

## II

(Non-legislative acts)

## DECISIONS

## 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

(notified under document C(2016) 4046)

(Only the Spanish text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a),

Having called on interested parties to submit their comments pursuant to Article 108(2) of the Treaty <sup>(1)</sup> and having regard to their comments,

Whereas:

#### 1. PROCEDURE

- (1) In November 2009, detailed information sent by citizens drew the attention of the Commission to a possible preferential corporate tax treatment of the four Spanish sport clubs Athletic Club Bilbao, Club Atlético Osasuna (Navarra), FC Barcelona and Real Madrid CF in comparison to sport limited companies. Spain was asked to comment on 15 February, 12 April and 28 September 2010. Comments were received on 23 March and 15 December 2010.
- (2) By letter dated 18 December 2013, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid ('the opening decision'). By letter dated 17 February 2014, Spain provided comments on that decision. On 17 December 2015, Spain provided additional information.
- (3) The Commission decision to initiate the procedure (the opening decision) was published in the *Official Journal of the European Union* <sup>(2)</sup>. The Commission invited interested parties to submit their comments on the aid/measure.
- (4) The Commission received comments from interested parties. It forwarded them to Spain, which was given the opportunity to react; its comments were received by letter dated 21 November 2014.

<sup>(1)</sup> OJ C 69, 7.3.2014, p. 115.

<sup>(2)</sup> Cf. footnote 1.

## 2. DETAILED DESCRIPTION OF THE AID

### 2.1. THE MEASURE

- (5) Article 19(1) of the 'ley del deporte' of 1990 <sup>(3)</sup> (Law 10/1990) obliged all Spanish professional sport clubs (clubes deportivos) to convert into sport limited companies (sociedades anónimas deportivas). The justification for the measure was that many clubs had been managed badly because neither their members nor their administrators bore any financial liability for economic losses. The purpose was to establish with the new sport limited company a model of economic and legal responsibility for clubs which perform professional activities, in order to increase their chance for good management.
- (6) The 'Seventh Additional Disposition' (hereinafter 'DA 7a') of Law 10/1990 exempts from this obligatory conversion those football clubs which had a positive balance in the preceding 4-5 years. The exemption is, according to the preamble of the law, based on the fact that these clubs have shown 'a good corporate management' and would not need that switch. They may maintain their current legal structure of a club unless their assemblies agree to the contrary <sup>(4)</sup>.
- (7) It turned out that the only clubs fulfilling this condition were Athletic Club Bilbao, Club Atlético Osasuna (Navarra), FC Barcelona and Real Madrid CF. The law does not explicitly mention by name these four clubs that eventually benefited from this exemption. They did not convert into a sport limited company although they would be entitled to do so.
- (8) The fiscal treatment of sport clubs deviates from the fiscal regime applicable to sport limited companies, which are subject to the general regime of corporate taxation of companies. Sport clubs are non-profit entities (*Entidades sin ánimo de lucro*) which as such qualify for a partial corporate tax exemption according to Article 9(3)a) of the Spanish Corporate Tax Law (*Ley del Impuesto sobre Sociedades*). As a result of this partial exemption, Article 28(2) of the Corporate Tax Law provides that the exempted clubs, as non-profit entities, shall pay corporate tax for their commercial income at a reduced rate of 25 % instead of the general rate of 30 % (having been 35 % until 2006 and 32,5 % in 2007).
- (9) The Spanish Sports Law does not include a time period for a possible re-assessment of this specific treatment. Thus, only the originally qualified four teams have the option of benefitting from a fiscally favourable status of 'sports club', irrespective of how the financial health of the other teams evolves. No commercially viable team may reconvert to club status either.
- (10) The four clubs conduct profit oriented professional activities. For example, in the 2013/2014 season, Real Madrid CF earned revenues of EUR 549 million and FC Barcelona EUR 484 million <sup>(5)</sup>. The revenues derived from the sale of broadcasting rights, from sponsoring, merchandising (sale of club related articles like replica shirts) and licensing, and from so called match day revenues (ticket sales and other revenues generated in the stadium). Both clubs have been leading the European Premier League clubs in terms of revenues for several years. Athletic Club Bilbao has constantly been playing in the Spanish first league and regularly participates in international competitions, like the Champions League. Also Club Atlético Osasuna played in the first league until the season 2012/2013, when it was relegated to the second league (Segunda División) of the National Professional Football League, and participated occasionally in European competitions of professional clubs.
- (11) In the opening decision, the Commission described that at least Real Madrid CF and FC Barcelona had taxable profits in the years after 2000. Also the annual reports of, for example, Real Madrid CF show earnings before taxes of EUR 25 million for the 2008/2009 season, EUR 31 million for 2009/2010, EUR 47 million for 2010/2011, EUR 32 million in 2011/2012 and EUR 47 million in 2012/2013. Those figures suggest considerable taxable revenues for the last years, at least for Real Madrid CF, where a different tax rate of 25 % instead of 30 % may lead to an economic advantage against its competitors.

<sup>(3)</sup> Ley 10/1990, de 15 de octubre, del Deporte, BOE de 17 de Octubre de 1990.

<sup>(4)</sup> 'Those clubs, that at the time of enactment of this law participate in official football competitions at a professional level and had had a positive shareholders equity balance in all of the audits performed at the request of the Professional Football League since the 1985-1986 season, shall maintain their current legal structure unless their assemblies agree to the contrary...'

<sup>(5)</sup> Source: Deloitte Football Money League 2015, <http://www2.deloitte.com/content/dam/Deloitte/na/Documents/audit/gx-football-money-league-2015.pdf>.

