

# EU State Aid Law and Professional Football: A Threat or a Blessing?

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*The European Commission's decision to investigate alleged State aid granted to numerous professional football clubs in the Netherlands and Spain has caused a wave of criticisms. National public authorities and stakeholders of the football sector have insisted that none of the measures undertaken by the Netherlands and Spain constitute unlawful aid and that enforcing State aid rules in the football sector might result in greater legal uncertainty. Further critics maintain that the idea of European State aid rules is in itself counterproductive and that it does not take into account the individual cultures of the Member States or the specificity of the market sector in question.*

*This article will analyse whether the allegations of State aid can be substantiated. In order to do so, it will focus on the way the Commission has implemented the State aid rules in the sport sector in general. The study of the Commission's past decisions will provide the legal background to understand the extent to which professional football clubs and national public authorities should be concerned about the application of EU State aid law in the football sector.*

*Keywords: State Aid Law and Policy; Sport; Professional Football; Compatibility Assessment; Sports-Specific State Aid Framework.*

## I. Introduction

Following the European Commission ('the Commission') decision to open a formal State aid investigation into several professional European football clubs in 2013, including renowned football clubs, such as FC Barcelona,<sup>1</sup> Real Madrid,<sup>2</sup> Valencia CF<sup>3</sup> and PSV Eindhoven,<sup>4</sup> there has been a high level of public interest in the outcome. Is the Commission really willing to order the Spanish State to recuperate the aid granted to two of the most powerful football clubs in

the world, or will it decide that the aid measures were justified? Furthermore, what effect could the imposition of recovery orders have on professional football and professional sport in general?

The application of State aid rules to European professional football was not welcomed by everyone. The Spanish government clearly supported the investigated football clubs, declaring that it "will battle until the end in defence of the Spanish (football) clubs, who also form part of the *Marca España*."<sup>5</sup> Javier Tebas, the president of the Spanish football

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1 European Commission, Decision of 18 December 2013, State aid to certain Spanish professional sport clubs, [2014] OJ C69/115.

2 Ibid. However, Real Madrid is also under scrutiny in a second formal investigation: European Commission, Decision of 18 December 2013, Real Madrid CF, [2014] OJ C69/108.

3 European Commission, Decision of 18 December 2013, Alleged aid in favour of three Valencia football clubs, [2014] OJ C69/99.

4 European Commission, Decision of 6 March 2013, Alleged municipal aid to the professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008-2011, [2013] OJ C 116/19.

5 L Doncel, 'Bruselas pone en jaque a la Liga' (*El País*, 16 December 2013) <[http://deportes.elpais.com/deportes/2013/12/16/actualidad/1387211353\\_097209.html](http://deportes.elpais.com/deportes/2013/12/16/actualidad/1387211353_097209.html)> Last accessed on 14 July 2014.

league (LPF), stated that “Spanish football is being questioned because it wins many titles.”<sup>6</sup> Additionally, the Dutch public authorities expressed their discontent with the Commission. In fact, the cities of Nijmegen and Eindhoven decided to appeal the Commission’s decision to launch formal investigations before the European Courts.<sup>7</sup>

It is clear that national public authorities, as well as some football officials, were indignant with the Commission’s decisions, alleging that the Commission had erred substantively because none of the measures were considered as illegal State aid by them. Furthermore, actively enforcing State aid rules in a market sector that previously received scarce enforcement might result in legal uncertainty.

However, this article argues that there is a widespread lack of knowledge about the purpose of EU State aid law and how it functions. Firstly, too little attention has been given to the fact that the Commission had only completed preliminary reviews of the measures, meaning that the Member States concerned had, at that time, plenty of room to argue why the measures were compatible with EU law. Given the numerous ways to justify the granting of State aid, it is surprising that none of the public authorities or relevant football institutions referred to any possible justification for the aid measures granted to the football clubs.

Secondly, many critics persist that the idea of EU State aid rules is in itself counterproductive<sup>8</sup> and that it does not take into account the specific culture of the Member States or the specificity of the market sector in question.<sup>9</sup> The Commission is portrayed as an “ultra-liberal”<sup>10</sup> institution, which is only interested in establishing a free market without leaving space for the national authorities to maintain and invest in their cultural heritage, including football.

The above criticisms demonstrate a level of concern that this development will impact negatively on football as strict enforcement of the State aid rules could lead many professional football clubs into more financial problems and even bankruptcy. This article will analyse whether this claim can be substantiated and determine whether the Commission’s strict enforcement of the State aid rules has a negative impact on the professional football sector. Is it true that the objectives of the Commission are only limited to creating a free market without taking the specificities of each market sector into account?

The article will firstly explain the objectives and purpose of State aid control in the EU. Secondly, an overview will be provided of recent Commission decisions in the sport/football sector. Analysing the Commission’s past decisions allows us, first of all, to determine whether the Commission’s practice in this sector is in line with the overall objectives of EU State aid law and, consequently, to predict Commission decisions in pending and future cases. Furthermore, the outcome of this analysis will show us the extent to which professional football clubs and national public authorities should be concerned about EU State aid law.

## II. The Objectives of State Aid Control

The rules on State aid form one of the four competition law areas<sup>11</sup> and have existed since the foundation of the European Economic Community in 1958. Article 107(1) TFEU formulates the general prohibition of granting State aid.<sup>12</sup> In order for a measure to constitute State aid, it has to grant a selective economic advantage to one or more undertakings,

6 ‘Miguel Cardenal: “Almunia ha filtrado los nombres de Real Madrid y Barcelona para que la investigación de los otros clubes tenga repercusión”’ (*Iusport*, 19 December 2013) <[7 Case T-251/13 \*Gemeente Nijmegen v. European Commission\* \[2015\] ECLI-142; T-370/13 \*Gemeente Eindhoven v. European Commission\*. On 3 March 2015 the General Court dismissed Nijmegen’s appeal as inadmissible; Eindhoven’s appeal is still pending.](http://iusport.com/not/1335/miguel_cardenal___almunia_ha_filtrado_los_nombres_de_real_madrid_y_barcelona_para_que_la_investigacion_de_los_otros_clubos_tenga_repercusion_/></a> Last accessed on 14 July 2015.</p>
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8 This radical view was shared, for example, by the former Economy minister of France, Arnaud Montebourg: <<http://euractiv.com/eu-elections-2014/europe-competitiveness-rules-stu-news-531285>> Last accessed on 15 July 2015.

9 K Donders, *Public Service Media and Policy in Europe* (Palgrave Macmillan 2012), 4; See also J Bardoel and G Ferrel Lowe, ‘From public service broadcasting to public service media. The core challenge’ in G Ferrel Lowe and J Bardoel (eds), *From public service broadcasting to public service media* (Gothenburg, Nordicom 2007).

10 This statement was made by former Belgium’s enterprise minister, Paul Magnette: <<http://euractiv.com/euro-finance/commission-reproached-tough-belgium-news-511398>> Last accessed 15 July 2015.

11 The others being the rules on cartels, abuse of dominance and mergers.

12 It reads as follows, “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.”

through State resources, distorting or threaten to distort competition and affecting cross-border trade. The thresholds for these requirements are low, meaning that it is relatively simple for a measure to be considered as State aid under Article 107(1) TFEU.

