

## State aid in sport: Striking a difficult balance

### SUMMARY

Under the Treaty on the Functioning of the European Union, a measure constitutes state aid if it grants a selective economic advantage to one or more enterprises through state resources, thus distorting or threatening to distort competition. However, not all forms of state aid are prohibited. Indeed, under certain conditions the European Commission may consider the state aid acceptable. This is notably the case when the support measures pursue a common objective or underpin the general interest. The Commission has developed a methodology to determine the compatibility of support measures with the Treaty provisions. It includes a 'balancing test', which is based on various questions aimed at analysing the negative effects of the aid measure and weighing them against its positive effects in reaching the objective of common interest.

The decisions on state aid for sports infrastructure adopted up until recently revealed a consistent and favourable approach on the part of the Commission towards aid measures for sports infrastructure. In the process, the Commission translated some recurring general principles into operational exemption criteria. Building on those principles, in 2014, the Commission's General Block Exemption Regulation clarified the types of sports infrastructure investment that should be considered exempt from the EU's general laws on state aid.

The European Commission has not yet articulated sector-specific rules regarding support measures granted to individual professional sports clubs. However, prompted by complaints from individual citizens, the case law on the Commission's discretion in handling complaints, and the impact of the European Ombudsman's recommendations, the Commission has substantially increased the number of in-depth investigations into various public support measures in favour of certain professional football clubs in the last few years.



### In this briefing:

- Background
- Rationale behind state aid control and its application to the sports sector
- Evolution in the European Commission approach to state aid in sports
- State aid for sports infrastructure
- State aid for sports clubs

## Background

Sport has a unique capacity to capture public attention and even [impact](#) political debate. In July 2016, the European Commission published a much anticipated [decision](#) in state aid investigation cases concerning several Spanish professional football clubs, among which figure FC Barcelona, Real Madrid, and Valencia. Underscoring sport's uniquely political nature, the investigation began following the European Ombudsman's [recommendation](#) that the Commission should stop delaying a decision on whether to open infringement proceedings, following a complaint from citizens alleging that the Commission's inaction might be linked to the fact that the Commissioner responsible at the time supported one of the football teams in question, and was a former Minister in the Spanish government that agreed the state aid provided. The Commission concluded that the tax payers' money granted was to be repaid, as the funds gave those clubs an unfair advantage over other football clubs competing in the European Union (EU).

With citizens being painfully aware of the cost of hosting mega-sporting events, such as the football World Cup<sup>1</sup> or the Olympic Games,<sup>2</sup> state aid control in the area of sport could serve as a useful tool to ensure that taxpayers' money is not wasted. For example, efficient state aid control can prevent ill-advised spending, such as building a disproportionately large stadium for a club or municipality. Similarly, it can dissuade public authorities from financially assisting a bankrupt professional football club, without preparing a viable restructuring plan for the future.

In its 2012 communication on '[EU state aid modernisation](#)', the Commission argued that efficient state aid control can help EU countries 'strengthen budgetary discipline and improve the quality of public finances – resulting in a better use of taxpayers' money.'

More generally, the purpose of state aid rules is to ensure that economic competition among EU countries does not undermine the internal market through competition distortion. Today, more than half a century after the foundation of the European Economic Community, ensuring the continuous functioning of the internal market [remains](#) a priority for the European Commission in particular, and the EU in general.

## Rationale behind state aid control and its application to the sports sector

The rules on state aid form one of the four competition law areas, together with the rules on [cartels, abuse of dominant position, and mergers](#).

Under [Article 107\(1\)](#) of the Treaty on the Functioning of the EU (TFEU), a measure constitutes state aid if it grants a selective economic advantage to one or more undertakings,<sup>3</sup> through state resources, distorting or threatening to distort competition and affecting cross-border trade. The thresholds for these requirements are low, meaning that it is relatively easy for a measure to be considered as state aid. The basic prohibition against aid in Article 107(1) is accompanied by some exceptions under Article 107(2) and 107(3). The former are automatically allowed, whereas the latter may be treated as lawful if the measures pursue a common objective or underpin the general interest.