## 2.2. GROUNDS FOR INITIATING THE PROCEDURE

- (12) In the opening decision, the Commission determined that the football clubs concerned qualify as non-profit organisations. That does not exclude their qualification as undertakings according to Article 107(1) of the Treaty. The supported professional sport activities are of a commercial nature <sup>(6)</sup>. Those revenue-generating activities are economic in nature and conducted in fierce competition with the other large European professional football clubs. The sources of revenue are linked to the teams' success in sport competitions. In turn, that success very much depends on the amount of funds available to clubs to attract or keep the best players and coaches.
- (13) Tax differentiation may selectively favour the four clubs. The Commission therefore preliminarily concluded in the opening decision that the four sport clubs in question enjoy an advantage in the form of a preferential tax rate which is not justified by the nature of the tax system. The tax differentiation between them and other clubs is an effect which is caused by Law 10/1990, which singled out a limited number of beneficiaries. The Commission furthermore found that that advantage derives from State resources, as the State forgoes possible tax revenues and that aid to professional football clubs has an effect on competition and trade between Member States.
- (14) The Commission preliminarily concluded in the opening decision that the financial State support providing an advantage to the professional sport clubs Athletic Club Bilbao, Club Atlético Osasuna (Navarra), FC Barcelona and Real Madrid CF will, in all likelihood, have the potential to distort competition and affect trade. Thereby it constitutes State aid in the meaning of Article 107(1) of the Treaty.
- (15) The Commission expressed doubts regarding the compatibility of the aid with the internal market. It also found that no guidelines on compatibility criteria seem to be applicable to the present case. Therefore, compatibility should be assessed directly under Article 107(3)(c) of the Treaty, according to which aid may be considered compatible with the internal market if it facilitates, in the common interest, the development of certain economic activities or of certain economic areas.
- (16) The Commission doubted that there would be an objective of common interest which could justify selective operating support to very strong actors in a highly competitive economic sector. Accordingly, the Commission considered in the opening decision that by means of the scheme introduced by Law 10/1990, Spain grants individual operating aid through a preferential tax rate to four sport clubs Athletic Club Bilbao, Club Atlético Osasuna (Navarra), FC Barcelona and Real Madrid CF which cannot be justified under Article 107(3)(c) of the Treaty. The Commission invited Spain and interested parties to provide comments.

## 3. COMMENTS FROM INTERESTED PARTIES

- (17) Following the publication of the opening decision, the Commission received observations from Real Madrid CF, FC Barcelona, Athletic Club Bilbao, the Liga Nacional de Fútbol Profesional, from a citizen and from organisations desiring that their identity is treated as confidential.

### 3.1. GENERAL OBSERVATIONS

- (18) The Liga Nacional de Fútbol Profesional refers to the special status of sport under Article 165 of the Treaty. It claims that Law 10/1990 simply wanted to introduce a voluntary system of social responsibility for clubs. The Liga maintains that therefore the reform had not a fiscal objective. The fiscal consequences would be an indirect effect of other objectives pursued.
- (19) Athletic Club Bilbao points to the tax autonomy of the Territorio Histórico de Bizkaia in the Basque Country with regard to corporate taxation, which was acknowledged by the General Court <sup>(7)</sup>. The territorial reference frame for the determination whether Athletic Club Bilbao enjoys a selective advantage would therefore be the

<sup>(6)</sup> Case C-415/93 *Bosman* ECLI:EU:C:1995:463, paragraph 73, Case C-519/04 P *Meca-Medina and Majcen v Commission* ECLI:EU:C:2006:492, paragraph 22, and C-325/08 *Olympique Lyonnais* ECLI:EU:C:2010:143, paragraph 23.

<sup>(7)</sup> Joined Cases C-428/06 to 434/06 *UGT-Rioja* ECLI:EU:C:2008:488.

Territorio Histórico de Bizkaia. Although the sport law is of national application, it does not contain rules on taxes. Under the Treaty on European Union, the Union would however be bound to respect the regional and local self-government structures of the Member States. In the Territorio Histórico de Bizkaia there would be no sport limited companies. Therefore, according to the club, there cannot be any selective treatment of sport entities in that region. Athletic Club Bilbao should be seen simply as subject to the general corporate tax regime applicable in the Territorio Histórico de Bizkaia for all non-profit entities.

### 3.2. ON THE JUSTIFICATION FOR DIFFERENT CORPORATE TAX RATES

- (20) The Liga Nacional de Fútbol Profesional, Real Madrid CF, FC Barcelona and Athletic Club Bilbao consider the corporate tax differentiation justified by the nature of the tax; therefore it would not entail selective advantage. Sport clubs would be taxed in the same way and subject to the same rules as other non-profit entities. The general regime applicable to non-profit entities could not be considered as an exception to the tax regime applicable to companies. It would be a distinct, general regime in its own right, applicable to all Spanish non-profit entities irrespective of the sector, the size and the region. The different legal regime would limit the market activity of non-profit associations and curb their ability to generate the same profits as for-profit companies. For-profit companies' essential motive for obtaining profits would be to generate distributable funds so as to be able to offer an adequate return on investment for its shareholders.
- (21) Real Madrid CF refers to the Court of Justice judgment in *Kennemer Golf* <sup>(8)</sup>, which states in paragraphs 26, 31 and 35 that a non-profit organisation must not have the aim of achieving profits for its members.
- (22) Real Madrid CF and Athletic Club Bilbao argue that, although the systematic pursuit of profits would not prevent a categorisation of an entity as non-profit organisation, these profits have to be used for the purposes of the provision of its services. They put emphasis on the fact that the profit of a sport club must not be distributed to its members. Consequently, sport clubs and sport limited companies would not be in a comparable factual and legal situation. In any case, a possible difference in taxation would be justified by the nature or general structure of the Spanish fiscal system.
- (23) According to Real Madrid CF it would therefore not be sufficient as common reference base to have the objective to make a profit. The reference should instead be to make a profit which can be distributed, something which is not possible for clubs. Real Madrid finds that clubs share the same characteristics with cooperatives and refers to the arguments set out in the *Paint Graphos* judgment of the Court of Justice <sup>(9)</sup>.
- (24) Real Madrid CF, FC Barcelona and the Liga Nacional de Fútbol Profesional underline that the liability regime imposed on the management body of sport clubs is much stricter than for sport limited companies. The management board must provide a bank guarantee covering 15 % of the club's budgeted spending in order to guarantee any losses generated during its term. In addition, management board members will be strictly liable, in an unlimited manner, with their present and future personal assets, for any losses generated that exceed this guaranteed amount. Moreover, sport clubs are subject to a strict supervision and control of their commercial behaviour, in particular with regard to taking loans, by a public body, the Spanish High Council for Sports ('Consejo Superior de Deportes').
- (25) Athletic Club Bilbao and the Liga Nacional de Fútbol Profesional argue that clubs do not have the means which limited companies have as regards access to the capital market. In particular, they cannot increase their capital by the emission of new shares. Furthermore, there would be no fiscal consolidation between a club and its controlled companies, given that different tax rates are applicable. Consequently, profits and losses between the club and these companies cannot be set off, by contrast to the possibility for limited companies to fiscally consolidate their controlled subsidiaries. FC Barcelona observes that the clubs find themselves therefore in a manifestly disadvantaged position compared to the rest of Europe, where investors may inject large amounts of money into sport clubs.

