

Draft recommendation of the European Ombudsman in the inquiry into complaint 2521/2011/JF against the European Commission

Recommendation

Case 2521/2011/JF - Opened on 09/02/2012 - Recommendation on 16/12/2013 - Decision on 28/07/2014 - Institution concerned European Commission (Draft recommendation accepted by the institution) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The complainant represents a number of investors specialised in the purchase of publicly listed shares, and current shareholders of a number of European football clubs.
2. On 11 November 2009, the complainant sent to the European Commission a complaint relating to the alleged unlawful State Aid provided by the Kingdom of Spain to four Spanish football and basketball clubs (hereafter, respectively, the 'Complaint' and the 'Exempted Clubs'). According to the complainant, the Exempted Clubs are excluded under Spanish sports law from the otherwise compulsory conversion into Sports Public Limited Companies [2] that is applicable to all Spanish clubs participating in professional sport competitions.
3. The complainant considered that the Exempted Clubs are exceptionally allowed by the provision mentioned above to continue being established as Sports Clubs [3] with enhanced rights. According to him, the foregoing provides the Exempted Clubs with a number of anti-competitive and unfair advantages, namely, of a corporate, legal and tax nature. In the complainant's view, the State Aid granted under Spanish sports law infringes EU law as it prevents fair competition within the internal market. In addition, the above State Aid also infringes Article 107 of the Treaty on the Functioning of the European Union ('TFEU') since it constitutes an economic advantage granted by the Kingdom of Spain through its state resources favouring certain undertakings and affecting trade between Member States.
4. When submitting the Complaint, the complainant requested that his identity be treated as confidential. All other information in the Complaint was not confidential and could be disclosed [4] .



5. On 12 December 2009, the complainant sent the Commission a reminder concerning the Complaint asking it to acknowledge receipt of the Complaint and the existence of an investigation.
6. On 16 December 2009, the European Commission's Directorate-General for Competition ('DG COMP') acknowledged receipt of the Complaint.
7. On 14 January 2010, the complainant called DG COMP's attention to the fact that two months had passed since the submission of the Complaint. He referred to the Commission's Code of Best Practice for the conduct of State aid control procedures (the 'Code of Best Practice') and asked DG COMP to confirm the Complaint's priority status [5] .
8. On 18 January 2010, the complainant sent another reminder to DG COMP.
9. On 10 February 2010, DG COMP apologised for the delay and confirmed that there were sufficient grounds to carry out an investigation into the Complaint. However, because of the appointment of the new Commission, the Complaint's priority status could not yet be fully assessed. DG COMP asked the complainant to allow a few more days in order for the issue to be discussed with the new Commissioner for Competition, who had been appointed the previous day (the 'Commissioner').
10. On 11 February 2010, the complainant replied that he did not understand the need to wait for the Commissioner to be appointed prior to establishing the priority of the Complaint. The complainant expressed the view that the Commissioner was very closely related to one of the Exempted Clubs receiving the unlawful State Aid and had even been photographed by a Spanish newspaper wearing a replica shirt of that club. He expressed the hope that that circumstance was just a coincidence and would not adversely affect the Complaint. The complainant was confident that the Commissioner would treat the Complaint fairly.
11. On 15 February 2010, DG COMP asked the complainant for authorisation to forward a non-confidential version of the Complaint to the Spanish Authorities, to which the complainant agreed.
12. On 16 February 2010, DG COMP informed the complainant that it had forwarded the Complaint to the Spanish Authorities for "*their own summary of the facts, as well as the reasons why they do not consider the alleged aid to be unlawful aid*". This information would allow DG COMP to assess the measures in light of Articles 107 and 108 of the TFEU.
13. Between late March and the first half of April 2010, DG COMP received the Spanish Authorities' replies, on which it invited the complainant to comment. On 15 April 2010, it also confirmed the priority status of the Complaint [6] . The complainant submitted his comments on 3 May and further information on 8 July 2010.
14. On 28 September 2010, DG COMP addressed eight further questions to the Spanish



Authorities.

15. On 22 October 2010, a British newspaper contacted the Commission's Spokespersons' Service with a request for information concerning the Complaint. The Commission declined to make any comments on it.

16. In the meantime, on 1 October 2010, and also on 29 October 2010, the complainant pointed out to DG COMP that it had a twelve-month time frame in which to decide on priority cases [7]. The Commission replied that it was working on the Complaint and awaiting the Spanish Authorities' reply to the arguments the complainant raised in his comments of 3 May 2010.

17. On 30 November 2010, the complainant expressed disappointment regarding the lack of progress in the investigation of the Complaint and the non-compliance in his case with the twelve-month time frame for adopting decisions on priority cases. He reiterated that the Commissioner had close ties with one of the Exempted Clubs and questioned the reasons why DG COMP had been unable to confirm the existence of the Complaint to the interested parties who approached it. By doing so, the Commission harmed the interests of those interested parties and protected the Exempted Clubs. The complainant urgently requested to meet the Commission, the Spanish Authorities and/or the Exempted Clubs in Brussels to discuss any outstanding issues and avoid further delays in the resolution of the Complaint.

18. On 15 December 2010, DG COMP informed the complainant that the Spanish Authorities had submitted their responses. It also noted that, in his Complaint, the complainant asked for confidential treatment of his identity. It was therefore considered to be in his interest that the Commission remain silent when approached by the press. The complainant was of course free to advise the public on the Complaint. In such a case, the Commission would be most happy to confirm that it had indeed received the Complaint. DG COMP's e-mail to the complainant included the following sentence:

" I would feel inclined to write him that he asked for keeping his identity confidential and that therefore we were not keen going public, and that it would be up to him to ".

19. On the following day, and on 18 January 2011, the complainant asked DG COMP to send him the Spanish Authorities' last set of replies. He also repeated his concerns and emphasised that he had requested that only his identity be treated as confidential. This did not, in any way, prevent the Commission from confirming the existence of the Complaint. He further asked DG COMP to explain the meaning of the sentence included in its e-mail of 15 December 2010.

20. On 24 January 2011, DG COMP sent the Spanish Authorities' last set of replies to the complainant and invited him to comment on them.

21. On 11 March 2011, DG COMP requested the complainant to clarify the meaning of the first sentence included in his Complaint, namely:



" we are [X] based investors specialised in the purchase of shares of European football clubs ".

In particular, DG COMP wished to know whether the complainant is:

" representing the investors, are you part of the investors (as you indicated that you are not submitting the complaint on behalf of anyone else), is the investor institutionalised? Is this a professional kind of investment? Could you please describe this background to give us a more precise idea of who is behind the complaint? "

22. On 14 March 2011, the complainant commented on the Spanish Authorities' last set of replies. He also replied to DG COMP's request for clarifications. He explained that he represents retail investors submitting the Complaint on their own behalf. The complainant questioned why, sixteen months into the Complaint, DG COMP was asking those kinds of questions. If DG COMP was trying to establish the size of the complainant, he emphasised that this should not influence the outcome of the Complaint. All EU citizens may complain to the Commission, irrespective of their size and/or economic strength. Finally, the complainant asked DG COMP to clarify whether it investigated the other issues he referred to in the Complaint, namely, those relating to the basketball markets and antitrust. If it did not, the complainant would need to submit a parallel complaint with the Commission as soon as possible to make sure that those issues were also dealt with.

23. Not having heard again from DG COMP, on 19 December 2011, the complainant turned to the European Ombudsman.

The subject matter of the inquiry

24. In his initial complaint, the complainant alleged that DG COMP failed properly to handle the Complaint and to make a timely decision on it.

25. The complainant claimed that DG COMP should:

(i) make a decision on the Complaint or, alternatively, provide appropriate explanations as to why it has been unable as yet to reach a decision;

(ii) reply to his request for a meeting and to the matters raised in his correspondence of 14 March 2011;

(iii) reply to the matters raised in his correspondence of 18 January 2011 and apologise for the sentence (apparently originating from internal discussions) contained in its e-mail of 15 December 2010; and

(iv) clarify whether complainants may be disadvantaged as a result of their size/economic power and/or their request for the confidential treatment of their complaints, and if the answer is in the affirmative, guarantee that they are duly informed of that.



