

Decision of the European Ombudsman in case 2086/2014/EIS concerning an alleged conflict of interest in the European Commission's handling of a procedure for infringement of competition law

Decision

Case 2086/2014/EIS - **Opened on** 15/01/2015 - **Decision on** 30/11/2015 - **Institution concerned** European Commission (No maladministration found) |

The case concerned an alleged conflict of interest by a former Commissioner in a Commission decision not to investigate an antitrust complaint made to the Commission. The antitrust complaint to the Commission alleged an infringement of EU competition rules by the Union of European Football Associations ('UEFA'). *The complainant considered that the UEFA Club Licensing and Financial Fair Play Regulations ('the FFP') are unlawful insofar as they require that, over a period of three years, the relevant income of a football club has to at least match its relevant expenses. The Commission decided not to investigate the complaint on the grounds that the issue did not constitute a priority for it. In the complainant's view, this decision was influenced by the Commissioner in charge who had a conflict of interest, as he was an "associate" and a strong supporter of one particular club for which the FFP are advantageous. The complainant also pointed to the fact that the Commissioner had issued a joint declaration with the UEFA president, expressing support for the FFP, more than a year prior to his complaining to the Commission.*

The Commission argued that the former Commissioner had no legal, financial, organisational or other form of ties with the football club in question. It added that the joint declaration made by the Commissioner and the UEFA president was completely unrelated to the complainant's complaint, as it did not express any views on the FFP from an antitrust point of view.

The Ombudsman inquired into the issue and found no maladministration by the Commission. She thus closed the case.

The background to the complaint

1. The UEFA [1] Club Licensing and Financial Fair Play Regulations [2] (the 'FFP') contain a set of licensing criteria that have to be fulfilled by football clubs in order to compete in UEFA club competitions. According to Articles 58 to 63 of the FFP, over a period of three years, the



relevant income of clubs has to at least match their relevant expenses, with an acceptable variant of EUR 5 million. This requirement is often referred to as the "break-even" requirement. Clubs may exceed the acceptable variant of EUR 5 million, provided that such excess is entirely covered by contributions from equity participants and/or related parties, and provided such contributions do not exceed EUR 45 million for the monitoring period assessed in the 2013/14 and 2014/15 seasons.

2. The complainant is a football agent. On 5 May 2013, he lodged a complaint with the Commission against the "break-even" requirement, taking the view that it was unlawful. The complainant's antitrust complaint was registered under reference number AT.40105 – UEFA Financial Fair Play Rules. The complainant argued that this rule, which in practice prohibits small, low-income football clubs from investing in expensive football players, infringes EU competition rules (Articles 101 and 102 of the Treaty on the Functioning of the European Union, 'TFEU'), in that it (a) distorts competition between clubs, by imposing a limit on their investment in players; (b) negatively affects salaries and the professional mobility of players; and (c) distorts competition in the market for the services of players' agents, by reducing the number of transfers and the relevant fees. Following his complaint to the Commission, on 20 June 2013, the complainant also initiated judicial proceedings against UEFA before the Court of First Instance of Brussels ('the Brussels court').

3. On 24 October 2014, the Commission rejected the complaint on the grounds of priority setting without analysing its substance. Furthermore, it concluded that the Brussels court was well-placed to deal with the case, and that there was thus no reason for the Commission to dedicate time and resources to the matter. The court case was still pending when the Commission took the decision to reject the complaint.

4. The complainant's complaint was dealt with, and its rejection was signed, by the competition Commissioner at the time, Mr Almunia. In the complainant's view, this was not appropriate, since the Commissioner had a conflict of interest in the matter. This was so, according to the complainant, because, in March 2012, the Commissioner had issued a joint declaration [3] with the UEFA president, Mr Platini, expressing support for the UEFA "break-even" rule. This public, official statement meant that the Commissioner had already made up his mind as regards the legality of the relevant rule. Moreover, the Commissioner was an "associate" and strong supporter of the Athletic Bilbao football club, which is a "party" to the "break-even" agreement. Furthermore, not long before, Bilbao had been chosen by UEFA to be one of the host cities of the 2020 EURO tournament, with the result that the Athletic Bilbao club would acquire a new stadium to be used during the tournament, financed by public funds, of which it would be the sole beneficiary after the tournament.