<sup>(8)</sup> Case C-174/00 *Kennemer Golf* ECLI:EU:C:2002:200.

<sup>(9)</sup> Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* ECLI:EU:C:2011:550.

- (26) Regarding the possible advantage deriving from the different taxation rates, Real Madrid CF claims that establishing a lower tax rate on operating income for clubs, as non-profit entities, cannot in itself constitute a more favourable selective measure amounting to State aid. Substantial differences between the fiscal regimes for corporate taxation of clubs and limited companies would be unfavourable towards clubs and counterbalance the effects of the slightly lower tax rate applied to them. Real Madrid CF refers to the fact that a deduction for the reinvestment of extraordinary profit or capital gains received from equity transfers is higher for sport limited companies (12 %) than for sport clubs (7 %). Depending on the circumstances, this deduction may sometimes be very significant.
- (27) Real Madrid CF provided a taxation report on the club, in relation to Corporate Tax for the period between July 2000 and 30 June 2013, drawn up by its tax advisors. That report demonstrates that for Real Madrid CF, during the period investigated, its fiscal regime as a non-profit entity has been significantly more disadvantageous than a hypothetical counterfactual application of the general regime for companies.
- (28) Real Madrid CF submits [...] (\*).
- (29) Athletic Club Bilbao underlines [...].

### 3.3. ON THE PRESENCE OF NEW AID

- (30) Real Madrid CF, FC Barcelona and Athletic Club Bilbao claim that the alleged aid, if present, would need to be considered existing aid. The special tax rate for non-profit organisations was introduced before Spain's accession to the European Union on 1 January 1986, and has not substantially changed since then. Law 61/1978, of 27 December, on Corporate Tax (*Ley 61/1978, de 27 de diciembre, del Impuesto sobre Sociedades*) contemplated a partial exemption and a lower tax rate for income obtained from economic operations carried out by non-profit associations, such as football clubs.
- (31) FC Barcelona observes that Law 10/1990 would itself not create a new State aid measure. On the contrary, it would take out most of the clubs from the preferential system. One could thus argue that it did not introduce this advantage for the four clubs but reduced the number of beneficiaries. This would not be new aid but a successive modification intended to reach a lower distortion of competition, compared with the previous situation. Athletic Club Bilbao argues that Law 10/1990 did not change at all the situation of the club which simply continued to be subject to the corporate tax regime for non-profit organisations.

## 4. COMMENTS FROM SPAIN

- (32) The observations of Spain include those contributed by the provincial government of Bizkaia (*Diputación Foral de Bizkaia*) in the Basque Country and the Community of Navarra (*Comunidad Foral de Navarra*).
- (33) Spain confirms that Law 10/1990 requires clubs participating in professional competitions to convert to sport limited companies. It underlines that the fiscal rules on the taxation of non-profit organisations do not only extend to football clubs but to all non-profit entities. For all these entities, the law provides that they have to pay corporate tax of 25 % for profits they realise in the pursuit of activities of commercial character. Therefore revenues from professional sport are subject to taxation. The treatment of the sport clubs would thus be a general measure, applicable to all non-profit entities.

### 4.1. THE DIFFERENT TAXATION OF SPORT CLUBS AND SPORT LIMITED COMPANIES

- (34) On 9 February 2015, Spain informed the Commission about an amendment of the corporate tax rules by Law 27/2014 of 27 November 2014 on the taxation of companies (*del Impuesto sobre Sociedades*) <sup>(10)</sup> by which the general corporate income tax rate of 30 % will be reduced to 28 % for 2015 and to 25 % from 2016 onwards. This means that limited sport companies will, from 2016, also be submitted to a 25 % corporate tax rate. From 2016, according to Spain, there will not anymore be a different taxation between clubs and sport limited companies.

(\*) Confidential information.

<sup>(10)</sup> BOE No 288, de 28 de noviembre de 2014, p. 96939.

- (35) Spain underlines the tax differentiation does not lead to an advantage because clubs do, in effect, not pay fewer taxes. Companies depending on a non-profit entity, which are subject to a different tax regime (e.g. because they are limited companies) cannot benefit from the tax regime applicable to the holding club. Limited companies however can consolidate the profits of the various companies of the group. Spain illustrates with data on the effective corporate tax rate paid by entities subject to corporate taxation in the years 2008 to 2011 that the advantage is not as important as the difference of 5 percentage points in the taxation rate suggests <sup>(11)</sup>:

Taxation year	2008	2009	2010	2011
Non-profit entities (%)	15,60	15,80	19,60	17,60
Entities subject to the general tax regime (%)	18,90	17,80	18,80	18,80

- (36) Spain, and in particular the provincial government of Bizkaia and the Community of Navarra refer to paragraph 25 of the notice on the application of State aid rules to measures relating to direct business taxation <sup>(12)</sup> according to which a different treatment may be justified by the nature and overall structure of the tax system. The lower tax rate would be justified as the benefiting clubs would be non-profit organisations, which would not earn any profits. Furthermore, would be justified because clubs, unlike limited companies in relation to their shareholders, do not pursue the aim to distribute profit to the club members.
- (37) To support that argument, Spain refers to the Judgment of the Court of Justice on Italian cooperatives <sup>(13)</sup>. In paragraph 61 of that judgment, which concerns the taxation of cooperatives, the Court states that in the light of special characteristics peculiar to cooperative societies, it must be held that producers' and workers' cooperative societies cannot, in principle, be regarded as being in a comparable factual and legal situation to that of commercial companies — provided, however, that they act in the economic interest of their members and their relations with members are not purely commercial but personal and individual, the members being actively involved in the running of the business and entitled to equitable distribution of the results of economic performance.
- (38) The provincial government of Bizkaia points to the difference between investors who hope to get a return from investing in a company and club members who do not have this right. The Commission would be wrong if it considered as the general aim of corporate taxation the taxation of profits of corporations. According to the provincial government of Bizkaia, the general aim of taxation would not only be to tax the profits of a legal entity but also to consider whether profits are redistributed among shareholders and whether the shareholders are taxed also on their share in the profits.
- (39) Spain also refers to fewer possibilities of access to capital markets of cooperatives because they cannot emit tradable shares. Spain argues that, likewise, clubs are without the means limited companies have for access to the capital market. Shareholder capital injections would not be possible to finance improvement of the competitive position of the clubs e. g. through the acquisition of expensive football players. Furthermore there are limits for making debts (e.g. a need of approval by the Consejo Superior de Deportes). Spain also refers to the rules of personal financial responsibility of the members of the boards of sport clubs for negative results the club generates, which are stricter than for managers in limited companies.
- (40) Spain finally refers to the fact that according to Article 30 of Real Decreto 177/1981 sobre clubs y federaciones deportivas <sup>(14)</sup>, the income a club realises with the sale of its sport infrastructure or grounds must be reinvested in the construction or improvement of goods of the same nature.