The main purpose of introducing State aid rules was to ensure that national economic rivalry did not undermine the internal market. More than half a century later, and after the introduction of the Lisbon Treaty,<sup>13</sup> ensuring the functioning of the internal market remains a primary objective of the Commission in particular,<sup>14</sup> and the European Union in general. However, due to greater economic integration within the EU, in addition to the protection of the internal market, increased emphasis is placed on policies focused on efficient government intervention in the economy.<sup>15</sup> The Commission, in its Communication entitled 'EU State Aid Modernisation' ('SAM') of 2012, underpinned this refocus of priorities in enforcement and attempted to offer better assessment tools. It held that "public spending should become more efficient, effective and targeted at growth-promoting policies that fulfil common European objectives." Furthermore, "by putting an emphasis on the quality and the

efficiency of public support, State aid control can also help Member States strengthen budgetary discipline and improve the quality of public finances – resulting in a better use of taxpayers' money."<sup>16</sup>

In the context of State aid control in the sport sector, it could serve to avoid using taxpayers' money inefficiently, for example by building a disproportionately large stadium for a particular club and/or municipality which would be imprudent spending. In the current economic climate, citizens are acutely aware of the costs of hosting mega sporting events, such as the football World Cup<sup>17</sup> or the Olympic Games,<sup>18</sup> and State aid control could serve as a useful tool to ensure that taxpayers' money is not wasted. Similarly, State aid control can be used to prevent public authorities from financially aiding a bankrupt professional football club, without drafting a viable restructuring plan for the future.

In 2012, the Commission and the European football federation (UEFA) jointly stated that the objectives of UEFA's Financial Fair Play (FFP) rules are "consistent with the aims and objectives of European Union policy in the field of State Aid."<sup>19</sup> The objectives of FFP include improving the economic and financial capability of clubs, encouraging clubs to operate on the basis of their own revenues, introducing more discipline and rationality in club finances and encouraging responsible spending for the long term benefit of football.<sup>20</sup> These objectives are very similar to the objectives stipulated by the Commission in, for example, 'SAM'. It is therefore remarkable that football governing bodies, such as the Spanish League, disagree with an active State aid control in the sports sector, but are at the same time in favour of the FFP rules.

There appears to be a fundamental misconception of State aid rules among critics of the Commission decision permitting investigations into aid given to football clubs. While granting selective economic advantages through State resources to undertakings is *prima facie* State aid, it does not mean that all forms of State measures are prohibited by the rules. Nor does it mean that national authorities cannot invest in their cultural heritage, including football. The Treaty has always provided different possibilities to justify measures that breach EU provisions provided the measures pursue a common objective or the general interest. In fact, Article 107(3) TFEU names certain conditions under which the Commission may consider the State aid acceptable.<sup>21</sup> In situations

13 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.

14 J Almunia, Speech: Doing more with less – State aid reform in times of austerity: Supporting growth amid fiscal constraints (11 January 2013).

15 L Coppi, 'Introduction to State Aid Law and Policy' in K Bacon (ed), *European Union law of State Aid*, (2nd edition, Oxford University Press 2013), 3-11.

16 European Commission, Communication of 8 May 2012, EU State Aid Modernisation, COM (2012) 209, paras 4 and 14.

17 For example, the Brazilian authorities were confronted with mass protests by dissatisfied citizens before and during the World Cup of 2014 <<http://theguardian.com/football/2014/jun/12/anti-world-cup-protests-brazilian-cities-sao-paulo-rio-de-janeiro>> Last accessed on 14 July 2015.

18 For example, several campaigns were held in Madrid against hosting the 2020 Olympic Games <<https://oiga.me/campaigns/no-queremos-los-jjoo-de-2020-en-madrid>> and <[http://www.eldiario.es/sociedad/favor-Madrid-organice-Juegos-Olimpicos\\_3\\_171162883.html](http://www.eldiario.es/sociedad/favor-Madrid-organice-Juegos-Olimpicos_3_171162883.html)> and the people of Munich voted in a referendum against hosting the 2022 Winter Olympics <<http://www.reuters.com/article/2013/11/10/us-olympics-munich-idUSBRE9A90FH20131110>>. Last accessed on 14 July 2015.

19 European Commission, Joint Statement of 21 March 2012: Joint Statement by Vice-President Joaquín Almunia and President Michel Platini, para 7.

20 Ibid.

21 The possibility to justify measures that breach EU provisions are not limited to the EU State aid rules. See for example the Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 [hereinafter referred to as 'TFEU'], Article 101(3).

where an aid measure fulfils, or potentially fulfils the conditions of Article 107 (1), Member States have the task to substantiate that the aid measure is compatible with the internal market due to being in the public or general interest.

#### *The Compatibility Assessment*

In case of the football sector where a measure falls within the scope of Article 107(1) TFEU, the Member State in question will likely use the provision in Article 107(3)(c) TFEU to derogate from the general prohibition.<sup>22</sup> Pursuant to this provision, aid to facilitate the development of certain economic activities may be considered as compatible with the internal market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. Article 107 (3)(c) permits *inter alia*, rescuing and restructuring aid for football clubs in difficulty, as long as the distortive effects of the measure are limited.

The Commission has set a methodology to determine the compatibility of an aid measure.<sup>23</sup> The approach, which is found consistently in the Commission's decision-making process,<sup>24</sup> sector specific guidelines<sup>25</sup> and strategy documents,<sup>26</sup> includes the so-called balancing test, which consists of 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 not be obtained with less aid?
3. Are the distortions of competition and effect on trade limited, so that the overall balance is positive?<sup>27</sup>

As stated above, in order for an aid measure to be compatible with EU law it must firstly contribute to a well-defined objective of common interest. A market failure refers to a situation where the market sector alone is not willing to, or capable of, efficiently fulfilling the objective.<sup>28</sup> Thus, once a market failure has been identified, State intervention in the form of State aid can be regarded as the most appropriate in-

strument to address the market failure. The aid will be effective in achieving the objective when it has an incentive effect, i.e. it induces the aid beneficiary to undertake activities that it would not have been able to do without the aid.<sup>29</sup> The necessity of an incentive effect of the aid measure has been affirmed by the Court of Justice of the EU (CJEU) in several of its cases.<sup>30</sup> An aid measure is deemed not to be necessary, for example, if the aided project has already been started by the undertaking concerned prior to the application for aid being submitted to the public authorities. In such a case, there is no existence for an incentive for the aid beneficiary to undertake activities that it would not have done without the aid.<sup>31</sup> In addition to the necessity principle, the public authorities must make sure that the aid is granted in a transparent manner and that the aid is proportionate to the common objectives pursued.<sup>32</sup>

The next step in the procedure is the balancing test. This is where the Commission balances the negative effects of the aid measure and positive effects in reaching the objective of common interest. The negative effects are always related to the consequences a measure can have on the internal market. If an aid measure allows a football club to build a

22 Aid could also be declared compatible under 107 (3)(a), (b) and (d) TFEU, but these provisions are less relevant for the football sector.

23 F Chirico and N Gaál, 'A Decade of State Aid Control in the Field of Broadband' (2014) *European State Aid Law Quarterly* 1/2014, 35.

24 Examples such as European Commission, Decision of 20 November 2013, Football stadiums in Flanders, [2014] OJ C69/1 will be analysed in chapter IV.

25 See for example European Commission, Communication of 26 January 2013, EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks [2013] OJ C25/01, paras 32-34.

26 *EU State Aid Modernisation* (n16), [12].