26. In his observations, the complainant also informed the Ombudsman that he had filed, in the meantime, three new separate complaints relating to alleged further State Aid with respect to two of the Exempted Clubs (one of them being the one with which the complainant stated that the Commissioner has close ties). According to the complainant, DG COMP failed to reply to his requests for confirmation of the priority status of those complaints, which was contrary to the Code of Best Practice. While he did not make a new complaint to the Ombudsman in respect of the above in order not to waste EU resources, in the complainant's view, the Commission's above omissions demonstrated its continuous failure to apply the Code of Best Practice correctly, which has general implications. A further formal State Aid complaint that the complainant had filed in the meantime concerning another two Spanish football clubs was considered by DG COMP as "*general market information*" only. The complainant considered making a new complaint to the Ombudsman with respect to this because he found the Commission's above analysis to be another example of its dilatory tactics and discrimination towards him.

The inquiry

27. On 10 February 2012, the Ombudsman forwarded the complaint to the Commission for an opinion.

28. On 6 June 2012, the Ombudsman received the Commission's opinion, which was forwarded to the complainant with an invitation to make observations. The Ombudsman received the complainant's observations on 31 July 2012 and 24 January 2013.

29. After a careful analysis of the Commission's opinion, the Ombudsman was not satisfied that the Commission had responded adequately to the complaint. The Ombudsman therefore proposed a friendly solution to the dispute on 30 May 2013, in accordance with Article 3(5) of the Ombudsman's Statute. The Ombudsman invited the Commission to adopt a decision on the Complaint or properly explain why it was not yet able to do so, in accordance with the Code of Best Practice, and paying particular regard to the need to avoid giving the impression of a conflict of interest. The Ombudsman further invited the Commission to clearly reply to the complainant's query regarding the issues relating to basketball markets set out in his Complaint and referred to in his further correspondence of 14 March 2011.

30. On 26 September 2013, the Ombudsman received the Commission's reply, which was forwarded to the complainant with an invitation to submit observations. The Ombudsman received the complainant's observations on 11 October and 4 November 2013. Further correspondence received from the complainant before the Commission replied to the Ombudsman's friendly solution, namely that of 2 May, 13 August and 24 September 2013, was considered by the Ombudsman together with the complainant's observations on the Commission's reply.



The Ombudsman's analysis and conclusions

Preliminary remarks

31. In his observations on the Commission's opinion, the complainant asked the Ombudsman for assistance in raising with Parliament the question of the Commission's interpretation of the European Parliament's resolution of 2 February 2012 on the European dimension in sport.

32. The reasoning leading to the proposal for a friendly solution sets out the Ombudsman's views on the relevance of the Commission's alleged interpretation of that resolution with respect to the subject matter of the complaint. This, of course, does not prevent the complainant from raising the issue with the European Parliament or any of its individual Members, namely, those he appears to have already contacted directly.

33. In his observations on the Commission's opinion, the complainant also suggested that an independent third-party competition law expert assess the Complaint.

34. In this respect, the Ombudsman pointed out in the friendly solution proposal that, as far as the complainant's suggestion referred to the Ombudsman's investigation, even though the Implementing Provisions of the European Ombudsman's Statute [8] foresee the possibility of commissioning expert reports, the Ombudsman did not consider this necessary for the assessment of the case.

A. Alleged failure properly to handle the Complaint and related claims

35. In support of his complaint, the complainant put forward a number of arguments which, in his view, demonstrated that the Commission mishandled the Complaint.

36. The Ombudsman referred to each argument under the separate headings 1) to 3) below and carefully analysed the Commission's replies to those arguments.

Issue 1) DG COMP's failure to reach a decision on the Complaint or to provide appropriate justification for this failure

Arguments presented to the Ombudsman

37. In his complaint to the Ombudsman, the complainant argued that DG COMP did not comply with:

(i) Points 4 " *Acknowledgement of receipt* " and 8 " *Time limit for investigating complaints* " of the Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (the 'Communication') [9] ; and

(ii) Section 7.2 " *Indicative time frame and outcome of the investigation of a complaint* " of the



Code of Best Practice.

38. The complainant emphasised that, at that stage, more than two years had passed since he submitted the Complaint. DG COMP failed to adopt a decision within the twelve-month time frame provided for in the Code of Best Practice. It further failed to comply with the 15 working day period for acknowledging receipt of a complaint and for informing him whether there were sufficient grounds to carry out an investigation [10] . DG COMP granted priority status to the Complaint three months after it had been submitted. This was contrary to the Code of Best Practice, which provides for a two-month period in this respect [11] . In addition, DG COMP incurred a significant delay when it decided to put the Complaint on hold until it could be discussed with the Commissioner, and took almost five months from the receipt of the complainant's comments and more than half a year after the Spanish Authorities' first set of replies, to address additional questions to those authorities. While it is true that the twelve-month time frame provided in the Code of Best Practice is only indicative and that the need to obtain information from the Spanish Authorities is a valid reason to extend the investigation of the Complaint beyond that time frame, DG COMP could not have used that extension as an excuse randomly to postpone *sine die* the adoption of a decision on the Complaint.

39. The complainant further argued that the Commissioner has close ties with a club identified in the Complaint as one of the beneficiaries of unlawful State Aid.

40. In his complaint to the Ombudsman, the complainant also argued that many important members of the Commission have very close ties with the Exempted Clubs and with the Kingdom of Spain. The complainant hoped that, despite these close ties, the treatment given by DG COMP to the companies that are the subject of the Complaint would be no different from the treatment given to any other company. Because of these undeniable national and emotional ties of many Commission members, the Commission should take additional care to avoid anomalous situations relating to such members.

41. The complainant reported that, immediately after he had submitted the Complaint in November 2009, two Commissioners were invited by one of the Exempted Clubs to visit its stadium, as shown by photographs placed on that club's and on one of the above Commissioners' websites [12] . Again, the complainant hoped that this was a mere coincidence and the Commission treated the Complaint fairly but, more than two years into the Complaint, it was difficult for him to avoid having a certain feeling of unease.

42. The complainant claimed that DG COMP should make a decision on the Complaint or, alternatively, provide appropriate explanations as to why it had been unable to reach a decision on it.

43. In its opinion, the Commission, first, argued that the Communication did not apply to the present case. It explained that, according to Point 1.3 of the Communication, the measures described therein apply to relations between complainants and the Commission in connection with infringement proceedings related to Article 258 TFEU. They do not apply to complaints



relating to other Treaty provisions, namely, complaints regarding State Aid covered by Articles 107 and 108 TFEU.

44. The Commission emphasised that DG COMP did nevertheless send an acknowledgement of receipt to the complainant and registered the Complaint. However, because of an administrative error, it was able to do so only after a month had passed since the receipt of the Complaint and after the complainant had sent it a reminder.

45. The Commission, second, referred to Section 7.2 of the Code of Best Practice and acknowledged that it had not respected the twelve-month time frame provided for therein. It, nevertheless, emphasised the non-legally binding nature of the above time frame and explained that, in light of the provisions of Sections 1.5 and 7.2 of the Code of Best Practice, individual investigations may deviate from the above deadline depending on their specific circumstances. Nonetheless, DG COMP regretted the length of the procedure, which it explained with the time it took to receive comments from the Spanish Authorities. It added: "[t] *his may be deplorable but can be influenced by the Commission to a very limited extent only.* "

46. The Commission, third, explained that DG COMP was considering, in general terms, how State Aid rules should be applied to professional football. At the time of the Commission's opinion, DG COMP still needed to collect information on several pending complaints regarding State Aid to " *professional football* " before taking a position. DG COMP further referred to its White Paper on Sport [13] and stated that " *there is a need for guidance in this area* ". In that respect, it argued that also the European Parliament, in its resolution of 2 February 2012 on the European dimension in sport, had " *reiterated its call for the Commission to adopt guidelines on the application of EU law to sport in order to rectify the many remaining legal uncertainties* " [14] .

47. The Commission assured the complainant that the Commissioner has no legal, financial, organisational or any other form of tie with any of the clubs the complainant identified as beneficiaries of State Aid. As a football enthusiast, he has, since his childhood, closely followed one of the clubs mentioned in the Complaint and supports that club during its competitions, which in no way affects his decisions in his capacity of Commissioner for Competition.

48. In his observations, the complainant accepted the Commission's explanations regarding DG COMP's administrative error which led to its delayed acknowledgement of the Complaint's receipt.

49. The complainant nevertheless took the view that the Commission did not explain DG COMP's unnecessary delay in confirming the priority status of his Complaint. DG COMP's failure to respect the deadline provided for in Point 49 of the Code of Best Practice and its putting the Complaint on hold until it could be discussed with the Commissioner, an ardent supporter of one of the clubs mentioned in the Complaint, reinforced the complainant's view that DG COMP treated the Complaint in an unfair and biased fashion. The complaint asked the Commission properly to explain the reasons and the circumstances behind that delay.



