State aid in the Dutch football sector

Master’s thesis International Business Law

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Preface

It is with great pleasure that I am presenting you my thesis for the conclusion of my Master International Business Law at Tilburg University. This thesis could not have been written without the support and help of many.

A special word of thank goes to my parents for their endless love and confidence in me. I could never have completed this study successfully without them! I would also like to thank my sister, brother and brother-in-law, for all their support and sociability when I got stuck with the writing of my thesis. Additionally, my friends for listening, understanding and many cups of coffee at the university campus.

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Chapter 1: Introduction

On March 21, 2011, the European Commission announced that it had started a preliminary investigation regarding the granting of possible unlawful State aid by four Dutch municipalities to their local football clubs. The four municipalities which are under investigation are Tilburg (Willem II), Maastricht (MVV), Nijmegen (NEC) and Arnhem (Vitesse).

One of the fundamental goals of the European Union is the creation of a single market, a market in which all custom barriers are removed and free trade is possible. Competition can be regarded as an important cornerstone for the single market. Effective competition encourages undertakings to be innovative and efficient and creates a climate for growth and progress while pushing down the prices.

There are many causes for a distortion of competition, State aid being one of them. State aid refers to forms of assistance from any public body, given to undertakings on a discretionary basis which therefore may affect trade between the Member States of the European Union.

The Treaty on the Functioning of the European Union contains three provisions (articles 107-109) which stipulate that those aids which distort or threaten to distort competition are incompatible with the internal market. Despite that State aid in general is considered to be incompatible with the internal market, there may be circumstances in which government intervention may be necessary. Therefore, the Treaty leaves room for a number of circumstances in which State aid may be considered compatible. An example is when it promotes Union objectives.

In principle, the European Commission is in charge of all State aid problems and the compliance of the Member States with the rules on State aid. Unless a scheme is exempted by a Block Exemption Regulation (BER), all schemes involving State aid must be notified to the Commission, and it is only after approval by the Commission that an aid measure may be implemented. In the event that State aid is granted without the approval of the European Commission, the aid is considered to be unlawful and may be subject to repayment.

Although the European Commission has laid down some guidelines to determine whether or not State aid may be compatible with the rules of the internal market, the rules for granting aid are a complex set of rules, which are therefore often difficult to comprehend. Moreover, “because of

2 http://www.eu4journalists.eu/index.php/dossiers/english/C9
4 http://ec.europa.eu/competition/state_aid/overview/what_is_state_aid.html
5 http://ec.europa.eu/competition/state_aid/overview/what_is_state_aid.html
6 http://ec.europa.eu/competition/state_aid/overview/index_en.html
the proliferation of – sometimes inconsistent – Commission decisions, which are not always in line with Court judgements, it is becoming increasingly difficult for those involved in or affected by State aid proceedings to assess whether a particular measure may constitute aid”.

This creates legal uncertainty as public authorities are unsure if the granting of a certain measure constitutes aid and whether or not they should notify the measure. While beneficiaries have the obligation to consult their Member State whether or not the measure has been notified, it is also difficult for them to assess whether a measure can be considered as illegal which is subject to recovery. Moreover, due to the strict application of the rules, public authorities created contrived escape mechanisms in the jumble of exemption Regulations and Guidelines. As the rules on State aid are often so difficult to comprehend and public authorities have created their own interpretations, should these rules be amended in order to improve them?

1.1 Problem definition

In the Netherlands there are many examples of municipalities giving possible unlawful aid to their local football club. Nevertheless, at this moment there is too much obscurity when it comes to the application and enforcement of State aid rules in the sports sector. Even the case law does not provide a clear set of guidelines which can be followed. Should the EU State aid rules be amended in order to make them more comprehensive and effective or is it the State aid awareness that should be improved?

1.2 Research question

While taking the above question into consideration, the research question of this thesis will be:

Is there a conflict between European Union State aid law and its application in the Member States in the sports sector and are adjustments necessary to make these rules clearer and more effective?

