Tax, state aid and professional football:

The FC Barcelona case

BY ANNA GUNN[1]

Introduction

On 4 March 2021, the Court of Justice of the European Union ("CJEU") ruled that Spain has provided unlawful state aid to four professional football clubs. These clubs are: Club Atletico Osasuna, Athletic Club, Real Madrid, and FC Barcelona. This state aid was provided through a preferential tax rate for these four clubs, and now needs to be recovered with compound interest. This combination of tax, state aid and professional football will be of particular interest to readers of this journal.

This case – which will be referred as the "FC Barcelona case' – is interesting from, at least, two perspectives. Firstly, the judgement sheds light on an important general question regarding the application of the state aid rules in the field of direct taxation, namely the interpretation of the concept of an "advantage" in the context of fiscal state aid. Secondly, the judgement is relevant from the wider policy perspective of the enforcement of the state aid rules by the European Commission ("EC") in the area of professional football.

In this article, both perspectives will be addressed. The intended readership consists of (non-EU) tax specialists, with little or no background in the state aid rules.

The first section starts by introducing the basics of the EU state aid rules. The next, section raises the question of state aid and sports, which has been a focal point for the EC over the past decade. The third section then looks at the FC Barcelona case in some detail. This section provides a summary of the case, including the relevant provisions of Spanish law, and also some brief observations on the case. The fourth section addresses the issue of the recovery of unlawful aid. The article then closes with a number of observations, in the last section.

The EU state aid rules

Background

Since the beginning of the EU in the 1950's, the regulation of state aid has been a fixed feature of the European Treaty2. The state aid rules belong to the area of EU competition law and have the primary function of protecting fair competition and a "level playing field" for undertakings operating throughout the EU.3 Although the state aid rules do not entail a wholesale ban on the provision of aid by member states, they do introduce a strict system for regulating the provision of aid, ensuring that aid is kept to a minimum.

EU legal framework: concise overview

The legal heart of the state aid rules lies in art. 107 and 108 TFEU, which respectively deal with the substantive and procedural aspects of state aid control. In the remainder of this section, both provisions will be addressed. It should, however, be noted that EU state aid law is a complex field of law, involving many different legal instruments – for example, directives, notices and individual commission decisions – and a large body of caselaw. Crucially, it is often not possible to come to a meaningful interpretation of the state aid provisions without taking into account the judgements of the European courts.

Definition of "state aid"

Under art. 107(1) TFEU, "state aid" granted by a member state is in principle incompatible with the internal market. The text of this provision is:

"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

1 Partner at Gunn Tax Communication B.V. and a lecturer in tax law at the University of Curaçao and Leiden University.

2 The term "European Treaty" is used here to refer to the Treaty on the Functioning of the EU ("TFEU") and all of its predecessors.

3 For a more detailed account of the objectives of state aid control, see: H.C.H. Hofmann, "State Aid Review in a Multi-level System: Motivations for Aid, Why Control It, and the Evolution of State Aid Law in the EU, in: H.C.H. Hofmann and C. Micheau (eds.), *State Aid Law of the European Union* (Oxford University Press 2016), p. 3-11.

According to this provision, "state aid" is prohibited, save for a number of exceptions provided for in the TFEU. The concept of "state aid" is defined by a series of cumulative elements, which can be "broken down" into assessment criteria. According to settled caselaw, the CJEU uses four requirements[4], although the six-requirement test suggested by Advocate General Saugmandsgaard Øe in 2018 is, in the view of the present author, easier to understand:

"First, the national measure must confer an advantage on an undertaking. Second, that advantage must be selective. Third, the advantage must be attributable to the State. Fourth, it must be financed through State resources. Fifth, the measure must affect trade between the Member States. Sixth, that measure must distort or threaten to distort competition."[5]

For the purpose of this present article, it is not necessary to discuss each of the elements in detail.[6] If a member state offers a tax exemption to a certain undertaking or certain undertakings, or – as is the case for FC Barcelona – a reduced tax rate, this will, in principle, constitute a selective advantage for the undertaking granted by a member state from state resources. The undertaking is relieved from a burden which would otherwise have been due.[7] Furthermore, under settled case law, the requirement of a (potential) distortion of trade is understood in an extremely broad manner; there is no need to establish whether there has been a real effect on trade and competition.[8]

Compatible state aid

Notwithstanding the fact that state aid is, as a rule, prohibited, the TFEU does provide certain instances whereby aid can be compatible with the internal market, meaning that member states do have an option of granting such aid, legally. These instances can be found in art. 107(2) and (3) TFEU. The former covers a number of instances where aid is compatible de jure. This includes, for example, aid granted to make good the damage caused by natural disasters, such as earthquakes of fires. Broadly speaking, member states are free to grant *de jure* aid as needed. Art. 107(3) TFEU then contains various situations where state aid may be compatible with the internal market, subject to approval by the EC. Examples of such situations include: social aid, aid to promote projects of common European interest, and aid to promote culture and heritage conservation.