50. The complainant also noted that the Commission acknowledged having failed to comply with the indicative one-year time frame for taking a decision on the Complaint and justified that failure with the reasons set out in the Code of Best Practice for deviating from that deadline. He emphasised in this respect that the provision, which the Commission referred to for the first time in its opinion, allows for exceptions to the one-year time frame in very specific circumstances, none of which appear to be present in the this case. The Complaint is, in his view, "*a very clear and relatively standard case*", without any specific features that could justify any of the extraordinary measures falling under the application of Section 1.5 of the Code of Best Practice. DG COMP never argued that the Complaint has any such specific features in any of its previous communications with the complainant or offered any guidance as to how much more time it needed in addition to the one-year time frame of the Code of Best Practice to decide on the Complaint. Consequently, in the complainant's view, by referring to Section 1.5 of the Code of Best Practice, the Commission simply tried to justify an otherwise unjustifiable delay in adopting a decision on the Complaint.

51. The complainant expressed the view that the fact that the one-year time frame provided for in Section 7.2 of the Code of Best Practice is not legally binding does not mean that the Commission can simply ignore that provision and refuse to investigate the Complaint and adopt a decision on it. The only valid reason set out in the Code of Best Practice for deviating from the above deadline is "*the possible need to request complementary information from ... the Member State*", provided for in Point 47 of that Code. Consequently, the only delay which was justified was the one necessary for obtaining the second set of replies from the Spanish Authorities. After these replies (and the complainant's comments of 14 March 2011 on them) had been analysed, DG COMP should have adopted a decision on the Complaint. Any additional delay is unjustified because, after having received the Member State's last replies of December 2010, DG COMP requested no further information from that Member State.

52. The complainant further took the view that the fact that the Commission was considering in general terms how State Aid rules should be applied to professional football contradicted statements made by the Commissioner in public [15]. According to the complainant, the Complaint sets out a very clear case of a selective tax advantage with a devastating impact on the internal market. DG COMP should simply apply the existing legislation and case-law to the Exempted Clubs identified in the Complaint, in the same way as it does to other undertakings [16], instead of relying on any plans that it may or may not implement in the future. According to the complainant, the Spanish Authorities had admitted that they apply tax advantages and, therefore, DG COMP's continuing delay in adopting a decision on the Complaint was simply irresponsible.

53. The complainant also considered incorrect the Commission's argument that DG COMP first needed to collect information related to other cases before it could adopt a decision on the Complaint. He noted that DG COMP raised that argument for the first time more than a year and a half after the Spanish Authorities had sent the last set of replies. He took the view that DG COMP should assess the Complaint on its own merits, on the basis of the information which it already had and which was sufficient to allow it to adopt a decision. DG COMP should investigate all complaints concerning football clubs in the same diligent way that it investigates



those concerning other industries. The Commission had recently adopted and enforced State Aid decisions in respect of financial institutions and should not, therefore, give any favourable treatment to the Exempted Clubs mentioned in the Complaint.

54. Commenting on the Commission's references to the White Paper on Sport, the complainant noted that, even though that document dates back to 2007, the Commission referred to it for the first time in its opinion to justify its delay in adopting a decision on the Complaint. He took the view that the Commission misinterpreted that document. In his opinion, it clearly follows from the White Paper that sports fall under Competition law. It also clearly follows from the White Paper that both the European courts' case-law and the Commission's own decisions provide guidance as to how EU law applies to sport [17] . On its website on the White Paper on Sport [18] , the Commission clearly acknowledges that professional clubs are engaged in economic activities and that they cannot, as such, be exempted from State Aid rules [19] . There was therefore simply no reason why DG COMP should not investigate the Complaint under its Competition and Internal Market rules and quickly reach a decision on it.

55. Likewise, the complainant commented on the Commission's references to the European Parliament's resolution of 2 February 2012 on the European dimension in sport. He took the view that the resolution, which is a non-binding call addressed to the Commission to produce guidelines, cannot be interpreted as a general call to stop an ongoing State Aid case which should have been decided one year prior to that resolution and which involved a multi-billion-euro provision of State Aid via taxes by a Member State which is currently requesting hundreds of billions of Euros in aid from the rest of the Euro-area members. In addition, according to the complainant, the Complaint did not involve any legal uncertainties that would require any rectification, such as that mentioned by the Commission, and moreover, the Spanish Authorities admitted the existence of tax privileges as early as 2010. In the complainant's view, the Commission's reference to the above resolution was simply an attempt to shift the responsibility for its lack of action to another EU institution. The complainant discussed the issue with a number of Members of the European Parliament ('MEPs'), who were alarmed at the Commission's interpretation of the resolution in such a way as to delay reaching a decision on the Complaint. Many of them represent constituents who are being adversely affected by the unlawful State Aid.

56. The complainant further expressed his surprise that the Commission made no mention of the Council of Europe's report of 5 April 2012 on " *Good governance and ethics in sport* ", which, he stressed, called for a " *strict application of the ban on State aid for professional sports companies* ". He emphasised that that report expressly referred to tax breaks such as those in his Complaint and advised that " *local and national loyalties should not translate into unfair financial support for certain teams* ". According to the complainant, one of the Exempted Clubs is mentioned in the above report [20] . He emphasised that while DG COMP continued refusing to apply EU Competition law to the issues raised in the Complaint, the above Exempted Club used state-sponsored financial resources to lure the main star of one of the clubs, in which the investors represented by the complainant invested, into a transfer to that Exempted Club. The instability created by this interference reduced the value of the investors' investment and was yet another example of how unfair and damaging the Commission's refusal to adopt a decision



on the Complaint was.

57. The complainant, finally, took the view that the Commission confirmed the Commissioner's strong emotional ties to one of the Exempted Clubs and that this helped to explain the series of very unusual and unfortunate events affecting his State Aid Complaint. Enclosing an article from a Spanish daily newspaper depicting the Commissioner as a supporter of one of the Exempted Clubs during a football match [21], the complainant concluded that investigating the Complaint was never on the Commission's agenda. The complainant acknowledged that the Commissioner is free to support any company in his free time. He nevertheless expected him to refrain from making public displays of support for any of the companies under investigation, especially at a time when DG COMP had failed to meet the deadlines in dealing with a complaint related to that company and had put that complaint on hold for no valid reason. Such an attitude was inappropriate and risked hurting the feelings of those who enthusiastically follow the other club against which the Exempted Club in question was playing. That club had already been detrimentally affected by the abnormal financial resources of another of the investigated clubs, namely, when, in 2009, it lost its main star player to that Exempted Club.

58. In his observations, the complainant advanced a new argument in support of his view that the Commissioner was in a conflict of interest situation. The complainant pointed out that the Complaint concerns Spanish legislation which had been enacted in 1990 by the Cabinet in which the Commissioner was a member. The complainant " *d [id] not necessarily doubt that [the Commissioner wa] s doing his best to avoid that these conflicts of interest affect him* ". He nevertheless considered that it would be beneficial for the general functioning of the EU markets if any doubt or suspicion could be dispelled.

59. In conclusion, the complainant reaffirmed his view that the Commission could and should immediately adopt a decision regarding the Complaint. Its explanations to justify DG COMP's delay in reaching a decision were not supported by the applicable rules or by any of the arguments advanced in its opinion to the Ombudsman. The above failure to adopt a decision resulted in significant damage to the investors represented by the complainant and put the EU's reputation at unnecessary risk. Indeed, countries such as China, USA or Argentina could now legitimately question the EU's complaining about their anti-competitive practices while allowing a situation such as the one described in the Complaint to continue.

The Ombudsman's preliminary assessment of the issue set out under 1) leading to the first friendly solution proposal

60. At the outset, the Ombudsman noted that the matters concerning the application of the Communication and the acknowledgement of receipt of the Complaint were settled following the Commission's explanations and their acceptance by the complainant. Nevertheless, the complainant was still not satisfied with the Commission's explanations as regards its failure to comply with the one-year indicative deadline for reaching a decision on the Complaint, as provided for in the Code of Best Practice.

61. In this respect, the Ombudsman emphasised that, according to the Code of Best Practice,



"[t] he Commission will use its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt. That time limit does not constitute a binding commitment. Depending on the circumstances of the individual case, the possible need to request complementary information from the complainant, the Member State or interested parties may extend the investigation of a complaint. " [22]

It followed from the above that the one-year deadline for reaching a decision on a State Aid complaint is not an absolute constraint on the Commission. It admits exceptions, namely, when the Member State or the complainant is required to submit complementary information which is important to the investigation of that complaint.