<sup>(11)</sup> Source: Recaudación y estadísticas del sistema tributario español 2001-2011, [http://www.minhap.gob.es/Documentacion/Publico/Tributos/Estadisticas/Recaudacion/2011/Analisis\\_estadistico\\_recaudacion\\_2011.pdf](http://www.minhap.gob.es/Documentacion/Publico/Tributos/Estadisticas/Recaudacion/2011/Analisis_estadistico_recaudacion_2011.pdf).

<sup>(12)</sup> OJ C 384, 10.12.1998, p. 3.

<sup>(13)</sup> Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* ECLI:EU:C:2011:550.

<sup>(14)</sup> BOE No 39, de 14 de febrero de 1981, p. 3408.

#### 4.2. THE QUALIFICATION OF THE ALLEGED AID AS EXISTING AID

- (41) Like Real Madrid CF and Athletic Club Bilbao, Spain claims that, if there should be aid, it has to be considered existing. Law 10/1990 was preceded by Law 13/1980 General de la Cultura Física y del Deporte. Under this law, at the accession of Spain in 1986, all football clubs were non-profit entities. Since 1982, these clubs were, like any other non-profit entity, subject to a low corporate tax of 15 % on their commercial profits. Therefore any aid would be existing aid according to Article 1(b)(i) of Council Regulation (EU) 2015/1589 <sup>(15)</sup> (Procedural Regulation), which includes any aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty in the respective Member State. Law 10/1990 just confirms the status of the clubs, including its fiscal consequences, though restricted to the certain clubs fulfilling certain conditions. The fiscal advantage for those clubs was consequently established before Spain's accession in 1986.

#### 4.3. THE TAX AUTONOMY OF THE PROVINCIAL GOVERNMENT OF BIZKAIA AND THE COMMUNITY OF NAVARRA

- (42) Spain, and in particular the Community of Navarra and the provincial government of Bizkaia point to the autonomy of these regions in tax matters. This autonomy includes the level of the corporate tax rate. The general corporate tax rate is 30 % in the Community of Navarra and 28 % in the Territorio Histórico de Bizkaia. The rate for the commercial profit of non-profit entities is 25 % and 21 % respectively.
- (43) Because of the tax autonomy enshrined in the Spanish constitution, a general tax measure adopted by the Community of Navarra and the provincial government of Bizkaia would not be territorially selective. In both territories there would not exist a single sport limited company. Therefore, there would not be any other sport entity that could claim to be treated unfairly. The Commission committed an error in not identifying the geographical reach of the reference system. Therefore, if the Commission examines whether a certain tax treatment is discriminating, the relevant reference system for fiscal regimes of regions, which are in that respect independent, is the respective regional regime.
- (44) The Community of Navarra advises that [...].
- (45) Also, the provincial government of Bizkaia advises, and supports with the tax assessments of the internal revenue service, that Athletic Club Bilbao [...].

### 5. ASSESSMENT OF THE AID

#### 5.1. PRESENCE OF AID

- (46) According to settled case-law, for a measure to be categorised as aid within the meaning of Article 107(1) of the TFEU, all the conditions set out in that provision must be fulfilled <sup>(16)</sup>. It is thus well-established that, for a measure to be categorised as State aid within the meaning of that provision, there must, first, be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on an undertaking and, fourth, it must distort or threaten to distort competition <sup>(17)</sup>.

##### 5.1.1. STATE RESOURCES AND IMPUTABILITY

- (47) By a lower tax rate, the aid scheme introduced by Law 10/1990 allows that four clubs enjoy an advantage deriving from State resources, as the State foregoes possible tax revenues. This advantage derives from a relief from economic burdens such as tax burdens normally included in the budget of an undertaking <sup>(18)</sup>. This lower tax rate constitutes State resources forgone by the State. The measure is imputable to the State because it results from the application of Law 10/1990.

<sup>(15)</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

<sup>(16)</sup> See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 38 and the case-law cited therein.

<sup>(17)</sup> See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 39 and the case-law cited therein.

<sup>(18)</sup> Case C-387/92 *Banco Exterior de España* ECLI:EU:C:1994:100, paragraph 13; Case C-156/98 *Germany v Commission* ECLI:EU:C:2000:467, paragraph 25; Case C-6/97 *Italy v Commission* ECLI:EU:C:1999:251, paragraph 15; Case C-172/03 *Heiser* ECLI:EU:C:2005:130, paragraph 36.

## 5.1.2. EXISTENCE OF A SELECTIVE ADVANTAGE

- (48) Article 107(1) of the Treaty requires it to be determined whether a State measure transfers a selective advantage to undertakings, in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.

5.1.2.1. *Advantage*

- (49) First, an advantage has to be conferred to an undertaking. Football clubs qualify as undertakings according to Article 107(1) of the Treaty if they are engaged in an economic activity, irrespective of their status under national law. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed<sup>(19)</sup>. The application of the State aid rules as such does not depend on whether the entity is set up to generate profits. According to the Court of Justice and the General Court, non-profit entities can offer goods and services on a market, too, and therefore may qualify as undertakings<sup>(20)</sup>. Professional sport clubs therefore qualify as commercial undertakings and are subject to European Union competition law in so far as they pursue an economic activity<sup>(21)</sup>. Professional football clubs raise profits generated by revenues from ticket sales, marketing activities, broadcasting rights, merchandising, sponsorship, etc. and compete with each other and with other professional football entities (that have a status of sport limited companies. Accordingly, the four clubs concerned by this investigation constitute undertakings for the purposes of Article 107(1) of the Treaty.

5.1.2.2. *Selectivity*

- (50) Regarding a possible selective advantage in the form of forgone tax income, the Court of Justice has developed a set of criteria for the application of Article 107(1) of the Treaty<sup>(22)</sup>.
- (51) As the Commission set out in the opening decision, differential taxation would be *prima facie* selective if it constituted a departure from the general or reference taxation system with regard to certain undertakings. It needs to be assessed whether the measure consists in a derogation applicable to certain undertakings in comparison with other undertakings which are in a comparable legal and factual situation in light of the objective of the tax scheme. If that is the case, it may be concluded that the advantage conferred by the measure is *prima facie* selective. However, such a measure can still be justified by the logic and the nature of the tax system.

