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Public funding of the sport sector: Scope and limits?

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Public funding of the sport sector – scope and limits?

Jan Gerrit Westerhof

aus:

Sportfinanzierung – Spannungen zwischen Markt und Staat

Herausgegeben von Martin-Peter Büch, Wolfgang Maennig und Hans-Jürgen Schulke

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Public funding of the sport sector – scope and limits?¹

Jan Gerrit Westerhof

Introduction: sport and community law

Although sport is nowhere mentioned in the Treaty establishing the European Community (hereinafter: EC Treaty), it has never really been excluded from the application of European Community law. It is only since recently that sport has triggered legal questions in the domain of financing sport clubs, infrastructure and events. Of course, the jurisprudence with regard to the free movement of workers and services (Articles 39 and 49 EC Treaty) has existed since the judgment of the European Court of Justice (ECJ) in the B. N. O. Walrave case in 1974.² Nevertheless, the application of antitrust and State aid law in the sport sector is of much later date. The first decision regarding State aid was actually only taken in 2000.³

The history and development of the EU's policy on sport is an interesting one. The direct policy is based on two declarations annexed to the Treaty of Amsterdam and the Treaty of Nice as well as on policy areas where the treaties do provide for a legal base such as education, health and cultural or social policy.⁴ The indirect policy seems, however, to have had a bigger effect than the direct policy. Sports policy has been made through the rules on free movement on workers and services, confirm for example the impact the Jean-Marc Bos-

¹ This is a transcript of the presentation given at the conference "Sports and Economics" in Hamburg, Germany, on July 28 and 29, 2006. Jan Gerrit Westerhof, case-handler in the European Commission's Directorate General for Competition, would like to thank Irina Orssich Slavetich for her comments. The views expressed are purely personal and may not in any circumstances be regarded as stating an official position of the European Commission.

² Cf. European Court of Justice (1974).

³ Decision regarding aid granted to French training centers, cf. European Commission (2001).

⁴ "Declaration on sport" annexed to the final act of the Treaty of Amsterdam and "Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies" annexed to the conclusions of the Nice European Council.

man case had on the transfer of football players between clubs and the financial impact and through the rules of competition, as for example the decision on collective selling of entrance tickets for the FIFA World Cup in Italy in 1998.⁵ The indirect policy with regard to sport is based on the fact that sport is generally considered an economic activity. To that extent, these activities are subject to the EC Treaty rules.

The application of State aid rules stands in the shadow of the aforementioned areas of internal market rules and competition law. With regard to State aid granted to sport clubs and aid granted for sport infrastructure the Commission's policy has been driven predominantly by complaints. Due to its increased economic importance people and undertakings tend to complain more now the interests at stake have become bigger. The increased importance has also led to the first case initiated *ex officio* by the Commission.⁶ In this article, it will be explained what the scope and limits are for public funding of the sport sector under the State aid rules. It will be explained what considerations are important and which decisions the Commission has taken. First of all, the rules on State aid should be explained.

State aid rules

The rules on State aid are laid down in Articles 87 to 89 EC Treaty. In a nutshell, State aid is prohibited, unless the Treaty provides for a justification. But how is State aid actually defined? Article 87(1) EC Treaty defines State aid as any advantage granted to a specific undertaking which distorts competition and has an effect on trade between Member States. Thus, if all of these four conditions are met, an intervention should in principle be considered as prohibited because it constitutes State aid. In more detail, the four criteria can be explained as follows.

State resources

The State should first of all be involved financially in the measure. There has to be a so-called transfer of State resources. The State can be the federal government, a regional or local authority and even under certain circumstances State controlled undertakings.

⁵ Cf. for example European Court of Justice (1995) and European Commission (2000).

⁶ Cf. Commission Decision regarding Salva Calcio, European Commission (2003).

Advantage

The granting of an advantage has to be selective but can take many forms.⁷ It could take the obvious form of granting of a straightforward subsidy or a (cheap) loan. However, there are also less obvious examples of State aid as providing a guarantee to an undertaking, but also the sale of real estate property by the State to an undertaking below market price is considered as granting an advantage.

Distortion of competition

In *Philip Morris vs. Commission*, the ECJ held that when State aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade, the latter must be regarded as affected by that aid.⁸ (Professional) football clubs engage in different activities on different markets. They provide, for remuneration, live entertainment in stadiums, and content for television broadcasters. Secondly, they are a vehicle for advertising. Thirdly, they participate in sporting events, as for example the Champions League, which do not only involve “sport” but also constitute an economic event as such. Last but not least: they buy and sell football players. They perform these activities in competition with other sports clubs in general and football clubs in particular. They are besides engaged in a number of “side” activities like merchandising, publishing sport magazines and the management of dedicated television channels (as Real Madrid TV for example). Finally, it should be noted that several football clubs are organized as a public limited company and are even quoted on stock markets.