27 European Commission, Draft Communication: 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3' - 2009 (draft for public consultation and comments received), para 9.

28 T M Rusche et al, 'State Aid' in J Faull and A Nikpay (eds), *The EU Law of Competition*, (3rd edition, Oxford University Press 2014), 1963.

29 *EU State Aid Modernisation* (n16), [12].

30 *Rusche et al* (n 28), 1965.

31 Case C-390/06 *Nuova Agricast Srl v Ministro delle Attività Produttive* [2008] ECR I-2577, [68].

32 See European Commission, Decision of 13 December 2013, Contribution to the renovation of ice arena Thialf in Heerenveen [2014] OJ C50/1, para 60.

new stadium, thus generating more revenue, the club could obtain an economic advantage over other clubs in the same region and in the whole of Europe. To determine the positive effects of the measure, one must firstly discern the objective of general interest, which must be well defined. Using the same example, if the aid measure allows a club to build a new stadium, the objectives could include promoting sport in a city or region, improving security and/or creating jobs. When the negative effects of the measure outweigh the positive effects, the State aid cannot be considered as justified and should subsequently be considered as incompatible.

### III. State Aid Control in the Football Sector: Where Are We Now?

#### 1. Application of EU Law to the Sport Sector

In 1974, the CJEU held that sports, and therefore also football, is subject to EU law.<sup>33</sup> A landmark case in the sports sector followed in 1995. The case concerned a Belgian professional football player, Bosman, who challenged football's transfer system for breaching EU law, most notably the fact that out-of-contract professional football players could not change club without the new club having to pay a transfer fee. In its judgment, the CJEU ruled that the transfer system was contrary to EU free movement

law and that all EU football players were to be given the right to a free transfer at the end of their contracts.<sup>34</sup> In the aftermath of *Bosman*, it appeared that the EU institutions would play an active role in the field of sports and due to the application of EU law, including EU competition law. In fact, FIFA's Regulations on the Status and Transfers of Players of 2001 was the result of an agreement signed between the Commission and FIFA/UEFA.<sup>35</sup> Additionally, the regulations of race driving's governing body, Fédération Internationale de l'Automobile (FIA), underwent considerable amendments after the Commission determined that FIA had abused its power by, *inter alia*, putting unnecessary restrictions on promoters, circuit owners, vehicle manufacturers and drivers.<sup>36</sup>

A further important case regarding the application of EU law to sport was the *Meca-Medina* case of 2006. Two professional swimmers who had failed doping tests, Meca-Medina and Majcen, had challenged the International Olympic Committee's anti-doping rules for being incompatible with EU competition law. The Court acknowledged that the mere fact that a rule is purely sporting in nature does not remove it from the scope of EU competition law.<sup>37</sup> The judgment meant that the regulatory aspects of sport must comply with the requirements of Articles 101 and 102 TFEU.<sup>38</sup> However, even though the Court's judgment in this case was high profile in the field of antitrust law, the amount of sports and antitrust law cases since *Meca-Medina* has been limited.<sup>39</sup>

#### 2. Application of EU State Aid Law to the Sport Sector

In the case of sports and the application of EU State aid law even fewer examples exist and less than a handful are worth mentioning. The lack of examples is interesting as there are no compelling reasons to exclude professional football clubs from the scope of Article 107 (1) TFEU. Football clubs should be considered as undertakings to the extent that they carry out economic activities such as the sale of tickets and the transfer of players.<sup>40</sup> It is further settled case law 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>41</sup>

33 Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR I-1405.

34 C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.

35 European Commission, Press Release IP/01/314 of 5 March 2001, 'Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international football transfers'.

36 European Commission, Press Release IP/01/1523 of 30 October 2001, 'Commission closes its investigation into Formula One and other four-wheel motor sports'.

37 Case C-519/04 *P David Meca-Medina and Igor Majcen v. Commission* [2006] ECR I-6991, [27].

38 B Van Rompuy, 'The role of EU competition law in tackling abuse of regulatory power by sports associations' (2015) 22 *Maastricht Journal of European and Comparative Law* 2, 176.

39 On the interaction between EU Law and sport, see *Van Rompuy* (n38), 174-203.

40 See for example Case T-193/02, *Laurent Piau v Commission*, [2005] ECR. II-217, [69].

41 Case C-41/90 *Höfner v Macroton* [1991] ECR I- 1979, [21].

The Commission carried out a survey in 1997 on aid granted to sports clubs in the Member States. The survey showed that aid granted to sports clubs was marginal and did not seem to affect trade between Member States. However, the Commission did add in the survey that it was prepared to look at any specific complaint submitted to it.<sup>42</sup>

The many instances of the Commission's reluctance to intervene in the football sector include parliamentary questions posed to the Commission about alleged aid granted to Real Madrid in the late 90's<sup>43</sup> and about an agreement signed in 2001 by the municipality of Alkmaar and the Dutch football club AZ regarding a new location for the stadium that was alleged to be beneficial for the club.<sup>44</sup> In both cases, the Commission did not impose a recovery order.

The Commission's approach from the 90's appears to have changed and in particular, in the recent five years the Commission's activity in this field has notably increased. The joint statement on the UEFA Financial Fair Play Regulations (FFP) was published in 2012, and was followed by a Commission request for information addressed to the Member States regarding public financing of infrastructure used by professional football clubs at the end of the same year.<sup>45</sup>

The primary reason for the increased Commission interest in the football sector in the last few years was that it had received numerous complaints from citizens across the EU, alleging that different State aid measures had been granted to several professional football clubs. However, due to the lack of such aid notifications by the Member States, the Commission had not had the possibility to develop a fully-fledged case practice in the area of State aid to professional sports and consequently, the Commission requires as much information as possible, in order to define a policy in this market sector.<sup>46</sup>

This evolution shows both similarities and differences when compared to other economic sectors. For example the broadcasting sector, and the film and other audiovisual works sector followed a similar pattern when the Commission received a wave of complaints.<sup>47</sup> In the broadcasting sector, private broadcasters complained that public broadcasters had a financial advantage because they received public money.<sup>48</sup> However, in the case of professional football clubs the complaint was not made by a direct competitor who could arguably allege that they are in an

unfair position due to State aid measures. Instead, dissatisfied citizens have filed the complaints to the Commission. It should be noted that an important trigger for the rise in complaints filed by citizens is the economic crisis that has affected the EU since 2008, as it has caused citizens to increasingly question public spending.<sup>49</sup> Particularly, citizens disapproved of public authorities deciding to invest public money 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.

As stated above, Member States have never previously felt that it was necessary to notify aid granted to football clubs to the Commission as the Commission has never demonstrated that it intended to scrutinize State aid in the football sector. However, Member States and professional football clubs would be mistaken to think that failure to notify aid measures would exclude them from the Commission's scope of competence.

### 3. Recent Commission Decisions

At the time of writing this article, there were four State aid cases awaiting a final Commission Decision. These cases involved five Dutch professional football

42 European Commission, Communication of 15 February 1999 from Competition Commissioner Van Miert, 'Preliminary Guidelines on the application of the competition rules to sport', para 63.

43 Parliamentary Question P-2491/02 of 2 September 2002, 'Planning agreement involving Real Madrid football club and the free competitive market'.

44 European Commission, Commission Decision of 25 January 2006 on the State Aid implemented by the Netherlands for AZ and AZ Vastgoed BV [2006] OJ L 307/194.