**Selectivity *prima facie***

- (52) Accordingly, in the opening decision, the Commission established a common reference taxation system for professional sport clubs. Confirming its preliminary opinion, the Commission considers that the general rule is that as of 1990 such undertakings are taxed as limited companies, pursuant to the corporate tax law. However, clubs with certain characteristics related to their economic performance in the preceding years may continue to be taxed as non-profit organization. De facto, these conditions were met by four professional football clubs. In the opening decision, the Commission also established that these four clubs are in a comparable legal and factual situation as other professional sport companies in light of the objective of the tax scheme, which is generating State revenues on the basis of company profits. For both, the tax basis is the amount of net profit earned by an undertaking at the end of the tax year. The Commission confirms its preliminary position.
- (53) By way of derogation from the normal tax rates applicable to entities active in professional sport, the taxable income of certain professional football clubs is taxed pursuant to a different tax regime, with a lower rate, than that of other such entities. The former clubs are treated differently as they enjoy a reduced tax rate to which clubs incorporated as limited companies and thus subject to the general corporate tax are not entitled. Accordingly, the DA 7a of Law 10/1990 establishes a *prima facie* selective advantage in favour of certain professional football clubs.

<sup>(19)</sup> Joined Cases C-180/98 to C-184/98 *Pavlov and Others* ECLI:EU:C:2000:428, paragraph 74.

<sup>(20)</sup> Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* ECLI:EU:C:1980:248, paragraph 88; Case C-244/94 *FFSA and Others* ECLI:EU:C:1995:392, paragraph 21; Case C-49/07 *MOTOE* ECLI:EU:C:2008:376, paragraphs 27 and 28.

<sup>(21)</sup> Case C-415/93 *Bosman* ECLI:EU:C:1995:463, paragraph 73, Case C-519/04 P *Meca-Medina and Majcen v Commission* ECLI:EU:C:2006:492, paragraph 22, and C-325/08 *Olympique Lyonnais* ECLI:EU:C:2010:143, paragraph 23.

<sup>(22)</sup> Most recently in the judgment of 8 September 2011 in Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* ECLI:EU:C:2011:550.

- (54) The advantage is also *de facto* selective as Law 10/1990 singled out a limited number of beneficiaries. It introduced a lasting distinction based on the economic performance of the clubs in 1990, reserving *de facto* to the four clubs the possibility to remain outside the general system of corporate taxation and under the lower taxation rate for non-profit organisations. If Spain considered that the legal entity of club was not appropriate for professional competitions, it would have been logical to change the system for all clubs.
- (55) Regarding the reasons as to why the professional football clubs and sport limited companies are not in the same factual and legal situation, alleged by Spain, the Commission notes that differences in the economic performance cannot justify different treatment as regards the obligatory form of organisation or the lack of choice in that respect. Losses are not intrinsic to a certain form of organisation. The business performance is therefore not an objective criterion justifying different taxation bases or imposing certain forms of incorporation for an indefinite period.
- (56) The differentiation can neither be justified by stricter internal control mechanisms to which Real Madrid CF and FC Barcelona refer. Such internal controls are not relevant for the level of taxation of these clubs and do not place the entities in two non-comparable groups from a tax perspective. Moreover, such justification is at odds with the rationale for the different tax treatment, as will be explained below (recital 57).

#### **Justification by the nature and logic of the tax system**

- (57) This different treatment may be justified, however, by the nature and overall structure of the tax system <sup>(23)</sup>. As the Commission noted in the opening decision, it is for the Member State which has introduced such a differentiation in charges in favour of certain undertakings active in professional football to show that it is actually justified by the nature and general scheme of the system in question <sup>(24)</sup>.
- (58) As already outlines above, differences in the economic performance cannot justify different treatment as regards the obligatory form of organisation which results in a different taxation. The business performance is not an objective criterion inherent to the logic of the tax.
- (59) Furthermore, the differentiation cannot be justified by stricter internal control mechanisms to which Real Madrid CF and FC Barcelona refer, as explained in recital 55. Such internal controls are not relevant for the level of taxation of these clubs. Moreover, such justification is at odds with the rationale for the different tax treatment. The rationale for the differentiation introduced by Law 10/1990 was the fact that many clubs had been managed badly because neither their members nor their administrators bore any financial liability for economic losses. The new sport limited company should be a model of economic and legal responsibility for clubs which perform professional activities, in order to increase their chance for good management. However, the allegedly stricter rules for clubs appear to take away the basis for this justification. If there was a need for certain clubs to be subject to stricter controls, the obligatory transformation into a limited company would not be necessary to pursue the purpose of that law.
- (60) Spain and various interested parties argue that the deviation from the general tax rate is justified and therefore not conferring an advantage, by referring to the *Paint Graphos* judgment the Court of Justice regarding the taxation of cooperatives <sup>(25)</sup>. In that judgment, the Court indicated that, in light of the peculiarities of cooperative societies which have to conform to particular operating principles, those undertakings cannot be regarded as being in a comparable factual and legal situation to that of commercial companies, provided that they act in the economic interest of their members, the members being actively involved in the running of the business and entitled to equitable distribution of the results of economic performance <sup>(26)</sup>.
- (61) Spain and the interested parties argue that, in line with that judgment, the fact that clubs must not distribute profits to shareholders is a relevant peculiarity which justifies a deviation from the general tax rate.
- (62) Similarly, the provincial government of Bizkaia finds that a difference between investors which hope to get a return from a participation in a company and club members who do not have this right justifies lower taxation of clubs. The general aim of taxation would not only be to tax the profits of a legal entity but also to consider whether profits are redistributed among shareholders and whether there are taxed also on their level.

<sup>(23)</sup> Cf. paragraph 25 of the Commission notice on the application of State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

<sup>(24)</sup> Case T-211/05 *Italian Republic v Commission* ECLI:EU:T:2009:304, paragraph 125.

<sup>(25)</sup> Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* ECLI:EU:C:2011:550.

<sup>(26)</sup> Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* ECLI:EU:C:2011:550, paragraph 61.