62. It was however clear that, when the Commission sent its opinion of 6 June 2012 to the Ombudsman, more than a year had passed since its receipt of the complainant's observations of 14 March 2011 on the Spanish Authorities' last replies. During that time, DG COMP neither reached a decision on the Complaint nor further justified the absence of that decision by requesting additional complementary information from the complainant, the Spanish Authorities or any other interested party. It was, therefore, sufficiently clear that DG COMP failed to comply with the indicative deadline set out in the Code of Best Practice.

63. The Commission justified the above failure with "*specific circumstances*", namely, with its collecting of information on several other pending professional football State Aid complaints and its consideration of how, in general terms, State Aid rules should be applied to professional football. It also referred to its White Paper on Sport and to the European Parliament's resolution of 2 February 2012.

64. It was therefore necessary to establish whether or not the above actions invoked by the Commission could indeed be reasonably perceived as specific circumstances justifying its delay in reaching a decision on the Complaint.

65. In this regard, the Ombudsman emphasised that the Code of Best Practice's references to "*specific circumstances*" concern those of the "*individual case [s]*". It is "[t] he specific features of an individual case [that] may however require an adaptation of, or deviation from, this Code " [23] .

66. The Ombudsman was not convinced by any of the Commission's explanations for justifying its delay in reaching a decision on the Complaint. DG COMP's consideration of other pending cases, or its reflection about a general approach to State Aid in football, clearly did not concern the circumstances of the Complaint and therefore did not appear to justify deviating from the Code of Best Practice in the present case. Indeed, DG COMP can only do so if the "*specific circumstances of an individual case*", that is, of the Complaint, would justify it. The explanations which the Commission put forward in its opinion did not concern any "*specific circumstances*" or "*features*" of the Complaint that could justify its delay in reaching a decision within the one-year indicative time frame of the Code of Best Practice.



67. In this connection, the Ombudsman considered that neither the White Paper on Sport nor the European Parliament's resolution of 2 February 2012 had any relevance for the application of the above exception to the Complaint. While it is welcomed that the Commission follows Parliament's call to produce " *guidelines on the application of EU law to sport* ", any such task may certainly run in parallel with DG COMP's primary role of investigating, among others, allegations of a Member State granting unlawful State Aid in a specific case. In the Ombudsman's view, it would appear reasonable that the production of any such guidelines could even result, or take great inspiration from, the very conclusions reached in any such investigations. Similarly, the Ombudsman was not convinced by the Commission's pleas that it " *need [s] guidance* ". It appeared more logical to the Ombudsman that it is the Member States and/or the football clubs which need such guidance and the Commission which offers it to them, namely, through its DG COMP's investigations into State Aid and/or Competition complaints.

68. Finally, the Ombudsman noted that DG COMP had treated the Complaint as a " *priority case* ", without ever informing the complainant, either directly or through its opinion to the Ombudsman, of any decision it might have taken in the meantime withdrawing that priority treatment. Consequently, according to the Code of Best Practice, DG COMP should have, in principle, adopted a decision on the Complaint within one year after receiving the last piece of information important to its investigation, that is, the complainant's comments on the Spanish Authorities' last set of replies [24] .

69. It followed from all the above that DG COMP had clearly failed to comply with the provisions of its Code of Best Practice by not reaching a decision on the Complaint within one year after the complainant's last comments. It further failed properly to justify why it was unable to reach that decision.

70. In such circumstances, the Ombudsman considered it necessary to clearly convey to the Commission that the Commissioner's support, even if only as a football enthusiast, of one of the clubs mentioned in the Complaint, could indeed create the impression that no decision has been taken as yet on the Complaint exactly because of that support, which is an argument repeatedly raised by the complainant. While the Ombudsman could, in general, agree with the Commission that the Commissioner's enthusiasm does not, by any means, provide solid evidence that the Commission's decision-making was affected, the Ombudsman had nevertheless to emphasise the great importance of dispelling any suspicion of potential conflicts of interest. Reasonably, in the circumstances of the present case, unjustified delays in reaching a decision may have created a suspicion of a conflict of interest.

71. The Commission's reply to the complaint did not provide any explanation capable of dispelling any suspicion of a conflict of interest on behalf of DG COMP. The Ombudsman strongly emphasised that it was of the utmost importance for the Commission to avoid giving the wrong impression in this respect.

72. In light of all the above, the Ombudsman made the preliminary finding that DG COMP failed to comply with its Code of Best Practice when it failed to adopt a decision on the Complaint within the indicative twelve-month time frame, starting with the complainant's comments of 14



March 2011, and properly to justify that failure, thus creating an impression of a conflict of interest. This could have been an instance of maladministration and the Ombudsman made a proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman, that

"[DG COMP] *could adopt a decision on the Complaint or properly explain why it is not yet able to do so, in accordance with the Code of Best Practice, and paying particular regard to the need to avoid giving the impression of a conflict of interest.* "

The arguments presented to the Ombudsman after the first friendly solution proposal

73. The Commission " *welcome [d] the Ombudsman's proposal and [wa] s pleased to... accept this proposal* ". It emphasised that, at the time of its reply, it had not had the possibility of developing a case practice in the area of State Aid to professional sport, also due to the fact that Member States had never notified such aid. Its experience was therefore limited to analysing the market-related aspects of the sector and trying to devise general principles of State Aid control. This approach was, in the Commission's view, clear from the joint statement issued by the Commissioner and the President of UEFA in March 2012 on Financial Fair Play rules and State aid control in professional football (the 'Joint Statement') [25] . It further resulted from the letter DG COMP sent in October 2012 to all Member States enquiring about their financial relations with professional football [26] . Subsequently, DG COMP opened formal investigations regarding possible State Aid to various Dutch football clubs [27] .

74. The Commission regretted the delay in taking a decision on the Complaint regarding Spanish football clubs. It nevertheless stated that DG COMP would prepare as a next step a Commission decision concerning the facts which are the subject of the Complaint.

75. In his extensive and detailed observations, in addition to repeating his previous arguments, the complainant stated that the complaint against the Dutch football clubs was submitted to the Commission long after his Complaint. He took the view that the fact that DG COMP opened formal investigations against a number of Dutch football clubs supported his conclusion that a decision on his Complaint could have and should have been adopted a long time ago [28] . In that respect, the complainant also wrote directly to the President of the Commission, and sent a copy to the Ombudsman. He took the view that DG COMP treated his Complaint and the one concerning Dutch football clubs differently.

76. The complainant also questioned again the Commission's position that the Commissioner had no ties with one of the Exempted Clubs. He enclosed another article from the Spanish press, which included a photograph of the Commissioner in a replica shirt of that Exempted Club and which described calls from a Spanish politician for the Exempted Club to withdraw the Commissioner's membership card [29] . The complainant asked the Ombudsman to urge the Commissioner properly to explain whether he holds any membership or season tickets of that Exempted Club and whether the Commission received from any of the Exempted Clubs any gifts or benefits, namely VIP invitations to games. He was not satisfied by the Commission's reply to the Ombudsman's friendly solution proposal and found that it actually reinforced the



impression of a conflict of interest.

77. Furthermore, the complainant contested the view that the Commission did not have any experience in investigating football State Aid complaints. He argued that the Commission had investigated one of the Exempted Clubs under State Aid rules in the past, namely in 2004 and 2012, and decided that it did not breach those rules. The Commission thus treated that Exempted Club as an undertaking and had no doubts when deciding on how State Aid legislation and case-law applied to that club [30]. In the complainant's view, DG COMP demonstrated quick judgment when adopting decisions which were favourable to that Exempted Club under State Aid rules, but declared that it was unable to reach a decision on the Complaint. This added further to the complainant's impression that preferential treatment was being given to the Exempted Clubs by DG COMP when dealing with his Complaint.

78. The complainant also noted the Commission's references to the Joint Statement and emphasised that it was the first time that the Commission referred to it. Among other things, the complainant took the view that UEFA's Financial Fair Play rules had no relation with his Complaint whatsoever and that the Joint Statement again confirmed that State Aid rules apply to professional football clubs considered as undertakings [31]. In addition, the complainant found the Commission's references to the Joint Statement and UEFA rules rather worrying as they could give the impression of undue influence of a private entity on the Commission, considering that the latter has been unable to reach a decision on a complaint concerning violation of precisely State Aid rules.

