

State Aid and European football clubs? Summary of recommendation by the European Ombudsman following a complaint against the EU Commission

Correspondence - 17/12/2013

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) |

More than four years after it received a complaint which alleges that Spain is in breach of State Aid rules in its treatment of certain football clubs, the European Commission has failed to make any decision on whether the complaint warrants enforcement action on its part. This is the situation despite the fact that the normal period for a decision in this kind of case is 12 months; and despite the fact that the continuing failure to make a decision could lead to public concern that the Commission's inaction reflects an unwillingness to act by the relevant Commissioner who is known to have strong links to one of the Spanish clubs in question.

The Ombudsman has now completed her inquiry [1] into the complaint and has made a number of findings. These include:

- that the Commission has failed to take a timely decision on whether infringement proceedings against Spain should be initiated; and
- that the Commission has failed to allay suspicions that the relevant Commissioner has a conflict of interests and that its inaction reflects an unwillingness by that Commissioner to start infringement proceedings which might impact negatively on a football club with which it is acknowledged that he has close links.

The Ombudsman has sent a draft recommendation [2] to the European Commission asking that it make a decision in this case by 30 June 2014. The Ombudsman's inquiry does not involve her taking any view on the merits of the allegation regarding State Aid to some Spanish football clubs.

Background

In **November 2009** the Commission received a complaint from a man who represents the interests of individuals who are investors in a number of European football clubs. His complaint is that certain Spanish football clubs are benefitting very significantly under special



arrangements which confer exemptions and other advantages in relation to corporation tax, capital gains tax and income tax. These advantages, which are provided for in Spanish legislation, are confined to a small number of clubs and, according to the complainant, amount to several billion Euro in value. His case is that these State conferred advantages are in breach of EU competition law and amount to State Aid. If the complainant is correct in his contention, other football clubs in Spain and indeed throughout Europe are affected negatively.

In concrete terms, the complainant says that the Spanish clubs in question are able to exploit their State subsidised resources to compete unfairly in buying the best players. He complained that one of the Spanish clubs in question had been able to “lure” the main star of a club, in which his investors have an interest, into transferring to it.

The complainant also contended that basketball clubs, linked to the Spanish football clubs in question, were also benefitting from the same type of State Aid. [3]

Arising from his complaint, the complainant expected the EU Commission to take infringement action against Spain. He also expected that the Commission would tell him its decision – on whether or not it would start infringement action – within 12 months of his complaint.

On **10 February 2010** , three months [4] after it had received the complaint, the Commission (DG Competition) told the complainant that there were sufficient grounds for it to investigate his complaint. As regards the level of priority to be given to his complaint, the Commission said that it wished to first consult with the new Competition Commissioner. In his reply, the complainant commented that the recently appointed Competition Commissioner was a Spaniard with very public and strong links to one of the Spanish clubs in question; and he hoped that this fact would not affect his complaint adversely.

On **15 February 2010** the Commission wrote to the Spanish authorities inviting it to set out the facts and give its comments. Spain replied to the Commission by mid April 2010 and on **15 April 2010** the Commission sent on that reply to the complainant for his comments. On that date also the Commission told the complainant that his case was being given priority treatment.

On **3 May 2010** , and again on **8 July 2010** , the complainant gave his comments and some additional information to the Commission. On **28 September 2010** the Commission asked Spain to reply to eight specific questions.

There followed then a number of contacts with the Commission by the complainant in which he again raised the issue of a potential or perceived conflict of interests on the part of the Competition Commissioner. On **24 January 2011** the Commission sent the complainant a copy of Spain’s reply to the eight questions it had raised and he gave his comments to the Commission on **14 March 2011** .

On **19 December 2011** , 25 months after he had first complained, and because he had heard nothing further from the Commission, the complainant lodged a complaint with the European Ombudsman, against the Commission.



Ombudsman's Inquiry

The central issue raised in the complaint to the Ombudsman was the failure of the Commission to decide, in a timely way, on whether or not to begin infringement action against Spain. [5] According to its own Code of Best Practice, the Commission should have decided within 12 months on whether it would act on the complaint.