5. The complainant raised these arguments in a letter he sent to the Commission on 16 June 2014 in which he contested what he anticipated would be the Commission's intention not to follow up on his grievances. On 26 September 2014, he also forwarded to the Commission a copy of his pleadings before the Brussels court, asking it to take them into account. Since the Commission did not react to these arguments, the complainant submitted a complaint to the European Ombudsman on 3 December 2014.



The inquiry

6. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

1) The Commission acted incorrectly when dealing with case AT.40105 – UEFA Financial Fair Play Rules as its member who decided on this case was in a situation of conflict of interest.

2) The Commission should acknowledge the existence of this conflict of interest and apologise to the complainant.

7. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Allegation that the Commission acted incorrectly when dealing with the case and related claim

Arguments presented to the Ombudsman

8. The complainant argued that the former Commissioner for competition, Mr Almunia, had a conflict of interest when deciding case AT.40105 – UEFA Financial Fair Play Rules. This was so because the Commissioner (i) had very close links with the Athletic Bilbao club since he was an "associate" and a strong supporter of it, and (ii) had declared public support for the UEFA "break-even rule" in a joint declaration with the UEFA president in March 2012. Moreover, (iii) the Athletic Bilbao club is a "party" to the "break-even" agreement and Bilbao had, not long before, been chosen to host the 2020 EURO tournament.

9. In its opinion, the Commission raised an objection as to admissibility, since, in its view, the complainant had never explicitly raised the issue of an alleged conflict of interest with the Commission before lodging a complaint with the Ombudsman. Against this background, in the Commission's view, the complaint should have been declared inadmissible pursuant to Article 2(4) of the Ombudsman's Statute [4] .

10. As regards the substance, the Commission considered the complainant's view unfounded for the following reasons. The complainant's argument that, through the mere membership of UEFA, the club would become a party to UEFA's decisions was far-fetched and would run counter to his own arguments, as some other football clubs, which were equally members of UEFA, were unhappy with the adoption of the new FFP.



11. Second, as regards the alleged suspicious ties of the former Commissioner with Athletic Bilbao, the Commission rejected the complainant's view and said that the former Commissioner had " *no legal, financial, organisational or any other form of ties* " with the club while the case was being dealt with, apart from being a fan of the club, as are many other football fans.

12. The Commission stated that it gave no preferential treatment to Athletic Bilbao or UEFA. This is demonstrated by the fact that when Mr Almunia was the Commissioner in charge of competition, the Commission initiated an in-depth state aid investigation against four Spanish football clubs, including Athletic Bilbao. The joint declaration made by Mr Almunia and the president of UEFA was unrelated to the Commission's rejection of the complainant's complaint and had no bearing on its assessment. In fact, according to the Commission, the joint declaration concerned the FFP from the state aid point of view and had nothing to do with antitrust issues. Thus, it did not prejudice in any way the Commission's position on the antitrust aspect of the FFP.

13. The Commission stated also that it had not taken a position on the *merits* of the complainant's antitrust complaint but had merely decided not to investigate it on the grounds of priority setting, as it is entitled to do on the basis of points 41 [5] and 45 [6] of the Notice on the handling of complaints by the Commission under Articles 101 and 102 of the TFEU [7] . When setting priorities, the Commission considers various criteria. It is clear from the relevant case-law of the Court of Justice of the European Union ('CJEU') that the Commission is entitled to decide not to pursue certain cases where national courts can protect the rights of a complainant in a satisfactory manner [8] , and in this case, the Brussels court was already dealing with the matter.

14. Finally, in response to the complainant's comment that Mr Almunia signed the decision himself, which in the complainant's view was something unusual, the Commission stated that the decision not to investigate went through the normal decision-making procedure on behalf of the College of Commissioners, as provided for in the Commission's internal procedural rules [9] . The complainant's procedural rights were respected throughout the handling of the case.