This research will give an overview of the granting of State aid with regard to the sports sector, its causes, consequences and bottlenecks. The existing EU legislation will be described and evaluated and the way in which municipalities grant aid to the sports sector will also be addressed. Moreover, the way the State aid rules are enforced will also be explained. On the basis of these descriptions it will be determined whether the existing EU State aid rules should be

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amended.
The questions will be answered on the basis of a literature study. The sources included in the bibliography are used to provide an answer to the research question. Moreover, European legislation will be used, as well as relevant judgments of the European Courts and Commission Decisions.

1.3 Structure
In order to determine whether there is a conflict between the rules on State aid and the way they are applied in the Member States and if adjustments are necessary, it is important to explain what State aid is. Chapter two of this thesis will explain what State aid is and why these rules were developed in the first place. In chapter three it will then be outlined how the enforcement of the State aid rules is regulated. That will be done by discussing the enforcement procedure under Article 108 TFEU and the way in which the Commission examines aid measures. How State aid is granted to the sports sector and what the effects are will be explained in the fourth chapter. In the fifth chapter there will be an elaboration on how the State aid rules are applied in the Netherlands. Moreover, it will be discussed whether the Dutch municipalities grant aid to professional sport clubs, thereby evading the State aid rules. The last chapter will be a concluding chapter in which also some recommendations will be given on how to improve and to enhance the enforcement of EU State aid rules.
Chapter 2: What is State aid?

2.1. Introduction

The rules on State aid can be regarded as a complex set of rules, which may be difficult to comprehend. In order to determine whether or not the rules on State aid should be amended, it will be first explained why the rules on State aid were developed. The way the State aid rules are codified in the Treaty on the Functioning of the European Union (hereinafter TFEU) will then be looked at and what the criteria are in order for Article 107(1) TFEU to apply. In addition, the exemptions with regard to the incompatibility of State aid with the internal market will be outlined and this chapter will end with a short conclusion.

2.2. Background

By means of the Treaty of Rome in 1957, the European Economic Community was established. Article 2 of the EC Treaty set out the main purpose of the treaty. It reads as follows:

“The Community shall have as its task, by establishing a common market (...), to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.”

The common market, founded on the four freedoms (free movement of goods, persons, services and capital), can be seen as one of the fundamental goals of the European Union. However, it was not until 1993 that the European Union fully realized this purpose of the Treaty of Rome, and there still remain important gaps in some areas.\(^9\) In a common market goods can be traded freely, people can live and work in other Member States and companies can expand their businesses as they’re not harmed by legal barriers.\(^10\)

However, the creation of a common market will not appear automatically. European legislation is needed in order to provide guidance. Such a guidance follows from Article 119 TFEU, which reads as follows:

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Competition can be regarded as an important cornerstone for the rules on free trade and thus the creation of a common market. Effective competition encourages undertakings to be innovative and efficient and create a climate for growth and progress while pushing down the prices. However, distorted competition may take the opposite effect. Consumers will face higher prices, less innovative products and lower quality of goods. Undistorted competition requires anti-competitive behaviour not only from undertakings, but also that Member States refrain from State intervention, for example in the form of State aid. As the European Court of Justice stated: “the common market is based on the principle that conditions of competition between (…) undertakings must result from their natural and undistorted production conditions. All special internal rates and conditions involving an element of aid or subsidy contravene that principle in that their effect is artificially to alter the production conditions which are characteristic of the undertakings which benefit from them.” Therefore, the State aid regime forms an integral part of Community’s competition policy.

2.3. State aid in the Treaty on the Functioning of the European Union

Article 3(1)(b) of the TFEU sets outs the Community’s competition policy:

“The Union shall have exclusive competence in the following area: the establishing of the competition rules necessary for the functioning of the internal market.”

Title VII, chapter 1 of the TFEU contains the rules on competition while the more detailed rules regarding state aid are laid down in section II of that chapter. Article 107(1) is the basic rule which constitutes a general prohibition of national State aid measures. It reads as follows:

The Treaty itself does not provide for a definition of the notion of State aid. However, the Court has stated that “the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking”.