In situations where an aid measure fulfils, or potentially fulfils the conditions of Article 107(1), EU countries need to notify their intentions to the Commission (Article 108(3)), and demonstrate that the measure is compatible with the internal market, on the grounds that it is in the public or general interest. Under the rules, the Commission must give its approval for the aid to be received, and EU countries must not transfer aid until that permission has been granted. Failure to do so runs the risk of the

Commission finding the aid to be illegal and ordering the recipient to repay the sum received.

For any party who feels disadvantaged, a ten-year window is allowed to launch a challenge regarding the state aid granted and lodge a complaint with the Commission.

#### The compatibility assessment

If a potential aid measure for the sports sector falls within the scope of Article 107(1) TFEU, the EU country in question may refer to a provision in Article 107(3)(c) TFEU allowing a derogation from the general prohibition. This provision facilitates the development of certain economic activities, as long as the distortive effects of the measure are limited.

The Commission has developed a methodology to determine the compatibility of such measures with the treaty provisions. It includes a '[balancing test](#)', which is based on the following questions:

1. Is the aid measure aimed at a well-defined objective of common interest?
2. Is the aid well-designed to deliver the objective of common interest, i.e. does the proposed aid address the market failure or other objectives?
  - i. Is the aid an appropriate policy instrument to address the policy objective concerned?
  - ii. Is there an incentive effect, i.e. does the aid change the behaviour of the aid recipient?
  - iii. Is the aid measure proportionate to the problem tackled, i.e. could the same change in behaviour be obtained with less aid?
3. Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

The test helps the Commission to analyse the negative effects of the aid measure and weigh them against the positive effects in reaching the objective of common interest. For example, if a football club builds a new stadium with state aid input, and as a result boosts its revenue, the club could thus obtain a selective economic advantage over other national or EU clubs. To determine the positive effects of the measure, the Commission will therefore look for the objective of general interest, which must be well-defined.

Following the same logic, if the aid measure contributes to promoting sport in a city or region, improving security and/or creating jobs, and altogether its positive effects outweigh the negative ones, then the state aid can be considered as justified and compatible.

### Evolution in the European Commission approach to state aid in sports

Broadly speaking, the EU's competence to intervene in sports-related matters is feeble. [Article 165](#) TFEU merely provides a supporting competence. That being said, the EU state aid rules have always applied to sport, but the precise scope for public intervention has not always been entirely clear.

As early as 1974, the decision of the European Court of Justice (ECJ) in the [Walrave and Koch case](#), highlighted that sport is subject to EU law 'in so far as it constitutes an economic activity'. In 2006, the ruling of the ECJ in the [Meca-Medina case](#) confirmed that all sporting organisation regulations which have economic effects are open to scrutiny by the competition authorities, and their legality under competition law can be examined on a case-by-case basis.

Application of EU competition law to the sports sector is therefore the result of fairly recent developments. Experts [claim](#) that, in spite of the notification obligation in sport-related state aid cases, in the past, EU countries preferred to take the risk of not notifying measures that constitute or might constitute state aid, based on the assumption that no precedence exists of Commission sanctions of state aid measures for sporting entities.

The procedures by which the Commission examines state aid are dealt with only very succinctly in Article 108 TFEU. They have mainly developed through the Court of Justice case law, which was consolidated and codified by [Council Regulation \(EC\) No 659/1999](#). It should be noted that under Article 20 of Regulation (EC) No 659/99, the Commission may independently decide to examine information regarding alleged unlawful aid. While the normal procedure begins with a notification, the procedure regarding unlawful aid can be triggered by a complaint launched by disadvantaged competitors. The Commission's approach appears to have changed, however, particularly in the past five years. Since 2011, it dealt with over a dozen different sport-related state aid [cases](#).

The primary reason for this increased interest in the sports sector appears to reside in the numerous [complaints](#) received from EU citizens. Researchers [argue](#) that the rise in complaints was prompted by the economic crisis and the growing inclination of citizens to question public spending. Seemingly, what citizens [disapproved](#) of most was the fact that public authorities chose to invest, for example, in professional football, rather than in improving the state of the economy, especially in light of high unemployment rates and high levels of public debt.

In addition, the [joint Commission-UEFA statement](#) on the [UEFA Financial Fair Play Regulations](#) was published in 2012, and was followed by a Commission [request for information](#) addressed to the (then) 27 Member States, regarding public financing of infrastructure used by professional football clubs at the end of the same year. In 2013, the Commission proceeded to open a first round of investigations regarding six clubs in the Netherlands, before focusing on seven clubs in Spain.

