the most prestigious races included on the UCI's world calendar, Unibet (as a continuation of the MrBookmaker.com cycling team) rode on the lower ranked European Continental Circuit. After some hesitations of the UCI, Unibet obtained the UCI's ProTour license for the 2007 season allowing its riders to participate in the races included on the UCI's world calendar. Despite some good results, including wins in the first races of the 2007 season (e.g. Jeremy Hunt in the Grand Prix d'Ouverture La Marseillaise, Baden Cooke in the third stage of the Tour Down Under, Jimmy Casper in Le Samyn), Unibet was denied participation in the three grand tours and the most prestigious races organized by ASO in 2007.

As a result of its exclusion from most of the biggest races in 2007, Unibet ceased operations at the end of the 2007 season.²¹ Unibet was however succeeded by the Swedish team Cycle Collstrop, which is sponsored by a timber company.²² Although the UCI did not grant to this team the 2008 Pro Tour license, Cycle Collstrop was granted a one-year "wild card" license allowing the team to be invited to races on the UCI's world calendar.

2 THE ISSUE UNDERLYING THE UNIBET CASE: THE UCI PRO TOUR

Underlying the Unibet case was the decision of the UCI to launch the UCI Pro Tour as of the 2005 cycling season. The UCI ProTour meant to be a race series of prestigious cycling events (including the three grand tours) featuring the best teams and the best riders in the world.²³ Its aim was to offer a more comprehensive package of events to media, giving the sponsors more solid guarantees.²⁴

Participation in the UCI Pro Tour required the race organizers and the teams to hold a UCI Pro Tour license, to be granted by the UCI.²⁵ The UCI Pro Tour license obliged (i) all UCI Pro Teams (i.e. the cycling teams with a UCI Pro Tour license) to compete in all the UCI Pro Tour events²⁶ and consequently (ii) the race organizers to invite all UCI Pro Teams to participate in all the UCI Pro Tour events they organize.²⁷

¹⁸ ASO's website is available at http://www.aso.fr/index_us.html.

¹⁹ See the composition of the Unibet roster at

<http://www.uciprotour.com/Modules/SUCI/TEAMS/TeamDetails.asp?id=NTA&RefDate=01.01.2007&MenuId=MTUyODM&BackLink=%2Ftemplates%2FUCI%2FUCI%2Flayout%2Easp%3FMenuId%3DMTUyODM>.

²⁰ <http://www.velonews.com/article/11832>.

²¹ <http://www.velonews.com/article/13095>.

²² <http://www.velonews.com/article/73317>.

²³ <http://www.uciprotour.com/templates/UCI/UCI1/layout.asp?MenuId=MTcxNw>.

²⁴ <http://www.velonews.com/article/7029>.

²⁵ Section 2.15.001 of the UCI Cycling Regulations.

²⁶ Section 2.15.127 of the UCI Cycling Regulations.

²⁷ Section 2.15.261 of the UCI Cycling Regulations.

As from the start, ASO, as well as the organizers of the other grand tours, RCS and Unipublic, have expressed strong criticism against the UCI Pro Tour. The organizers reproached the UCI Pro Tour for giving the UCI too much power and for creating a “closed circuit” built along the same lines as the American professional sports leagues. Such “closed circuit” system would exclude promotion and relegation of teams which would block any ambitious teams from being able to win promotion to the elite league. In September 2004, ASO, RCS, and Unipublic released a joint statement in which they opposed the UCI Pro Tour project. The consequence of this joint statement was far-reaching for the UCI since the three grand tour organizers ran other races which had been set – by the UCI – to become part of the UCI Pro Tour (e.g. besides the Tour de France, ASO also organizes (among others) in France Paris-Nice and Paris-Roubaix, and in Belgium the Flèche Wallonne and Liège-Bastogne-Liège; besides the Giro d’Italia, RCS also organizes in Italy Milan-San Remo and Tirreno-Adriatico; besides the Vuelta a España, Unipublic also organizes in Spain the Tour of Catalonia).²⁸ Pressed by the UCI, the organizers ultimately agreed to include their events in the 2005 UCI Pro Tour calendar, emphasizing however that numerous disagreements remained between them and the UCI.²⁹

ASO, RCS, and Unipublic reiterated their opposition to the UCI Pro Tour on several occasions. Taking note of the failure to reach an agreement with the UCI, the organizers released a new joint statement on December 12, 2006 confirming again their refusal to include their events in the “closed circuit” system imposed by the UCI. The joint statement started as follows: “All their attempts at rapprochement with the Union Cycliste Internationale [UCI] having ended because of the refusal of the latter to return to an open sporting model, and not wanting their events to be part of a closed system called the ‘UCI ProTour,’ RCS Sport, ASO and Unipublic, the organizers notably of the three Grand Tours, have to define the conditions of participation in their principal events, starting in 2007. These conditions help move toward the desired open system wanted by the three national federations [France, Italy and Spain] along with numerous other organizers.” Instead of using the UCI Pro Tour system whereby the ProTour Teams get automatic starts, the organizers proposed to implement an alternative racing circuit under the following conditions:

- “Starting in 2008, 16 teams will qualify automatically under conditions still being worked out, but based principally on performances in the two previous years. The details of these criteria will be announced before March 1, 2007, after consultation with the teams and the riders.
- The current 18 Pro Tour teams will qualify automatically for the 2007 events.
- None of the above teams are obliged to start any of the 11 events, but they will have to notify the three organizers of their decisions by December 31 of each year.
- The organizer of each race reserves the right to refuse a start to any rider, or to any member of a team’s staff, whose presence could threaten the reputation of the event.
- The organizer of each event can invite wild cards. For the grand tours, these will be distributed three months before the race start; the number of teams participating cannot exceed 20 (starting in 2008), and 22 in the transition year of 2007”.³⁰

The aforementioned conditions were similar to those existing prior to the launch of the UCI Pro Tour.

At the date of the release of the joint statement, Unibet had not been granted the Pro Tour license and was therefore not part of the 18 Pro Tour Teams which automatically qualified for the 2007 events, according to the aforementioned conditions. The UCI

²⁸ <http://www.velonews.com/article/7029>.

²⁹ <http://www.velonews.com/article/7264>.

³⁰ <http://www.velonews.com/article/11316>.

eventually granted the Pro Tour license to Unibet a few days later, on December 15, 2006.³¹

³² With this Pro Tour license, the UCI intended to guarantee Unibet's participation in all UCI Pro Tour events in accordance with its UCI Cycling Regulations, including, in the UCI's eyes, ASO's races.

3 ASO'S DECISION NOT TO INVITE UNIBET TO PARTICIPATE IN ITS RACES

The granting of the Pro Tour license to Unibet – which team was mainly sponsored by the online gambling company Unibet.com – appears to be questionable in light of the betting provision of the UCI Cycling Regulations. Section 1.2.030 of the UCI Cycling Regulations provides that “[a]nyone subject to the UCI regulations may not be involved directly or indirectly in the organisation of bets on cycling competitions”. In addition, “if an organiser is involved, any competition organized by him may be excluded from the calendar for one year”. To deny Unibet participation in its events, ASO founded its decision on similar provisions of French and Belgian laws prohibiting the advertisement of out-of-country betting and lotteries.