Under the State aid regime, Member States are obliged to notify the Commission in advance of any plans to grant or alter aid to an undertaking which may fall within Article 107(1). Member States have a so-called standstill-obligation, which means that they may not grant the aid until the Commission has given its approval. In the event that an aid has been granted unlawfully and illegally, the Member State must recover the aid.

2.4. Criteria for State aid within Article 107(1) TFEU

As stated above, any aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member State constitutes State aid and is, therefore, incompatible with the internal market. In order for the TFEU to apply, it first must be established that the aid is given to an undertaking. An undertaking is “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”. The term economic activity has been defined by the Courts as “any activity consisting in offering goods and services on a given market”. Moreover, another five conditions must be fulfilled in order for Article 107(1) TFEU to apply. These conditions are laid down therein and the European Court of Justice elaborated on them in Belgium v. Commission.

First, there must be an aid in any form whatsoever. Second, the advantage must be granted by the State or through State resources. Third, this intervention must be liable to affect trade between Member States. Fourth, the intervention must confer an advantage on the recipient by favouring certain undertakings or the production of certain goods. And last, it must distort or threaten to distort competition.

15 Article 108(3) TFEU.
18 Case C-78/76, Steinike and Weinlig v. Germany, [1977], ECR 595, para.18.
2.4.1 An aid in any form whatsoever

The first criterion that must be fulfilled is that there must be an aid in any form whatsoever. This means that it has to be decided whether or not the action of the Member State constitutes an aid. The concept of an aid is very broad. As the ECJ held: “the Treaty contains no express definition of the concept of subsidy or aid referred to under Article 4(c). A subsidy is normally defined as a payment in cash (…). An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.”

State aid, therefore, can appear in many forms, such as subsidies, tax reductions, covering operating losses or providing goods or services without any remuneration.

Moreover, the Courts will use the Market Economy Investor Principle (MEIP) to assess whether the Member State has given aid by testing whether or not the beneficiary received financial benefits that it could not have obtained under normal market conditions. In the event that the undertaking could have obtained the advantage from the commercial market, the measure is not regarded as State aid.

2.4.2 Intervention by the State or through State resources

The second criterion is that the aid must be granted either by the State or through State resources and must also be imputable to the State. According to the ECJ, “the distinction between ‘aid granted by a Member State’ and aid granted ‘through State resources’ does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State”.

An actual transfer of State resources to an undertaking is, however, not necessary to regard a measure as aid.

The element that the aid must be imputable to the State was discussed by the ECJ in Stardust Marine. The Court held that: “imputability to the State of an aid measure taken by a public

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undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken”.24 Examples of such indicators are: the legal status of an undertaking, the way the public undertaking is integrated into the structures of the public administration or the supervision which is exercised by the public administration over the undertaking.25

2.4.3. **Intervention must be liable to affect trade between the Member States**

The third criterion is that this intervention must be liable to affect trade between the Member States. In the event that an aid measure is purely national, it will not affect inter-Member State trade, and Article 107(1) TFEU will not apply. Nevertheless, even when the aid is given to an undertaking which is not engaged in inter-Community trade, it may affect trade between Member States and thus constitute State aid. In Spain v. Commission, the Court held that even a small amount of aid can constitute aid: “the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected”.26 Moreover, in another judgment it held that: “the prohibition in Article 92(1) of the Treaty applies to any aid which distorts or threatens to distort competition, irrespective of the amount, in so far as it affects trade between Member States”.27

2.4.4. **Advantage on the recipient by favouring certain undertakings**

The fourth criterion is that the intervention must favour certain undertakings. Article 107(1) TFEU will not be applicable if a measure is general in scope and benefits the economy as a whole. There has to be an element of selectivity, an undertaking has to receive special treatment with regard to other undertakings. As the ECJ stated in Adria-Wien: “the only question to be determined is whether, (…), a State measure is such as to favour ‘certain undertakings or the production of certain goods’ within the meaning of Article 92(1) of the Treaty 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”. Moreover, “a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfill that condition of selectivity”.28

2.4.5. Intervention must distort or threaten to distort competition

The last criterion is that the intervention distorts or threatens to distort competition. Identifying the relevant product and geographical market is necessary to establish a distortion of competition. This does not mean that the Commission should define the market in detail. However, the Commission needs to establish that the given aid is of such a kind that inter-Community trade is (threatened to be) distorted. As the case law shows, such a distortion of competition is often easily presumed. “When State financial 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”. And in Siemens v. Commission, the CFI stated that “aid intended to relieve an undertaking of the expenses which it would itself normally have to bear in its day-to-day management or its usual activities, does not in principle fall within the scope of Article 92(3). The effect of such aid is in principle to distort competition (…).”