15. In his observations, the complainant rejected the Commission's objection as to admissibility and referred to the exchange of correspondence between himself and the Commission in this respect. He also rejected the Commission's view that the former Commissioner had no legal, financial, organisational or any other form of ties with the club. He argued that being a fan, that is, an occasional or frequent supporter of a football club and being an "associate" [10] of the same club are two distinct matters. In his view, it is common knowledge that Mr Almunia is an "associate" of the club, which, in his view, the Commission did not contest.

16. The complainant reiterated his disagreement with the Commission's interpretation that Athletic Bilbao is not a party to the "break-even" agreement and referred to the judgment of the General Court in the *Piau* case [11] in support of his position. As regards the joint declaration made by Mr Almunia and the president of UEFA, he contested the Commission's position on the grounds that certain passages of the declaration, such as point 1, which states that UEFA acts in conformity with the relevant legislation and in particular within the framework of EU law [12] ,



went beyond the state aid issue. What is more, Mr Almunia was politically involved in favour of the FFP, which is why the issue of whether the declaration was made from the point of view of state aid or of competition law is irrelevant. Furthermore, the distinction made by the Commission was purely artificial, since the state aid rules laid down in the TFEU are found in a chapter which falls under Title VII (Common rules on competition, taxation and approximation of laws) of the TFEU. Hence, these state aid rules are, in the complainant's view, also competition rules.

The Ombudsman's assessment

As regards the Commission's objection as to admissibility

17. The Ombudsman is satisfied that, prior to his lodging the present complaint with her office, the complainant did raise with the Commission his contention regarding a conflict of interest on the part of the then Commissioner. This matter was raised with the Commission in the complainant's letter of 16 June 2014. Furthermore, on 26 September 2014, the complainant sent a copy of his pleadings before the Brussels court to the Commission and these documents contain a number of references to the conflict of interest issue. These communications were sent to the Commission several months in advance of the complaint being made to the Ombudsman on 3 December 2014. In light of these considerations, the Ombudsman finds that the Commission's objections are not grounded and that the complaint is admissible.

As regards the substance of the complaint

18. The Ombudsman has consistently taken the view that building and maintaining the public's trust in the EU institutions, bodies, offices and agencies is of utmost importance. It is only by building and maintaining such trust that the EU public administration can function effectively [13]

19. In the present case, the complainant has alleged that the Commission acted incorrectly as its member who decided on the antitrust complaint was in a situation of conflict of interest. Conflicts of interest are situations in which the private interests and affiliations of a public official create, or have the potential to create, a conflict with the proper performance of his/her official duties [14]. The General Court of the European Union has recently confirmed that the concept of a conflict of interest does not relate only to a situation where a public official has a private interest which has actually influenced the impartial and objective performance of his official duties, but also to a situation in which the interest identified may, in the eyes of the public, appear to influence the impartial and objective performance of his official duties [15].

20. As regards the joint declaration made by the Commissioner and Mr Platini in March 2012, the Ombudsman notes that the relevant parts of the statement read as follows:



" 1. *The objectives of the FFP are to*

- Improve the economic and financial capability of clubs;*
- Increase transparency and credibility;*
- Improve governance standards in football;*
- Encourage clubs to operate on the basis of their own revenues;*
- Introduce more discipline and rationality in club finances;*
- Protect the integrity and smooth running of UEFA club competitions;*
- Encourage responsible spending for the long term benefit of football;*
- Protect the long term viability and sustainability of European club football.*

*These are objectives which **UEFA** , as governing body for football in Europe, will promote in a balanced and proportionate way, **acting in accordance with all applicable legal rules and, in particular, within the framework of EU law** .*

[...]

6. With a view to promoting positive long-term investments in football, it is nevertheless legitimate that certain categories of expenditure, directed to matters such as infrastructure improvement, youth training and development and community and social projects, should not jeopardize the ability of clubs to comply with the "break even" principle.