Enforcement by the European Commission

The EC plays a central role in the monitoring and enforcing of the state aid rules. Under art. 108(1) TFEU, the EC shall, firstly:

"in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market."

Under art. 108(3) TFEU, member states are obligated to notify new aid measures to the EC (notification obligation), and to refrain from granting aid under such a measure before having received a "green light" from the EC, that is, new measures need to be approved. If a member state granted aid that has not yet been approved this aid is unlawful and should, in principle, be recovered from the beneficiary. This issue is discussed in the section "Recovery of unlawful aid by Spain" of this article.

State aid and sport

Sporting activities as an "undertaking"

Over the past decade, the area of sport has become a focal point for state aid control by the EC.[9] This is unsurprising, given the importance of sport to the EU economy and the large sums of money involved with certain types of sporting activities, including professional football. For the purpose of EU Law, sport has something of a special status owing to its undoubtedly beneficial qualities (for example, for public health or promoting community spirit). From the perspective of state aid, however, these positive features do not alter the fact that sports clubs do sometimes engage in economic activities, for example, through the sale of merchandise or licensing rights, and, consequently, qualify as "undertakings" for the purpose of the state aid rules. The existence of a profit motive on the part of the clubs, their legal status or the manner in which they are funded, is not relevant in this regard.[10]

Art. 165 TFEU

Under art. 165 TFEU, the promotion of "European sporting activities" is identified as an area where the EU should be active. In particular, this concerns:

4 "First, there must be an intervention by the state or through state resources. Secondly, the intervention must be liable to affect trade between the member states. Thirdly, it must confer a selective advantage on the recipient. Fourthly, it must distort or threaten to distort competition" (see *e.g.*, CJEU 21 December 2016, WDF (C-20/15 P and C-21/15 P), par 53).

5 Opinion of Advocate General Saugmandsgaard Øe, *Finanzamt B v. A-Brauerei* (C-374/17), para. 48.

6 A detailed account of the concept of "state aid" has been provided by C. Quigley, *European State Aid Law and Policy, Third Edition* (Hart Publishing Ltd, Oxford 2015), Part I. For more on the application of art. 107(1) TFEU in the specific case of football, see: T. Traupel, "Football and State Aid: Really the Greatest Pastime in the World?, State Aid Scrutiny beyond the Limits of Reason?", in: *European State Aid Law Quarterly*, 3/2014, p. 414.

7 CJEU 4 March 2021, *EC v. Fútbol Club Barcelona* (C-362/19P), para. 58-61.

8 CJEU 8 September 2011, Paint Graphos case (C-78/08 to C-80/08), para. 78-79. See also: Opinion of Advocate General Saugmandsgaard Øe, *Finanzamt B v. A-Brauere* (C-374/17), para. 53-57 and the case law mentioned in the footnotes to those provisions.

9 O. Van Maren provides a useful overview of cases (until 2016) in: "EU State Aid Law and Professional Football: A Threat or a Blessing?", in: *European State Aid Law Quarterly*, 1/2016. See also: https://ec.europa.eu/competition/sectors/sports/overview_en.html (accessed 31 May 2021).

10 CJEU, 6 November 2018, *Scuola Elementare Maria Montessori* cases (C-622/16 P and C-624/16 P), para. 103-104.

"developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen".

A similar sentiment can be found in the European Council Declaration in 2000, on the specific characteristics of sport and its social function. Here, the Council states that:

"Even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured."[11]

Sporting activities are within the scope of the state aid rules

To what extent is this special status for sport relevant when it comes to the application of the EU state aid rules? Could a member state, for example, argue that a particular aid measure is outside the scope of the state aid prohibition for the mere reason that it benefits a sports club? At first glance, such an approach may seem persuasive. However, from the perspective of the state aid rules it is clear that the answer to this second question is negative, if the beneficiary carries out an economic activity, and therefore qualifies as an "undertaking" in the sense of art. 107(1) TFEU.