2.5. Effects-based approach

Two types of aid can be distinguished: those which relate aid to a purpose which can only be achieved with outside help and the second one which relates aid to its effects, which means that the beneficiary who receives the intervention will be relieved of charges it would otherwise had to bear. In order to determine whether a measure constitutes State aid the European Court of Justice adopted an effects-based approach. “The aim of Article [107] is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Accordingly, Article [107] does not distinguish between the measures of state intervention concerned by reference to their causes but defines them in relation to their effects”. Rather than looking at the measure itself, the Commission and the Courts will look at the effect of the measure in order to determine whether a measure constitutes aid.

2.6. Exemptions

In principle, State aid is considered to be incompatible with the internal market. However, Article 107 provides that certain aid is considered to be compatible. It is up to the Member States and/or the Commission to establish the grounds for such an exception.32

Article 107(2) TFEU contains three categories of State aid which are compatible with the internal market. It reads as follows:

“In the following shall be compatible with the internal market:
(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination relation to the origin of the products concerned;
(b) aid to make good the damage caused by natural disasters or exceptional occurrences;
(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages causes by that division.”

Aids which fall under one of these categories are automatically exempted from Article 107(1) TFEU. However, they still have to be notified to the Commission, so that the Commission can decide whether or not the aid falls within Article 107(1) TFEU and if it is compatible with the internal market and thus can be exempted under Article 107(2) TFEU.

Article 107(3) contains another five categories which may be considered compatible with the internal market. It reads as follows:

“The following may be considered to be compatible with the internal market:
(a) Aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and the regions referred to in Article 349, in view of their structural, economic and social situation;
(b) Aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;“

Aid which falls within one of the above categories may be exempted by the Commission depending on several factors. The procedure is as follows: after the Member State has notified the Commission of an aid, the Commission will first decide whether it may fall within one of the above categories and then decide whether the aid is compatible with the internal market. In the event that the Commission decides that the aid is compatible with the internal market, the aid is exempted from the prohibition of Article 107(1) TFEU and may be granted to the undertaking.33

Another exemption is provided through the adoption of Block Exemption Regulations. In 1988, the Council adopted Regulation No. 994/98, which provides the Commission with the opportunity to adopt Block Exemption Regulations for State aid. The Commission can then declare specific categories of State aid, which meet certain criteria, to be compatible with the internal market. Moreover, Member States do not have to follow the formal notification procedure, but are able to grant the aid if those criteria are fulfilled.34

2.7. Conclusion

The rules on State aid were developed to maintain a level playing field for all undertakings which are active in the common market. Articles 107 – 109 TFEU are the main rules on State aid, which regulate that those aids which distort or threaten to distort competition are incompatible with the common market. The criteria which must be fulfilled in order for Article 107(1) TFEU to apply are: (I) there must be an intervention by the State or through State resources; (II) the intervention must be liable to affect trade between Member States; (III) the intervention must confer an advantage on the recipient by favouring certain undertakings and; (IV) the intervention must distort or threaten to distort competition.

In practice the Commission and the European Courts usually take the two criteria of effect on trade between the Member State and distortion of competition into account together, as these criteria are closely linked. Moreover, it does not matter whether the competitors are established in

the same Member State or in other Member States. Decisive is whether the aid (threatens to) distorts competition between the Member States.\textsuperscript{35}

In the event that there is no inter-State trade when the aid is granted, but it is foreseeable that export will shortly be directed to other Member States, the Commission must examine not only whether there is an effect on trade when the aid is granted, but also if it is possible that an effect on trade will occur when export will finally be directed to other Member States.