3.1 THE SITUATION IN FRANCE

From September 2006, the French authorities have started criminal investigations against online gambling companies on the ground that their activities violated the legal monopoly which the French government has granted to the Française des Jeux and the Pari Mutuel Urbain (PMU). As a result of these criminal investigations, two heads of the Austrian betting company Bwin.com as well as the CEO and the former Vice-President of the online gambling company Unibet.com were arrested in France.³³ The French authorities also sanctioned some organizers of sporting events sponsored by online gambling companies. In this context, the organizer of the French cycling race “L’Etoile de Bessèges” was imposed a fine and sentenced to conditional imprisonment for having invited Unibet to participate in its race.³⁴

In January and February 2007, prior to its first race of the 2007 season, Paris-Nice, planned to start on March 18, 2007, ASO got worried about the legality of the activities of the online gambling company Unibet.com, main sponsor of the cycling team Unibet, on the French territory. By joint letter of January 31, 2007, the French Ministry of Sports and the French Ministry of Budget invited ASO – as a conservatory measure – to reject Unibet's application to its races because the participation of Unibet entailed an unlawful advertisement of an illegal activity in France. By letter of February 21, 2007, the Ministry of Sports also informed the UCI of the illegality of the participation of Unibet to the cycling races organized by ASO. The French Ministry of Sports emphasized that the advertisement of the online gambling company Unibet.com through the participation of its team to cycling races violated the statutory provisions of the French Law of May 21, 1836 prohibiting betting advertisement in France. The French Ministry of Sports also stressed that it was the organizer's entire and exclusive responsibility not to register any cycling team representing online gambling companies, would the organizer want to avoid any criminal liability.

Facing the refusal of ASO to join the UCI Pro Tour and to accept the automatic participation of the 20 UCI Pro Teams (i.e. teams with a UCI Pro Tour license), including

³¹ <http://www.velonews.com/article/11342>.

³² The UCI granted a Pro Tour License to Astana on December 19, 2006.

<http://www.velonews.com/article/11361>.

³³ <http://www.bettingmarket.com/zeturfparis135780.htm>.

³⁴ See Press release of March 7, 2007 available at <http://209.85.173.104/search?q=cache:-i-IWswWKZcJ:cyclingmodel.over-blog.com/30-categorie-1170995.html+Etoile+de+Besseges+amende+unibet&hl=fr&ct=clnk&cd=5&gl=be>.

Unibet, to its races, the UCI called for a boycott of Paris-Nice and vowed to fine and sanction any team and rider that would show up for at start of the race.³⁵ To circumvent the UCI's possible boycott, ASO announced that it would organize the race according to French law by soliciting the French Cycling Federation in order to establish an agreement insuring the respect of the technical regulations.³⁶

As ASO's decision to organize Paris-Nice under the support of the French Cycling Federation obviously undermined the UCI's authority as the governing cycling body, the UCI felt compelled to abandon its boycott threat and to reach an arrangement with ASO. On March 5, 2007, all parties involved in the conflict, i.e. the UCI, the grand tour race organizers – ASO, RCS, Unipublic – and the UCI Pro Teams, concluded a convention whereby the races organized by ASO, RCS, and Unipublic, were placed outside of the UCI Pro Tour calendar, and were no longer subject to the rules of selection and participation of teams as described by the UCI Cycling Regulations for the 2007 season.³⁷ This convention therefore implied that ASO was exempted from automatically inviting the UCI Pro Teams to its races in accordance with Section 2.15.261 of the UCI Cycling Regulations. The convention also confirmed the right of the 18 Pro Tour Teams selected by the UCI on the date of December 12, 2006 to participate in the races organized by ASO, RCS, and Unipublic. With respect to Unibet and Astana, which were not granted any Pro Tour license on the date of December 12, 2006, the convention however provided that ASO, RCS, and Unipublic will, “*in a positive spirit*”, consider the granting of wild cards to Unibet and Astana, “*to the extent such decision would not expose or cause to expose the organizers to any liabilities of any kind whatsoever*”.

The March 5, 2007 convention angered Unibet and Astana to which the UCI, by granting the Pro Tour license, had guaranteed the right to participate in all races of the UCI Pro Tour, which was supposed to include, according to the UCI, the races organized by ASO. From its part however, ASO had never given such a guarantee to these teams. On March 6, 2007, Unibet therefore filed a claim against ASO before the President of the Court of Commerce of Nanterre (France) in order to seek judicial order (in summary proceedings) forcing ASO to register Unibet to the race Paris-Nice starting on March 11, 2007. In its claim, Unibet argued that ASO had made abuse of a dominant position (in application of Article 82 of the European Community Treaty). By judgment of March 9, 2007, the Court of Commerce of Nanterre declared Unibet's claim ill-founded based on (i) the illegality of Unibet's participation and (ii) the legal risk ASO would bear if it were to register the team Unibet to a race organized on the French territory.³⁸ Consequently, ASO did not grant any wild card to ASO for the race Paris-Nice.

Since the position of the French authorities remained unchanged until that time, ASO did grant neither any wild card to Unibet to participate in the race Paris-Roubaix on April 15, 2007.

3.2 THE SITUATION IN BELGIUM

With respect to the races organized in Belgium, Unibet had requested ASO as of November 27, 2006 to participate in the Flèche Wallonne on April 25, 2007 and Liège-Bastogne-Liège on April 29, 2007.

³⁵ <http://www.velonews.com/./article/11761>.

³⁶ See Press release of February 20, 2007 available at <http://www.letour.fr/2007/PNC/LIVE/us/400/communiqu.html>.

³⁷ See Press release of March 9, 2007 available at <http://www.letour.fr/2007/PNC/LIVE/us/400/communiqu.html>.

³⁸ In the Court of Commerce's words : “*The Court cannot order a measure which would have as a direct consequence the violation of the law and which would impose on ASO the risk to face unacceptable criminal liabilities (...)*”.

On April 3, 2007, ASO, after consulting its Belgian legal counsels, informed Unibet that it would not invite the team to participate in its two races, this in order to comply with the Belgian laws prohibiting the advertisement of unauthorized online gambling activities. Belgian Gaming Commission's press release of April 12, 2007 proved ASO right. In this press release, the Belgian Gaming Commission confirmed that the online gambling company Unibet.com ran illegal betting activities in Belgium and made unlawful advertisement through the sponsoring of its cycling team Unibet.³⁹

Like in France, betting activities are strictly regulated in Belgium. Companies cannot run online gambling activities in Belgium without prior authorization to be granted by the Belgian Ministry of Sports and the Belgian Gaming Commission (Law of May 7, 1999 on gambling activities, Law of December 31, 1851 on lotteries, and Law of June 26, 1963 on the control of the enterprises organizing betting activities on sporting events.) Violations of these Belgian laws trigger criminal fines and imprisonment. These laws also criminally sanction anyone who advertises unauthorized online gambling activities.

On the basis of these laws, criminal claims were filed against Unibet after the team was allowed to participate in the Belgian races the Ronde van Vlaanderen on April 8, 2007 and Gent-Wevelgem on April 11, 2007.⁴⁰ On April 12, 2007, answering a parliamentary question about ASO's refusal to register Unibet to the races the Flèche Wallonne and Liège-Bastogne-Liège, the Belgian Ministry of Justice stressed on the risk of criminal liabilities lying on the race organizer which would invite cycling teams sponsored by unauthorized online gambling companies to participate in its races.

As a result of ASO's decision, Unibet turned to the UCI threatening to take legal action against the UCI in case it would not support Unibet's interests. On April 10, 2007, the UCI formally asked ASO to review its decision not to invite Unibet to participate in the races the Flèches Wallonne and Liège-Bastogne-Liège. ASO had no other option to again confirm (to Unibet and to the UCI) its decision not to grant any wild card to Unibet to participate in its races in France and in Belgium given the illegality of the online gambling activities of its sponsor on the French and Belgian territories.

At this point, it is worth noting that ASO did not deny Astana any wild card to participate in its French races Paris-Nice and Paris-Roubaix and its Belgian races the Flèche Wallonne and Liège-Bastogne-Liège. At that time, ASO justified the granting of these wild cards by the sporting value of Astana and by the fact that, unlike Unibet, the participation of this team in its races did not raise any legal concern which would expose ASO to a risk of criminal liabilities.