In its 2007 White Paper on Sport, the EC also stresses the social importance of sport.[12] In this document, the EC furthermore confirms that?:

"competition law and Internal Market provisions apply to sport in so far as it constitutes an economic activity,"[13]

noting that:

"the assessment whether a certain sporting rule is compatible with EU competition law can only be made on a case-by-case basis, as recently confirmed by the European Court of Justice in its Meca-Medina ruling."[14]

In the *Meca-Medina* case (C-519/04 P), the CJEU held that sport can constitute an economic activity and is, therefore, not automatically exempt from the state aid rules.[15]

Sporting nature as a justification for state aid?

In addition to the above, the question arises whether the special nature of sport can serve as a justification for a member state seeking to grant state aid to an undertaking which carries on sporting activities. As already noted above, if a measure of a member state constitutes state aid, it may still be possible to justify the measure (see before in subsection "Compatible state aid"). The question then arises: to what extent is the special status of sporting activities relevant when it comes to these grounds for justification? The mere fact that sport has a special status under art. 165 TFEU is – first and foremost – not sufficient as a justification of state aid. Depending on the facts of the case, it may however be possible to bring the aid within the ambit of one of the provisions of art. 107(3) TFEU. Two candidates emerge.

The first is art. 107(3)c TFEU (*"aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest"*). There are a number of examples where the EC uses this provision to justify aid. These include the renovation of an ice arena in The Netherlands[16], a number of football stadiums in Flanders[17], and an arena in Sweden[18]. In the decisions on all these cases, the EC refers to art. 165 TFEU as well as the Amsterdam Declaration on Sport.

The second candidate – at least, at first sight – is art. 107(3) d TFEU (*"aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest"*). There is, however, uncertainty regarding the "culture and heritage' exception to sporting activities, with one author noting that it would:

"only rarely be applicable to sports. This would only be possible if the athletic activity can also be seen as a cultural activity, which however is not generally the case, not least because large parts of sports activities are mainly economic."[19]

Please note, this section is included for completeness. The question of justification is not at issue in the FC Barcelona case.

Sport and the General Block Exemption Regulation

Lastly, it is interesting to note the inclusion of a section on state aid for *"sport and multifunctional recreational infrastructure"* in Section 12 of the General

11 *Declaration on the Specific Characteristics of Sport and Its Social Function in Europe, of Which Account Should Be Taken in Implementing Common Policies* (European Council – Nice, 7-10 December 2000, Conclusions of the Presidency, Annex IV).

12 EC, *White Paper on Sport,* Brussels, 11.7.2007, COM(2007) 391 final.

13 EC, *White Paper on Sport,* Brussels, 11.7.2007, COM(2007) 391 final, p. 13.

14 EC, *White Paper on Sport*, Brussels, 11.7.2007, COM(2007) 391 final, p. 14.

15 CJEU 18 July 2006, C-519/04 P (Meca-Medina), par 31-32.

16 State aid SA.37373 (2013/N) – The Netherlands Contribution to the renovation of ice arena Thialf in Heerenveen.

17 State aid SA.37109 (2013/N) – Belgium Football stadiums in Flanders.

18 State aid SA.33618 (2012/C) which Sweden is planning to implement for Uppsala arena.

19 T. Scharf, "Sports and Art 55 GBER", in: F.J. Säcker and F. Montag, European State Aid Law – A Commentary (Verlag C.H. Beck oHG, München), p. 1504 (point 1099).

Block Exemption Regulation ("GBER") in 2014.[20]

Briefly put, the GBER contains a range of state aid for which the EC has effectively given its prior approval. This means that those aid measures can be implemented by the member states, without needing further prior approval (in 2019, 94.7% of the new state aid measures were implemented under the GBER).[21] According to art. 55 of this Regulation, aid for sport and multifunctional recreational infrastructures is considered to be compatible with the state aid rules.

Please note, this section is included for completeness. The GBER is not at issue in the FC Barcelona case.

The FC Barcelona case

Spanish national law

The FC Barcelona case deals with the treatment of four professional football clubs for the purpose of Spanish corporate income tax (hereinafter "Spanish CIT"). These rules can be summarized as follows.