Article 108(3) poses an obligation on the Member States to notify the Commission of all aids they wish to grant. The Commission will then look at whether Article 107(1) applies and if the aid can be exempted either under Article 107(2) or by virtue of Article 107(3) TFEU.

In the next chapter the rules regarding the enforcement of the State aid rules will be explained.

Chapter 3: Enforcement of State aid law

3.1. Introduction

In the event a Member State wishes to grant (or alter aid) to a professional sports club, it has to notify the Commission of such an aid. The Commission will then review the aid for its compatibility with the common market. In this chapter the notification and reviewing procedure will be outlined. Background information on the procedural regulation will precede, whilst the procedure under Article 108 TFEU will follow. The way in which the Commission examines aid measures will be discussed, followed by an outline of the simplified procedure. Moreover, the concept of ‘unlawful aid’ and the role of the national courts will be explained. A short conclusion will end this chapter.

3.2. Background

Until 1999, there was no uniform procedural regulation concerning State aids, but the State aid procedure was mainly established by the case law of the Court and the Commission’s administrative practice. This changed with the adoption of the Council Regulation 659/1999 (the ‘Procedural Regulation’), which sets outs detailed rules concerning notification formalities, time limits, and the recovery of unlawful aid. This Procedural Regulation was intended mainly as a codification measure: “the regulation is largely a measure codifying in detail the interpretation of the procedural provisions of the Treaty on State aid laid down by the Community judicature prior to the adoption of that regulation”. Nevertheless, the Regulation contains some new matters, related to the misuse of aids and rules on injunctions, which had not been set out by the case law. This regulation was supplemented by Commission Regulation 794/2004 (the ‘Implementing Regulation’).

The State aid procedure is a procedure between the Commission and the Member States. Although in practice the beneficiary may be involved in negotiations with the Commission from the beginning it does not have a right under the Procedural Regulation to even submit comments until the second stage (Article 108(3) formal investigation). That right belongs to the Member State concerned. Moreover, other interested parties, such as competitors and complainants, have

the opportunity to submit comments during the formal investigation procedure, which will be explained below.\textsuperscript{38}

3.3. **Procedure under Article 108 TFEU**

Article 108 TFEU provides that State aid is under the supervision of the European Commission and defines the procedure concerning the review of State aid. Article 108 TFEU codifies the following issues:

- the review of existing aids (Article 108(1));
- the notification of new or altered aids and preliminary examination by the Commission (Article 108(3));
- investigation and decision on compatibility by the Commission, enforcement, and the powers of the Council (article 108(2));
- a general power for the Commission to adopt block exemptions pursuant to delegation by the Council (Article 108(4)).

3.3.1. **Existing aid schemes**

Article 108(1) covers the review of existing aids. It reads as follows:

> “The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measure required by the progressive development or by the functioning of the internal market.”

Article 1(b)(i) of the Procedural Regulation defines an existing aid as “all aid which existed prior to the entry in force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty.”

Articles 17-19 of the Procedural Regulation set out the procedure for dealing with existing aids. First, the Commission obtains all information necessary for the review from the Member State concerned of existing aid schemes. In the event the Commission considers that the existing aid scheme is not, or is no longer, compatible with the common market, it will inform the Member State of its preliminary view. The Member State will then have one month to submit its comments regarding that preliminary view.\textsuperscript{39} When the Commission, after having considered the comments made by the Member State, comes to its final conclusion that the existing aid scheme


\textsuperscript{39} Article 17 Procedural Regulation
is not, or is no longer, compatible with the common market, it issues a recommendation proposing measures to the Member State. This recommendation can consist of the following things: (1) substantive amendments of the existing aid scheme, (2) introduction of procedural requirements, or (3) abolition of the aid scheme. With the proposed measures in mind, the Member State has two choices. It can either accept the proposed measures, after which it informs the Commission. The Commission will then record that finding and inform the Member State thereof. The Member State is then bound by its acceptance to implement the proposed measures. The Member State can also reject the proposed measures and inform the Commission of its arguments. If, in the opinion of the Commission the proposed measures are necessary, after taking into account the arguments put forward by the Member State, it will initiate a formal investigation procedure pursuant to Article 4(4) of the Procedural Regulation. This procedure will be set out below.

