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Sport and State Aid—Reining in the Populist Gesture

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I. INTRODUCTION

Sport's ability to capture public attention and generate intense loyalties and rivalries is not overlooked by public representatives with budgets to spend. A recent focus by the European Commission on State Aid in sport has sought to reduce the risk of populist gestures causing controversy between Member States by clarifying how they may channel public money into their national sports teams and infrastructure without causing important distortions in economic (and ultimately sporting) competition.

However, at the very same time, as if to remind law-makers of sport's uniquely political nature, an unprecedented controversy has erupted in which the European Ombudsman has accused the EU's (Spanish) Commissioner for competition of maladministration for failing to initiate investigations into public support for some notable Spanish football clubs, including the club that the Commissioner is said to support.

II. EU STATE AID LAW AND SPORT

In light of sport's social, public health, and political dimensions, public spending plans across the European Union rightly allow for investment in sports facilities, teams, training, and infrastructure. EU law and policy not only recognize the value of this investment, but a special legal status has been afforded to sporting issues in the Treaty on the Functioning of the European Union (at Article 165), alongside other major public priorities.

EU State Aid law, on the other hand, is designed to serve another major EU priority: that of ensuring a level playing field among economic actors within the EU's internal market by limiting the ability of Member States to distort competition by selectively offering public money or any other support (including tax breaks, regulatory concessions, or anything which creates a more favorable trading environment), to particular undertakings.

Investment in purely public projects (such as building a motorway) will generally be exempt, but where a Member State wishes to invest public money or give any other benefit or support over certain thresholds that will give rise to purely private benefits, the Member State must notify the Commission. It can then block, approve, or add conditions to the aid, depending on the benefit's potential to distort competition within the European Union. The Commission has extensive powers to investigate complaints or conduct its own enquiries regarding potentially distortive aid. Aid that is not notified and approved is deemed invalid, and the Member State may be ordered to recover it.

The EU State Aid rules have always applied to sport, but the precise scope for public authorities to invest in and support sport-related activities without violating EU State Aid rules

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has not been entirely clear. However, a series of recent cases, policy initiatives, and controversies have begun to shed (and will shed more) light on the Commission's policies in this area.

III. DEVELOPMENT OF SPORTS INFRASTRUCTURE

The Commission has recently approved aid providing funding and support to a number of sporting infrastructure projects. These have involved public funding for projects such as modernization works to football stadiums in Belgium, and the construction of multisport arenas in Sweden and Germany. On December 18, 2013, the Commission approved financial support of more than EUR 1 billion by France for the construction and renovation of nine stadiums in order to host the UEFA EURO Championship in 2016.

As an illustration of the analysis required, in the French case the Commission found that the public financing would indeed provide a (private) advantage to the companies involved in the construction and renovation of the stadiums, as well as to the operators and users of the stadiums. And it found that this would indeed have the potential to distort competition among those constructors/operators and their competitors within the European Union. As with all such public financing cases, the task of the Commission was therefore to assess whether the aid could be found compatible on the grounds that it furthered a common EU objective without unduly distorting competition.

The Commission concluded that the project would not have been viable without public support and that the aid granted was limited to the minimum necessary to ensure it would conform to the UEFA requirements in time for the Euro 2016 championship. Crucially, the Commission found that, after the championship, the stadiums would continue to be available for the resident clubs and would also serve as multifunctional arenas for the public for sporting, cultural, and social events. France also committed to set up a system of permanent control of the prices paid by the resident clubs, in order to ensure that the stadiums would be used at market conditions. This, the Commission found in its approval decision, would limit the risk of distorting competition through granting undue advantages to the resident football clubs, compared to the conditions available to competing clubs.

In 2011 the Commission considered and approved the aid aspects of Hungary's multi-year national sport development strategy, which included both building infrastructure and financing youth training. Hungary argued, and the Commission accepted, that the existing infrastructure was significantly underdeveloped and that private investors could not economically fill the gap. Hungary therefore planned to incentivize commercial investments through tax benefits involving potential aid up to EUR 455m by 2017. Football, handball, water polo, basketball, and ice hockey were all to benefit.