79. The complainant found the Commission's references to DG COMP's letter of October 2012 to be a repetition of its opinion that it was collecting information on several pending complaints regarding State Aid and professional football. He asked whether the Spanish authorities had ever replied to DG COMP and, if they had, what the Commission did with that information, namely, in respect of his recent complaints concerning the Exempted Club of which, he stated, the Commissioner is an enthusiast. The complainant again took the view that the above did not help to dispel any doubts about the existence of a conflict of interest. He emphasised that, in the Dutch football clubs case, DG COMP was able to act rather promptly [32]. The Complaint, however, was put on hold.

80. Finally, the complainant emphasised that, on 9 October 2013, the Commissioner replied to a written question from an MEP that "[t] he Commission is investigating the different treatment of professional football clubs in Spain, based on their legal form. It is not able to indicate when this investigation will be closed. As the investigation is still ongoing, the Commission is not yet in a position to comment on its possible outcome." [33] In the complainant's view, the Commissioner's above reply of 9 October 2013 clearly contradicted the Commission's reply of 26 September 2013 to the Ombudsman's proposal for a friendly solution, namely, that it would prepare a decision on the Complaint shortly.

81. In light of all the above, the complainant asked the Ombudsman to make a draft recommendation to the Commission and to follow that draft recommendation with a special report to the European Parliament. He requested that the Ombudsman urge the Commission to



adopt a decision on the Complaint and to explain clearly whether or not it applies the provisions of the Code of Best Practice. In light of the general implications of the Commission's interpretation of its obligations under the Code of Best Practice, the complainant considered that the European Parliament should have the opportunity to express its views on the matter.

The Ombudsman's assessment leading to a draft recommendation

82. In the proposal for a friendly solution, the Ombudsman invited DG COMP to adopt a decision on the Complaint or properly explain why it is unable to do so, in accordance with the Code of Best Practice, and paying particular regard to the need to avoid giving the impression of a conflict of interest.

83. The Commission did not adopt a decision on the Complaint. It is therefore necessary to determine whether the explanations it provided (i) are compatible with the Code of Best Practice, and (ii) pay particular regard to the need to avoid giving the impression of a conflict of interest.

84. The Commission explained that it had not yet had the possibility of developing a case practice in the area of State Aid to professional sport and that its experience was limited to analysing the market-related aspects of the sector with a view to devising general principles of State Aid control. It argued that Member States had never notified it of their State Aid to professional sport. It thus sought to obtain information concerning how Member States deal with football clubs from a financial point of view, by means of a letter DG COMP sent to all Member States in October 2012. As a result, it opened formal investigations into possible State Aid being granted to a number of Dutch clubs.

85. The Ombudsman takes the view that the initiative to seek from Member States information " *about their financial relations with professional football* " is not relevant in the context of the Ombudsman's proposal for a friendly solution. In fact, DG COMP had already sought from the Spanish authorities the relevant information concerning the Complaint on 15 February and 28 September 2010, and had received their replies on 23 March, 12 April and 15 December 2010. The Commission's reference to DG COMP's letter of October 2012, which was a letter seeking information from all Member States about their financial relations with football clubs, does not on its own at all justify DG COMP's failure to adopt a decision on the Complaint. This is all the more true when, as the Commission recognised and the complainant strongly emphasised, as a result of the information obtained, the Commission was able to take a decision to open formal investigations into possible State Aid to Dutch football clubs as early as 6 March 2013.

86. In this respect, the Ombudsman in particular draws the Commission's attention to the conclusions set out in the proposal for a friendly solution and repeated in Points 65 and 66 of this draft recommendation that any reflection as to the general approach to issues of State Aid in football was not a valid reason to justify a deviation from the Code of Best Practice when handling the Complaint. The Ombudsman notes that the Commission did not comment on this interpretation, much less contest it. If, in its reply to the Ombudsman's friendly solution, the Commission's referring to DG COMP's letter of October 2012 was meant to demonstrate that it



needed to request supplementary information from the Spanish Authorities, it should have explained how this was justified by the circumstances of the Complaint [34] . However, the Commission failed to do so.

87. In light of the above, the Ombudsman concludes that the Commission once again failed to justify its failure to adopt a decision on the Complaint with an explanation which could be compatible with the Code of Best Practice.

88. Concerning the second aspect of the Friendly Solution proposal, it is necessary to analyse if the Commission's answer to that proposal does indeed address the aspect of the alleged "*impression of a conflict of interests*". The Ombudsman must regrettably conclude that the Commission has clearly failed to take the opportunity offered by the present inquiry to dispel any suspicion of a possible conflict of interest.

89. Indeed, in addition to having failed to explain properly why it had not yet adopted a decision four years after the complainant first submitted his Complaint, the Commission's not giving any reasonable indication as to the time when he could expect a decision certainly does not help to dispel any suspicion of a possible conflict of interest. Merely stating that it "*will prepare as a next step a Commission decision with regard to the facts which are the subject of the complaint*" or that "*DG Competition will prepare a Commission decision shortly*" (emphasis added) is clearly insufficient to explain when the decision on the Complaint will be adopted, especially considering that DG COMP has already been able to initiate formal investigations into possible State Aid to football clubs in another Member State.

90. In light of the forgoing, the Ombudsman must conclude that, contrary to the Commission's general announcement that it welcomes and accepts the Ombudsman's friendly solution, the Commission has failed (i) to adopt a decision, or (ii) properly to justify why it has been unable to do so, in accordance with the Code of Best Practice, and paying particular regard to the need to avoid giving the impression of a conflict of interest.

91. Given that the Commission, while accepting the friendly solution, failed to implement it (or to act upon it), thus committing an instance of maladministration, the Ombudsman will make a draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

Issue 2) DG COMP's failure (i) to reply to the complainant's request for a meeting and correspondence of 18 January and 14 March 2011, and (ii) to apologise for the sentence contained in its e-mail of 15 December 2010

Arguments presented to the Ombudsman

92. The complainant argued that a sentence, which apparently originated from internal discussions and was inadvertently included in an official e-mail sent to him on 15 December 2010 [35] , suggested bias and lack of care as regards the Complaint. The complainant submitted that DG COMP refused to confirm the existence of the Complaint to the interested



parties who approached it about the Complaint and appeared to have forgotten to delete the sentence from its previous internal communications as to how it could justify that refusal. Making up an excuse after the event indicated that there may have been other reasons for the refusal which DG COMP was not willing to mention. Keeping that sentence in the official e-mail was also unprofessional. DG COMP neither explained the reasons for including the sentence mentioned above in its e-mail of 15 December 2010 nor apologised for the fact that it happened.

93. In the complainant's view, these events indicate that DG COMP was biased in favour of the Exempted Clubs. By failing to confirm the existence of the Complaint, DG COMP unjustifiably prevented interested parties from providing it and the complainant with further information and evidence regarding the Complaint. DG COMP's arguments justifying its refusal to acknowledge the existence of the Complaint were flawed. The fact that the complainant asked that his identity be kept confidential did not prevent DG COMP from answering the question whether it received the Complaint with a simple "yes" because this would not involve disclosing his identity. The complainant had made it clear in the Complaint that, with the exception of his identity, the information in the Complaint was not confidential and could be disclosed. The reasons for his original request for confidential treatment of his identity are relatively easy to understand and relate to the very particular nature of the football business, in which tensions tend to run high and could compromise the complainant and the personal safety of the investors he represented. This is why he asked for confidential treatment of only his identity, and not the Complaint's contents.

94. Finally, the complainant argued that DG COMP did not reply to the matters raised in his related subsequent correspondence of 18 January and 14 March 2011. In particular, it failed to clarify whether it investigated the antitrust and the basketball aspects of the Complaint. The answer to these questions, which was as simple as a "yes" or "no", was very important to the complainant since it would have allowed him, if necessary, to submit a separate complaint as soon as possible. The complainant was alarmed at the silence of DG COMP and the Spanish Authorities on the issue of the effects of State Aid on the basketball market. Finally, according to the complainant, DG COMP did not reply to his repeated requests for a meeting.

95. In its opinion, the Commission referred to DG COMP's explanation of 15 December 2010, namely, that it had declined to comment on the press query of 20 October 2010 because the complainant wished to keep his identity confidential and DG COMP considered it to be in his interest to not comment publicly on the investigation.