*7. These **objectives** are also consistent with the **aims and objectives of European Union policy in the field of State Aid** " (emphasis added).*

21. While the declaration did not state that the rules were in conformity with EU law but that (i) UEFA aims to act in conformity with EU law; and (ii) the **objectives** of the FFP were consistent with those of EU State Aid policy, the Ombudsman acknowledges that it **could** be understood by the public as the Commissioner having endorsed, in a very general way, the compliance of the FFP with EU law, including antitrust law. In these circumstances, the Ombudsman considers that it might have been unwise for the Commissioner to have made this statement but it is stretching credulity to believe that the statement was influenced improperly by the Commissioner's personal loyalty to a particular football club, in relation to which he had already initiated a state aid investigation.

22. Furthermore, the Ombudsman notes that the decision not to investigate the complaint was in itself unremarkable and objectively reasonable. In particular, the decision was well within the discretion of the Commission and taken in the name of the College of Commissioners and not



just by the individual Commissioner. Finally, the substantive issue in relation to the FFP was in any event being dealt with by the Brussels court.

23. In these circumstances, the Ombudsman concludes that there is nothing to suggest that there was a conflict of interest situation because of the perception that the decision could have been influenced by the Commissioner's known affiliation to one particular club. The complainant's allegation is thus unfounded. As a result, his claim cannot succeed either.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There was no maladministration in the Commission's conduct.

The complainant and the Commission will be informed of this decision.

Emily O'Reilly

Strasbourg, 30/11/2015

Final English version of the decision on complaint **2086/2014/EIS**

[1] UEFA stands for the Union of European Football Associations.

[2] The UEFA Club Licensing and Financial Fair Play Regulations were initially adopted in September 2009. The 2015 edition is available at:

http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/26/77/91/2267791_DOWNLOAD.pdf [Link].

[3] The declaration is available at:

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

[4] According to Article 2(4) of the Ombudsman's Statute, "[a] complaint [...] must be preceded by the appropriate administrative approaches to the institutions and bodies concerned".

[5] "Under the settled case law of the Community Courts, the Commission is not required to conduct an investigation in each case [...] or, a fortiori, to take a decision within the meaning of Article [288 TFEU] on the existence or non-existence of an infringement of Articles [101] or [102] [...], but is entitled to give differing degrees of priority to the complaints brought before it and refer to the Community interest in order to determine the degree of priority to be applied to the various complaints it receives [...]. The position is different only if the complaint falls within



the exclusive competence of the Commission. "

[6] *" Where it forms the view that a case does not display sufficient Community interest to justify (further) investigation, the Commission may reject the complaint on that ground. Such a decision can be taken either before commencing an investigation or after taking investigative measures [...]. However, the Commission is not obliged to set aside a complaint for lack of Community interest. "*

[7] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [now Articles 101 and 102 of the TFEU], OJ 2004 C 101, p. 65.

[8] Judgments of the General Court of 18 September 1992, *Automec v Commission* , T-24/90, ECLI:EU:T:1992:97, paragraphs 89 to 96 and of 3 July 2007, *Au lys de France v Commission* , T-458/04, ECLI:EU:T:2007:195, paragraphs 81 to 84.

[9] Article 13 of the Rules of Procedure of the European Commission, OJ 2010 L 55, p. 60.

[10] In this respect, the complainant referred to the Spanish word "*socio*". In the context of a football club, "*socio*" is a structured expression of "fan", rather than "shareholder" (which would be the normal translation of the word).

[11] Judgment of the General Court of 26 January 2005, *Piau v Commission* , T-193/02, ECLI:EU:T:2005:22, paragraphs 69 et seq.

[12] The complainant quoted the declaration, which states that UEFA aims to act "*in accordance with all applicable legal rules and, in particular, within the framework of EU law*".

[13] See, for example, the Ombudsman's decision closing the inquiry into complaint 642/2012/TN, available at:
<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/53111/html.bookmark> [Link]

[14] Managing Conflict of Interest in the Public Service: OECD Guidelines and country experiences, OECD, Paris, 2003, p. 28.

[15] Judgment of the General Court of 15 July 2015, *Dennekamp* , T-115/13, ECLI:EU:T:2015:497, paragraph 106.