4 LEGAL PROCEEDINGS

4.1 SUMMARY PROCEEDINGS: THE BASICS

The legal proceedings that Unibet introduced in Belgium against ASO in order to seek judicial authorization to participate in ASO's Belgian races were summary proceedings. In Belgian civil procedure, summary proceedings are to be distinguished from regular proceedings. For both types of legal proceedings, courts have to decide the case by considering factual and legal arguments. The distinction lies in it that summary proceedings have to decide matters of urgency. To be admitted before a court in summary proceedings, a case must be urgent. The plaintiff must, as a preliminary issue, prove that his case is a matter of urgency. In the absence of any urgency, the court will dismiss the case.

³⁹ See the Belgian Gaming Commission's press release of April 12, 2007 at <http://www.kwbw-rlvb.be/Persberichten/Unibetcom/tabid/244/Default.aspx>.

⁴⁰ http://www.sports.fr/fr/cmc/scanner/cyclisme/200715/un-pv-pour-unibet_130256.html.

Summary proceedings can take the form of a unilateral procedure introduced by the plaintiff without the defendant being present to defend his case before the court. Unilateral summary proceedings may only be used in case of “*absolute necessity*”⁴¹. In other cases, summary proceedings are bilateral procedures in which both the plaintiff and the defendant defend their case before the court. The party against whom a judgment is ordered on unilateral summary proceedings has the right to appeal the decision in bilateral summary proceedings.

Another difference with the regular proceedings is that courts in summary proceedings decide the cases on a provisional basis. It is understood that, because summary proceedings pertain to matters of urgency, the courts in summary proceedings only decide the cases on the basis of the “semblance of law”. Courts in summary proceedings are not authorized to settle any (factual or legal) dispute on a definitive manner. This is the task of the courts in regular proceedings. The idea behind the summary proceedings is that the plaintiff still has the opportunity to bring his case before the courts in regular proceedings after he has preserved his urgent interests by obtaining a judgment in summary proceedings.

In practice, a case in summary proceedings can be decided within the week following its introduction before the court – and in most urgent cases, even immediately on the bench – whereas a case in regular proceedings take several years before being decided.

4.2 CHRONOLOGY OF THE SUMMARY PROCEEDINGS IN BELGIUM

Noting ASO’s unwillingness to review its decision not to invite Unibet to participate in its Belgian races the Flèche Wallonne on April 25, 2007 and Liège-Bastogne-Liège on April 29, 2007, both Unibet and the UCI were compelled to start legal action against ASO in order to seek judicial order to register Unibet to the aforementioned races. Unibet and the UCI used different paths in their attempt to reach this goal.

4.2.1 COURT OF COMMERCE OF LIÈGE – UNILATERAL PROCEDURE – UNIBET

On April 19, 2007, Unibet introduced unilateral summary proceedings before the Court of Commerce of Liège requesting the court to order ASO to register its team to the races the Flèche Wallonne and Liège-Bastogne-Liège, this subject to a penalty of EUR 5,000,000 (± USD 7,860,000) per infringement. On a subsidiary basis – should the court consider Unibet’s participation in these races as an unlawful advertisement of unauthorized online gambling activities, Unibet proposed that its riders use bikes and wear jerseys on which the logo and the name of the online gambling company Unibet.com would not appear but would be replaced by a question mark “?”.

In its judgment of April 23, 2007, the Court of Commerce of Liège admitted that the Unibet case constituted a matter of “*absolute necessity*”. Since ASO had already denied Unibet participation in its French races Paris-Nice and Paris-Roubaix, ASO’s refusal to register Unibet to the Belgian races the Flèche Wallonne and Liège-Bastogne-Liège could legitimately raise Unibet’s fear of an extremely serious prejudice for this team, taking into consideration the financial and human investments made for the formation of this team, the conditions required for maintaining its Pro Tour license, and the financial losses for the riders and the sponsors if the team did not participate in these races.

The Court of Commerce of Liège further admitted that by denying Unibet participation in its races, ASO had not adopted an “*objective, transparent, fair, and non-*

⁴¹ There is a case of “*absolute necessity*” justifying the introduction of unilateral summary proceedings when the defendant cannot be identified (clearly) or when a serious and (almost) irreparable prejudice can be expected and a bilateral procedure would make the intervention of the court useless. For instance, “*absolute necessity*” is upheld when it is necessary for the plaintiff to act by surprise in order to prevent the unlawful action of the opposing party.

discriminatory position which is expected from ASO towards its commercial partners.” To motivate its decision, the Court of Commerce found in particular, based on a prima facie assessment of the rights of the parties, that:

- ASO’s fear to participate in the advertisement of unlawful online gambling activities was not grounded. This was clearly demonstrated by ASO’s refusal to accept Unibet’s proposition to compete without any mention of the logo and the name of its sponsor on the bikes and the jerseys of the riders;
- ASO had a dominant position in the organization of cycling races. In this context, ASO must treat its actual and potential commercial partners on an objective, transparent, fair, and non-discriminatory manner;
- Nothing proved that, by accepting Unibet’s participation in its races, ASO’s liability could be put at risk under Belgian law;
- The Belgian laws prohibiting unauthorized online gambling activities in Belgium as well as their advertisement, which ASO invoked for justifying its decision, violated the principle of free movement of services under European Union law (Article 49 of the European Community Treaty).⁴²

Consequently, the Court of Commerce of Liège ordered ASO to register Unibet to its races the Flèche Wallonne and Liège-Bastogne-Liège and to let its riders compete with the bikes and the jerseys on which the logo and the name of Unibet appear. The Court of Commerce attached to its order a penalty of EUR 5,000,000 (± USD 7,860,000) per infringement.

4.2.2 COURT OF COMMERCE OF BRUSSELS – BILATERAL PROCEDURE – UCI v. ASO IN THE PRESENCE OF UNIBET

Parallel to the unilateral procedure pending before the Court of Commerce of Liège – which was unknown to the other parties, the UCI, as a result of Unibet’s insistent request, introduced bilateral summary proceedings against ASO in order to seek judicial order forcing ASO to register Unibet to the races the Flèche Wallonne and Liège-Bastogne-Liège. Prior to the introduction of this bilateral procedure, the UCI and ASO, as a preparatory matter, had exchanged their briefs of arguments. Being informed of the preparation of this bilateral procedure, Unibet quickly filed its claim before the Court of Commerce of Liège on April 19, 2007 in order to obtain the same order, though in unilateral summary proceedings. The bilateral procedure was eventually filed by both the UCI and ASO before the Court of Commerce of Brussels on April 20, 2007 in ignorance of Unibet’s unilateral procedure before the Court of Commerce of Liège.

During the hearings before the Court of Commerce of Brussels on April 20, 2007, Unibet decided to voluntarily intervene in the bilateral procedure. On this occasion however, Unibet knowingly did not mention the existence of the unilateral procedure that it had previously introduced before the Court of Commerce of Liège although both procedures had the same object. Similarly, Unibet had knowingly neither mention the existence of this bilateral procedure to the Court of Commerce of Liège. At the end of these hearings, the Court of Commerce of Brussels fixed the date of its judgment at the hearings of April 24, 2007, i.e. before the start of the races the Flèche Wallonne and Liège-Bastogne-Liège.

The day before the judgment hearings, on April 23, 2007, the Court of Commerce of Liège pronounced its judgment in favor of Unibet ordering ASO to register its team to both of its races in Belgium. Although Unibet’s legal counsels had received a copy of the judgment of the Court of Commerce of Liège on April 23, 2007 in the morning, they only sent a copy thereof to ASO’s legal counsels in the late afternoon, requesting moreover the continuance of

⁴² The free movement of services implies the right of individual EU citizens and companies established in the European Union to offer and provide services in any EU country unhindered.

the bilateral procedure pending before the Court of Commerce of Brussels in order to discuss the impact of the order of the Court of Commerce of Liège on the bilateral procedure.