45 European Commission, 'State aid to professional football clubs', COMP/C4/WP/AH/ZZ/md-D\*2012/98568, 1 October 2012.

46 European Ombudsman, Comments of the Commission on a proposal for a friendly solution from the European Ombudsman in case 2521/2011(MF)JE.

47 See K Donders, 'State Aid to Public Service Media: European Commission Decisional Practice Before and After the 2009 Broadcasting Communication' (2015) 1 European State Aid Law Quarterly, 68-87; I Orsich, 'State Aid for Films and Other Audiovisual Works – Current Affairs and New Developments' (2012) 1 European State Aid Law Quarterly, 49-55.

48 European Commission, Decision of October 15 2003 on the measures implemented by Italy for RAI SpA, OJ L119/47; European Commission, Decision of October 15 2003 on ad hoc measures implemented by Portugal for RTP, OJ L142/1.

49 O Van Maren, 'The Real Madrid case: A State aid case (un)like any other?' (2015) 11(1) Competition Law Review, 88-89.

Table 1

The State Aid Cases Awaiting The Commission's Final Decision					
Case N°	Date Decision to Launch Investigation	MS	Bene-ficiaries	Notifi-cation	Commission Decision
SA.33584	03 March 2013	NL	Vitesse NEC Willem II MVV PSV FC Den Bosch	No	The measures appear to fulfil the criteria of Art. 107(1) and the Netherlands is invited to provide information
SA.29769	18 December 2013	ES	Real Madrid FC Barcelona Osasuna Athletic Bilbao	No	The measure appear to fulfil the criteria of Art. 107(1) and Spain is invited to provide information
SA.33754	18 December 2013	ES	Real Madrid	No	The measure appear to fulfil the criteria of Art. 107(1) and Spain is invited to provide information
SA.36387	18 December 2013	ES	Valencia CF Hércules Elche	No	The measures appear to fulfil the criteria of Art. 107(1) and Spain is invited to provide information

Source: Author's own compilation.

clubs and seven Spanish professional football clubs. They are summarized in the table 1.

In addition to these pending investigations, the Commission has looked into another ten cases, involving State aid granted in the sport sector since 2011. They mainly involved aid granted for the construction or renovation of sports infrastructure. All ten State aid measures were declared compatible under Article 107(3)(c) TFEU and are shown in the table 2.

#### IV. Analysis of the Current Decisional Practice

A brief look at the current decisional practice allows us to make the following remark: the Member States

involved neglected to notify the Commission in all the cases that are currently under investigation. By contrast, all the measures that were declared as compatible were notified to the Commission. Pursuant to Article 108(3) TFEU and Article 2(1) of Council Regulation 659/99, which lays down detailed rules for the application of Article 108 TFEU, Member States have an obligation to notify all new aid.<sup>50</sup> Non-notified aid is deemed unlawful and faces the Commission's examination once the Commission becomes aware of the measure.<sup>51</sup> Although one could infer from the current decisional practice that all the non-notified aid measures will *de facto* face a formal investigation and all the notified aid will always be deemed compatible with EU law, this view must be nuanced. The decisional practice does indeed show that the Commission is rather lenient in its application of the State aid rules in the sport sector, taking into account the specificities of the sector and appears to apply a low threshold in order to declare aid compatible. Nonetheless, the Member State in question is required to do more than simply inform the Commission about its plan to invest in sports. As explained in section II.

50 An exception to this rule applies when certain aid has been exempted from prior notification and approval.

51 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] OJ L83/1, Chapter III. Although a new regulation was published in 2015, Regulation 659/99 was the regulation in force at the time of the Commission decisions.

Table 2

The State Aid Cases Declared Compatible Under EU Law					
Case N°	Date Decision	MS	Bene-ficiaries	Notifi-cation	Commission Decision
SA.31722	09 November 2011	HU	Sport Associa-tions and clubs	Yes	The measures are declared compatible un-der Art. 107(3)c)
SA.33618	02 May 2013	SE	Uppsala arena tenants	Yes	The measures are declared compatible un-der Art. 107(3)c)
SA.33728	15 May 2013	DK	The Arena Com-pany	Yes	The measures are declared compatible un-der Art. 107(3)c)
SA.35135	20 March 2013	DE	FC Rot-Weiß	Yes	The measures are declared compatible un-der Art. 107(3)c)
SA.35440	20 March 2013	DE	FC Carl Zeiss Jena	Yes	The measures are declared compatible un-der Art. 107(3)c)
SA.36105	02 October 2013	DE	Chemnitzer Fc	Yes	The measures are declared compatible un-der Art. 107(3)c)
SA.35501	18 December 2013	FR	Girondins de Bor-deaux Lille OSC Olympique de Marseille OGC Nice Toulouse FC AS Saint-Étienne RC Lens PSG Olympique Lyon-nais	Yes	The measures are declared compatible un-der Art. 107(3)c)
SA.37109	20 November 2013	BE	KAAs Gent OH Leuven KV Mechelen KRC Genk Zulte-Waregem Stad Oostende Sporting Lokeren	Yes	The measures are declared compatible un-der Art. 107(3)c)
SA.37342	09 April 2014	UK	Linfield F.C. and others	Yes	The measures are declared compatible un-der Art. 107(3)c)
SA.37373	13 December 2013	NL	Thialf B.V.	Yes	The measures are declared compatible un-der Art. 107(3)c)

Source: Author's own compilation.

under the compatibility principles, the Member States will need to fulfil certain criteria in order to the aid measure be declared compatible. A study of

the 10 measures that were considered as justified by the Commission shows that the criteria for declaring the measure as compatible were fulfilled by the rele-



vant Member State, including demonstrating the existence of market failures or important inequalities, proving the appropriateness of State aid as a policy instrument and introducing the aid measure in a proportionate and transparent manner.

## 1. State Aid for the Renovation of the Multifunctional Arena in the German City of Erfurt

A good illustration of a Member State fulfilling the criteria is the case in which Germany informed the Commission about its plan to renovate the city of Erfurt's sport stadium into a multifunctional arena. The stadium would still primarily be used for sports such as football and athletics, but would also serve to host concerts, company events or congresses for business. A market analysis had indeed demonstrated that there was a need for congress and event facilities in the region.<sup>52</sup>

After analysing Germany's plan, the Commission concluded that aid to renovate this sports infrastructure would constitute State aid under Article 107(1) TFEU. In line with the *Leipzig/Halle*<sup>53</sup> judgment, the Commission concluded that the public financing of the arena renovation would entail a selective economic advantage for the operating company of the arena, since the operating company would not be financially burdened by the renovation costs.<sup>54</sup>

For the compatibility assessment, the Commission firstly accepted that a sports infrastructure, supporting different categories of activities, could be consid-

ered as embodying a typical State responsibility towards the general public and acknowledged the special characteristics of sports as stipulated in Article 165 TFEU.<sup>55</sup> Therefore, the aid would be aimed at a well-defined objective of common interest.<sup>56</sup> The Commission further emphasised the problem of under-investment in sports infrastructure by the private sector, including in Erfurt and the surrounding region. State aid could thus be regarded as an appropriate instrument to address this problem.<sup>57</sup>

Lastly, by tendering out the commercial operation of the infrastructure in order to keep the aid to the operator as low as possible, the Commission established that the public financing of the project was proportionate, i.e. that the measure was well-designed to fulfil its objectives.<sup>58</sup> Accordingly, it decided that the aid measure was compatible with Article 107(3)(c) TFEU.<sup>59</sup>

