

# SELECTED TOPICS RELATED TO SPORT AND STATE AID

Compatibility rules and the potential impact of the  
Foreign Subsidies Regulation

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# KEY CONCEPTS

- Professional sport clubs carry out economic activities – clear case law – undertakings
  - 2nd league threshold (?)
- Economic activity Klaus Höfner case (C-41/90.): any entity involved in economic activity
- Economic activity (Com v Italy C-118/85.): providing services or products on the market, entails certain risks
- Legal form, social aim, non-profit attitude: not relevant
- Type of funding / ownership is irrelevant
- Separation of activities / accounts: C-74/16 Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe – the issue of ancillarity

# SPORT AS ECONOMIC ACTIVITY

- Clearly no, if the infrastructure is not meant to be commercially exploited = accessible for the general public for free based on the *Aéroport de Paris* (T-128/98) and *Leipzig-Halle* judgments (T-455/08 and T-443/08 confirmed in C-288/11 P. *Leipzig-Halle*)
  - Outdoor gyms, running track circles
  - Infrastructure for the training and education of young athletes
  - The infrastructure is used by amateur clubs (generally not pursuing economic activity)
  - What is amateur? – not professional
  - Professional sport means the practice of sport in the nature of gainful employment or remunerated service, irrespective of whether or not a formal labour contract has been established between the professional sportsperson and the relevant sport organisation, where the compensation exceeds the cost of participation and constitutes at least half of the income for the sportsperson
    - Professional sport club = club having at least one professional player complies with the notion of professional sport

# FINANCING AND SPONSORSHIP

*Any economic benefit which an undertaking would not have obtained under normal market conditions*

- Sport sponsorship is an inexpensive form of advertising which can easily reach favoured market segments, for example through TV coverage.
- Sponsorship deals can provide a benefit obtained under normal market conditions, therefore the money paid under the sponsorship does not provide advantage for the sport club.
- No advantage, if the investment complies with the MEIP / MEOP

# NO EFFECT ON TRADE ARGUMENTS

First famous N 258/00 Dorsten pool case – distance from the border

SA.43983 – Sportcamp Nordbayern (DE)

- Project: EUR 20.76 million investment aid
  - Sports infrastructure aimed to be used by schools and sport associations, these had priority, other users are occasional
  - Rent of rooms to private people was the only economic activity
  - Not advertised, could not book in advance
  - 81% of the overnight stays come from Bavaria, only 1% of the users come from abroad = limited geographical market
  - Very small revenues
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- Case by case approach: in general endorsed by the General Court in T-728/17 Marininvest d.o.o. and Porting d.o.o. v Commission and T-582/20 - Ighoga Region 10 a.o. v Commission

# CONSEQUENCES

- Public financing of professional sports clubs can constitute State aid under Art. 107 (1) TFEU
  - Exception: training of youth athletes SA.11584 (FR)
- Compatibility has to be ensured
- COM has to decide both about the presence of State aid and about compatibility T-469/20 Netherland v COM

# COMPATIBILITY USUALLY BASED ON ART 107 (3) C)

- „ 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”
- Article 165 TFEU EU dimension of sport
- COM practice – sport arenas, multifunctional facilities, marinas, sport and wellness facilities, climbing halls; wide margin of interpretation, balancing between positive and negative effects
- COM guidelines – not adopted for the sport sector
- Block exempted aid: since 2014 rules for investment and operating aid, 2017 and 2023 notification thresholds increased
- Crisis aid since 2020: under Article 107 (3) b) TFEU

# CASE PRACTICE OF THE COMMISSION

- Ad hoc decisions on arenas following the Leipzig-Halle Judgments
- Similarity to other infrastructure cases
  - Different levels where aid (advantage can be present): owner, operator, users
  - Long term return, funding gap
- Since 2014/2017: drop in number of cases, „GBERization”
- The Commission did not want to deal with individual cases (SA.35440 Jena, SA.35135 Erfurt, SA.33045 Kristall Bäder AG)



# **RULES FOR SPORT FINANCING IN THE 2014 GBER**

- Investment aid for construction or upgrade of sport and multifunctional infrastructure (incl. energy upgrade)
- Operating aid to sport infrastructure, no direct financing of clubs