On April 24, 2007, the Court of Commerce of Brussels however denied Unibet's request to put the bilateral procedure in continuance, blaming Unibet for having knowingly hidden the existence of the unilateral procedure before the Court of Commerce of Liège. As previously announced, the Court of Commerce of Brussels pronounced its judgment during these hearings.

Contrary to the Court of Commerce of Liège, the Court of Commerce of Brussels declared the UCI's claim ill-founded and consequently did not order ASO to register Unibet to its races the Flèche Wallonne and Liège-Bastogne-Liège. According to the Court of Commerce of Brussels, the only issue to be considered was whether ASO performed in good faith the convention concluded between the parties on March 5, 2007. Under this convention, the races organized by ASO were no longer subject to the rules of selection and participation of teams as described by the UCI Cycling Regulations for the 2007 season. With respect to Unibet, Article 5 of the convention applied so the only duty resting on ASO was the duty to consider, "*in a positive spirit*", the granting of wild cards to Unibet. This assessment had to be made by taking into consideration that "*such decision would not expose or cause to expose the organizers to any liabilities of any kind whatsoever*". In that regard, the Court of Commerce of Brussels considered, based on a prime facie evaluation of the facts of the case, taking into account especially the above mentioned declaration of the Belgian Ministry of Justice (see above 3.2), the report of the Belgian Gaming Commission (see above 3.2), and the apparent compliance of the Belgian laws prohibiting unauthorized online gambling activities with the EU law, which seemed to be confirmed at that time by the Belgian Ministry of Justice and the Belgian Gaming Commission, that "*ASO's assessment of the risk to expose its criminal liability in case of the granting of a wild card to Unibet, is grounded.*" This prima facie evaluation of the facts of the case by the Court of Commerce of Brussels clearly departed from the Court of Commerce of Liège's view. Consequently, the Court of Commerce of Brussels concluded that ASO had performed its duty to consider, "*in a positive spirit*", the granting of wild cards to Unibet, in good faith.

The Court of Commerce of Brussels eventually rejected Unibet's subsidiary argument, i.e. its proposal to compete with bikes and jerseys making no mention of the logo and the name of Unibet. According to the Court of Commerce of Brussels, the advertisement of unauthorized gambling activities was not limited to the mentions appearing on the bikes and jerseys of the riders but was also present on Unibet's website.

4.2.3 COURT OF COMMERCE OF LIÈGE – BILATERAL PROCEDURE ON APPEAL OF UNILATERAL PROCEDURE – ASO v. UNIBET

On the date of April 24, 2007, the Unibet case had produced two opposite judicial decisions. Faced with a judicial order to register Unibet to its races the Flèche Wallonne and Liège-Bastogne-Liège, ASO nevertheless opted not to grant any wild card to this team for the participation in these races. ASO founded its decision on the judgment of the Court of Commerce of Brussels, which ASO considered to have priority over the order of the Court of Commerce of Liège, taking into account its posteriority and its bilateral nature – being understood that all parties were able to defend their legal arguments before the court. Unibet had therefore lost in its attempt to force ASO by means of a judicial order to register its team to the Flèche Wallonne and Liège-Bastogne-Liège.

ASO informed Unibet of its decision and expressly requested Unibet to waive the enforcement of the order of the Court of Commerce of Liège. Instead of waiving the order of the Court of Commerce of Liège, Unibet launched several procedures of conservatory seizure against ASO in order to preserve its financial interests. ASO therefore appealed the judgment

of the Court of Commerce of Liège on May 21, 2007. In other words, the Court of Commerce of Liège was requested to review its previous judgment, though this time in bilateral summary proceedings.

On July 6, 2007, the Court of Commerce of Liège declared Unibet's claim inadmissible due to a lack of "*absolute necessity*". The Court of Commerce of Liège reproached Unibet for placing itself in a situation of urgency. According to the Court of Commerce:

- Unibet was aware, as of December 12, 2006, of the risk of being denied participation in the races of the UCI Pro Tour since its team was not granted a Pro Tour license at that time;
- Owing to the illegality of the sponsoring of a cycling team by an online gambling company, Unibet was refused to participate in the French races by a judicial decision of March 9, 2007 – which Unibet did not appeal;
- Invoking the similar situation in France and in Belgium with respect to the laws prohibiting unauthorized online gambling activities and their advertisement, ASO informed Unibet in writing on April 3, 2007 that it did not invite its team to participate in its Belgian races the Flèche Wallonne and Liège-Bastogne-Liège, this to comply with the Belgian laws. To avoid any misunderstanding, ASO again confirmed its position to Unibet in a more detailed letter of April 6, 2007. This correspondence was so clear and unambiguous that Unibet could not expect any review of ASO's decision;
- Despite ASO's clear and unambiguous position, Unibet has waited until April 19, 2007 to bring its case before the Belgian courts.

In the light of the foregoing, the Court of Commerce of Liège considered that Unibet placed itself in a situation of urgency, making difficult the introduction of a bilateral procedure. Given ASO's clear and unambiguous position, well-known to Unibet for several weeks before the introduction of the unilateral summary proceedings, and given the prior judgment of the French Court of Commerce of Nanterre, Unibet had to act more cautiously in assessing its legal situation. The Court of Commerce of Liège therefore concluded that Unibet had to introduce its claim in summary proceedings earlier so a bilateral procedure allowing both parties to defend their arguments could take place. The Court of Commerce of Liège consequently reversed its previous judgment.

Many reasons may explain the change of mind expressed by the Court of Commerce of Liège in its judgment on appeal. First of all, and unlike the initial procedure introduced by Unibet, the procedure on appeal was bilateral which enabled the Court of Commerce of Liège to hear ASO arguments in response of Unibet's claim and to have a more comprehensive view of the case. It is likely that at the end of the initial unilateral procedure, the Court of Commerce of Liège did not have all the factual and legal elements in its possession to make a sound decision. Therefore it is not surprising that without full knowledge of the factual context prior to ASO's decision, the Court of Commerce of Liège rejected Unibet's claim. That the Court of Commerce rejected Unibet's claim on procedural grounds – lack of "*absolute necessity*" – without even considering the merits of Unibet's claim may nevertheless appear more suspect, having in mind the judgment of the Court of Commerce of Brussels making substantive conclusions in favor of ASO. Behind the line, the Court of Commerce of Liège's judgment on appeal could be read as sanctioning Unibet for not processing its claim in good faith, especially for not having disclosed the existence of the other summary proceedings that were to be introduced the next day before the Court of Commerce of Brussels. When aware of Unibet's manoeuvres, the judges of the Court of Commerce of Liège may have felt they had been fooled by Unibet. More likely might however be the view that the Court of Commerce of Liège wished to avoid a new judicial conflict with the Court of Commerce of Brussels. Regardless of these speculative

assumptions, no legal argument can be found to challenge the legality of the Court of Commerce of Liège's judgment on appeal. The Court of Commerce motivated its judgment in such a way that it was clear that Unibet's claim lacked any "*absolute necessity*" to be admissible.

4.3 UNIBET'S EXCLUSION FROM THE GRAND TOURS

Despite these unsuccessful summary proceedings in Belgium, Unibet continued to file claims against the race organizers ASO, RCS, and Unipublic, in order to seek judicial order forcing the organizers to register its team to the grand tours. The summary proceedings introduced in Belgium seem however to have affected Unibet's motivation and to have influenced the later judicial decisions in the Unibet case.