96. The Commission also argued that the sentence included in DG COMP's e-mail of 15 December 2010 by mistake merely reflected the internal discussions leading to DG COMP not confirming the existence of the Complaint to the press. According to the Commission, it is its practice not to divulge such information to the general public before taking the formal step of a decision, unless the complainant himself makes the complaint public. The Commission apologised for the wrong impression which the wording of its e-mail of 15 December 2010 may have given.

97. The Commission further took the view that it had replied to the complainant's e-mail of 18



January 2011 by forwarding him the last set of the replies by the Spanish Authorities. As regards his disagreement with its not communicating information on the State Aid investigation following a press enquiry, DG COMP had already explained to the complainant on 15 December 2010 why it had been reluctant to make the investigation public. The complainant's correspondence of 18 January 2011 gave no reason to add anything to what had been already explained to him in DG COMP's e-mail of 15 December 2010.

98. The Commission acknowledged, however, that DG COMP did not reply to the complainant's e-mail of 14 March 2011 regarding a possible violation of antitrust rules by Spanish sport clubs and the possible need for him to submit a separate complaint in that respect. It explained that, on 29 February 2012, DG COMP sent a letter to the complainant apologising for its delay in replying to his questions and indicating the rules and requirements applicable to antitrust complaints [36] .

99. Finally, as regards the complainant's repeated requests for a meeting, the Commission explained that DG COMP was of the view that no meeting with third parties was needed at that point.

100. In his observations, the complainant repeated his previous arguments. He also referred to a newspaper article he included with his observations and took the view that the Commission can and, indeed, does confirm the existence of investigations, namely, into the tax affairs of certain Spanish football clubs, without necessarily disclosing the identity of the complainant [37] . This, in his view, again demonstrated that DG COMP discriminated against the Complainant.

101. The complainant welcomed the fact that the Commission apologised for the sentence in its e-mail of 15 December 2010. However, he was not satisfied with the Commission's explanations in that regard. He noted the expression "*feel inclined*" used in that sentence and took the view that this indicated that there were other reasons being considered by DG COMP during its internal discussions. This added to the complainant's feeling that his Complaint was receiving unfair, biased and differentiated treatment.

102. The complainant further took note of DG COMP's practice of not divulging any information to the general public before adopting a decision on a complaint, unless the complainant himself makes the complaint public. He suggested that this should be clearly explained to complainants who request that their identity not be revealed [38] .

103. The complainant then strongly emphasised that DG COMP has not yet clearly replied as to whether or not it investigated the Complaint in respect of the Spanish basketball market [39] . DG COMP's letter of 29 February 2012 did not address this issue at all.

104. He nevertheless acknowledged that the Commission did reply on 29 February 2012 to his question as to whether DG COMP investigated his allegations of antitrust. He stated that he was not surprised that it took it almost a year, and a complaint to the European Ombudsman, to obtain a reply on this matter since, according to him, the current Deputy Director-General for Antitrust is an ardent supporter of another Exempted Club mentioned in the Complaint [40] .



The complainant accepted DG COMP's reasons for not initiating an investigation on the basis of the information he had provided. As soon as he was reassured that DG COMP treated his complaints fairly, he would submit to it a new formal complaint in respect of the antitrust issue.

105. Finally, the complainant noted DG COMP's refusal to hold a meeting with him and took the view that the foregoing position strengthened his view that DG COMP simply never had any intention of adopting a decision on the Complaint.

The Ombudsman's preliminary assessment of the issue set out under 2) leading to the second friendly solution proposal

106. The Ombudsman noted that, in the Complaint, the complainant explicitly stated:

" You may not reveal our identity. For the avoidance of doubt only our identity needs to remain confidential unless otherwise authorised by us. The rest of the information contained in this document is not confidential and may be disclosed ".

107. To the Ombudsman, the above statement appeared to indicate in a sufficiently clear manner that, with the exception of his identity, the complainant was not opposed to the facts of the Complaint being disclosed.

108. There appeared, however, to be no clear obligation on the Commission to confirm the existence of the Complaint, and, once approached, DG COMP had considerable discretion in deciding how to proceed in this respect. It was, therefore, necessary to establish whether, by remaining silent about the existence of the Complaint, DG COMP exercised that discretion in a reasonable manner.

109. In its e-mail of 15 December 2010 and in its opinion to the Ombudsman, the Commission explained that, in light of the complainant's request that his identity be kept confidential, DG COMP considered it to be in his interest that it not comment on enquiries with respect to the Complaint.

110. The Ombudsman noted that, in the Complaint, the complainant identified the clubs in which the investors he represents are shareholders, as well as the Member State where those investors are based. These elements could logically require extra care when possible requests for information regarding the Complaint were dealt with. However, in light of the complainant's initial straightforward request that only his identity be kept confidential and not the remainder of the Complaint, it appeared that it could have been possible for the Commission simply to confirm that a complaint concerning alleged State Aid to football clubs in Spain existed, without this necessarily resulting in its disclosing any details that could have led to the identification of the individual(s) who had submitted the Complaint. The Ombudsman noted in this respect that the Commission did not argue that it had been asked to reveal or to confirm that identity.

111. It followed that the complainant's request to keep his identity confidential did not justify the Commission's refusal to comment on the Complaint. In other words, the Commission appeared



to have adopted an overly cautious approach.

112. However, the Ombudsman had no reason to believe that, by declining to comment on the Complaint, DG COMP sought to pursue objectives other than that of keeping the complainant's identity confidential, even if, as set out above, doing so made it act in a manner which could be perceived as being overly cautious.

113. In light of the foregoing, the Ombudsman took the view that no further inquiries were necessary concerning the above matter, which was raised in the complainant's correspondence of 18 January 2011.

114. As regards DG COMP's further replies, the Ombudsman noted and welcomed the Commission's decision to inform the complainant about its position on the antitrust matters in the Complaint. While the complainant remained critical of the Commission's delay in dealing with this issue, he clearly accepted that position. The Ombudsman therefore concluded that the Commission had settled this aspect of the complaint.

115. As regards the complainant's request for a meeting, DG COMP clearly replied to this in its opinion. While the Ombudsman, as a matter of principle, encourages any and all collaboration between the Commission and the complainants, the Ombudsman noted that DG COMP had clearly set out its position as regards its discretionary powers concerning whether it would be appropriate to hold any such meeting in respect of the Complaint. Consequently, the Commission had satisfied the related claim for a reply.

116. In his letter of 14 March 2011, the complainant asked DG COMP whether it also investigated matters relating to (i) basketball markets and (ii) antitrust he had raised in the Complaint. In its letter of 29 February 2012, DG COMP only replied to the second of the above issues, confirming that "*there is no ongoing antitrust investigation*". It did not clearly reply whether or not its investigation of the Complaint included the basketball markets.

117. The Ombudsman therefore made the preliminary finding that the Commission failed properly to reply to the complainant's correspondence of 14 March 2011, namely, on the issue of whether DG COMP included the basketball markets in its investigation of his Complaint. This may have been an instance of maladministration, and the Ombudsman made a second proposal for a friendly solution, in accordance with Article 3(5) of the Ombudsman's Statute, that

"[DG COMP] could clearly reply to the complainant's query regarding the issues relating to basketball markets set out in his Complaint and referred to in his further correspondence of 14 March 2011."

The arguments presented to the Ombudsman after the second friendly solution proposal

118. The Commission also "*welcom [ed and] accept [ed]*" this proposal. It stated that a State Aid investigation of tax advantages to professional sport clubs, which are not limited to a specific activity of these clubs, automatically covers all the commercial activities of these clubs.



The investigation of the Complaint therefore covers all economic activities of the clubs affected.

119. In his observations, the complainant took the view that the Commission had opted to redraft the Ombudsman's proposal and not reply to the question of whether the issues of the basketball markets were covered by the investigation. According to the complainant, the Commission's reference to "*basketball activities of the professional sport clubs*" leaves out the very important general effects on the basketball markets of the anomalous situation created by the Spanish sports law. The complainant was therefore not satisfied by the Commission's reply and asked the Ombudsman to urge the Commission to provide a clear response to this matter and to admonish it for its behaviour.

The Ombudsman's assessment after the second friendly solution proposal

120. In the second friendly solution proposal, the Ombudsman invited the Commission to reply clearly to the complainant's query regarding the issues relating to basketball markets, as set out in his Complaint and his further letter of 14 March 2011.

121. In its reply, the Commission interpreted the Ombudsman's above invitation as to:

"[r] eply to the complainant's request as to whether the State aid investigation also includes the basketball activities of the professional sports clubs, as referred to in his letter of 14 March 2011..."