Experts [maintain](#) that the late emergence of state aid control and the Commission's selective approach in the area of professional sport may be due to the fact that its limited staff and resources are devoted to the supervision of many economically more significant and strategically more important sectors (such as, for example, the application of state aid rules to individual [tax rulings](#) delivered by EU countries).

## State aid for sports infrastructure

### **The Leipzig/Halle case – a watershed in decisional practice**

The judgment in the [Leipzig/Halle case](#) (2011) on airport infrastructure marked a turning point in the Commission's approach to the public financing of sports infrastructure projects. It made clear that the economic character of subsequent changes of use of infrastructure determines whether the funding of its construction is subject to state aid control. In other words, only the financing of infrastructure that is not commercially exploited at a later date, and built in the interest of the general public, is in principle excluded from the application of state aid rules.

Since most sports infrastructure is commercially exploited, it became clear that the state aid rules apply to the way in which such infrastructure is funded. As a result, EU countries began to notify the Commission of their support measures for sports infrastructure, triggering the development of decisional practice.

From 2011 to 2013, the European Commission adopted various decisions on state aid measures for stadiums or other sports infrastructure. Most cases involved football stadiums, but there have also been decisions on aid for the construction and/or renovation of a [swimming pool](#), an [ice arena](#), [a rugby stadium](#), [a Gaelic games stadium](#), and a [multifunctional sports arena](#).

The decisions [revealed](#) a consistent and favourable approach towards aid measures for sports infrastructure. In the process, the European Commission translated some recurring general principles into operational criteria regarding exemption of the aid measures under Article 107(3)(d) TFEU.

Firstly, the European Commission consistently used the specificity of sports – referring to the inherent characteristics of sport which set it apart from other economic and social activities – to demonstrate how public support for sports infrastructure can support the common interest. State aid decisions thus regularly made reference to [Article 165](#) TFEU in addition to the Amsterdam [Declaration on Sport](#), to strengthen the argument that the aid measure is in line with the common interest.

Secondly, in all of the decisions, the European Commission continued to emphasise and acknowledge the problem of under-investment in sports infrastructure, and to conclude that the aid measure is necessary and well-designed.

Finally, the principle that subsidised sports infrastructure is not to be used exclusively by a single professional sport user remained valid. The Commission applies this principle as a safeguard to ensure the proportionality of the aid measure and to limit its distortive effect.

### **General Block Exemption regulation**

Building on the principles established through the above-mentioned European Commission decisions, the 2014 [General Block Exemption Regulation](#) (GBER), [amended](#) in [May 2017](#), clarifies the types of sports infrastructure investment that should be considered exempt from the EU's general laws on state aid. The conditions for exemption are detailed in Article 55 and are as follows:

- Sports infrastructure is not to be used exclusively by a single professional sports user. It has to be offered to other professional or non-professional sports users for at least 20 % of the time capacity each year. If the infrastructure is used by several users simultaneously, corresponding fractions of time capacity usage have to be calculated.
- Access to the sport or multifunctional recreational infrastructures is granted on a transparent and non-discriminatory basis. Users which have financed at least 30 % of the investment costs of the infrastructure may be granted preferential access under more favourable conditions, provided those conditions are made publicly available. Pricing conditions for professional sports clubs must be made publicly available.
- In public-private partnerships, the concessionaire is chosen on the basis of an open, transparent and non-discriminatory tender, respecting the applicable procurement rules.
- Any concession or other entrustment to a third party to construct, upgrade and/or operate the sports or multifunctional recreational infrastructure is to be assigned on an open, transparent, and non-discriminatory basis, respecting the applicable procurement rules.

Aid may take the form of investment aid, including aid for construction or upgrade of sports and multifunctional recreational infrastructure or operating aid for sports infrastructure.

In addition, to benefit from an exemption, the aid measure must comply with the common provisions of the GBER and may not exceed the following thresholds: for investment aid, a maximum €30 million per project (with total costs not exceeding €100 million) and for operating aid, a maximum €2 million per infrastructure per year.

The Commission must be notified of aid measures that do not fulfil all of the above criteria. This does not mean that the aid will be declared incompatible within the meaning of Article 107 TFEU, but simply implies that it must be directly assessed under, and declared compatible with, the Treaty rules.