4.3.1 MILAN COURT DENYING UNIBET PARTICIPATION IN THE GIRO D'ITALIA

In May 2007, Unibet filed a claim before a Milan (Italy) Court in order to seek judicial order forcing RCS to register its team to the Giro d'Italia. After having heard the case, the Milan Court however announced that it would pronounce its judgment on May 21, 2007... nine days after the race had started.⁴³ Unibet therefore desisted from its claim.

4.3.2 LILLE COURT DENYING UNIBET PARTICIPATION IN THE TOUR DE FRANCE

On July 2, 2007, Unibet filed a claim in summary proceedings before the Court of Commerce of Lille (France) in order to seek judicial order acknowledging that, by refusing Unibet to participate in the Tour de France, ASO had committed an abuse of dominant position and had made discriminatory practices. Unibet did not seek any judicial order forcing ASO to register its team to the Tour de France.

The Court of Commerce of Lille rejected Unibet's claim considering the lack of any urgency. Informed of ASO's refusal since May 30, 2007, Unibet had not to wait until June 29, 2007 for introducing its claim in summary proceedings. In addition, Unibet's claim, requesting the Court to decide complex antitrust principles, did not fall within its tasks. Such matter had to be decided by a court in regular proceedings.

4.3.3 BRUSSELS COURT REFUSING UNIBET THE PARTICIPATION IN THE VUELTA A ESPAÑA

On August 31, 2007, the UCI filed a claim in summary proceedings before the Court of Commerce of Brussels in order to seek judicial order forcing Unipublic to register Unibet to the Vuelta a España. Unibet did not take part to this litigation.

Again, the Court of Commerce of Brussels rejected the UCI's claim. Like in its previous judgment, the Court of Commerce of Brussels considered the application of Article 5 of the March 5, 2007 convention. Like in Belgium and in France, Spanish laws prohibit the advertisement of online gambling activities. Since Unipublic invoked these Spanish laws to justify its decision, the Court of Commerce was of the opinion that there was an objective risk that Unipublic exposes its criminal liability in case of participation of Unibet in the Vuelta. Interestingly, the Court of Commerce also emphasized that the participation of the Belgian team Predictor-Lotto and the French team the Française des Jeux in the Vuelta, both sponsored by agencies running gambling activities, had not to be treated similarly. According to the Court of Commerce, both teams were allowed to participate in the Vuelta by virtue of Article 4 of the convention, both teams being granted a Pro Tour license on the date of the conclusion of the convention. Like the Court of Commerce of Lille, the Court of Commerce of Brussels also decided that assessing the compliance of the Spanish laws with EU law did not fall within the tasks of courts deciding on summary proceedings. Finally, the Court of

⁴³ <http://www.velonews.com/./article/12230>.

Commerce stressed that Unipublic had lawfully motivated its decision on the basis of Section 1.2.030 of the UCI Cycling Regulations prohibiting anyone subject to the UCI Regulations, including the organizers, to be involved directly or indirectly in the organization of bets on cycling competitions.

4.4 CONCLUSION

With the exception of the initial judgment of the Court of Commerce of Liège –which was made in unilateral summary proceedings without ASO being given the chance to defend its arguments before the court, Unibet lost all litigations against the race organizers ASO, RCS, and Unipublic in order to force by judicial decision these organizers to invite its team to participate in their cycling races. Nonetheless, Unibet participated in other cycling races during the 2007 season, though of minor importance and prestige. Unibet’s exclusion of the most prestigious cycling races in 2007, and its continuous failure to obtain a judicial authorization to participate in these races have irremediably affected the sponsor’s motivation to continue to invest in this team. Unibet therefore decided to cease operations at the end of the 2007 season.⁴⁴

5 ISSUES UNSOLVED BY THE UNIBET CASE

5.1 ASO’S ABUSE OF A DOMINANT POSITION

Unibet’s main argument to challenge ASO’s decision was that ASO made abuse of a dominant position by treating Unibet not on an objective, transparent, fair, and non-discriminatory manner (violation of Article 82 of the European Community Treaty (EC Treaty)).⁴⁵ Only the Court of Commerce of Liège in its initial judgment (see above 4.2.1) followed Unibet’s argument. The other courts either rejected or even did not consider Unibet’s argument. The courts’ attitude can easily be explained by the fact that the Unibet case was decided on summary proceedings. Requested to decide matters of urgency, courts in summary proceedings only consider the “semblance of law”. Deciding complex legal issues like ASO’s abuse of a dominant position does obviously fall outside the scope of the jurisdiction of courts in summary proceedings.

European Union Law of Competition

The European Union (EU) rules on competition comprises rules prohibiting distortion of competition by undertakings (Articles 81 to 86 EC Treaty) and rules restricting State aid granted to undertakings (Articles 87 to 89 EC Treaty). Unibet invoked the former set of rules applying to undertakings, especially Article 82 of the EC Treaty prohibiting the abuse of a dominant position, to challenge the legality of ASO’s decision.⁴⁶ Article 82 of the EC Treaty prohibits one or more undertakings from abusing a dominant position within the common market (i.e. within the European Union) or in a substantial part of it in so far as it may affect trade between Member States. Article 82 has direct effect in that its provision is directed at undertakings.⁴⁷

The European Court of Justice has defined the “dominant position” referred to in Article 82 as “*a position of economic strength enjoyed by an undertaking which enables it to*

⁴⁴ <http://www.velonews.com/.article/13095>.

⁴⁵ A consolidated version of the EC Treaty (as of December 24, 2002) is available at http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf.

⁴⁶ Article 86 of the EC Treaty does not apply to ASO as this provision only applies to publicly-owned undertakings or undertakings to which a Member State has granted special or exclusive rights. ASO is a private commercial company which has not been granted any special or exclusive rights by a Member State. Please note that Article 86 is the former numbering of current Article 82 of the EC Treaty [abuse of dominant position].

⁴⁷ See K. LENAERTS & P. VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 256 (2005).

prevent effective competition [from] being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.⁴⁸ The primary feature of a dominant position is an undertaking’s ability to take actions without having to consider its competitors’ undertakings in the market with respect to its market strategy and without “*suffering any detrimental effects from such [independent] behavior*”.⁴⁹

In assessing the existence of a dominant position, a two-factor test is to be considered: (i) the relevant market from a geographic point of view and from the point of view of the product (i.e. interchangeability of products in that market), and (ii) the market power of the undertaking.⁵⁰ As a rule, an undertaking has a dominant position if its product is not interchangeable with alternative products existing in the relevant market and if it holds a large market share in that market in relation to its competitors. Determining the relevant market is a fact-based assessment for which the European Commission has considerable discretion. Decisions of the European Court of Justice are made on a case-by-case basis so it is difficult to determine in advance what a relevant market may be.

Article 82 of the EC Treaty does not prohibit a dominant position; only its abuse is prohibited. Article 82 lists some instances of prohibited abuse of a dominant position, including limiting production, markets or technical development to the prejudice of consumers or “tying” the conclusion of contracts to the acceptance by parties of supplementary obligations without necessary connection with the subject of the contracts.⁵¹ Article 82’s list of prohibited abuse of a dominant position is, however, non-exhaustive. The European Court of Justice has construed this concept broadly as “*an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services based on the basis of commercial operators has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition*”.⁵²

Recent decisions of the European Court of Justice have stressed that as part of its primary purpose to prevent distortion of competition, Article 82 is intended to safeguard the interests of consumers rather than to protect the position of particular competitors.⁵³

An undertaking is deemed to abuse its dominant position if it refuses to deal with a commercial partner without any objective justification.⁵⁴ In a refusal-to-deal situation, the proportionality test is sometimes used to assess the abusive character of the dominant undertaking’s behavior.⁵⁵ Under the proportionality test, the dominant undertaking’s refusal to deal will be justified if such refusal is based on a legitimate objective provided refusing to deal is necessary to achieve this legitimate objective.

