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The Court of Justice Clarifies That A State Aid 'Advantage' Must Be Assessed Ex-Ante: Fútbol Club Barcelona (C-362/19 P)

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On March 4, 2021, the Court of Justice ('CJEU') delivered a judgment in the State aid case *Fútbol Club Barcelona* (C-362/19 P), quashing the ruling of the General Court of February 26, 2019 (T-865/16) and upholding the Commission's Decision of July 3, 2016 (SA.29769). In its judgment, the CJEU provided helpful guidance to assess the existence of an 'advantage' under Article 107(1) TFEU. According to the CJEU, the advantage must be determined *ex-ante* – that is, at the moment of the authorisation – and not be based on future variable events.

The Commission's Investigations Concerning State Aid To Spanish Football Clubs

In 2016, the Commission found that Spain had granted illegal and incompatible State aid in the form of corporate tax privileges to F. C. Barcelona, Real Madrid, Athletic Club and Atlético Osasuna. Article 19(1) of Law 10/1990 on sport obliged all Spanish professional sports clubs to convert into public limited sports companies ('SLCs') with the objective of encouraging more responsible financial management. However, an exception was provided for professional sports clubs that had achieved a positive financial balance in the preceding years. In the Commission's view, this meant that the four football clubs continued to operate in the form of non-profit legal persons and, therefore, enjoyed a 5% lower corporate tax rate for over 20 years, without an objective justification. The Commission thus ordered Spain to discontinue the tax arrangement and to recover the aid.

The Commission's Decision was part of a broader series of investigations launched in 2013 into State aid to Spanish football clubs, including (i) a settlement on a land transfer from the city of Madrid to Real Madrid (Decision of August 11, 2016 – SA.33754) and (ii) loan guarantees from the State-owned Valencia Institute of Finance ('VIF') to Valencia, Hércules and Elche (Decision of November 3, 2016 – SA.36387).

The General Court's Judgments of 2019 and 2020

The three Decisions were appealed by most of the football clubs concerned, leading to the first batch of judgments of the General Court in 2019: on February 26, (i) *F. C. Barcelona* (T-865/16) and (ii) *Athletic Club* (T-679/16); on March 20, (iii) *Hércules* (T-766/16); and on May 22, (iv) *Real Madrid* (T-791/16). While the General Court ('GC') dismissed the action brought by *Athletic Club*, it upheld the rest and annulled the respective Decisions, in essence, because the Commission did not prove or motivate its State aid findings to the requisite legal standard. In *F. C. Barcelona*, in particular, the GC found that the Commission (i) had not sufficiently established the existence of an 'advantage' because it had not proved whether the lower nominal tax rate could be offset by capping tax deductions at a level less beneficial for non-profit entities than for SCLs (GC, paras. 58-60 and 67) and (ii) failed to request Spain the necessary information in that regard (GC, para. 59).

The GC handed down the second batch of judgments in 2020, annulling the Commission's Decision ordering the recovery of the loan guarantees granted by the State-owned VIF to *Valencia* (T-732/16) and *Elche* (T-901/16) football clubs (for more details, see Main Developments in Competition Law and Policy 2020: Spain).

The Court of Justice Rules in *F. C. Barcelona*

Both the *F. C. Barcelona* (C-362/19 P) and the *Valencia* (C-211/20 P) GC rulings were appealed. The recent judgment of the CJEU in *F. C. Barcelona* largely followed AG Pitruzzella's Opinion of October 15, 2020, and clarified, in essence, that the existence of an 'advantage' must be determined *ex-ante*, regardless of a possible future offset.

The CJEU highlighted that when the Commission assesses whether an aid scheme grants an advantage, it exclusively examines said scheme and not aid subsequently granted on the basis of it, which is in general not notifiable (CJEU, paras. 66, 74 and 86). The Commission must, therefore, focus on the financial situation of the beneficiaries at the time of the authorisation of the scheme (CJEU, paras. 86-87). In this sense, and contrary to the GC's assessment (GC, para. 69), it is irrelevant whether the relevant measure could be regarded as relating both to an aid scheme and individual aid (CJEU, paras. 71-75).

While it is true that the Commission must carry out a "global assessment of the aid measure" and "consider all points of law or fact which are attached to [it]" (CJEU, paras 63, 64), that remains "an *ex-ante* analysis" (AG Opinion, para. 76). This is explained by the 'fundamental' role of the notification requirement in State aid control (CJEU, para. 90), which is "essential to enabling the Commission to exercise fully the supervisory function entrusted to it by Articles 107 and 108 TFEU" (CJEU, para. 91). Consequently, when the Commission reviews the aid, the assessment of the advantage criterion cannot depend on "the subsequent occurrence of random and variable circumstances", such as a possible future offset that may or may not eventually neutralise the advantage (CJEU, paras. 98-99). That question is only relevant at the later stage of recovery, where the Commission will consider the individual situation of the beneficiaries in order to determine the precise amount to be recouped (CJEU, paras. 65 and 88). Indeed, as the Commission argued (CJEU, para. 18), if it were to take these considerations into account *ex-ante*, it would impermissibly favour non-notified aid over notified (CJEU, paras. 92-93, and case-law cited). As a result, it was sufficient for the Commission to prove that the scheme conferred, at the time of its authorisation, a privileged tax rate to the beneficiaries (CJEU, paras. 94-95).

The CJEU, therefore, held that the GC further erred in law when it criticised the Commission for not acting diligently and failing to request "all of the relevant information" (*Frucona Kosice II*, C-300/16 P, para. 71) to prove that the advantage would not be offset in the future (CJEU, paras. 103, 114-115; GC, para. 59).

Conclusion

The *F. C. Barcelona* ruling is in line with the previous case-law (e.g. *Electrabel and Dunamenti Er?m?*, C-357/14 P, para. 104; *EDF*, C-124/10 P, para. 105) and backs the Commission's general approach, according to which the advantage "must be examined on an *ex-ante* basis, having regard to the information available at the time the intervention was decided upon" (Notice on the notion of State Aid, para. 78). Still, the analysis may be forward-looking to some degree (*see* Notice, para. 78; *Electrabel and Dunamenti Er?m?*, C-357/14 P, para. 104), as *F. C. Barcelona* hinted, whenever the future circumstances occur "systematically" (CJEU, para. 115). As the CJEU indicated, this approach is the most reasonable, given the general design of EU State aid control, which is fundamentally based on the notification and standstill requirements. Only in this way will the Commission be able to practically assess the compatibility of the aid with the internal market before it is granted.

Finally, it should be noted that, even if the CJEU heavily relied on the dichotomy between aid schemes and individual aid (CJEU, para. 66; *France Télécom*, C-81/10 P, para. 22), the same logic will be applicable to self-standing individual aid measures (e.g. *Stardust*, C-482/99, para. 71).

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