- (63) However, these arguments cannot support a lower taxation of certain professional football clubs when compared to other professional sport entities. The Commission notes that such arguments are meant to propose that the football clubs are not in a factually or legally comparable situation to any other limited company rather than meant to explain that the derogation of tax treatment of certain professional sport entities is justified. In any event, those four clubs, although they are non-profit entities, actively seek to make profit for themselves. In the *Paint Graphos* judgment, the Court held that cooperative societies cannot be regarded as being in a comparable factual and legal situation to that of commercial companies because they act in the economic interest of their members, the members being in particular entitled to equitable distribution of the results of economic performance. The Court also refers to paragraph 25 of the Commission notice on direct business taxation, which expresses the Commission's view that the nature or general scheme of the national tax system may justify that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members <sup>(27)</sup>.
- (64) As Spain sets out, non-profit entities, unlike cooperatives, are characterised by the absence of the aim to distribute profits to the members or entities constituting them. The clubs are not allowed to distribute profits. Clubs have to use the income for the club's objectives, which means that they can use that income fully instead of giving a part to its members.
- (65) Likewise, the fact that clubs are obliged to reinvest the income they realise with the sale of their sport infrastructure or grounds in the construction or improvement of infrastructure of the same nature does not weaken their competitive position, nor justifies a different, more favourable, tax treatment with respect to other entities active in professional sport. It rather drives them to improve their facilities.
- (66) Regarding the fact that clubs may have fewer possibilities of access to the capital market, the lack of the possibility to sell shares on the capital market for instance does not prevent those four clubs from other means of access to liquidity. For a professional sport club there remain various possibilities, such as loans or merchandising, where the access is comparable with other companies. Alleged fewer possibilities of access to capital markets as such do not justify a different treatment of the taxable profits for certain football clubs. It is not even substantiated whether this reduces the risks or raises or lowers the chances for profits. If the disadvantages of the clubs in this respect are as manifest as they assert, they always have the possibility to change their corporate form.
- (67) As far as other considerations put forward by the Spanish authorities and interested parties are concerned, regarding the argument of Spain that there is no advantage if one compares the effective tax contribution of non-profit entities, the figures provided and reproduced in recital 35 above show that not in all but in most years the effective taxation of professional football clubs taxed as non-profit organisations was lower than that of comparable entities under the general tax regime. As far as it is considered that a non-profit entity cannot consolidate the profits of the various companies it is holding, this does not change that the main activity is benefiting from a lower tax rate.
- (68) Real Madrid CF furthermore refers to the system of tax credits for reinvestments. According to Article 42 of the Revised Corporate Income Tax Law, a deduction for the reinvestment of extraordinary profit or capital gains received from equity transfers is higher for sport limited companies, which are subject to the full corporate tax rate (12 %) than for sport clubs, which are subject to a corporate tax rate of 25 % (7 %). According to that club, during a certain period, for Real Madrid CF the fiscal regime as a non-profit entity has been more disadvantageous than the counterfactual general regime for limited companies. But even if that circumstance were confirmed, that would not demonstrate that the standard system of tax credits for reinvestments for clubs is in principle and in the longer term more advantageous. Moreover, the tax credit is only granted under certain conditions which do not apply continuously.
- (69) Finally, Spain refers to possible disadvantages which clubs may enjoy under the Financial Fair Play rules of the UEFA. But those are internal rules set by a football organisation which aim to ensure a reasonable financial management of sport entities and to avoid continuous loss making. They cannot justify a different taxation of profits by the State. Indeed, this justification is external to the logic and nature of the tax system of reference and therefore it does not exclude the existence of selectivity.
- (70) The effective taxation from which the four sport clubs benefited therefore tends to be lower in comparison to the normal taxation for limited companies active in professional sport, as illustrated by the figures provided by Spain and reproduced in recital 35, even if one considers, as referred to by Real Madrid, the different possibilities for

<sup>(27)</sup> Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* ECLI:EU:C:2011:550, paragraph 71.

limited companies and non-profit entities to deduct the reinvestment of extraordinary profit or capital gains received from equity transfers in a given year in which those reinvestments or transfers took place. Therefore, reserving to the four clubs the non-profit tax treatment, including a lower taxation rate than to other professional sport clubs is not in the logic of any tax system and has the effect of a tax advantage for certain clubs <sup>(28)</sup>. The comments of Spain and interested parties did not provide elements of law or fact which would affect the preliminary conclusions of the Commission in the opening decision regarding the presence of an advantage.

- (71) Accordingly, tax exemptions which are the result of an objective that is unrelated to the tax system of which they form part cannot circumvent the requirements under Article 107(1) of the Treaty <sup>(29)</sup>. The State measure is selective as it is for the benefit of four specific undertakings which are put in a different situation than all other professional sport clubs which are subject to the taxation of limited companies.

### 5.1.3. EFFECT ON TRADE AND DISTORTION OF COMPETITION

- (72) The advantage for a club playing in a national first league may furthermore have an effect on competition and trade between Member States. All clubs subject to non-profit taxation are, at least at some stage, in the national first league. Clubs active in the first and second leagues compete for presence in European competitions and are active on the markets for merchandising and TV rights. Broadcasting rights, merchandising and sponsoring are sources of revenue for which national first league clubs compete with other clubs within and outside their home country. The more funds clubs have available to attract top players or to retain them, the more success they may have in sport competitions, which promises more revenue from the activities mentioned. Furthermore, the ownership structure of the clubs is international.
- (73) Therefore, financial State support providing an advantage to certain professional football clubs in the form of lower taxation than for competing operators is liable to affect intra-EU trade and distort competition, since their financial position will be strengthened as compared to their competitors on the market for professional football as a result of that aid <sup>(30)</sup>. Consequently, it constitutes State aid in the meaning of Article 107(1) of the Treaty. This aid has been granted to the four clubs on an annual basis since the entry into force of Law 10/1990 in October 1990 until 2015. It is not relevant that that effect may not have been the primary objective of Law 10/1990 <sup>(31)</sup>.

### 5.2. THE TAX AUTONOMY OF THE PROVINCIAL GOVERNMENT OF BIZKAIA AND THE COMMUNITY OF NAVARRA

- (74) Athletic Club Bilbao is established in the Territorio Histórico de Bizkaia, Club Atlético Osasuna in Navarra. The Commission does not question the tax autonomy of the provincial government of Bizkaia and the Community of Navarra, including their prerogatives. It does not question their authority to set the rate of corporate tax applicable in their territory. The Commission is aware of that autonomy also in the context of the application of the State aid rules and the determination of selectivity of a measure. However, what the Commission examines in the present decision relates to the effects which the different forms of corporation may have under the respectively applicable tax regime, and whether this treatment, under the specific constellation, is selective, taking due account of the differences in corporate tax rates in some territories.
- (75) Law 10/1990, however, applies in the whole territory of Spain and may thus cause effects of differential treatment equally in regions, which set a different corporate tax rate, as long as that rate is different for certain professional football clubs (non-profit organizations) that are in comparable situation to other clubs that do not

<sup>(28)</sup> This reasoning is similar to the one in Case T-211/05 *Italian Republic v Commission* ECLI:EU:T:2009:304, paragraphs 120 and 121 (confirmed by the Court of Justice in Case C-458/09 P — *Italy v Commission* ECLI:EU:C:2011:769, paragraph 60), which considered selective a tax advantage available only to undertakings admitted to listing on a regulated market during a brief period, whereas all other undertakings were excluded from the advantages conferred by that scheme because they could not satisfy the conditions required for listing during the period covered by the aid scheme.