Legality of ASO’s decision?

Although the issue of ASO’s potential abuse of a dominant position remained undecided, ASO challenged Unibet’s argument before the courts in the summary proceedings. ASO argued that it did not have a dominant position in the meaning of Article 82 of the EC Treaty. Assuming that the relevant market would be the cycling races of international

⁴⁸ ECJ, Case 22/76 United Brands v. Commission [1978] E.C.R. 207, 65.

⁴⁹ ECJ, Case 85/76 Hoffman-La Roche [1979] 3 C.M.L.R., 283–84.

⁵⁰ ECJ, Case 22/76 United Brands v. Commission [1978] E.C.R. 207, 10-129.

⁵¹ K. LENAERTS & P. VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 257 (2005).

⁵² ECJ, Case 85/76 Hoffmann-La Roche [1979] E.C.R. 461, 91.

⁵³ VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 179 & 209 (2007).

⁵⁴ I. VAN BAEL & J.-F. BELLIS, COMPETITION LAW OF THE EUROPEAN COMMUNITY 940 (2005).

⁵⁵ MICHEL WAELBROECK & ALDO FRIGNANT, EUROPEAN COMPETITION LAW 266 (1999).

reputation organized in Belgium, ASO emphasized that this relevant market had not to be limited to its races the Flèche Wallonne and Liège-Bastogne-Liège but that other prestigious cycling races – that ASO does not organize – had to be included in this relevant market, namely the Ronde van Vlaanderen, Gent-Wevelgem, the Tour de Belgique, the Grand Prix de l’E3, the Trois Jours de la Panne, the Flèche Brabançonne, Het Volk, the Grand Prix de l’Escaut, the Tour des Régions Wallonnes, ... According to ASO, it was obvious that the organization of only two cycling races in Belgium did not give ASO a dominant position on the market of the cycling races of international reputation organized in Belgium.

ASO’s assessment of the absence of a dominant position is however subject to discussion. All aforementioned cycling races, including the Flèche Wallonne and Liège-Bastogne-Liège, are not interchangeable in the market of the cycling races of international reputation organized in Belgium. Because of their prestige, such cycling races are subject to the highest media coverage and generate the most revenue for the cycling teams. Each team has a financial interest to participate in all these races and would not consider participating in any other race scheduled at the same time. For this reason, all aforementioned cycling races are scheduled on different dates in order to allow the best teams and the best riders to compete in them. Furthermore, in organizing many of the greatest races of the cycling season, including the Tour de France, ASO might be seen as having “*the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*”.⁵⁶ The conflict with the UCI obviously proves that ASO, like the other grand tour organizers, RCS and Unipublic, has a large market power in the market of the cycling races of international reputation which allows it not only to resist the pressures of the cycling governing body, but also to act independently in proposing an alternative racing circuit.

Subsequently, ASO also argued that it had a legitimate reason to deny Unibet participation to its races and that therefore it could not be considered as abusing a potential dominant position. ASO justified its decision by the illegality of Unibet’s online gambling activities and the unlawful advertisement ASO would make by registering Unibet to its races, which would expose ASO to criminal liabilities under the Belgian gambling laws. However, as it will be described hereunder (see 5.2), the compliance of these Belgian gambling laws with EU law – especially the freedom of establishment and the freedom to provide services – remains subject to much discussion so ASO’s position seems to be challengeable.

In the current context of ASO’s denying Astana participation in its cycling races during the 2008 season, ASO’s justification on the basis of ethical reasons (i.e. combating doping) appears suspect as teams like Rabobank and Cofidis, also involved in doping scandals in the 2007 season, have been granted the authorization to compete. In this context, ASO’s decision could be seen as a “refusal to deal” with Astana without any objective – transparent, fair, and non-discriminatory – justification, constitutive of an abuse of dominant position within the meaning of Article 82 of the EC Treaty.⁵⁷

More generally – assuming ASO would have a dominant position within the meaning of Article 82 of the EC Treaty, any decision of ASO to deny any professional cycling team participation in its races should, in my view, to not be considered an abuse of a dominant position – in the form of an unlawful refusal to deal – (i) be justified by a legitimate sports-related reason and (ii) be necessary to achieve such legitimate reason. Ethical reasons (e.g. combating doping) would be a legitimate sports-related reason. Economic, financial, or political reasons would not be legitimate reasons insofar as such reasons would not be, at least indirectly, sports-related. In this respect, arguments could be found to justify ASO’s refusal to allow a team sponsored by a tobacco company; tobacco sponsorship indeed seems to be in contradiction with the healthy nature of sport. One can however wonder whether a refusal of

⁵⁶ ECJ, Case 22/76 United Brands v. Commission [1978] E.C.R. 207, 65.

⁵⁷ I. VAN BAEL & J.-F. BELLIS, COMPETITION LAW OF THE EUROPEAN COMMUNITY 940 (2005).

tobacco sponsorship is absolutely necessary to guarantee this legitimate objective. Couldn't this objective be achieved by a less detrimental measure? For instance, as it was proposed by Unibet before the Belgian and French courts, couldn't cycling teams sponsored by tobacco companies be allowed to race with equipment having no mention of the name or the logo of the tobacco sponsor so there would be no prejudicial advertisement to the public... Although political reasons do not appear, at a first glance, to constitute a legitimate objective to deny a cycling team participation in races, peculiar circumstances, such as the sponsoring of a cycling team by a political group linked to a criminal organization, might justify such a refusal – if, like in the aforementioned hypothesis, the security of the race would be threatened.

5.2 THE COMPLIANCE OF THE BELGIAN AND FRENCH GAMBLING LAWS WITH EU LAW

For the same reasons as explained above (i.e. courts in summary proceedings deciding on the basis of the “semblance of law” only), the courts in summary proceedings, with the exception of the Court of Commerce of Liège in its initial judgment (see above 4.2.1), have not addressed the issue of the compliance of the Belgian and French laws prohibiting online gambling activities with EU law, especially the freedom of establishment (Article 43 of the EC Treaty) and the freedom to provide services (Article 49 of the EC Treaty). This issue is however subject to much discussion and even to decisions of the European Court of Justice.

European Union Law on Freedom of Establishment and Freedom to Provide Services

Article 43 of the EC Treaty creates a freedom of establishment for companies having their registered office within the European Union. The freedom of establishment involves the right for such companies to pursue an economic activity within any Member State of the European Union through a fixed establishment in another Member State for an indefinite period. Under Article 43 of the EC Treaty, any restriction on the freedom of establishment is prohibited.⁵⁸

Article 49 is the legal basis of the principle of free movement of services within the European Union. Under Article 49 of the EC Treaty, any restriction on the freedom to provide services within the European Union is prohibited in respect of companies which are established in a State of the European Union. The freedom to provide services is to be distinguished from the freedom of establishment in such a way that the supply of services consists of an occupational activity that is not carried out in a lasting way.⁵⁹

In essence, both the freedom of establishment and the freedom to provide services seek to abolish any discrimination against a company established in a State of the European Union by reason of the fact that it is established in a Member State other than that in which the economic activity is to be performed or the services are to be provided. Furthermore, freedom of establishment and freedom to provide services also require the abolition of any restriction, even if it applies without distinction to national companies and to those established in other Member States, when such restriction has the effect to prohibit or otherwise impede the activities of a company established in another Member State where it lawfully performs similar activities or provides similar services.

The EC Treaty provides for some permitted restrictions on freedom of establishment and freedom to provide services. Restrictions on freedom of establishment and freedom to provide services may, under certain circumstances,⁶⁰ be justified (among others) on the

⁵⁸ K. LENAERTS & P. VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 176 (2005).