Effect on trade

The last condition, affectation of trade between Member States, is generally easily met as well. Nowadays, economic sectors are crossing national borders, and in most sectors of the economy there is trade between Member States. There are rarely any sectors where granting of an advantage to an undertaking

⁷ If all undertakings in a Member State profit from a tax exemption, the measure is not considered to be selective. If however all football clubs profit from a tax exemption, the measure is selective since the measure is restricted to football clubs. This is considered as a sectoral aid.

⁸ Cf. European Court of Justice (1980).

does not have an effect on trade. As will be shown later on, there are still exceptions though.

Application of State aid rules

The Commission has so far applied the State aid rules first of all to the financing of sport infrastructure like football stadiums, secondly as regards sport clubs and thirdly in the field of sport related areas like betting and horse racing organizations. The first two areas are being discussed: sport infrastructure and sport clubs. When talking about State aid granted to sport clubs, it is important to know that it is referred to professional sport clubs, not to amateur clubs. The latter are to be considered as entities which do not perform an economic activity and are therefore not covered by the rules on State aid.

Funding of stadiums

Under certain circumstances, the construction of a venue for public events (like a football stadium), supporting different categories of activities which in addition benefits the general public, can be considered as embodying a state policy objective.⁹ In particular, consideration should be given to the social significance of sport as referred to in the Amsterdam Declaration on Sport.¹⁰ Moreover, a stadium is a facility implying a large and risky investment, which the market might not be capable of carrying out in its entirety on its own.¹¹ Under these circumstances, it can be considered that the financing of a stadium would constitute funding of an “infrastructure” and not fall under the provisions of Article 87(1) EC Treaty, provided that the operation does not selectively favor one or more specific undertakings or production. To satisfy the latter condition, the stadium should not be dedicated to a specific economic use, but provide facilities for different activities and users. If the public authorities maintain ownership of the facility, the stadium should be made available to sport clubs on non-discriminatory terms. If it is rented out to football clubs, appropriate fees should be paid.

⁹ Cf. Sandro Santamato and Jan Gerrit Westerhof (2003).

¹⁰ Cf. footnote 87.

¹¹ As illustration, the Amsterdam Arena home to AJAX Amsterdam cost 170 million euro ten years ago. The economic value of the stadium is at this moment below 40 million euro.

If however the management of the facility is entrusted to a private operator or in cases of private ownership of the stadium, the qualification of 'infrastructure' could still be accepted provided that at least the following conditions are complied with. In the first place, the state concession or financial contribution would need to be made conditional on the acceptance of operating requirements which would preserve the nature of the stadium as a facility open to different users and activities. There should also be evidence that the amount of state funding was the minimum necessary to allow the project to proceed or, in the case of a concession, that an appropriate compensation was paid by the concession holder. This is to ensure that the operator of the stadium does not receive more than a normal market return for its activity. In this context, the state funding or the concession should preferably be awarded as a result of an open, transparent and non-discriminatory procedure, determined through a competitive process. However, where a competitive process is not possible (for example where there are only a few credible candidates or only one) it is important for there to be evidence of an independent expert assessment of the level of funding/compensation necessary.

Funding of cable ways

The question whether the funding of cable ways would qualify as an infrastructure and therefore be outside the scope of Article 87(1) EC Treaty was addressed by the Commission in a decision adopted in 2002.¹² The Commission actually rejected the argument brought forward that cable way installations as being infrastructures and are not subject to State aid rules. The Commission stated that cable ways are typically servicing a single operator and can, at least in principle, be an economically viable activity exercised for profit purposes by private operators. Moreover, cable ways do not serve for general mobility needs but are destined to serve a specific economic category of users as skiers, which is not transport in a broader sense. Those installations are not providing a general service but rather a service of a facility for the practice of a sport. It was therefore denied the existence of a general market failure that rendered State intervention necessary and it was furthermore observed that the infrastructure was hardly non-selective: it was typically dedicated to a single operator.

¹² Cf. European Commission (2002).

Nevertheless, it does not mean that if the cable way cannot be considered as “general infrastructure”, that there is always aid involved. The Commission applied a few years later in a decision concerning cable ways in Trento (Italy) the “local character” test. The test has been applied in these specific circumstances. In this case, the length of the slopes was limited (less than 3 kilometers), the number of weekly ski passes was very low compared to other ski passes (less than 15 percent) and the beds available commercially were very limited (less than 2 000). According to the Commission, this showed that the aid could not have an effect on trade.

Funding of sport clubs

With regard to the funding of sport clubs, the Commission has received in the last few years several complaints. These complaints stem from citizens, politicians or pressure groups, but hardly ever from sport or football clubs themselves. Clubs do generally not complain about the aid granted to their competitors. Besides the complaints, the Commission also received notifications, from France as well as from the Netherlands.

As regards France, the State provided financing of training centers set up by sport clubs and recognized by the French state. The Commission came to the conclusion that such a subsidy was aimed at education rather than at an economic activity like sports.¹³ Therefore, the State aid rules did not apply.