The Commission found that the plan was clearly state aid (in that it had a significant potential to distort competition notably between the beneficiaries and their competitors). They then weighed the potential distortion of competition against the goal of increasing the participation of the general public in sporting activities and events, while considering various safeguards that had been proposed to maintain competition. These safeguards included: (i) requiring operators to pay market prices for using the facilities constructed, (ii) setting minimum rental prices, (iii) requiring beneficiary sports clubs to ensure the widest possible benefits to the general public, (iv) ensuring that the infrastructure constructed had a multifunctional character

(and was not for the benefit of the main tenant club only), etc. On balance, the Commission accepted the competition safeguards proposed and approved the scheme.

Thus, where cases are notified to the Commission, approval is usually the result, potentially after a period of negotiation of conditions to ensure the maintenance of undistorted competition.

IV. AID TO PROFESSION FOOTBALL CLUBS

However, the more controversial cases have arisen not from the notification process (like the infrastructure cases above) but, instead, from complaints submitted to the Commission that certain Member States have been distorting competition by offering clandestine financial support to clubs—particularly football clubs—in their territories.

In 2012, UEFA and the Commission issued a joint statement in which the Commission blessed certain rules imposing minimum solvency requirements upon professional clubs within UEFA's competitions. The purpose of these rules is, in part, to ensure stability and avoid potential distortions in the sport arising from the tendency of some clubs to over-borrow and risk insolvency (e.g. to purchase new players). With iconic national clubs in financial danger, the Commission noted that a temptation might arise for Member States to grant a lifeline, whether in the form of a "bail-out," tax breaks, loans on favorable terms, or other forms of support—which would risk violating State Aid rules.

This risk was not merely hypothetical. In October 2012, the Commission addressed a request for information to all Member States concerning potential State Aid given to national football clubs, as it was concerned about un-notified aid. The Commission is said to be still pursuing the leads generated by this inquiry.

Following a complaint from a retired Dutch civil servant in 2010, the Commission opened, in March 2013, an investigation into alleged measures of five Dutch municipalities to support five well-known Dutch football clubs. This investigation is ongoing and relates to waivers of financial claims, lowering rents with retroactive effect, purchase of land at favorable prices, and the purchase of facilities for the benefit of clubs.

In November 2009 the Commission also received a complaint from a representative of investors in a number of European football clubs, alleging that certain Spanish football clubs have benefitted significantly from arrangements that confer exemptions and other advantages in relation to corporation tax, capital gains tax, and income tax. According to the complaint, these advantages have been provided for in Spanish legislation, benefit a small number of clubs, and amount to several billion Euros in value.

In response to what it perceived to be Commission inaction regarding the complaint, the complainant argued that the Commission was delaying a proper investigation because the Commissioner for competition was a Spaniard, made no secret of his support for one of the football clubs in question, and had been a Minister in the Spanish government which had approved certain of the tax advantages in question. By December 2011 the Commission had not opened a formal investigation and the complainant took the matter up with the European Ombudsman, responsible for identifying incidents of maladministration on the part of the EU's institutions.

In an unprecedented decision of December 16, 2013, the Ombudsman found after investigation (a) that the Commission had failed to take a timely decision on whether infringement proceedings against Spain should be initiated; and (b) that:

the Commission has failed to allay suspicions that the relevant Commissioner has a conflict of interests and that its inaction reflects an unwillingness by that Commissioner to start infringement proceedings which might impact negatively on a football club with which it is acknowledged that he has close links.

On December 17, 2013 the Ombudsman issued a press release calling on the Commission to act immediately to open an investigation against Spain, or justify its refusal to do so. The next day the Commissioner's spokesman called the allegations of conflict of interests "unacceptable" and the Commission has refused any suggestion of bias. Nonetheless, the Commission opened three investigations concerning public support in favor of seven Spanish professional football clubs.