⁵⁹ *Id.*, 176.

⁶⁰ Restrictions must be limited to what is necessary in order to protect the interests which they seek to safeguard (proportionality-test). K. LENAERTS & P. VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 233 (2005).

grounds of the exercise of public authority and public policy, public security and public health (see Articles 45 and 46 EC Treaty). Because the EC Treaty, however, does not enumerate the permitted restrictions on freedom of establishment and freedom to provide services exhaustively, the European Court of Justice has expanded the scope of the permitted restrictions to the (so-called) “restrictions based on the rule of reason.” Under the rule of reason, restrictions on the freedom of establishment and freedom to provide services are permitted provided (i) they are justified in the public interest (including for instance, consumer protection, protection of investors’ confidence in the domestic financial markets, the maintenance of order in society, combating fraud, ensuring the cohesion of the tax system, respecting fundamental rights in general), (ii) they apply without distinction to all companies regardless of the Member State in which they are established, and (iii) they are “objectively justified” by the need to comply with such objectives in the public interest (i.e. proportionality-test).⁶¹ In this respect, the proportionality-test is not met if the public interest is already protected by the rules of the State of establishment of the provider of services and the same result can be obtained by less restrictive rules.⁶²

Enforcement of the Freedom of Establishment and Freedom to Provide Services

The European Court of Justice ensures that in the interpretation and application of the Treaties the European law is observed (Article 220 EC Treaty). However, the enforcement of the European law is left, in first place, to the national courts.⁶³ A dispute relating to European law – e.g. question whether the national law of a Member State is in line with the freedom of establishment and the freedom to provide services – is generally brought before the Court of Justice in accordance with the following procedures:

- ✦ The European Commission may bring a case against a Member State which has failed to fulfil its Treaty obligations – e.g. by enacting a national law that is not in line with the freedom of establishment and the freedom to provide services.⁶⁴
- ✦ The European Court of Justice affords legal protection to natural and legal persons where a national court makes a reference for a preliminary ruling on the interpretation of Treaty provisions or on the validity or interpretation of the European institutions.⁶⁵ If Unibet’s legal actions against ASO had been pleaded in regular proceedings, it is likely that the courts would have made a reference for a preliminary ruling on the interpretation of the Treaty provisions relating to the freedom of establishment and the freedom to provide services in order to assess the conformity of the Belgian gambling laws with European law. Such a procedure is contrary to the urgent character of the summary proceedings.

In both procedures, Member States whose national law is not in dispute may intervene in order to defend either the legality or the illegality of the national law disputed (Article 40 Statute of the Court of Justice).⁶⁶ In other words, it is therefore possible that in a case where the conformity of Belgian gambling laws is to be assessed with European law, France and Germany join Belgium to defend the legality of Belgian gambling laws – both Member States may have a common interest in Belgian gambling laws’ conformity with European law because their gambling laws provide similar requirements – while England and Spain might intervene in order to argue that European law must prevail – because of a matter of general interest.

⁶¹ K. LENAERTS & P. VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 236 (2005).

⁶² ECJ, Case 154/89 Commission v. France [1991] E.C.R. 659, 15.

⁶³ K. LENAERTS & P. VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 443 (2005).

⁶⁴ K. LENAERTS & P. VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 444 (2005).

⁶⁵ K. LENAERTS & P. VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 445 (2005).

⁶⁶ The Statute of the Court of Justice is available at <http://curia.europa.eu/en/instit/txtdocfr/txtsenvigreur/statut.pdf>.

Compliance of the Belgian and French gambling laws with the EU freedom of establishment and freedom to provide services?

The Belgian and French laws prohibiting Unibet of running online activities and sanctioning the advertisement thereof in Belgium and in France (for instance through the participation of the Unibet cycling team to cycling races) are seen by some legal scholars as violating the EU freedom of establishment and freedom to provide services. These legal scholars argue that, since the online gambling company Unibet.com was granted a license to run online gambling activities in different Member States of the European Union, like Italy and England, Unibet.com had to be authorized to perform its services freely in every country of the European Union. This was, however, not the case in Belgium, as the report of the Belgian Gaming Commission confirmed it.⁶⁷ To the extent they served for ASO as the legal basis for denying Unibet participation to its races in Belgium and in France, Belgian and French gambling laws are said to constitute an unlawful hinder to Unibet's freedom of establishment in the European Union and the free movement of Unibet's services within the European Union.

The Gambelli and Placanica rulings of the European Court of Justice

In its Gambelli⁶⁸ and Placanica⁶⁹ cases, the European Court of Justice has had the opportunity to decide on the compliance of the Italian gambling laws with the EU freedom of establishment and freedom to provide services. In these cases, the European Court of Justice ruled that Member States of the European Union are prohibited from preventing online gambling companies whose shares are quoted on the regulated market to obtain a license necessary to pursue their activities.⁷⁰

In Italy, an operator wishing to pursue an activity in the betting and gaming sector, like Gambelli and Placanica, must comply with national legislation characterized by the following elements:

- the obligation to obtain a license;
- a method of awarding those licenses, by means of a tender procedure excluding certain types of operator and, in particular, companies whose individual shareholders are not always identifiable at any given moment – in practice, all companies quoted on the regulated markets;
- the obligation to obtain a police authorization; and
- criminal penalties for failure to comply with the legislation at issue.

The European Court of Justice ruled that, *“in so far as the [Italian] legislation (...) prohibits – on pain of criminal penalties – the pursuit of activities in the betting and gaming sector without a licence or police authorisation issued by the State, it constitutes a restriction on the*

⁶⁷ The Belgian Gaming Commission confirmed that the online gambling company Unibet.com ran illegal betting activities in Belgium and made unlawful advertisement through the sponsoring of its cycling team Unibet. See above footnote 39.

⁶⁸ ECJ, Case 243/01, Piergiorgio Gambelli and Others, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:007:0007:0007:EN:PDF>.

⁶⁹ ECJ, Joined Cases 338/04, 359/04 and 360/04, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnrec=alldocnrec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=Placanica&domaine=&mots=&resmax=100>.

⁷⁰ See Th. Verbiest & E. Heffermehl, *Placanica ruling strengthens the case for private online gaming operators in their battle against national monopolies*, available at <http://www.droit-technologie.org/actuality-1024/placanica-ruling-strengthens-the-case-for-private-online-gaming-operat.html>.

*freedom of establishment and the freedom to provide services.*⁷¹ To be legal under EU law, such a restriction on the freedom of establishment and the freedom to provide services must be permitted under Articles 45 or 46 of the EC Treaty or justified for reason of public interest (“rule of reason”). On that point, the European Court of Justice acknowledged that “*a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order.*”⁷² In application of its rule of reason, the European Court of Justice had therefore to assess (i) whether “*the [restriction] is suitable for achieving the objective invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives*” (proportionality-test), and (ii) whether “*the restriction [is] applied without discrimination.*”⁷³

