Court of Justice of the European Union
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Press and Information

Judgment in Case C-362/19 P
Commission v Fútbol Club Barcelona

The Court of Justice sets aside the judgment of the General Court by which the Commission's decision classifying as State aid the tax scheme of four Spanish professional football clubs had been annulled

The action which had been brought by Fútbol Club Barcelona against that decision is definitively rejected

A Spanish law adopted in 1990 obliged all Spanish professional sports clubs to convert into public limited sports companies, with the exception of professional sports clubs that had achieved a positive financial balance during the financial years preceding adoption of that law. Fútbol Club Barcelona (FCB), and three other professional football clubs which came within that exception – Club Atlético Osasuna (Pamplona), Athletic Club (Bilbao) and the Real Madrid Club de Fútbol (Madrid) – had thus chosen to continue operating in the form of non-profit legal persons and enjoyed, in that capacity, a special rate of income tax. As that specific tax rate remained, until 2016, below the rate applicable to public limited sports companies, the Commission took the view, by decision of 4 July 2016, [1] that that legislation, in introducing a preferential corporate tax rate for the four clubs concerned, constituted unlawful and incompatible State aid, and ordered Spain to discontinue it and to recover the individual aid provided to the beneficiaries of that scheme.

Hearing an action brought by FCB against the decision at issue, the General Court of the European Union, by judgment of 26 February 2019, [2] annulled that decision on the ground that the Commission had not proved to the requisite legal standard the existence of an economic advantage conferred on the beneficiaries of the measure at issue. In particular, the General Court found that the Commission had not sufficiently assessed whether the advantage resulting from the reduced tax rate could be offset by the less favourable deduction rate for reinvestment of extraordinary profits applicable to clubs operating in the form of non-profit legal persons compared to that applicable to entities operating in the form of public limited sports companies.

In its judgment of 4 March 2021, the Court of Justice, granting the form of order sought in the appeal brought by the Commission, sets aside the judgment under appeal. In support of its appeal, the Commission raised a single ground alleging infringement of Article 107(1) TFEU, so far as concerns, first, the concept of an 'advantage capable of constituting State aid', within the meaning of that provision, and, second, the Commission's duty of diligence in the context of the examination of the existence of aid, in particular from the point of view of the existence of an advantage. In that context, the Court specifies the evidentiary requirements incumbent on the Commission in the analysis of whether a tax regime confers an advantage on its beneficiaries and, therefore, whether it is capable of constituting 'State aid' within the meaning of Article 107(1) TFEU.

Findings of the Court

In its assessment of the merits of the single ground of appeal, **the Court finds, in the first place, that the General Court erred in law when it found that the decision at issue was to be**

[1] Commission Decision (EU) 2016/2391 of 4 July 2016 on the State aid SA.29769 (2013/C) (ex 2013/NN) implemented by Spain for certain football clubs (OJ 2016 L 357, p. 1).
[2] Judgment of 26 February 2019, *Fútbol Club Barcelona* v *Commission*, T-865/16 (see also CP No 17/19).

construed as a decision relating both to an aid scheme [3] and to individual aid, since the Commission also expressed its view, in its decision, on the aid individually granted to the four clubs named as beneficiaries. In the case of an aid scheme, a distinction must be drawn between the adoption of that scheme and the aid granted on the basis of it. Individual measures which merely implement an aid scheme constitute mere measures implementing the general scheme, which do not, in principle, have to be notified to the Commission.

In the present case**, the Court observes that the measure at issue concerns such an aid scheme, since the specific tax provisions applicable to non-profit entities, in particular the reduced tax rate, are capable of benefitting, by virtue of that measure alone, each of the eligible football clubs, defined in a general and abstract manner, for an indefinite period of time and an indefinite amount, without further implementing measures being required and without those provisions being linked to the realisation of a specific project.** Therefore**, the mere fact that,** in the present case**, aid was granted individually to the clubs on the basis of the aid scheme at issue cannot have any bearing on the examination to be carried out by the Commission to determine the existence of an advantage. In those circumstances, therefore, the General Court was wrong to find such a fact to be relevant.**