In 1990, Spain adopted legislation (art.19(1) Ley 10/1990 on sport) requiring all Spanish professional sports clubs *(clubes deportivos)* to adopt the legal form of a public limited sports company *(sociedades anónimas deportivas; "SAD"),* which qualify as for-profit taxpayers for the purpose of the Spanish CIT. The objective of this new legislation was to encourage responsible financial management of the sports clubs. On this point the EC notes that:

"The justification for the measure was that many clubs had been managed badly because neither their members nor their administrators bore any financial liabilities for economic losses. The purpose was to establish with the new sport limited company a model of economic and legal responsibility for clubs which perform professional activities, in order to increase their chance for good management."[22]

This obligation to convert legal form, did not apply– simply put – to sports clubs that had shown *"a good corporate management"*[23] and a positive financial balance in the financial years prior to the introduction of the law. Sports clubs meeting these requirements, need to convert into SAD, meaning that they could keep their non-profit status for the purpose of Spanish CIT. In practice, only four professional sports clubs met the requirement of the exception.
From the perspective of the Spanish CIT, the conversion obligation is relevant because SADs are considered for-profit organisations, subject to the normal rate of 30%.[24] By contrast, the non-profit sports clubs are subject to reduced rate of 25%. In addition to this difference in tax rate, there exists a difference regarding tax deduction for the reinvestment of extraordinary profits (referred to as: "reinvestment deduction"), which – according to FC Madrid – is greater for SADs than for non-profit entities: a SAD could deduct up to 12% of its extraordinary profits that were reinvested, whereas the ceiling for non-profit entities was just 7%.[25]

Neutralisation approach (rejected by CJEU)

Tax rules of an EU member state which provide for a reduced tax rate for specific undertakings is suspicious from the perspective of the state aid rules. In the case of the Spanish treatment of non-profit entities, the EC decided, in 2016, that the reduced 25% tax rate constituted unlawful state aid. The fact that the non-profit status was only accessible to four specific football clubs, is relevant in the context of selectivity, but not necessarily decisive.

This decision was appealed by FC Barcelona on, amongst others, the ground that the EC had not taken into account that the benefit of reduced tax rate could – under certain conditions – perhaps be neutralized as a result of the lower 7% ceiling for the reinvestment deduction. The burden of proof for establishing the existence of an advantage lies with the EC.

Keeping that in mind, the question arises whether the EC can limit its investigation to just the difference in tax rates, or whether the potential impact of the reinvestment deduction should also be taken into account. It should also be noted that whereas the difference in tax rate is a fixed feature of the Spanish tax system, applicable in all cases, whether and to what extent a taxpayer utilises the reinvestment deduction can only be assessed on a case-by-case basis, depending on the actual facts of the case.

The General Court comes to the conclusion that:

"The Commission, which had the burden of proving that an advantage arose from the tax regime for non-profit entities – the various components of which cannot be analysed in isolation in the present case – was not entitled to conclude that such an advantage existed without establishing that capping tax deductions at a level less beneficial for non-profit entities than for [SADs] did not offset the advantage derived from a lower nominal tax rate."[26]

The General Court, consequently, annulled the EC's decision.

20 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of art. 107 and 108 of the Treaty.

21 European Commission, State aid Scoreboard 2019, p. 4, available at https://ec.europa.eu/competition/state_aid/scoreboard/state_aid_scoreboard_2019.pdf (accessed 31 May 2021).

22 Commission decision of 4 July 2016, on the State aid implemented by Spain for certain football clubs (SA.29769), para. 5.

23 *Ibid*., para. 6.

24 In the relevant period, the tax rate has in fact decreased from 35% to 30%.

25 GC 26 February 2019, *EC v. Fútbol Club Barcelona* (T-865/16), para. 57.

26 GC 26 February 2019, *EC v. Fútbol Club Barcelona* (T-865/16), para. 59.

The CJEU's ex ante approach

On 15 October 2020, Advocate General Pitruzzella published his Opinion on the FC Barcelona case. Unlike the General Court, the Advocate General concludes that the EC was not required to take into account the impact of the reinvestment deduction. The Advocate General notes that:

"It is clear from the caselaw that, in the case of tax regimes such as the one at issue in the present case, which apply on an annual or periodic basis, it is necessary to make a distinction between, on the one hand, the adoption of an aid scheme, and, on the other, the grant of annual aid on the basis of that regime."[27]

It follows from the system of prior approval by the EC for the introduction of new state aids, which is based on art. 108(3) TFEU, that the assessment of a potential state aid measure by the EC must take place before the introduction of the measure. This assessment can only be based on information which is available at that time. In other words, the assessment needs to be done ex ante. Aspects of a measure which only materialize with the concrete application of the rules – that is, ex post aspects – cannot be taken into account when determining the existence of aid up front. However, they are relevant for the quantification of aid in the event of recovery. The Advocate General, therefore, advises the CJEU to set aside the General Court's annulment of the decision.