## 2. Football Stadiums in Flanders

The Commission's direct reference to the special characteristics of sports was not limited to the *Erfurt* case. In 2013, the Belgian authorities notified the Commission of their plan to subsidize the renovation and the construction of multifunctional football stadiums.<sup>60</sup> The Belgian authorities aimed to "ensure that professional football in Flanders/Region of Brussels Capital generates a higher social return, while at the same time improving the quality of stadiums used for professional football by ensuring that they meet the UEFA criteria for European football

52 European Commission, Decision of 20 March 2013 concerning Multifunktionsarena der Stadt Erfurt, OJ C140/1, paras 2-3.

53 Joined Cases T-443/08 and T-455/08, *Freistaat Sachsen and Land Sachsen-Anhalt and Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v Commission*, Judgment of 24 March 2011, ECR II-1311. The General Court argued that the publicly financed construction of a new runway at the Leipzig-Halle airport would permit the undertaking that commercially exploited the airport to increase its capacity and extend its business of operating the airport. It consequently held that the public financing of infrastructure cannot be dissociated from its subsequent operation for commercial purposes and thus constitutes an economic advantage that must be classified as State aid. The CJEU largely upheld the judgment in Case C-288/11 P, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v European Commission*, [2012] ECLI-821.

54 *Multifunktionsarena der Stadt Erfurt* (n52), [10]. The same approach was followed by the Commission in its other decisions concerning State aid for sports infrastructure: Public financing for the (upstream) construction or renovation of a sport infrastructure for commercial activities, could be considered as a selective

economic advantage for the (downstream) commercial operator of the infrastructure. See for example Commission Decision of 2 May 2013, Uppsala arena [2013] OJ L243/19, paras 32-41.

55 Article 165(1) TFEU, second sentence: "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational form", and Article 165(2), seventh sentence: "Union action shall be aimed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sport, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and women."

56 *Multifunktionsarena der Stadt Erfurt* (n 52), [14].

57 *Ibid* [16].

58 *Ibid* [21].

59 *Ibid* [23].

60 *Football stadiums in Flanders* (n24), [1].

games.<sup>61</sup> In order to establish the compatibility of the aid measure with EU law, the authorities presented information detailing the duration of the aid, the selection procedure, the amount of aid to be granted, and demonstrated that the process would take place in a transparent manner.

For the compatibility assessment of the aid measure, the Commission balanced the positive and the negative effects of the aid. In applying the balancing test, the Commission analysed whether the aid measure was aimed at achieving a well-defined objective of general interest; whether State aid was an appropriate policy instrument; whether there was an incentive effect for the aid beneficiaries; and whether the aid measure was proportionate.<sup>62</sup> The Commission concluded that the measure was aimed at a well-defined objective of common interest, because it considered that a sports infrastructure embodies a typical State responsibility towards the general public.<sup>63</sup> Furthermore, the Commission agreed with the Belgian authorities that it was increasingly difficult to obtain bank loans for infrastructure projects and that without State aid it would be impossible to construct or renovate football stadiums.<sup>64</sup> In other words, the Commission concluded that there was a market failure in the Belgian football sector, with regard to the infrastructure, and that State aid is an appropriate instrument to solve the market failure. In continuation, it also held that the distortion of competition and the effect on trade were limited, since the beneficiaries would have to pay a price set by benchmarking for the use of the infrastructure.<sup>65</sup> The positive effects of the aid measure therefore outweighed the distortive effect the measure could have on competition, and the Commission declared the State aid compatible with EU law.

### 3. French Aid for the Construction and Renovation of Stadiums for EURO 2016

This case involved French authorities providing aid to build and renovate the stadiums necessary to host the European football championship in 2016. France notified the Commission of its plans to spend a total of approximately €1,052 million on nine different stadiums.<sup>66</sup> Hence this case involved an additional element, namely aid granted for the purpose of hosting a mega-sporting event. As was mentioned in chapter

II, the general public has increasingly expressed opposition to hosting mega-sporting events, because they involve spending large amounts of taxpayers' money. Consequently, the Commission found itself in a tricky position. On the one hand, a negative decision could fundamentally jeopardize a Member State's possibility of hosting a mega-sporting event, since such events always require an injection of public money. On the other hand, raising no objection whatsoever would further anger the ever-increasing number of mega-sporting events critics.

The Commission believed that France was pursuing a well-defined objective of common interest and agreed with France that there was a public need for the modernisation and enlargement of the stadiums. It also referred to Article 165 TFEU and repeated that supporting sporting activities was a State responsibility.<sup>67</sup> While it could be disputed that the stadiums genuinely required renovation since most of them had already been renovated prior to the 1998 World Cup,<sup>68</sup> the Commission stressed that it was important to satisfy the infrastructure criteria set by UEFA<sup>69</sup> and raised no further objections regarding the construction and renovation of the stadiums.

### 4. Interim Conclusion

The three cases demonstrate that the Commission places a great deal of attention to the arguments put forward by the Member States to justify aid. Thus, when a Member State decides to grant State aid to the sport sector in general, or to the football sector in particular, it is essential that the Member State clearly identifies its reasoning as to the necessity of granting the aid in question (the objective of gener-

61 Ibid [2].

62 Ibid [29].

63 Ibid [30].

64 Ibid [5].

65 Ibid [41].

66 European Commission, Decision of 18 December 2013, *Financement de la construction et de la renovation des stades pour l'EURO 2016*, para 12.

67 Ibid [269].

68 R Craven, 'State aid and sports stadiums: EU sports policy or deference to professional football' (2014) 35(9) *European Competition Law Review* 453, 457.

69 *Financement de la construction et de la renovation des stades pour l'EURO 2016* (n66), [74].

al interest) and demonstrates that the measure is well-designed to fulfil the pursued objective. This procedure forces Member States to present comprehensive and transparent aid measures to the Commission, thus contributing to the appropriateness of the spending of public money and therefore acts as a control mechanism.

As can be seen from these three cases, the Commission takes into account the specificity of the sports (football) sector, when evaluating the compatibility of an aid measure with EU law. The Commission highlights the educational, social, cultural and health role sports can play and it even stated in the Belgian and French cases that the construction of sports venues and supporting different types of sporting activities can be considered as State responsibility.<sup>70</sup> Even though this statement should not be interpreted as a *carte blanche* to Member States to aid football clubs in any manner they deem convenient, it does show that the Commission is not opposed to State aid in the sport sector and that it will even encourage Member States to invest.

Notwithstanding the Commission's willingness to declare State aid granted in the sports or football sector compatible, it is currently investigating aid measures granted to several professional football clubs in the Netherlands and Spain. In each of the decisions to launch a formal investigation the Commission pointed out that the Dutch and Spanish public authorities did not produce sufficient arguments to substantiate the compatibility of the aid measures.<sup>71</sup> Given that the measures are currently under investi-

gation, they can still be declared compatible, provided that the Member States provides the necessary information.