The complainant was also aggrieved that the Commission had not, in his view, given any solid reasons for its failure to decide on whether to act on his complaint. He felt that the Commission was evading its responsibilities and that, in the circumstances, one had to wonder whether the Commission's unwillingness to act was being influenced by a conflict of interests on the part of the Spanish Competition Commissioner.

As is normal practice, the Ombudsman engaged both with the Commission and with the complainant in the course of the inquiry. The complainant was able to comment on the facts and views as put forward by the Commission.

Commission's Position

The Commission's explanation of its position included the following key points:

- that it was engaged in a wider consideration of how State Aid rules should apply to professional football and that it saw a need to develop guidance in this area; [6]
- that the timeframe of 12 months, within which it should to decide on whether infringement action is warranted, is indicative and not legally binding and may be set aside where specific circumstances so warrant; and
- that the Competition Commissioner has no legal, financial, organisational or any other form of tie with any of the Spanish football clubs in question; while he has been a football enthusiast since childhood, and a supporter of one of the clubs in question, this does not affect his decisions as the Commissioner for Competition.

Complainant's Position

The complainant made very extensive and detailed submissions which included his responses to the position put forward by the Commission. His submissions included the following key points:

- that the Commission has already accepted that professional sports clubs are engaged in economic activities and thus State Aid rules apply to them; furthermore, the case law of the European courts provides guidance in the area;
- that the Commission has already shown itself willing to apply the State Aid rules in the case of European football clubs [7] ;
- that his complaint about the Spanish clubs is " *a very clear and relatively standard case* " and



not one whose circumstances are such that additional time, and the development of additional guidelines, are necessary;

- that Spain has acknowledged that it confers tax advantages on certain Spanish football clubs;
- that the impact of the unlawful State Aid is unfair on other European clubs and creates a significant distortion in the professional football market; [8]
- that the Commission's failure to act in this case is damaging to the reputation of the EU in the global context and weakens its hand in complaining about anti-competitive practices elsewhere.

The complainant also argued that it is particularly unacceptable that the Commission should " *put on hold* " any action, on the pretext of developing guidelines, where the reality is that, in this case, " *there is a multi-billion provision of state aid via the foregoing of taxes by a Member State that is currently requesting aid in the hundreds of billions from the rest of the Eurozone members* ".

The complainant made some detailed observations regarding the possibility of a perceived conflict of interest on the part of the Competition Commissioner. The complainant felt, in the light of the information in the public domain regarding the Commissioner's links with one of the Spanish clubs in question, that the Commissioner should have done much more to allay any suspicions which might exist. The complainant argued that it was unwise and inappropriate for the Commissioner to continue to be so publicly associated with that particular club during a period when a decision, which might well affect the club, remained to be taken by him. [9]

The complainant pointed out also that there is a separate ground for a perceived conflict of interest. This arises from the fact that the Commissioner was a Minister in the Spanish government which was responsible for the legislation under which the Spanish clubs in question have been benefitting. Any infringement action which the Commissioner might initiate would, in reality, reflect a view that the Spanish legislation breaches EU law.

Friendly Solution

Overall, the Ombudsman was not convinced by the arguments put forward by the Commission and, on 30 May 2013, tried to resolve matters by proposing a friendly solution to the Commission. At that stage, the Commission had been considering the case for 42 months. The proposal involved the Commission agreeing to decide on whether or not to take infringement action; but, if it could not yet make a decision, it would explain properly why this was the case. And in all of this, the Commission would have particular regard to the need to avoid the impression of a conflict of interest.

On 26 September 2013, four months later, the Commission " *welcome(d) the Ombudsman's proposal and (was) pleased to ... accept* " it. However, it was clear from the overall reply that the Commission was not committed to making its decision in the near future. The Commission said it had limited experience in the area and that it needed to develop case practice on State Aid and professional sport.



Subsequently, the complainant drew attention to a reply, dated 9 October 2013, from the Commissioner to a written question from an MEP. The question related to the issue of possible State Aid for some Spanish football clubs. In his reply, the Commissioner referred to the Commission's investigation in this area and commented that he was not " *able to indicate when this investigation will be closed* ".