#### **Euro 2016 and state aid to French stadiums**

The renovation of the French stadiums that hosted the European football championship in 2016 provides a good illustration of the balance necessary in the compatibility assessment. France [notified](#) the European Commission of its plans to spend some €1 052 million on nine different stadiums. The state aid in this case involved an additional element, namely, that it was granted for the purpose of hosting a mega-sporting event.

Experts [argue](#) that this put the European Commission in a delicate position. A negative decision could have weakened France's position, since mega-sporting events usually require an injection of public money. In contrast, raising no objection would have further antagonised the growing number of mega-sporting event detractors.

Upon examination, the European Commission concluded that France was pursuing a well-defined objective in the common interest, and consented that there was a public need for the modernisation and enlargement of the stadiums. It also referred to Article 165 TFEU, and underscored that supporting sporting activities was a state responsibility.

While it is debatable whether the stadiums genuinely required renovation, since most of them had already been renovated prior to the 1998 World Cup,<sup>4</sup> the European Commission stressed that it was important to satisfy the infrastructure criteria set by UEFA and raised no further objections regarding the construction and renovation of the stadiums.

## **State aid for sports clubs**

### **Overview**

Unlike state aid support for sports infrastructure, where soft policy has gradually evolved into hard law,<sup>5</sup> the European Commission has yet to articulate sector-specific rules regarding support measures for professional sports clubs, through the adoption of individual 'precedent' decisions on the compatibility of different types of state aid.

Prior to 2013, the European Commission initiated only two formal investigations into alleged unlawful state aid to professional sports clubs (against the Italian [Salva-Calcio act](#) on accounting rules, and regarding the sale of land to [football club AZ](#) in the Netherlands), in which it concluded that the measures did not constitute state aid.

The situation began to change in 2013, when the European Commission opened a series of in-depth investigations into various public support measures in favour of certain [Spanish](#) and [Dutch](#) professional football clubs (including tax privileges, the transfer and sale of land and property, state guarantees, bank loans, and debt waivers).<sup>6</sup>

Although the involvement of individual citizens can at least partly account for this surge of enforcement activity, a number of other factors have additionally contributed, among which is the case law on the European Commission's discretion in handling complaints, and the impact of the European Ombudsman's recommendations.

### **Case law on handling of complaints**

In a series of judgments beginning in 2004, the European Court of Justice (ECJ) significantly enhanced protection of complainants' rights in state aid procedures, and clarified the Commission's duties when handling complaints. The ECJ judgment in the [Athinaiki Techniki](#) case (2008) is of particular importance, since it upheld that a complaint regarding allegedly unlawful aid inevitably brings the European Commission to the

preliminary examination stage, which must be closed with a formal decision addressed to the EU countries. As a result of this jurisprudence, it became clear that the European Commission has little room for discretion in setting state aid enforcement priorities.

In the wake of the ECJ judgment in *Athinaïki Techniki*, the European Commission amended its [Procedural Regulation](#), and no longer has a duty, but rather a discretionary power to investigate information received by persons other than interested parties. For example, in 2014, the Commission [denied](#) the status of complainant to a number of individual supporters and minority shareholders of the Rangers Football Club in respect of allegations against their city rivals. The Commission rejected the complaint through an administrative letter and decided not to investigate the matter on its own initiative.

However, between 2008 and 2013, under Article 10(1) of the original [Procedural Regulation](#), the Commission was bound to act on every complaint – regardless of the legitimate interest of the complainant. This explains why citizen complaints alleging unlawful state aid to Dutch and Spanish football clubs lodged during this period automatically triggered the preliminary assessment stage, and eventually the decision to open formal investigation procedures.

### **European Ombudsman recommendations**

In 2009, a representative of a number of investors in European football clubs lodged a complaint about the preferential tax treatment of four major Spanish football and basketball clubs. More than 25 months later, and still without information on the progress of the case, the complainant turned to the Ombudsman. The complainant argued that the European Commission had failed to make a timely decision on whether or not to open the formal investigation procedure. Moreover, the complaint suggested that the Commission's inaction might be linked to the fact that the then Vice-President of the European Commission and Commissioner for Competition, Joaquín Almunia, supports one of the football clubs concerned and was a Minister in the Spanish government that had decided on the tax advantages at the time.