According to the European Court of Justice, the goal of the Italian legislation was to “[prevent] the use of betting and gaming activities for criminal and fraudulent purposes by channelling them into controllable systems.”⁷⁴ Such goal, as part of the aforementioned reasons of public interest (i.e. the prevention of both fraud and incitement to squander on gaming), may justify the restriction on the freedom of establishment and the freedom to provide services. In assessing the proportionality of the licensing requirement, the European Court of Justice considered that “*a licensing system may, in [certain] circumstances, constitute an efficient mechanism enabling operators active in the betting and gaming sector to be controlled with a view to preventing the exploitation of those activities for criminal or fraudulent purposes.*” With respect to the tender procedures, the European Court of Justice observed that the Italian legislation created a “blanket exclusion” to the extent that all companies quoted on the regulated markets, i.e. the leading operators in the betting and gaming sectors, were excluded from the tender procedures. According to the European Court of Justice, “[such] blanket exclusion goes beyond what is necessary in order to achieve the objective of preventing operators active in the betting and gaming sector from being involved in criminal or fraudulent activities” and “*there are other ways of monitoring the accounts and activities of operators in the betting and gaming sector which impinge to a lesser extent on the freedom of establishment and the freedom to provide services, one such possibility being the gathering of information on their representatives or their main shareholders.*”⁷⁵ Consequently, the European Court of Justice ruled that “*Articles 43 of the EC Treaty [freedom of establishment] and 49 of the EC Treaty [freedom to provide services] must therefore be interpreted as precluding national legislation such as [the Italian gambling laws], which excludes – and, moreover, continues to exclude – from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets.*”⁷⁶

⁷¹ ECJ, Joined Cases Placanica and Others 338/04, 359/04 and 360/04, par. 42. The European Court of Justice described the restrictions on the freedom of establishment and the freedom to provide services further as follows: “*In the first place, the restrictions imposed on intermediaries such as [Gambelli and Placanica] constitute obstacles to the freedom of establishment of companies established in another Member State, such as [Company X], which pursue the activity of collecting bets in other Member States through an organisation of agencies (...) operated by [Gambelli and Placanica].*” “*Secondly, the prohibition imposed on intermediaries such as [Gambelli and Placanica], under which they are forbidden to facilitate the provision of betting services in relation to sporting events organised by a supplier, such as [Company X], established in a Member State other than that in which the intermediaries pursue their activity, constitutes a restriction on the right of that supplier freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services.*”

⁷² ECJ, Joined Cases Placanica and Others 338/04, 359/04 and 360/04, par. 46.

⁷³ ECJ, Joined Cases Placanica and Others 338/04, 359/04 and 360/04, par. 49.

⁷⁴ ECJ, Joined Cases Placanica and Others 338/04, 359/04 and 360/04, par. 55.

⁷⁵ ECJ, Joined Cases Placanica and Others 338/04, 359/04 and 360/04, par. 62.

⁷⁶ ECJ, Joined Cases Placanica and Others 338/04, 359/04 and 360/04, par. 64.

The impact of the Gambelli and Placanica cases

Since most leading online gambling companies are quoted on the regulated market, including Unibet.com whose shares are quoted on the Stockholm stock exchange, the Gambelli and Placanica rulings give the online gambling companies a powerful lever to access the European gambling market and to break up the national monopolies. According to legal scholars, these rulings show that Belgian and French gambling laws limiting the access to the Belgian and French gambling markets to national monopolistic companies (like Lotto in Belgium, and La Française des Jeux and the PMU in France) are clearly in contradiction with the EU freedom of establishment and freedom to provide services.

However, it is important to note that in its Gambelli and Placanica rulings, the European Court of Justice has only made a judgment on the compliance of the Italian gambling laws with EU law. Though they have an important value for the interpretation of EU law, the legal value of these rulings is limited to the Gambelli and Placanica cases. These rulings do not make the Belgian and French gambling laws automatically non-compliant with EU law. To this end, an express ruling of the European Court of Justice is required.

If requested to assess the compliance of the Belgian gambling laws with EU law, it is therefore not sure that a Belgian court (in regular proceedings) would find the Belgian gambling laws in violation with the EU freedom of establishment and freedom to provide services. It is more likely that a Belgian court would make a reference to the European Court of Justice for a preliminary ruling on the interpretation of the EC Treaty and on the compliance of the Belgian gambling laws with the EC Treaty.

In this context, Belgium is proactively – in anticipation of a potential non-compliance ruling of the European Court of Justice (?) – reviewing its current gambling legislation, seeming to admit that Belgian laws are not completely in line with EU law.

6 THE AFTERMATH OF THE UNIBET CASE: ASTANA AS THE NEW “SCAPEGOAT”

The Unibet case does not mean the end of the war between the UCI and ASO. With Unibet ceasing operations at the end of the 2007 season, ASO has been quick to replace its former “scapegoat” with a new one, Astana. Using Astana’s involvement in doping scandals as a pretext to exclude Astana cycling team from its races, ASO is continuing to boycott the UCI Pro Tour, taking top riders like Alberto Contador, Levi Leipheimer, and Andreas Klöden hostage.

Though Astana has proved to be less litigation-minded than Unibet so far, the scenario of the 2007 season seems to repeat with the UCI threatening to stop ASO organizing its race Paris-Nice⁷⁷ and calling the Pro Tour Teams to boycott the race. Moreover, the UCI also warned the teams and their riders that they would be sanctioned if they participated in the race. The potential sanctions for the riders could amount to a six-month racing ban and a fine of CHF 10,000 (± USD 10,000) and could go as far as an exclusion from the World Championships and the Olympic Games, both events being (partially) organized by the UCI.⁷⁸ In response, ASO’s plan to organize the race under the aegis of the French Cycling Federation has materialized this year because both the UCI and ASO did not reach any amicable arrangement prior to the start of the race. By backing ASO for the organization of the race Paris-Nice in violation of the UCI Cycling Regulations, the French Cycling Federation is now risking being suspended from the UCI.⁷⁹ The French Cycling Federation however confirmed its full support of ASO and its willingness to go to court against the UCI, if necessary.

⁷⁷ <http://www.velonews.com./article/11580>.

⁷⁸ <http://www.velonews.com./article/73091>.

⁷⁹ <http://www.velonews.com./article/73065>.

At the center of the battle field, the teams and their riders are caught. In the words of Patrick Lefevere, manager of the Pro Tour Team Quick Step, “*now we must choose between the firing squad and the guillotine. If we say yes to the race, then we’re sanctioned. If we say yes to the UCI, then we don’t race the Tour.*”⁸⁰ Facing the escalation of the conflict between the UCI and ASO and the important consequences on the teams and their riders, some team managers start to call the UCI Pro Tour into question.⁸¹ Others note the existence of two competing cycling calendars: the UCI Pro Tour and the ASO Tour.⁸² Unsurprisingly, the group representing the Pro Tour Teams, the IPCT, recently appealed the Court of Arbitration for Sport to arbitrate the conflict.⁸³

The latest step in the conflict may be seen as a real threat for the development of professional cycling as a world-wide sport. ASO, as a powerful commercial organization, is clearly seeking to preserve its interests, and even to widen its power and control in cycling. ASO’s ultimate goal is however not the promotion and the development of cycling but the furthering of its commercial and financial interests. Promotion and development of cycling obviously falls within the goals of the UCI, which, however, has failed in its leadership role. In the absence of a quick agreement between the UCI and ASO, one may fear worse consequences for cycling in the coming months.

Maybe the intervention of a neutral third-party arbitrator, or at least mediator, like the Court of Arbitration for Sport, might pacify the parties. In the current situation, the conflict between the UCI and ASO has escalated to such a degree that both parties are no longer able to communicate in a positive way. As an institution independent of any sports organization, with the function of providing services in order to facilitate the settlement of sports-related disputes through arbitration or mediation,⁸⁴ the Court of Arbitration for Sport seems to be the ideal forum for solving the dispute.

Affaire à suivre ...

⁸⁰ <http://www.velonews.com/.article/73004>.

⁸¹ <http://www.velonews.com/.article/71421>.

⁸² <http://www.velonews.com/.article/71421>.

⁸³ <http://www.velonews.com/.article/73030>.

⁸⁴ See Court of Arbitration for Sport’s website available at <http://www.tas-cas.org/en/20questions.asp/4-3-214-1010-4-1-1/5-0-1010-13-0-0/>.