In the circumstances the Ombudsman now takes the view that, while the Commission had said it was accepting the Friendly Solution, in reality it is not acting upon it. A further seven months has elapsed since the Friendly Solution was proposed and there is no way of knowing when, or if, the Commission will decide on this case. Nor has the Commission given convincing reasons as to why a decision has not yet been made.

Ombudsman's conclusions

It is a matter of fact, more than four years after receiving the complaint, that the Commission has not yet decided whether or not it will start infringement action against Spain. The Ombudsman finds that the Commission has not justified its failure to decide on this matter. Furthermore, the Ombudsman finds that these failures on the part of the Commission could lead to the suspicion that the Commissioner's strong links, with one of the Spanish clubs in question, have played a part in the failure to make a decision on the matter. Each of these points amounts to maladministration.

The Ombudsman is not convinced that special circumstances existed which warranted the Commission's failure to decide on this case within 12 months. The Commission referred to the need to develop guidelines on assessing State Aid in the case of professional sports clubs; and to the need to gather relevant information from the Member States. It argued also that it had little experience of dealing with State Aid in the context of professional sport. The Ombudsman takes the view that none of these considerations is of a kind which would warrant the setting aside of the 12 month timeframe. [10]

The question of the Competition Commissioner's known links to one of the Spanish clubs in question is problematic. It would be unreasonable to expect the Commissioner to set aside the loyalty which many sports fans feel towards their preferred team. However, it would be reasonable to expect the Commissioner to exercise some discretion regarding the extent to which he is linked to his favourite club during a period when it is known that he must make a decision which will affect the interests of that club. Perceptions are important and a perception that a decision has been influenced by a personal loyalty of the Commissioner is something which the Commissioner and the Commission should seek to dispel. The continuing failure to decide on what to do in this case - more than four years now after the complaint was received - can only add to this perception. The Ombudsman finds that the Commission has not shown sufficient awareness of this issue. Rather than allaying suspicions regarding a conflict of interests, and regarding inappropriate influences on the decision making process, the Commission's failures here have actually added to those suspicions.



Ombudsman's Recommendation

Arising from these conclusions, the Ombudsman has now made a recommendation [11] to the Commission that it make a decision on whether or not to start infringement proceedings and that this decision be made as soon as possible but, in any event, not later than 30 June 2014.

17 December 2013

[1] The Ombudsman inquiry began during the term of the previous European Ombudsman, P. Nikiforos Diamandouros.

[2] A recommendation made by the Ombudsman must be sent first in draft form to the EU institution in question which is then allowed a period of three months in which to respond.

[3] He also raised some antitrust issues which ultimately were answered to his satisfaction by the Commission.

[4] The complainant was unhappy with this delay as, according to its own Code of Practice, the Commission should have contacted the Member State within two months of receiving the complaint.

[5] There were other procedural issues raised which are dealt with in the Ombudsman's decision.

[6] The Commission referred to a European Parliament resolution of 2 February 2012 which asks the Commission to adopt guidelines on how EU law should apply in relation to sport. But, as the complainant pointed out, this resolution was passed more than two years after he had made his complaint and could not have had a bearing on the Commission's failure to decide on his complaint.

[7] The complainant refers to the fact that the Commission has already investigated one of the Spanish clubs in question under State Aid rules, in 2004 and again in 2012, and concluded on both occasions that there had not been a breach of the rules. He observed that the Commission appears capable of speedy action in taking decisions favourable to that club but is unable to reach a decision in the present case.

[8] The complainant referred, by way of example, to a case in which one of the Spanish clubs in question was able to sell its training ground back to the city for more than EUR 400 million. This example was cited in the 2012 Council of Europe report " *Good governance and ethics in sport* ".

[9] For example, the complainant referred to a Spanish newspaper article from 18 March 2012 which illustrated the Commissioner's very close ties with his favourite club.



[10] The fact that the Commission has already taken infringement action in relation to other football clubs, including in Spain, tends to undermine the Commission's arguments.

[11] See Endnote ii above.