## 5. Alleged State Aid in Favour of Real Madrid Granted in the Form of an Advantageous Property Transfer

In its decision to formally investigate alleged State aid granted to Real Madrid, the Commission doubted whether "there is an objective of common interest which could justify selective support to a very strong actor in a highly competitive economic sector (i.e. the football sector)."<sup>72</sup> It should be noted that Spain did not forward arguments which could support the compatibility of the aid under Article 107(3)(c) TFEU.<sup>73</sup> The measures the Commission is referring to consists of a number of land transfer agreements made between the Council of Madrid and the football club in the last two decades. The first agreement is the one signed on 29 July 2011,<sup>74</sup> which aimed to solve an open legal issue between the parties relating to earlier agreements from 1991 and 1998.<sup>75</sup>

The transfers would permit the club to cover the stands of the stadium with a roof, to build a shopping centre and a hotel.<sup>76</sup> The operation is expected to create employment for 2300 people during the construction period and 600 after the completion.<sup>77</sup> Other objectives included creating more spaces for commercial activities, improving the overall comfort, quality and energy efficiency of the building; and architecturally improving the Bernabéu stadium.<sup>78</sup>

Similarly, the 'General Criteria' also establish that the operation had as an objective to convert Real Madrid into a world-class sports institution: "The objective, once the construction works are terminated, is presenting a maximum level of comfort and services superior to the most modern and advanced sport stadiums in the world. In order to achieve that objective, it is necessary to revise the limited buildable conditions that govern at this moment, as regards to occupation, height and buildability, that impede the covering of the stands [...], thereby permitting a radical improvement in comfort and energy efficiency of the stadium and its surroundings."<sup>79</sup>

Objectives such as creating jobs, public spaces and improving the mobility in the surrounding area, can fall within the general interest. Additionally, the Spanish authorities will need to argue why the ob-

70 Ibid [269]; *Football stadiums in Flanders* (n24), [30].

71 *Real Madrid CF* (n2), [40, 43]; *State aid to certain Spanish professional sport clubs* (n1), [32, 35]; *Alleged aid in favour of three Valencia football clubs* (n3), [46, 54]; *Alleged municipal aid to the professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008-2011* (n4), [87].

72 *Real Madrid CF* (n2), [40].

73 Ibid.

74 Convenio de regularización de los compromisos derivados de los convenios suscritos entre el Ayuntamiento de Madrid y el Real Madrid Club de Fútbol de fechas 29 de Mayo de 1998 y 20 de Diciembre 1991.

75 *Real Madrid CF* (n2), [2].

76 For a more extensive description of the measures, see *O Van Maren* (n51).

77 Modificación del plan general en el ámbito Bernabéu-Opañel, Área de Gobierno de Urbanismo y Vivienda 11.

78 Criterios Generales – Modificación Puntual del Plan General en el Ámbito del APE.00.03 "Real Madrid C.F." 1.

79 Ibid.

jectives mentioned above outweigh the potential market distortion resulting from the measure as it only benefits one major player in the sector. In other words, at this stage it is not certain whether or not Real Madrid will be ordered to repay the aid it received from the public authorities. In this regard, it is crucial that Spain and the football club present convincing arguments to defend the public interest value of the project and thus give the Commission sufficient grounds to declare that the aid measures are compatible.

## 6. Alleged Municipal Aid to Professional Dutch Football Clubs in 2008-2011

During the first six months of 2011, the Commission received numerous complaints from citizens about unlawful State aid being granted to professional Dutch football clubs namely, NEC Nijmegen, Willem II, MVV Maastricht, PSV and FC Den Bosch.<sup>80</sup> The measures included selling a property claim to the municipality (NEC), the lowering of stadium rent (Willem II), waiving the debt the football club had with the municipality (MVV), and a sale and lease-back agreement of the land beneath the football stadium between the city of Eindhoven and PSV.

The Commission concluded that all the football clubs in question were in financial difficulties at the time the aid was granted to them. However, the Dutch authorities had neither notified that they were rescuing these clubs nor presented the criteria that they employed to decide the type of aid offer. A closer look at the decision to launch a formal investigation shows that the Commission is willing to provide detailed instructions to guide the Dutch authorities through the compatibility criteria of Article 107(3)(c) TFEU. The key hint is the reference to the Community Guidelines on State aid for rescuing and restructuring firms in difficulty. As will be explained in the following chapter, the Commission published a set of guidelines to assist Member States to grant compatible rescue and restructuring aid to undertakings in financial difficulties.<sup>81</sup> This willingness to help the Dutch authorities by referring to the guidelines in the decision is even more peculiar since it is actually the “task” of the Dutch authorities to refer to these Guidelines as a tool for arguing the compatibility of the measures.<sup>82</sup>

In both cases, the *Real Madrid* case as well as the *Dutch* case, the public authorities failed to convinc-

ingly argue that the aid was aimed at a clear objective of general interest, that it was granted in a transparent and proportionate manner and that it outweighed the negative effects the measure could have on competition. However, by inviting the Member States to submit further information, the Commission does provide them with the opportunity to argue anew why the measures should still be considered as compatible. The information provided by the Member States in response to the Commission’s invitation will provide the basis for the final decision and may tip the balance in favour of the Member State’s position.

## V. Is a Sports-Specific Framework Necessary to Ensure Legal Certainty?

With a lack of decisional practice available and potential negative decisions looming, it is understandable that sport clubs and public authorities alike are operating in uncertain legal times. Plans for a stadium renovation, the selling of public land to a football club or even aiding a financially troubled club might be put “on hold”, because little is known about the Commission’s reaction towards Member States carrying out such transactions.

The Commission is notorious for developing sector-specific frameworks with the aim of creating legal certainty. These frameworks include criteria, aid intensity limits and procedures. Other sectors, such as the audiovisual sector, the broadcasting sector and the broadband sector have their own specific Commission Communications,<sup>83</sup> which were drafted af-

80 *Alleged municipal aid to the professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008-2011* (n4).

81 European Commission, Communication from the Commission of 31 July 2014 ‘Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty’ [2014] OJ C249/01.

82 The Commission refers here to the old Community Guidelines on State aid for rescuing and restructuring firms in difficulty ([2004] OJ C244/02), since the new Guidelines were not yet published at the time of the decision.

83 European Commission, Communication from the Commission of 15 November 2013, on State aid for films and other audiovisual works [2013] OJ C332/1; European Commission, Communication from the Commission of 27 October 2009 on the application of State aid rules to public service broadcasting [2009] OJ C257/01; European Commission, Communication from the Commission of 26 January 2013, EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks [2013] OJ C25/01.

ter the Commission received a wave of State aid complaints and had made enough decisions to create a standard policy. Developing a similar framework for the sports sector could help public authorities and sport undertakings to understand and anticipate the scope and application of EU's State aid rules.

There are, however, reasons to believe that a sports-specific framework is neither efficient nor necessary. Firstly, the recently decided and pending cases differ too much from one another due to the specific structure and aim of each aid measure. In the *Valencia* case, for example, the regional authorities had issued a guarantee on an amount of money that three professional football clubs had borrowed from a bank,<sup>84</sup> while the *Real Madrid* case concerned an advantageous land transaction in favour of the Spanish footballing giants.<sup>85</sup> By contrast, the third case involving Spanish football clubs concerned the granting of an advantageous fiscal position vis-a-vis the other clubs,<sup>86</sup> whereas the lowering of stadium rent by the municipality of Tilburg for the football club Willem II is currently under the Commission's scrutiny.<sup>87</sup> A further example of an aid measure in the sports sector is the spending of public money on the construction of a football stadium, such as in the case involving the German football club FC Rot-Weiß.<sup>88</sup> Due to the great variety of measures, creating a "one size fits all" framework would be rather difficult.