According to the Commission, Real Madrid FC, Barcelona FC, Athletic Club Bilbao, and Club Atlético Osasuna all are said to have availed of a preferential corporate tax rate by enjoying an exemption from an obligation to convert into "sport limited companies," as would normally have been required under Spanish law. Other forms of support (including to an additional three clubs) involved an allegedly advantageous land transfer based on an inflated evaluation and various sophisticated loan guarantee arrangements.

The reaction in Spain was severe. The Spanish authorities responded with promises to defend the reputation of the clubs as integral to "the Spanish brand." Real Madrid president, Florentino Perez, labeled the investigation as a "campaign against Spanish football." Secretary of state, Miguel Cardenal, categorized it as a concerted effort by the Commission to damage Spain's image. The investigations were also dismissed as amounting to mere competitor jealousy of Spain's success on the field (though skeptics might argue that if aid has been paid, this might have contributed to that same success).

Such responses testify to the strong national and local allegiances that are often associated with major sporting teams, and the political nature of decisions to grant aid in the first instance. Assuming there is substance to the allegations, they also illustrate that aid is certainly not always notified by Member States, whether because it is not obvious that it qualified as notifiable aid, or because Member States hope that the aid will remain free from scrutiny.

V. WHAT'S NEXT?

The above cases have only recently opened and will take some time to conclude. In the meantime, the Commission will also be focusing on State Aid policy. In 2008 the Commission adopted its General Block Exemption Regulation ("GBER") creating a "safe harbor" mechanism for certain categories of aid deemed compatible with the internal market, meaning Member States could grant qualifying aid without having to notify the Commission.

In the context of the recent "modernization" of State Aid, the Commission's focus has been on renewing the GBER with a view to expanding it to cover additional types of aid, including aid to the sporting sector. The enabling provisions (allowing sport to be included in the upcoming revised GBER) provide:

... State aid measures for sport, in particular those in the field of amateur sport or those that are small-scale, often have limited effects on trade between Member States and do not create serious distortions of competition. The amounts granted are typically also limited. Clear compatibility conditions can be defined on the basis of the experience acquired so as to ensure that aid to sports does not give rise to any significant distortion.

The Commission is therefore busy preparing and consulting on draft measures to enlarge the safe harbor mechanism to include certain categories of aid to sports. To the disappointment of many, the latest drafts would, if adopted, limit the block exemption to sporting infrastructure projects and not other types of aid; for example, concessions such as tax relief to a sporting club in poor financial health. Also, the conditions attached to the infrastructure aid being block exempted mean they will apply to a relatively narrow category of aid: (i) the facilities must be used by more than one professional sports user, (ii) they must provide for non-sports related functions, (iii) access must be given to all users, and (iv) use must be granted on a transparent and non-discriminatory basis. Pricing conditions must be objective and the amount of aid shall not exceed 75 percent of the total cost of the project.

Of course being outside the safe harbor of a block exemption does not mean that aid is illegal, it simply means it must be notified and individually justified, though this certainly adds to the burden all around.

The narrow scope of the sporting “safe harbor” (if adopted as is) would represent a missed opportunity for the Commission. As recent cases have shown, there is an appetite for more concrete statements, guidelines, and, where appropriate, block exemptions to ease the enforcement burden on the Commission. These would allow the Commission the resources to react more quickly, reduce the compliance burden on Member States, and, crucially, provide legal certainty for the clubs and other sporting interests that might be the recipients of aid.

What is at stake for clubs and their supporters is that any aid ultimately found to be incompatible with EU State Aid law would likely have to be repaid. In the football cases mentioned above, this has the potential to drive some of Europe’s best known sporting teams and brands into bankruptcy. Although the law might require such an outcome, and although it might be justifiable under State Aid and economic principles, at a time of rising Euro-skepticism and financial hardship across the European Union, it could represent a spectacular political “own goal” for European enforcement policy.

This risk represents an illustration of the political danger that attends the application of EU law to sport. It should also encourage the Commission to be more ambitious in its policy development, as advance certainty regarding which types of aid are permitted will help to avert calamitous developments in an area that holds public attention like few others.