The [above] point suggests a clarification of the scope of the investigation. The Commission can confirm that a State aid investigation of tax advantages to professional sport clubs, which are not limited to a specific activity of these clubs, automatically covers all the commercial activities of these clubs...

[T] he complainant can be assured that the investigation regarding his complaint covers all economic activities of the clubs affected. "

122. Although the Ombudsman notes that the Commission did not clearly refer to "*basketball markets*", it would appear to the Ombudsman that, according to the Commission, DG COMP's investigation covers all elements of the Complaint. As such, this aspect of the present complaint does not require any further investigation by the Ombudsman.

Issue 3) Complainants' being possibly disadvantaged as result of their size and economic power

Arguments presented to the Ombudsman

123. The complainant questioned DG COMP's reasons for requesting clarifications from him regarding who the complainant really was only on 11 March 2011, that is to say, sixteen months after the submission of the Complaint.



124. He emphasised in this respect that he disclosed the complainant's size and economic strength to DG COMP immediately on 14 March 2011, and asked it to explain the relevance of the above information to its handling of the Complaint. He stated that not hearing from DG COMP again was a clear indication that the Commission discriminated against retail investors whose interests were less valuable to it.

125. The complainant claimed that DG COMP should (i) clarify whether complainants may be disadvantaged as a result of their size/economic power and/or their request for the confidential treatment of their complaints, and (ii) if the answer is affirmative, guarantee that they are duly informed of that.

126. In its opinion, the Commission explained that it had asked the complainant to explain the precise identity of the complainant in the Complaint because it was not clear to DG COMP whether he was the complainant or whether he represented others who were the real complainants. In his submissions, the complainant often referred to himself in plural (" we ", " We are [X] based investors ... ") but signed the Complaint with his own name and profession. DG COMP thus found it necessary to clarify whether the complainant represented others interested in the Complaint and who these others were.

127. The Commission stated that complainants are not disadvantaged as a result of their size, economic power and/or their request for the confidential treatment of their complaints. According to the Commission, the confidential treatment of complainants' identities is a common element of the treatment of complaints and is especially important for smaller and weaker complainants.

128. In his observations, the complainant emphasised that the question of 11 March 2011 " *regarding the first line of [the C] complaint* " was the only direct request for clarification that he ever received from DG COMP. In light of his many communications and the large amount of information submitted, he concluded that all his correspondence in respect of the Complaint was, for DG COMP, totally clear. The fact that, even in such circumstances, DG COMP still failed to reach a decision on the Complaint made the complainant conclude that the Commission had no great interest in reviewing that correspondence and information at all.

The Ombudsman's assessment of the issue set out under 3)

129. The Ombudsman noted that the complainant submitted the Complaint in November 2009 and that DG COMP requested the clarification in question in March 2011, that is, almost a year and a half later.

130. The Ombudsman emphasised that the Spanish Authorities' last set of replies arrived at the Commission in December 2010. It therefore appeared that DG COMP requested the clarification regarding the complainant at a moment when it was in a position to carry out a full review of all the information submitted by the Spanish Authorities. The complainant's last comments on that information reached DG COMP three days after its request for clarification.



131. Ideally, any explanations or clarifications which the Commission might require from the complainant should have been sought at the earliest possible opportunity. It is also the case that the identity or status of the complainant should not, and as the Commission itself has made clear, would not affect the manner in which the complaint would be treated. The content of the Commission's request, as well as its timing, raised concerns for the complainant. The Ombudsman however takes the view that, in the context of the overall issues raised in the complaint, there is no advantage in pursuing this particular matter any further.

B. The draft recommendation

On the basis of the inquiries into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

The Commission should undertake to make a decision on whether or not to start infringement proceedings as soon as possible and, in any event, not later than 30 June 2014.

The President of the Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 March 2014. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

Emily O'Reilly

Done in Strasbourg on 16 December 2013

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] In the original Spanish: "*Sociedades Anonimas Deportivas*".

[3] In the original Spanish: "*Clubes Deportivos*".

[4] "*You may not reveal our identity. For the avoidance of doubt only our identity needs to remain confidential unless otherwise authorised by us. The rest of the information contained in this document is not confidential and may be disclosed.*"

[5] Code of Best Practice for the conduct of State aid control procedures, OJ 2009 C 136, p. 13. Section 7.2 ' *Indicative time frame and outcome of the investigation of a complaint* ' of the Code of Best Practice reads as follows: " 49. *As a matter of transparency, the Commission services will*



use their best endeavours to inform the complainant of the priority status of its submission, within two months from the date of receipt of the complaint ... "

[6] According to the Code of Best Practice: " 48. *The Commission is entitled to give different degrees of priority to the complaints brought before it (1), depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations (2), it can thus postpone dealing with a measure which is not a priority. Within twelve months, the Commission will, therefore, in principle, endeavour to: (a) adopt a decision for priority cases... with a copy addressed to the complainant... "*

[7] Section 7.2 ' *Indicative time frame and outcome of the investigation of a complaint* ' of the Code of Best Practice reads as follows: " 47. *The Commission will use its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt. That time limit does not constitute a binding commitment. Depending on the circumstances of the individual case, the possible need to request complementary information from the complainant, the Member State or interested parties may extend the investigation of a complaint. 48. The Commission is entitled to give different degrees of priority to the complaints brought before it, depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations, it can thus postpone dealing with a measure which is not a priority. Within twelve months, the Commission will, therefore, in principle, endeavour to: (a) adopt a decision for priority cases pursuant to Article 4 of Regulation (EC) No 659/1999, with a copy addressed to the complainant; (b) send an initial administrative letter to the complainant setting out its preliminary views on non-priority cases. The administrative letter is not an official position of the Commission, but only a preliminary view of the Commission services, based on the information available and pending any additional comments the complainant might wish to make within one month from the date of the letter. If further comments are not provided within the prescribed period, the complaint will be deemed to be withdrawn. "*

[8] Article 5(5) of the European Ombudsman's Implementing Provisions adopted on 8 July 2002 and amended by decisions of the Ombudsman of 5 April 2004 and 3 December 2008: "[t] *he Ombudsman may commission such studies or expert reports, as he considers necessary to the success of an inquiry. "*

[9] OJ 2002 C 244, p. 5.

[10] The complainant cited the information available on the DG COMP's website: "[y] *ou will receive an acknowledgement of receipt of your complaint within 15 working days, and you will be informed whether there are sufficient grounds to investigate your complaint. "*

[11] " 49. *As a matter of transparency, the Commission services will use their best endeavours to inform the complainant of the priority status of its submission, within two months from the date of receipt of the complaint. In the case of unsubstantiated complaints, the Commission services*



will inform the complainant within two months from receipt of the complaint that there are insufficient grounds for taking a view on the case, and that the complaint will be deemed to be withdrawn if further substantive comments are not provided within one month. As regards complaints which refer to approved aid, the Commission services will also endeavour to reply to the complainant within 2 months from receipt of the complaint. "

[12] The complainant provided internet links, which were inspected by the Ombudsman.

[13] COM (2007) 391 final.

[14] 2011/2087/(INI).

[15] The complainant referred to a speech given by the Commissioner on 2 February 2012 where, according to the complainant, the Commissioner stated: "*[I] want to shift the focus of our control on the cases that have a real impact on competition in the internal market and I want to investigate them thoroughly. The examples that first come to mind are subsidised network industries, publicly supported incumbents in liberalised markets and selective tax advantages. "*

[16] In this regard, the complainant referred to a press conference held on 25 July 2012 where, according to him, the Commissioner stated in respect of a decision adopted in another case of unlawful State Aid: "*these are the rules and I know how in particular my German friends like to enforce the rules "*.