It could also be argued that the call for legal certainty derives from a lack of knowledge about the analytical framework used in the enforcement of the State aid rules rather than the lack of a sector-specific framework. EU law provides the Member States

and potential aid recipients with the necessary information to understand the scope of EU State aid rules as well as the criteria that aid measure must fulfil in order to be declared compatible through a variety of tools. The rules, Regulations, frameworks and guidelines already in place are adequate to prevent the granting of unlawful aid. It is rather a matter of knowing how to use these tools in concrete situations.

First of all, the Member States and the recipients of the aid have an obligation under EU law to notify any new aid that is granted if the aid fulfils, or potentially fulfils, the criteria of Article 107(1) TFEU. Exceptions to the notification obligation can be found in the *de minimis* Regulation<sup>89</sup> and the General Block Exemption Regulation (GBER).<sup>90</sup>

The *de minimis* Regulation states that aid will not be considered as State aid under Article 107(1) TFEU if it is below an amount of €200.000 over three years to a single undertaking and as such does not need to be notified.

The GBER allows Member States to grant more aid measures and higher amounts without having to notify them to the Commission for prior authorisation, because they are less likely to lead to undue distortions of competition in the Single Market.<sup>91</sup> This regulation does not apply to all forms and categories of aid, but only to the types of aid listed in the Regulation. The latest General Block Exemption Regulation came into force on 17 June 2014 and is the first one to contain exemption criteria for aid to sport and multifunctional recreational infrastructures. According to these provisions, no prior notification is necessary unless:

- The aid exceeds €15 million
- The total costs of the project exceed €50 million
- The aid exceeds €2 million per infrastructure per year

Aid can be exempted provided that the following conditions are met:

- The infrastructure is multifunctional
- Used at least 20% of the time by other users
- Usage granted to other users on a transparent and non-discriminatory basis
- Pricing conditions made publicly available
- The aid takes the form of an investment grant.<sup>92</sup>

There are good reasons to believe that the introduction of provisions on sports infrastructure in the new GBER is linked to the 10 Commission decisions in

84 *Alleged aid in favour of three Valencia football clubs* (n3).

85 *Real Madrid CF* (n2).

86 *State aid to certain Spanish professional sport clubs* (n1).

87 *Alleged municipal aid to the professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008-2011* (n4).

88 *Multifunktionsarena der Stadt Erfurt* (n52).

89 European Commission, Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [2013] OJ L352/1.

90 European Commission, Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1.

91 European Commission, Press Release IP 14/587 of 21 May 2014, 'State aid: Commission exempts more aid measures from prior notification'.

92 Commission Regulation (EU) No 651/2014, (n 90) s 12.

which aid granted for sports infrastructure was declared compatible. Nonetheless, this Regulation only applies to aid granted for sport infrastructures. For other forms of aid, such as rescuing a sports club from bankruptcy, for example, the Member States can rely on Commission Guidelines, mentioned below.

The Commission introduced a set of Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty. In these guidelines, the Commission sets out the conditions under which State aid for rescuing and restructuring undertakings in difficulty may be considered to be compatible with the internal market on the basis of Article 107(3)(c) TFEU.<sup>93</sup> Contrary to the *de minimis* Regulation and the General Block Exemption Regulation, according to the Guidelines on rescuing and restructuring aid, the Member State in question will have to notify the aid in order for the measure to be declared compatible.<sup>94</sup> It must also be demonstrated that the firm qualifies as 'a firm in difficulty' in accordance with the Guidelines.<sup>95</sup> Subsequently, the Member State has to fulfil certain criteria, such as limiting the amount of aid provision, which is strictly necessary to keep the firm in business (for rescuing aid)<sup>96</sup>, limiting the amount and intensity of the aid to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of the existing financial resources of the firm (for restructuring aid)<sup>97</sup> and applying the so-called 'one time, last time' principle. According to this principle, rescue aid should only be granted once.<sup>98</sup> Moreover, the Guidelines also stipulate that in order to ensure that the adverse effects on trading conditions are minimized as much as possible, so that the positive effects pursued outweigh the adverse ones, compensatory measures must be taken by the Member State that grants the rescue and/or restructuring aid.<sup>99</sup>

These Guidelines are directly applicable to the sports sector, and to the football sector in particular, since several of the discussed aid measures involved professional football clubs in financial difficulties. The Commission considered the five Dutch clubs under investigation as undertakings in financial difficulties at the time the aid was granted<sup>100</sup> and the three Valencian clubs were also in financial turmoil.<sup>101</sup> The problem in the Dutch and the Valencian cases was that the public authorities had granted the aid without adhering closely to the criteria provided by the Guidelines. For example, the aid was not notified and the authorities did not guarantee that the measure

would only be granted once, in accordance with the 'one time, last time' principle.

Aid in the form of a guarantee on a loan that is provided to a football club which is not in financial difficulties could fall outside the scope of Article 107(1) TFEU if the guarantee is provided in accordance with the market economy investor principle.<sup>102</sup> In order to satisfy this principle, the public authorities have to invest in an undertaking on terms and conditions that would be acceptable to a private investor operating under normal market economy conditions. The investment would rule out a selective advantage to the undertaking in question, and would consequently not be considered as State aid.<sup>103</sup> The State guarantee enables a football club to obtain better financial terms for a loan than it would normally be available on the financial markets. The purpose of the Notice is therefore to give Member States more detailed guidance about the principles on which the Commission intends to base its interpretation of Articles 107 and 108 TFEU, and their application to State guarantees.<sup>104</sup> The Notice stipulates certain criteria that, when fulfilled, will be sufficient to rule out the presence of State aid, including the requirement that the guarantee must be fixed to a specific transaction, for a fixed maximum amount, a limited time, and does not cover more than 80% of the outstanding loan.<sup>105</sup> One could see the usefulness of

93 *Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty* (n81), Article 1.

94 R Bickler, 'Rescue and Restructuring Aid' in K Bacon (ed), *European Union Law of State Aid*, (Oxford University Press 2013), 275.

95 *Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty* (n 81), Articles 9-13.

96 *Ibid* [25d].

97 *Ibid* [43].

98 *Ibid* [72].

99 *Ibid* [38].

100 *Alleged municipal aid to the professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008-2011* (n4), [74].

101 *Alleged aid in favour of three Valencia football clubs* (n3), [17-25].

102 European Commission, 'Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees', 2008/C 155/02. See also M Friend, 'Guarantees' in L Hancher et al. (eds), *EU State Aids*, (Fourth edition, Sweet & Maxwell 2012), 302-320.

103 See B Slocock, 'The Market Economy Investor Principle' (2002) 2 Competition Policy Newsletter.

104 *Commission Notice on State aid in the form of guarantees* (n102), section 1.1.

105 *Ibid* [3.2].

this Notice in a situation where a municipality wants to grant aid to a football club in excess according to the limits set out in the GBER for the construction of sporting infrastructure.

Lastly, the football sector has also been confronted with a case involving the alleged economic advantages granted to Real Madrid through land transactions with the local municipality. The Commission has experience in investigating sales of publicly owned land in other sectors and had published a Communication on the sale of public lands and buildings in 1997.<sup>106</sup> A formal investigation into Real Madrid might have been avoided had the Spanish authorities used this Communication prior to reaching the agreement with the football club.