In 2013, the European Ombudsman (Emily O'Reilly) concluded an [inquiry](#) into the allegations, and urged the European Commission to make a prompt decision on whether to start infringement proceedings. Even though the Ombudsman did not investigate whether or not there was a conflict of interest, she stressed that 'the continuing failure to decide on what to do in this case – more than four years now after the complaint was received – can only add to this perception .... Rather than allaying suspicions regarding a conflict of interests, and regarding inappropriate influences on the decision making process, the Commission's failures here have actually added to those suspicions'.

Two days after receiving the Ombudsman's recommendation, the European Commission opened an investigation, not only into the tax privileges granted to four Spanish football clubs, but also into state guarantees in favour of three Spanish football clubs in Valencia and land transfers by Madrid City Council to Real Madrid.

In the European Commission's reply, Vice-President Almunia made a number of [critical observations](#) regarding the Ombudsman's inquiry and the 'insinuation' that his support for Athletic Club Bilbao could give the impression of a conflict of interests. Almunia also contested the assertion that the Commission's decision to open an in-depth investigation on 18 December 2013 might result from the Ombudsman's announcement of 17 December 2013, since 'the adoption of a case is prepared through a work of often months and is fixed weeks in advance'.

### Results of the investigations against

#### Real Madrid, FC Barcelona, Athletic Bilbao, Osasuna, FC Valencia, Hercules and Elche

In July 2016, the Commission officially [ordered](#) seven Spanish football clubs to repay public aid received unduly in the form of tax advantages and public bank guarantees. Real Madrid, FC Barcelona, Athletic Bilbao and Osasuna had, since 1990, enjoyed an exemption from the obligation to register as professional sporting limited liability companies, thereby benefiting from a preferential corporate tax rate of 25 %, rather than the 30 % applicable. Although this exemption was removed in January 2016, these clubs will have to pay unpaid taxes at between 0 and €5 million per club. The Spanish authorities will determine the total amounts to be recovered.

A second investigation looked into the public guarantees provided by a public entity, the Instituto Valenciano de Finanzas, to three clubs in the Community of Valencia – FC Valencia, Hercules and Elche – when they were experiencing financial difficulties. These guarantees covered bank loans of €75 million for FC Valencia in 2009, €18 million for Hercules in 2010 and €14 million for Elche in 2013. According to the European Commission, the clubs in question benefited on this basis from an undue economic advantage via these loans, which they received on more favourable terms, even though none of them had drafted a restructuring plan or compensation measure. FC Valencia was ordered to repay €20.4 million, Hercules €6.1 million and Elche €3.7 million.

Finally, Real Madrid was also held accountable for having enjoyed an undue advantage in the framework of a transfer of ownership for land between the club and the Madrid City Council. This land, which at the time of its acquisition was valued at some €595 000, appeared 13 years later, in an operation to offset mutual debts, with a value of €22.7 million. According to the European Commission's investigations, the operation was over-valued by €18.4 million.

In November 2016, Madrid City Council [received](#) the sum of €20.3 million from Real Madrid corresponding to the repayment of the unlawful state aid plus interest.

## Endnotes

- <sup>1</sup> For example, the Brazilian authorities were confronted with [mass protests](#) by dissatisfied citizens before and during the World Cup of 2014.
- <sup>2</sup> Several [campaigns](#) were held in Madrid against hosting the 2020 Olympic Games, the citizens of Munich voted in a [referendum](#) against hosting the 2022 Winter Olympics, and Budapest withdrew its bid for the 2024 Olympic Games, in the wake of a [petition](#) signed by more than a quarter of a million people, claiming that the money would be better spent on public services.
- <sup>3</sup> Case law upholds that the concept of an [undertaking](#) encompasses every entity engaged in economic activity, regardless of the legal status of the entity or how the entity finances itself.
- <sup>4</sup> R. Craven, 'State aid and sports stadiums: EU sports policy or deference to professional football', 2014 35(9) European Competition Law Review, p. 453, p. 457.
- <sup>5</sup> B. Van Rompuy, O. van Maren, [EU control of state aid to professional sport: why now?](#), Asser Institute, February 2016, p. 7.
- <sup>6</sup> See sub-section on European Ombudsman's recommendations.

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