3.3.2. New and altered aid schemes

The review of new and altered aid schemes is regulated by Article 108(3) TFEU. That article reads as follows:

“The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.”

The definition of new aid is explained in the procedural regulation, which states that “new aid shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid.”

Article 108(3) contains a notification requirement: “the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid”. Member States that wish to grant new aid or alter existing aid, have to notify the Commission of such plans. The notification shall contain all necessary information which is necessary for the Commission to review it. The Commission has then the obligation to notify the Member State concerned of the receipt of such a notification. The Commission must then, with all the necessary information, decide whether or not the notified measure does constitute State aid

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40 Article 18 Procedural Regulation
41 Article 19 Procedural Regulation
42 Article 1(c) Procedural Regulation
pursuant to Article 107(1) TFEU and, if it does, whether the aid is considered to be compatible with the common market.

Another important element of Article 108(3) is the so-called stand-still obligation: “the Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision”. Or in other words, the Member State may not implement the aid scheme until the Commission has taken a decision authorizing such aid. The stand-still obligation has direct effect which, as will be described below, has implications for actions in national courts.43

3.4. Examination by the Commission

Article 108 provides for two procedures, the Preliminary Examination procedure (Article 108(3)) and the Formal Investigation procedure (Article 108(2)). The difference between these two procedures was explained by the European Court of Justice: “In the context of the procedure laid down by Article 108, the preliminary stage of the procedure for reviewing aid under Article 108(3), which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must therefore be distinguished from the examination under Article 108(2), which is designed to enable the Commission to be fully informed of all the facts of the case”.44

3.4.1. The Preliminary Examination Procedure

Within two months after the Commission has been notified by the Member State of a new aid, it must conduct a preliminary examination of that aid. The Commission has to reach one of the following three possible decisions:
- the notified measure does not constitute State aid;
- a ‘decision not to raise objections’, which means that the measure falls within Article 107(1), but there are no doubts raised as to its compatibility with the common market. The Commission has the obligation to state which of the exceptions laid down in Article 107 has been applied; or
- a ‘decision to initiate the formal investigation procedure’, which means that the measure falls within Article 107(1) and that doubts are raised concerning its compatibility with the common market.45

The ECJ has stated that: “the Commission may restrict itself to the preliminary examination under Article 93(3) (now 108(3)) when taking a decision in favour of a plan to grant aid only if it

45 Article 4 Procedural Regulation
is convinced after the preliminary examination that the plan is compatible with the Treaty. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the plan is compatible with the common market, the Commission is under a duty to obtain all the requisite opinions and for that purpose to initiate the procedure provided for in Article 93(2)".46

3.4.2. The Formal Investigation Procedure

The procedure provided for in Article 108(2) is the Formal Investigation Procedure, which is also regulated in Article 6 of the Procedural Regulation. The decision to initiate the formal investigation procedure lays with the Commission. In this decision the Commission is obliged to include a preliminary assessment and the doubts it has as to its compatibility with the common market. The Member State concerned and other interested parties are then requested to submit comments within a certain time frame, which normally will not exceed one month.47 Interest parties are “not only the undertaking or undertakings receiving aid but equally the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations”.48 “The Court has held that, in proceedings concerning the application of that provision, publication of a notice in the Official Journal of the European Communities is an appropriate means of informing all the parties concerned that a procedure has been initiated.”49

Within 18 months from the opening of the procedure, the Commission has to take a decision concluding the formal investigation procedure. The Commission has several options for such a decision, all codified in Article 7 of the Procedural Regulation. It has the option to decide:
- that the measure does not constitute State aid;
- a ‘positive decision’, which means that the Commission’s doubts with regard to the compatibility of the measure with the common market have been removed, so that the aid is compatible. This may happen after the Member State has modified the measure. The Commission is obliged to specify which exception in Article 107 has been applied when taking such a ‘positive decision’; or
- a ‘negative decision’, which means that the notified aid is incompatible with the common market which prohibits the Member State concerned to put it into effect.