[17] The complainant referred to Section 4.1 of the White Paper, entitled 'The specificity of sport', which reads as follows: "*[c] ompetition law and Internal Market provisions apply to sport in so far as it constitutes an economic activity ... The case law of the European courts and decisions of the European Commission show that the specificity of sport has been recognised and taken into account. They also provide guidance on how EU law applies to sport. In line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law. "*

[18] http://ec.europa.eu/sport/white-paper/swd-the-economic-dimension-of-sport_en.htm#3_2_2

[19] "*Professional sport clubs [:] Since professional sport clubs are engaged in economic activities, there is no compelling argument why they should be exempted from the State aid rules. The need to ensure competitive equality between players, clubs and competitions as well as the necessity to ensure uncertainty of results can in fact be guaranteed most effectively by the application of State aid rules, which are meant to establish a level playing field and ensure that States or municipalities that are most willing or able to grant subsidies to their clubs will not disrupt fair competition. "*

[20] The complainant emphasised that the Council of Europe's report included the following statements: "*44. It should be noted that part of the problem lies in the differences between national legislations and in the support indirectly given to clubs by public authorities. Taxes and*



charges differ from country to country; these factors have a clear impact on expenditure associated with players' salaries and, consequently, distort competition to some extent. In addition, local and national loyalties should not translate into unfair financial support for certain teams. 45. This poses the question at which point competition between clubs can significantly be distorted, and some clubs enjoy an undue advantage, as a result of the financing of sports infrastructure, its sale to sports companies or placing on loan to teams, the granting of subsidies, loans, tax breaks or other financial benefits, gifts, the purchase by public authorities of advertising space or, indeed, facilities belonging to clubs, or other measures to support sports companies. For example, in the early 2000s [the football club] was able to sell its training ground back to the city for more than €400 million. 46. There is a need for strict application of the ban on State aid for professional sports companies - which are, by definition, engaged in economic activities and are therefore covered by the term "undertaking" for the purposes of Community law. Moreover, greater financial transparency should be required at national level in all transactions involving the use of public funds for the benefit of professional sport. This is in order to avoid taxpayers having to pay for the survival of companies incapable of introducing sound financial management. "

[21] The complainant enclosed an article from Spanish daily newspaper *El País* dated 18 March 2012 with the following statements (in the original Spanish): "[the Commissioner] *se muestra afable y cordial, pero la entrevista se demora unos minutos mientras el comisario cabaretea un rato con las palabras ... y va lanzando miradas furtivas al ordenador. Gol de [football club he supports] ... Solo entonces arranca una charla...* "

[22] Point 47 of Section 7.2. 'Indicative time frame and outcome of the investigation of a complaint' of the Code of Best Practice.

[23] Point 5 of Section 1. 'Scope and purpose of this Code'. Footnote 5 to Point 5 of Section 1. 'Scope and purpose of this Code' appears to contain some guidance in respect of the shape any such " *specific circumstances* " may take. It provides, in this respect, for the following explanation: "[i] *n the context of the 2008 banking crisis, the Commission has taken appropriate steps to ensure the swift adoption of decisions upon complete notification, if necessary within 24 hours and over a weekend. See Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8). As regards the real economy, see Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1).* "

[24] Point 48 of Section 7.2 'indicative time frame and outcome of the investigation of a complaint' of the Code of Best Practice reads as follows: "[t] *he Commission is entitled to give different degrees of priority to the complaints brought before it ... depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations ... it can thus postpone dealing with a measure which is not a priority. Within twelve months, the Commission will, therefore, in principle, endeavour to: (a) adopt a decision*



for priority cases ... "

[25] The Commission provided a link to the Joint Statement:

http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf [Link]

[26] The Commission did not provide any copies of this letter.

[27] The Commission provided a link to a press release pertaining to 'State aid: Commission opens in-depth investigation into public funding of five Dutch professional football clubs':

http://europa.eu/rapid/press-release_IP-13-192_en.htm [Link]

[28] The complainant enclosed a copy of the Commission's letter dated 6 March 2013 to the Dutch authorities concerning "*Alleged municipal aid to the professional Dutch football clubs*". The complainant emphasised that, in that letter, the Commission took the following views: "[t] *he football clubs in question are active in professional football, which must be qualified as an economic activity in line with the jurisprudence of the Court of Justice in this regard. Regardless of their legal form, those football clubs must be deemed to constitute undertakings in the meaning of Article 107(1) TFEU...*

The aid to [the concerned football clubs] was therefore awarded illegally...

The Commission also concludes that State aid in the meaning of Article 107(1) TFEU was awarded to [the concerned clubs]".

[29] According to the article from elcorreo.com, dated 18 July 2013 (in the original Spanish): "[e] *l senador... ha propuesto que se le quite de forma simbólica el carné de socio del [one of the exempted clubs] al comisario europeo de Competencia... en respuesta a su decisión de que el sector naval tenga que devolver las ayudas fiscales logradas por el método 'tax lease' "*

[30] The complainant enclosed copies of a report dated 9 November 2004 from a news agency and a letter dated 6 January 2012 from DG COMP to the complainant confirming, respectively, that :"[t] *he European Commission has dropped its investigation [to which the same news agency referred on 3 March 2004] into a controversial property deal by [one of the exempted clubs] after concluding that there was no state aid involved, a Commission spokeswoman said on Tuesday "* and that "[b] *ased on the information you provided [on 28 December 2011 regarding a sponsorship deal between one of the exempted clubs and the Ministry of Industry, Tourism and Commerce and the Community and City X] the services of the Commission have not been able to identify any issue regarding unlawful State aid "*

[31] Paragraph 8 of the Joint Statement provides that: "[t] *he main idea behind State aid control is that European undertakings should compete on a level playing field, where no operator is given special advantages by any layer of the government. In this respect, the financial regulations by UEFA and the State aid rules by the Commission pursue broadly the same objective of preserving fair competition between football clubs. "*



[32] The complainant quoted the Commission's letter dated 6 March 2013 to the Dutch authorities concerning " *Alleged municipal aid to the professional Dutch football clubs* " according to which: " 5. *In May 2011, the Commission further learnt from press reports and through submissions from citizens that the municipality... was planning to support the football club... through a financial transaction... The Commission requested information from the Permanent Representation of the Netherlands by letter dated 27 May 2011; in its letter the Commission also reminded the Dutch authorities that all measures involving State aid should be notified to the Commission. No such notification was sent to the Commission. After a request for additional time, information concerning the transaction was, however, submitted to the Commission on 26 and 28 July 2011.* "

[33] The complainant enclosed the written questions and the Commissioner's answer.

[34] Point 47 of Section 7.2 reads as follows: 'Indicative time frame and outcome of the investigation of a complaint' of the Code of Best Practice: "[t] he Commission will use it best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt. That time limit does not constitute a binding commitment. Depending on the circumstances of the individual case , the possible need to request complementary information from the complainant, the Member State or interest parties may extend the investigation of a complaint. " (emphasis added)

[35] " *I would feel inclined to write him that he asked for keeping his identity confidential and that therefore we were not keen going public, and that it would be up to him to* ".

[36] The Commission enclosed a copy of this letter with its opinion.

[37] The article from Bloomberg news agency included the following statement: "[t] he Commission is examining whether Spain's top-division soccer clubs are improperly receiving state aid under agreements that delay tax payments. The Commission is analyzing information it requested from the Spanish government about the tax pacts, Commission spokeswoman ... said in an e-mail "

[38] The complainant suggested that DG COMP add to the " *No, you may not reveal my identity* " case in the complaint form a phrase explaining that "[i]f you choose the option of not allowing the Commission to reveal your identity, the Commission will be unable to confirm the existence of your complaint to third parties. "

[39] Here, the complainant cited: (i) his Complaint: "[t] his is just another clear example of how the Additional Disposition was just made to selectively cater the interests of these two institutions and creates a distortion of other Spanish professional leagues such the Spanish basketball league (Liga ACB) that should be also analysed by the European Competition Commission "; (ii) his letter of 14 March 2011 to DG COMP: "[t] he situation in the Spanish and European basketball markets is an integral part of our complaint and we would be therefore very grateful if the Commission could confirm to us as soon as possible whether the basketball aspects of our complaint (i.e. the State aid provided by the Kingdom of Spain to the basketball teams of the



National Champions) is already being considered by the Commission. If that is not the case, we would be very grateful if the Commission could let us know as soon as possible since we would then immediately launch a parallel complaint focusing exclusively on the situation of the Spanish basketball market that we have described with great detail in our writings to the Commission "; and (iii) his e-mail of the same date: "[w] e would be grateful if the Commission could come back to us as soon as possible regarding our questions in Part 3 and 4 of our letter as to whether the Basketball and Antitrust issues described throughout our Complaint are already being investigated by the Commission. The reason for requesting a prompt response to these questions is that, if these issues are not being yet investigated by the Commission, we may need to launch parallel complaints as soon as possible to make sure that these crucial issues are also dealt with. "

[40] The complainant enclosed a copy of a letter published on 14 June 2000 in the Spanish daily newspaper *El País* , which is signed with a name that is the same as that of the Deputy Director-General for Antitrust and in which the latter apparently acknowledges being an associate member of one of the Exempted Clubs.