The Communication lists two selling procedures that are not considered to be State aid. The first one is sale through an unconditional bidding procedure. According to this procedure, if the sale of land follows a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best bid is *by definition* at market value and consequently does not constitute State aid.<sup>107</sup> Under the second procedure, “an independent evaluation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.”<sup>108</sup> It is worth highlighting that following one of the procedures, does not lead to the

justification of the aid in question, but excludes the existence of State aid all together. Consequently, a transaction that was not conducted in accordance with one of the two procedures could constitute State aid and would need to be notified to the Commission.<sup>109</sup>

The abovementioned regulations, notices, communications and guidelines were not specifically drafted for the sports sector (with the exception of some provisions found in the GBER), yet they are equally applicable. Subsequently, a proper knowledge of EU soft law in the field of State aid enhances legal certainty and will prevent Member States from granting unlawful State aid and facing Commission recovery decisions. It is the responsibility of the Member States’ public authorities and of the respective professional clubs to know the scope and application of the State aid rules and to implement their measures correctly.

## VI. Conclusion: State Aid Rules as a Means of Achieving Accountability and Transparency in Sports Governance

There is a widespread fear that the effect of strict enforcement of the State aid rules will have negative consequences for the professional football sector. Public authorities and football stakeholders believe that the enforcement of State aid rules could force professional football clubs into deeper financial problems or even bankruptcy. It is claimed that the Commission is only focused on protecting the internal market and does not take into account the specificity of sports and/or football.

This fear is to a certain degree understandable. If the Commission decides that a State aid measure is incompatible with EU law, it will order the concerned Member State to recover the aid from the beneficiary.<sup>110</sup> A negative decision could therefore have important consequences for those professional football clubs that are in financial difficulties, since they might have to return funding exceeding their means resulting in a more precarious financial situation than before. It is publicly known that clubs like Valencia CF, Elche or Osasuna are under suspicion of having received unlawful aid, facing serious financial difficulties.<sup>111</sup> A negative decision could be disastrous for their future as sporting entities. It is quite

106 European Commission, Communication of 10 July 1997 on the sale of public lands and buildings by public authorities [97] OJ C 209/03.

107 Ibid [1].

108 Ibid [2].

109 Ibid [3].

110 *Council Regulation (EC) No 659/1999* (n51), Article 14.

111 See P Morata et al, ‘Así pagará el Valencia 311 de sus 466 millones de deuda en 15 años’ (*Cadena Ser*, 26 February 2015) <[http://cadenaser.com/emisora/2015/02/26/radio\\_valencia/1424958922\\_996411.html](http://cadenaser.com/emisora/2015/02/26/radio_valencia/1424958922_996411.html)> Last accessed on 27 July 2015; ‘El Instructor propone al Juez de la Liga el descenso administrativo del Elche’ (*Iusport*, 03 June 2015) <<http://iusport.com/not/7602/el-instructor-propone-al-juez-de-la-liga-el-descenso-administrativo-del-elche/>> Last accessed on 27 July 2015; ‘Osasuna deberá pagar 20,6 millones en 30 años de la deuda que le queda con Hacienda tras ceder sus bienes’ (*Noticias de Navarra*, 29 April 2015) <<http://www.noticiasdenavarra.com/2015/04/29/osasuna/osasuna-debera-pagar-206-millones-en-30-anos-de-la-deuda-que-le-queda-con-hacienda-tras-ceder-sus-bienes-por-321->>> Last accessed on 27 July 2015.

understandable that supporters and sympathisers of these clubs would see a strict enforcement of State aid rules as a threat rather than a blessing.

Nevertheless, one can question the arguments of the critics when they assert that the Commission does not take into account the specificity of sports or the culture of a particular Member State. The 10 cases in which the Commission approved the granted State aid demonstrate that it does recognise the specific characteristics of sports, as well as the social and educational functions that it fulfils for a municipality, region or country. The Commission even held in two of its decisions that supporting sporting activities was a State responsibility.

The prohibition on State aid is primarily to prevent public authorities from granting aid that distorts, or threatens to distort, competition. However, this prohibition is not absolute, and Member States can always claim that the aid measure falls under one of the derogations, such as Article 107(3)(c) TFEU. In this regard, the arguments raised by the public authorities to support the granting of the aid form a fundamental part of the procedure. It is the Member State's duty to show that the aid measures pursue an objective of general interest, are limited to the minimum necessary to achieve that objective and outweigh the negative consequences that the measures could have on the internal market. These criteria oblige the Member States to execute a transparent and well-designed aid plan that could be beneficial for a city, region or country.

Even without any Commission recovery decision until date, there is enough evidence to argue that the effects of State aid enforcement in professional football are already being felt. In July 2015, the public authorities of the Spanish autonomous region of Navarra notified its decision to grant restructuring aid to the professional football club C.A. Osasuna to the Commission.<sup>112</sup> Given that previous aid measures to football clubs in Spain were never notified, one could see this as an important turning point in the way in which the Spanish public authorities deal with State aid in football.

Furthermore, the Netherlands have fundamentally changed their attitude after the Commission's decision to launch a formal investigation into potential aid granted to five Dutch professional football clubs. For example, the city of Rotterdam was only willing to aid the local football club Feyenoord with the renovation of the stadium after the Commission approved the project.<sup>113</sup> A few months ago, the football club FC Twente found itself in acute financial trouble and asked the municipality of Enschede for its support. Before granting any aid, the municipality of Enschede decided to consult the ministry of interior in order to avoid any potential breach of the State aid rules.<sup>114</sup> Finally, the city of Amsterdam recently announced its plan to sell its share in the Amsterdam ArenA to the football club Ajax (the stadium's tenant), but only if the sale was done in accordance with the market value so as to avoid any appearance of granting State aid to the football club.<sup>115</sup>

Apart from changing the behaviour of public authorities, enforcement of the State aid rules by the Commission can also raise awareness in professional football clubs that State aid is only granted under strict conditions. In other words, these rules will force the clubs to be more responsible with their expenses and not sign players or construct stadiums that they cannot afford, because they expect a public bailout to follow in case of financial distress.

112 *Ámbito de la Administración Foral, 'Actuaciones de la Hacienda Foral en relación con el C.A. Osasuna y aplicación de la Ley Foral 26/2014, de reestructuración de su deuda tributaria'* (July 2015) <[http://camaradecomptos.navarra.es/imgx/informes/2015/InformeComptos1512\\_firmado.pdf](http://camaradecomptos.navarra.es/imgx/informes/2015/InformeComptos1512_firmado.pdf)> Last accessed on 30 July 2015.

113 M Potters, 'Feyenoord hoopt op 35 miljoen van gemeente' (*AD*, 20 September 2014) <<http://www.ad.nl/ad/nl/1038/Rotterdam/article/detail/3751634/2014/09/20/Feyenoord-hoopt-op-35-miljoen-van-gemeente.dhtml>> Last accessed on 19 August 2015.

114 'Gemeente Enschede houdt FC Twente aan afspraken over lening en stadion' (*rtvOost*, 9 April 2015) <<http://www.rtvooost.mobi/nieuws/nieuwsitem.aspx?nid=215272>> Last accessed on 19 August 2015.

115 M Misérus, 'Ajax bulkt van het geld, maar koopt het de Arena?' (*de Volkskrant*, 23 April 2015) <<http://www.volkskrant.nl/sport/ajax-bulkt-van-het-geld-maar-koopt-het-de-arena~a3975307/>> Last accessed on 19 August 2015.