# COMPATIBILITY, IF IT IS STATE AID

- No exclusivity for a single professional sport user
  - $\geq 20\%$  of the time capacity has to be used by other professional or non professional user
- Access to the infrastructure shall be open for everyone on a transparent and non-discriminatory basis
- Preferential access under more favourable conditions only for investors who invested  $>30\%$  + the conditions have to be made public
- For sport infrastructure used by professional sport clubs: pricing conditions are made publicly available
- Concession or entrustment to a third party to construct, upgrade and/or operate the infrastructure assigned on an open, transparent and non-discriminatory manner (procurement rules)
- In-house operator does not qualify as third party, no tender is needed.
- Incentive effect is needed! No aid for projects started.



# COMPATIBILITY, IF IT IS STATE AID

- **Investment aid rules**
- **Eligible costs**
  - investment costs in tangible and intangible assets
- **Maximum aid thresholds**
  - The difference between the eligible costs and the operating profit of the investment (funding gap) - Ex ante, on the basis of reasonable projections, or through a claw-back mechanism.
  - For aid not exceeding EUR 2.2 million, the maximum amount of aid may be set, alternatively to the funding gap method, at 80 % of eligible costs.
  - Notification threshold: EUR 33 million or the total costs exceeding EUR 110 million per project



# COMPATIBILITY, IF IT IS STATE AID

- **Operating aid rules**
- **Eligible costs**
  - Operating costs (staff, materials, services, communications, energy, maintenance, rent, administration etc.) related to the infrastructure (and not to the sport club/team or sport activity!)
  - Excluding depreciation charges and costs of financing if these have been covered by investment aid
- **Maximum aid thresholds**
  - Aid amount shall not exceed the operating losses over the relevant period (ex ante calculation, or claw back mechanism)
  - For aid not exceeding EUR 2.2 million, the maximum amount of aid may be set, alternatively to the funding gap method, at 80 % of eligible costs.
  - Notification threshold for operating aid : EUR 2.2 million per infrastructure per year



# **PROTECTION OF THE INTERNAL MARKET FROM EXTERNAL SUBSIDIES**

# THE FOREIGN SUBSIDIES REGULATION

- Deglobalization
- More aid from third countries
- WTO dispute settlement does not work
- Consequence: EU COM proposals to protect the interests of the EU undertakings
- Complement traditional trade defence tools
- Regulatory gap subsidies by third countries having effect within the internal market (without import of goods)

# THE FOREIGN SUBSIDIES REGULATION

- New regulation proposed in 2021 and adopted in 2022: 2022/2560/EU
- New trade and competition powers given to the EU COM in case a foreign subsidy distorts the internal market
  - Undertaking engaged in economic activity
  - Foreign financial contribution (state resource) from a third State (or SOE) directly or indirectly
  - Benefit (advantage)
  - Selectivity, specificity
- Distortion is not presumed as in case of State aid granted by a MS! – liability to improve the competitive position, potential negative effects on EU companies

# THE FOREIGN SUBSIDIES REGULATION

- **Presumption of no liable impact:**
  - amount  $\leq$  4 EUR million / 3 years – unlikely to distort
  - De minimis amount (currently EUR 300.000 / 3 years): no distorting effect
- **Balancing the positive and negative impacts: commitments and/or redressive measures in case adjustment is necessary**



# THE FOREIGN SUBSIDIES REGULATION

- Three way the Commission can step up
  - Ex officio procedure: no hard threshold anything above EUR 4 million in the last 3 years
  - Notification related to mergers (EUR 500 million and EUR 50 million)
  - Notification related to public procurements (EUR 250 million and EUR 4 million per third state)

# THE FOREIGN SUBSIDIES REGULATION

- How is the FSR linked to sport?
- Relation to WTO ASCM rules, services are not covered by the WTO
- First complaints under the FSR came from the football sector,
  - Belgian second division Royal Excelsior Virton v Lommel SK (Abu Dhabi)
  - Spanish La Liga v PSG (Quatar)
- Market information, no obligation for the COM to open ex officio procedure: ,reasonable suspicion'
- First cases lean more towards Chinese companies, but the COM just started the application of the FSR ...