<sup>(29)</sup> Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* ECLI:EU:C:2011:550, paragraph 70.

<sup>(30)</sup> Case C-172/03 *Heiser* ECLI:EU:C:2005:130, paragraph 55 Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others v Commission* ECLI:EU:C:2011:368, paragraph 136. See also Case C-156/98 *Germany v Commission* ECLI:EU:C:2000:467, paragraph 30, and the case-law cited.

<sup>(31)</sup> Cases C-241/94 *France v Commission* ECLI:EU:C:1996:353, paragraph 20, C-5/01 *Belgique v Commission* ECLI:EU:C:2002:754, paragraph 45, and C-458/09 P *Italy v Commission* ECLI:EU:C:2011:769, paragraph 60.

receive that treatment (sport limited companies). In fact, as described in recital 42 above, both regions apply a different corporate tax rate, albeit similar to the Spanish fiscal scheme. It is not decisive that by coincidence just one entity may benefit from Law 10/1990 in their respective territories <sup>(32)</sup>. However, the issue at stake is not that Athletic Club Bilbao and Club Atlético Osasuna could continue benefiting from their non-profit status but that they enjoy a lower taxation rate than the one generally applicable to other undertakings in a comparable situation.

### 5.3. THE QUALIFICATION OF THE AID AS NEW AID

- (76) As regards the proposal made by Spain and interested parties that the aid in form of a lower corporate tax to sport clubs would be existing aid, it is apparent, that the general tax differentiation between limited companies and non-profit entities dates back to before the accession of Spain. As was also underlined, this differentiation benefited non-profit organisations of all sectors, irrespective of the size of the undertaking or its location. Spain also explained that at the accession of Spain in 1986, all football clubs were non-profit entities. The Commission would therefore not be entitled to treat the measure under consideration as new aid.
- (77) Existing aid means, according to Article 1(b)(i) of the Procedural Regulation, all aid measures which existed prior to and are still applicable after the entry into force of the TFEU in the respective Member States. Pursuant to Article 1(c) of the Procedural Regulation, the notion of new aid does not only refer to entirely new aid measures but includes also alterations to existing aid. For the purposes of Article 1(c) of the Procedural Regulation, Article 4(1) of Commission Regulation (EC) No 794/2004 <sup>(33)</sup> describes as a significant alteration to existing aid any change to it, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the internal market. This means that an alteration to an existing aid which could affect the Commission's original assessment of the compatibility of the scheme is to be considered new aid.
- (78) Article 4, Paragraph 2, of Regulation (EC) No 794/2004 mentions as an example for alterations requiring notification the tightening of the criteria for the application of an aid scheme. That also includes a reduction of the number of the eligible beneficiaries of the aid (in this case very significant). Therefore, irrespective of the analysis of the pre-accession rules, Law 10/1990 introduced a new regime, which limits the non-profit tax treatment to certain football clubs, whereas it obliged the other professional sport clubs to transfer to the generally applicable corporate tax regime.
- (79) By the contested measure, four undertakings were put in a position which is more advantageous than the position of undertakings which are, pursuant to the law, subject to the general tax rates. The measure thus creates a differentiation within the sector in which the clubs are active and affects the competitive equilibrium within that sector. It makes the four privileged clubs comparatively stronger, weakening at the same time the competitive situation of their competitors. Law 10/1990 excluded in general professional sport from the possibility to operate as a non-profit entity but allowed single entities active in professional football to remain in the more advantageous legal environment. This modification introduced a differentiation of taxation within a single sector. This constitutes discrimination between undertakings of that sector which is not of a purely formal or administrative nature and may affect the evaluation of the compatibility of the aid measure with the internal market (as shown in the next section).
- (80) Last but not least, the Commission notes that the expiry of the limitation period laid down in Article 17 of the Procedural Regulation does not have the effect of converting such new aid into existing aid <sup>(34)</sup>.
- (81) Therefore, the modification introduced by the 1990 law, which reduced the circle of potential beneficiaries and created a new competitive situation on the market, is to be considered new aid.

<sup>(32)</sup> The Commission notes in that context that there appears to be a sport limited company established in the Territorio Histórico de Bizkaia, namely Basket Bilbao Berri SAD.

<sup>(33)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

<sup>(34)</sup> Case C-81/10 P *France Télécom SA v European Commission* ECLI:EU:C:2011:811, paragraph 73.

## 5.4. COMPATIBILITY OF THE AID

- (82) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) TFEU <sup>(35)</sup> and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) TFEU <sup>(36)</sup>. However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) TFEU <sup>(37)</sup>.
- (83) Neither Spain nor the beneficiaries have claimed that any of the exceptions provided for in Article 107(2) and 107(3) TFEU apply in the present case.
- (84) The Commission notes in this regard that since the aid in the form of lower taxes results in a reduction of charges that should normally be borne by the clubs in the course of their business operations, the aid should be considered as operating aid. As a general rule, such aid can normally not be considered compatible with the internal market under Article 107(3)(c) of the Treaty in that it does not facilitate the development of certain activities or of certain economic areas, nor are the tax incentives in question limited in time, digressive or proportionate to what is necessary to remedy a specific economic handicap of the areas concerned.
- (85) The promotion of sport may be an objective of common interest in the sense of Article 107(3)c of the Treaty. Article 165(1) of the Treaty mentions that the Union shall contribute to the promotion of sporting issues. However, according to paragraph 2 of that Article, that shall be done in view of developing the European dimension in sport, by promoting fairness and openness in sporting competitions.
- (86) Spain and interested parties did not put forward arguments which could support the compatibility of the aid under Article 107(3)c of the Treaty in the sense described by Article 165 of the Treaty. It is obvious that the general support of sport is not an objective of the measure at stake, in as much as the measure aims at the supporting four single professional sport clubs.
- (87) The Commission cannot therefore identify an objective of common interest which could justify selective support to certain strong actors in a highly competitive economic sector and offset the potential for the distortion of competition in the internal market. Consequently, the State aid is incompatible with the internal market.