In its judgement of 4 March 2021, the CJEU comes to the same conclusion as the Advocate General, rejecting the possibility of neutralization in the case at hand. The CJEU confirms the approach taken by the EC, namely that:

"the deduction for reinvestment of extraordinary profits applicable to non-profit entities ought not be taken into account in determining whether the measure at issue conferred an advantage on its beneficiaries, on the ground that, since it was granted only under certain conditions which were not always met, that deduction was not such as to neutralise systematically, for each tax year, the advantage conferred by the reduced tax rate."[28]

The impact of the reinvestment deduction could, by contrast, be taken into account for the quantification of the aid.

Recovery of unlawful aid by Spain

Quantification – EC's approach

In accordance with art. 16(1) of the Procedural Regulation[29], unlawful aid must be recovered by the member state that provided the aid, over a period going back 10 years from the moment that the aid was granted.[30] The Procedural Regulation does not provide an approach for the quantification of the amount of aid which needs to be recovered. The EC has formulated an approach for determining the amount of aid to be recovered in tax cases. This approach involves a comparison between the amount of tax which should have been paid (in the absence of the unlawful aid) and the amount that, as a matter of fact, has been paid. The difference between these two amounts is the amount to be recovered, including an amount of compound interest.

Recovery amount in the present case

In the present case of FC Barcelona, the exact amount of aid to be recovered is, as far as the present author is aware, not in the public domain. In its final decision[31], the EC has provided a basic methodology for quantifying the amount for recovery, but no exact amount has been mentioned. Furthermore, in its 2016 Press Release, the EC stated that, based on the available information:

"the amounts that need to be recovered are limited (€ 0-5 million per club) but the precise amounts that need to be paid back are to be determined by the Spanish authorities in the recovery process."

Here, the EC appears to be giving a ballpark-range, that is, the amount of € 5 million is not a cap of the recovery amount.

Interestingly, it has been noted in the tax literature that, in the case of Real Madrid, the process of the recovery of aid showed that the football club had, in fact, been overcharged from 1999-2000 to 2014-2015, when compared to the hypothetical treatment which would have applied under the normal rules of the Spanish CIT. [32]

Legitimate expectations

The issue of recovery raises questions with regard to legal certainty and the protection of legitimate expectations. The possibilities for undertakings to invoke these general legal principles as an argument against recovery of unlawful aid are in practice extremely limited, and seem not to be applicable in the FC Barcelona case. A proper discussion of the theme of legitimate expectations is outside the scope of this article. However, the EC's 2019 Commission Notice on the recovery of unlawful and incompatible state aid may be of interest to those

27 Opinion of Advocate General Pitruzzella, 15 October 2020, *EC v. Fútbol Club Barcelona* (C-362/19P) para. 75.

28 CJEU 4 March 2021, *EC v. Fútbol Club Barcelona* (C-362/19P), para. 115.

29 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of art. 108 of the Treaty on the Functioning of the European Union.

30 The member state then gets to keep the aid. This has attracted criticism because that this limits the financial incentive for a member state to refrain from providing unlawful state aid.

31 Commission decision of 4 July 2016, on the state aid implemented by Spain for certain football clubs (SA.29769), Section 5.5. (Recovery).

32 B.P. Bernabeu, "How to Determine the Existence of a Tax Advantage: The F.C. Barcelona Case, Annotation on the Judgment of the General court (Fourth Chamber) of 26 February 2019 in Case T-865/16 F.C. Barcelona v. European Commission", in: *European State Aid Law Quarterly*, 2/2019, p. 380. It is not clear (to the present author) what the final outcome of this was.

seeking more information on this matter.[33] [34]

Concluding remarks

The FC Barcelona judgement is interesting on two levels.

Firstly, the case sheds light on the question of "offsetting" advantages with disadvantages for the purpose of art. 107(1) TFEU. It is now clear that:

– offsetting is possible, but only
– if the *ex ante* standard is met.

EU member states need to keep this in mind when designing their tax systems.

Secondly, the FC Barcelona case fits into a broader picture of the application of enforcement of the state aid rules in the field of sport. It is the product of work by the EC since the early 2010's.

Whilst it is hard to predict the future, this judgement underlines the fact that sport – in this case professional football – is squarely within the scope of state aid control.

Whilst, as mentioned, one cannot predict the future, the present author would be surprised if the EC, at this stage of the game, were to take its eye off the ball. New state aid investigations into professional sports are altogether possible.

33 Commission Notice on the recovery of unlawful and incompatible State aid, (2019/C 247/01).

34 C. Quigley, European State Aid Law and Policy, Third Edition, Hart Publishing Ltd, Oxford, 2015. Chapter 17. Recovery of Unlawful Aid, p. 577-617.