As regards the money granted to by the Dutch authorities to “Omniworld Almere” (basketball and volleyball club), the money granted constituted a *quid pro quo*. Under the terms of the contracts notified to the Commission, the club had to support education and leisure sport activities, stimulate a sporting environment and engage in city marketing. The financing compensated the football club for the delivered services. The Commission came to the conclusion that there was no advantage for the football club and that thus no aid was involved.¹⁴

Real Madrid

In a case which raised more attention, the requalification of a zoning scheme in the city of Madrid, benefiting the football club Real Madrid, the football club

¹³ Cf. European Commission (2001).

¹⁴ Cf. European Commission (2004a).

received an economic advantage due to the fact that the property of Real Madrid, previously qualified for recreational and parking purposes, was re-qualified as building area.¹⁵ As can be imagined, the value of the plot increased tremendously. Albeit the re-qualification led to an economic advantage, there were no State aid resources involved. The State (in this case the municipality and the region of Madrid) did after all not transfer State resources to Real Madrid. According to the ECJ in the case *Preussen Elektra*,¹⁶ Article 87(1) EC Treaty is only triggered if there is a transfer of State resources from the State to the beneficiary. A similar issue came up recently concerning the reconstruction of the football stadium of Valencia in Spain. A Member Parliament posed a question to the Commission on the financing of the renovation. The Commission, in line with its findings in the Real Madrid investigation confirmed that there is no State aid involved.¹⁷

Salva Calcio

Finally, in one case the Commission reacted *ex officio*, that means it did neither react upon a complaint nor upon a notification, but it acted upon own instigation. The so-called *Salva Calcio* law raised concerns as to the distortion of competition because the favorable tax scheme in that law concerned the entire Italian professional football league.

At the end of 2002, the Italian government adopted a law which created specific taxation and accounting rules for sports clubs.¹⁸ Especially professional football clubs were allowed to use accounting instruments to amortize the value of players in a favorable manner whereby inflating the value of the club's accounts. The Commission opened the formal investigation procedure in 2003. The Italian government amended subsequently the scheme and it did no longer provide for any tax advantage. The Commission concluded that there was no longer State aid involved and closed subsequently the formal investigation.¹⁹

¹⁵ Cf. European Parliament (2003 a, 2003 b and 2004).

¹⁶ Cf. European Court of Justice (2001).

¹⁷ Cf. European Parliament (2006).

¹⁸ Cf. Decree 282 of 24.12.2002. Amended in Law 27 of 21 February 2003.

¹⁹ Cf. European Commission (2003).

Compatible state aid measures

As state above, the granting of State aid is in principle prohibited, but can be held compatible under certain conditions. These conditions are laid down in Article 87(2) and (3) and Article 86(2) of the EC Treaty. So far, the Commission has not had to assess any of the measures under these derogations.

It is often argued that State aid for sport in general and actually even assistance for the construction or renovation of a stadium should be declared compatible on the basis of the cultural justification laid down in Article 87(3) (d) EC Treaty. Sport is part of the national cultural tradition, it is entertainment like film or theatre: it has after all the same goal, that is to amuse and divert. Nevertheless, if one would follow that line of argument any economic activity that is part of the national heritage (sport betting, fishing) could be considered as culture. The concept of culture would be even further blurred. It is generally known that the derogations in the EC Treaty are exceptions and should therefore be interpreted in a narrow sense.

Nevertheless, one could imagine that certain investments could be declared compatible under the special regime for small and medium sized enterprises (SME). The Commission has adopted special rules for this category of undertakings.²⁰ The regulation however only allows aid for investments and job creation up to certain intensity. The applicability of these rules is thus rather limited.

In addition to the specific rules on SME, there are other specific rules as to rescue and restructuring operations.²¹ In very limited circumstances, undertakings in difficulty could benefit from rescue and restructuring aid. The Guidelines on Rescue and Restructuring aid define "in difficulty" when, paraphrased, the undertaking concerned would be out of business in the short or medium term without additional funding. The same guidelines require however that the undertaking involved takes compensatory measures. Such measures may entail the divestment of assets but also reduction in production or market presence. What could however a football club offer by way of compensatory measures? Jokingly, one could imagine a team with 9 players or a home pitch with fewer seats. The only real and not unimaginable solution could, however, be relegation of the team to a lower league. This could work in

²⁰ Cf. Commission Regulation (EC) No. 70/2001.

²¹ Cf. European Commission (2004 b).

individual cases, but for example the situation which Salva Calcio tried to remedy, this would not have been possible. In that case, the entire league would have to be relegated which makes this compensatory measure superfluous.

Conclusions

The EC Treaty has never excluded the application of its rules to the sport sector. Nevertheless, the State aid rules have only been applied since recently. The State aid rules do in principle prohibit funding of professional sport clubs, because these clubs are considered as normal undertakings, since they are carrying out an economic activity. The Commission has laid down some general principles in a few decisions regarding the Italian Salva Calcio law, the French training centers and the financing for Omniworld Almere. As regards the financing of sport infrastructure, some infrastructure can be considered as general infrastructure, and the financing of it can be undertaken by the State. The State aid rules do not have any impact on these investments. On the contrary, certain infrastructure cannot be considered as general infrastructure. Investing in these types of infrastructure is not allowed by the State aid rules.

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