## 5.5. RECOVERY

- (88) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market <sup>(38)</sup>. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation <sup>(39)</sup>. In this context, the Court has established that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored <sup>(40)</sup>.
- (89) In line with the case-law, Article 16(1) of the Procedural Regulation laid down that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...].'

<sup>(35)</sup> The exceptions provided for in Article 107(2) TFEU concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

<sup>(36)</sup> The exceptions provided for in Article 107(3) TFEU concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

<sup>(37)</sup> Case T-68/03 *Olympiaki Aeroporja Ypiresies v Commission* ECLI:EU:T:2007:253, paragraph 34.

<sup>(38)</sup> See Case C-70/72 *Commission v Germany* ECLI:EU:C:1973:87, paragraph 13.

<sup>(39)</sup> See Joined Cases C-278/92 to C-280/92 *Spain v Commission* ECLI:EU:C:1994:325, paragraph 75.

<sup>(40)</sup> See Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311, paragraphs 64-65.

- (90) Thus, given that the scheme was not notified to the Commission and that, pursuant to it, four professional football clubs were granted individual aid in violation of Article 108 of the Treaty, which is, therefore, to be considered as unlawful and incompatible aid, it must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aids were put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery. The date at which the aid was put at the disposal of the beneficiaries is the date when they paid the corporate tax at a preferential rate.
- (91) According to Article 17(1) of the Procedural Regulation, the powers of the Commission to recover aid are subject to a limitation period of 10 years. According to Article 17(2) of that Regulation, the limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Consequently, the decisive factor in determining the starting point of the limitation period referred to in Article 17 is when the aid was in fact granted. That provision refers to the grant of aid to a beneficiary, not the date on which an aid scheme was adopted.
- (92) In the case of a scheme entailing advantages granted on a periodic basis, the date on which an act forming the legal basis of the aid is adopted and the date on which the undertakings concerned will actually be granted the aid may be a considerable period of time apart. In such a case, for the purpose of calculating the limitation period, the aid must be regarded as not having been awarded to the beneficiary until the date on which it was in fact received by the beneficiary. Therefore, the limitation period starts to run each year on the date on which the corporate tax is due, although the act forming the legal basis of the aid was adopted in 1990 <sup>(41)</sup>.
- (93) The obligation of Spain to recover the aid will therefore cover the 10 years since the Commission asked for the first time Spain for information on the aid measure. This was on 15 February 2010. Accordingly, the recovery of the tax difference starts with the taxation year 2000.
- (94) The amount of the aid for the four football clubs consists of the difference between the amount of corporate tax which the clubs actually paid and the amount of corporate tax which would have been due, would they have been subject to the rules on the corporate taxation of limited companies in a given year.
- (95) However, the effective advantage has to be established taking into account the specificities of the corporate tax regime for non-profit entities which may circumstantially lead, in single years, to a higher effective corporate taxation than in the counterfactual scenario of taxation of a sport limited company. The Commission takes note of the arguments submitted by Real Madrid CF [...]. The Commission recalls nevertheless that the exact amount of the aid to be recovered will be assessed on a case by case basis during the recovery proceeding which will be carried out by the Spanish authorities in close cooperation with the Commission.
- (96) In this respect, the Commission notes that pursuant to the *Unicredito* case law, aid subject to recovery should not take into account hypothetical elements such as the choices, often numerous, which could have been made by the beneficiaries, since the choices actually made with the aid might prove to be irreversible <sup>(42)</sup>.

## 6. CONCLUSION

- (97) The Commission finds that by Law 10/1990 Spain has unlawfully introduced an aid in form of a corporate tax privilege for Athletic Club Bilbao, Club Atlético Osasuna, FC Barcelona and Real Madrid CF in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
- (98) That aid is not compatible with the internal market. Accordingly, Spain will have to end this selective treatment of the four clubs and to recover from them the difference between the corporate tax they actually paid and the corporate tax to which they would be subjected, had they had the legal form of a sport limited company, as of the tax year 2000,

<sup>(41)</sup> Case C-81/10 P *France Télécom SA v European Commission* ECLI:EU:C:2011:811, paragraphs 80 to 85.

<sup>(42)</sup> Case C-148/04 *Unicredito* ECLI:EU:C:2005:774, paragraphs 118, 119.

HAS ADOPTED THIS DECISION:

#### *Article 1*

By reserving the right to enjoy the preferential corporate tax rate for non-profit organisations to certain professional football clubs, the Seventh Additional Disposition of Law 10/1990, de 15 de octubre, del Deporte, constitutes State aid pursuant to Article 107(1) of the Treaty on the Functioning of the European Union in favour of those football clubs, notably Athletic Club Bilbao, Club Atlético Osasuna, FC Barcelona and Real Madrid CF. This aid has been unlawfully implemented by the Kingdom of Spain in breach of Article 108(3) of the Treaty on the Functioning of the European Union and is incompatible with the internal market.

#### *Article 2*

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by the Regulation adopted pursuant to Article 2 of Council Regulation (EU) 2015/1588 <sup>(43)</sup> which is applicable at the time the aid is granted.

#### *Article 3*

Individual aid granted under the scheme referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by a Regulation adopted pursuant to Article 1 of Regulation (EU) 2015/1588 or by any other approved aid scheme is compatible with the internal market, up to maximum aid intensities applicable to that type of aid.

#### *Article 4*

1. The Kingdom of Spain shall recover the incompatible aid granted under the scheme referred to in Article 1 from the beneficiaries.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Commission Regulation (EC) No 271/2008 <sup>(44)</sup> amending Regulation (EC) No 794/2004.
4. The Kingdom of Spain shall discontinue the scheme referred to in Article 1 with effect from the date of adoption of this decision.

#### *Article 5*

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.
2. The Kingdom of Spain shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

#### *Article 6*

1. Within two months following notification of this Decision, The Kingdom of Spain shall submit the following information:
  - (a) the total amount of aid received by each beneficiary referred to in Article 1;
  - (b) the total amount (principal and recovery interests) to be recovered from each beneficiary;

<sup>(43)</sup> Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 248, 24.9.2015, p. 1).

<sup>(44)</sup> Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

- (c) a detailed description of the measures already taken and planned to comply with this Decision;
- (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. The Kingdom of Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

*Article 7*

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 4 July 2016.

*For the Commission*  
Margrethe VESTAGER  
*Member of the Commission*

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