In the second place, the Court finds that the error in law thus committed by the General Court vitiates the conclusions which the General Court draws from it as to the extent of the obligations incumbent on the Commission as regards proof of the existence of an advantage. That erroneous premiss led the General Court to consider that the Commission ought to have taken into account, for the purpose of its analysis, not only the advantage resulting from the reduced tax rate, but also the other components of the tax regime at issue, which the General Court finds to be inseparable from that regime, such as the possibilities of deductions, in so far as capping those deductions could offset that advantage. The Court recalls that, admittedly, the Commission is required to carry out a global assessment of the aid scheme, taking into account all the components which constitute its specific features, both favourable to its beneficiaries and unfavourable to them. However, the examination of the existence of an advantage cannot depend on the financial situation of the beneficiaries at the time of the subsequent grant of individual aid on that basis. In particular, **the impossibility of determining, at the time of the adoption of an aid scheme, the exact amount, per tax year, of the advantage actually conferred on each of its beneficiaries, cannot prevent the Commission from finding that that scheme was capable, from that moment, of conferring an advantage on those beneficiaries and cannot, accordingly, exempt the Member State concerned from its substantive requirement to notify such a scheme**. If, as the General Court acknowledged in the judgment under appeal, the Commission were required to verify, in the context of the analysis of a tax regime, on the basis of updated data, whether the advantage has actually materialised in subsequent tax years, and, where relevant, whether the advantage has been offset by the disadvantages recorded in other tax years, Member States which fail to comply with their obligation to notify such a scheme would be favoured by the approach in question. **It is, therefore, only at the stage of the possible recovery of the individual aid granted on the basis of the aid scheme at issue that the Commission is required to look at the individual situation of each beneficiary**, such a recovery requiring the exact amount of aid which those beneficiaries have actually obtained in each tax year to be determined.

In the present case, it is common ground that, from the time of its adoption, the aid scheme resulting from the measure at issue, in so far as it granted certain clubs eligible for that scheme – including FCB – the possibility of continuing to operate, by way of derogation, as a non-profit entity, allowed them to benefit from a reduced tax rate compared to that applicable to clubs operating as public limited sports companies. In so doing, **the aid scheme at issue was, from the time of its adoption, liable to favour clubs operating as non-profit entities over clubs operating in the form of public limited sports companies, thereby conferring on them an advantage capable of falling within the scope of Article 107(1) TFEU. It follows that,** to demonstrate to the requisite legal standard that the aid scheme at issue confers on its beneficiaries an advantage

[3] Within the meaning of Article 1(d) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

falling within the scope of Article 107(1) TFEU, **the Commission was not required to examine, in the decision at issue, the effect of the deduction for reinvestment of extraordinary profits or that of the possibilities of deferral in the form of a tax credit and, in particular, whether that deduction or those possibilities would neutralise the advantage resulting from the reduced tax rate.** Therefore, it must be held that **the General Court erred in law** in ruling that the Commission was obliged to carry out such an examination, if necessary, by requesting relevant information. Consequently, the Court sets aside the judgment under appeal on that point.

Lastly, as regards the consequences of setting aside the judgment under appeal, the Court finds, first of all, that, to uphold the action seeking annulment of the decision at issue, the General Court admittedly upheld, by the judgment under appeal, the second plea in law alleging, in essence, an incomplete analysis of the existence of an advantage, but first rejected the plea alleging infringement of Article 49 TFEU, in that the Commission ought, according to the FCB, to have found that the obligation imposed on professional sports clubs to convert themselves into public limited sports companies was contrary to the freedom of establishment guaranteed by that provision. In such circumstances, the Court finds that FCB or Spain, intervening in support of the form of order sought by the football club, were entitled to challenge, in the context of a cross-appeal, the merits of the grounds for rejecting the plea in question, even if the General Court had upheld their forms of order on other grounds. In the absence of such an appeal, the judgment under appeal therefore has the force of *res judicata* on that point.

That being stated, **the Court considers that the state of the proceedings is such that it may give final judgment in the matter and, ruling, accordingly, on it, it rejects the four other pleas relied on at first instance**, alleging, respectively, errors which the Commission committed in its examination of the advantage conferred by the measure at issue, infringement of the principles of the protection of legitimate expectations and of legal certainty, infringement of Article 107(1) TFEU, in that the Commission did not consider that the measure at issue was justified by the internal logic of the tax system at issue, and of the rules applicable to the recovery of existing aid. **Consequently, the Court dismisses the action brought by FCB.**

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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