47 Article 6 Procedural Regulation
In the event the Commission has not been provided with sufficient information for it to establish compatibility with the common market, it takes a negative decision.  

3.5. Simplified procedure

The Commission issued in 2009 a Notice which adopted a new simplified procedure. This procedure deals with certain types of aid within an accelerated time frame and it authorises the Commission to adopt a short-form decision. Only aids that have been notified to the Commission may apply for this procedure, unlawful aid is therefore excluded.

In the event a Member State wishes to follow the simplified procedure, it must submit a draft notification form to the Commission. The Commission will then organize a pre-notification contact after which it informs the Member State whether it considers the case to qualify for treatment under this procedure. Within 20 working days of notification, the Commission will either decide that it will not raise objections or that it finds that the notified measure does not constitute aid. Three types of categories are suitable for treatment under the simplified procedure:

- Aid measures which fall within the ‘standard assessment’;
- Aid measures which correspond to well-established Commission decision-making practices; and
- Prolongation or extension of existing aid schemes.

3.6. Unlawful aid

In the event the Member State fails to notify the Commission, the measure adopted is considered to be ‘unlawful aid’ as it contravenes Article 108(3) TFEU. As the Commission is not notified by the Member State of such an aid, it has to be informed otherwise. For example by complaints filed by competitors of the beneficiary undertaking. Although the non-notification will not lead to any sanctions or penalties, the Commission may adopt a decision which requires the suspension of the aid (a ‘suspension injunction’) and/or demand that the Member State recovers the aid until the Commission has taken a formal decision on whether the aid is compatible with the common market (a ‘recovery injunction’) or not. The non-notification will not automatically lead to an incompatible aid. Where a Member State has complied in full with the Commission’s order, the Commission is obliged to examine the compatibility of the aid with the

common market, in accordance with the procedure laid down in Article 108 (2) and (3).”

Although the TFEU does not expressly provide that unlawful aid should be recovered from the beneficiaries, this power has been granted to the Commission. “The Commission is competent, when it has found that aid is incompatible with the common market, to decide that the State concerned must abolish or alter it. To be of practical effect, this abolition or modification may include an obligation to require repayment of aid granted in breach of the Treaty, so that in the absence of measures for recovery, the Commission may bring the matter before the Court.”

It follows from this quotation that it is the Member State concerned that is obliged to recover the aid from the beneficiary, rather than the Commission.

Article 1(f) of the Procedural Regulation defines ‘unlawful aid’ as “new aid put into effect in contravention of Article 93(3) of the Treaty”. Examples of unlawful aid are aid which has not been notified to the Commission, aid that has been notified to the Commission but has been put into effect during the preliminary examination or the formal investigation, aid which has been put into effect but breaches the terms of a conditional decision and aid which has been put into effect although the Commission decided negatively on that aid.

Although the Commission has the power to recover unlawful aid, recovery should not be requested if this would be contrary to a general principle of Community law.

3.7. The role of the national courts

The review whether or not aid is compatible with the common market is exclusively reserved for the Commission. National courts are not allowed to make a judgement on this matter and cannot prohibit an existing aid. According to the ECJ, Article 107(1) does not have direct effect as there are exceptions and derogations. Moreover, Article 107(3) gives the Commission “a wide discretion (..) to accept State aid in derogation from the general prohibition in Article 107(1)”.

Although the role of national courts regarding the review of aid is limited, the national courts do play an important role in the enforcement of the State aid rules. The ‘standstill’ provision of Article 108(3) has direct effect, which therefore forms the basis of an action in a national court. The difference in role has been highlighted by the Court of Justice: “the principal and exclusive role conferred on the Commission by Articles 107 and 108 of the Treaty, which is to hold aid to

References

57 Article 14(1) Procedural Regulation
be incompatible with the common market where this is appropriate, is fundamentally different from the role of national courts in safeguarding rights which individuals enjoy as a result of the direct effect of the prohibition laid down in the last sentence of Article 108(3) of the Treaty.\textsuperscript{60} The ECJ has laid down the implications of the direct effect of Article 108(3). “In order to assess the implications of Article 108(3), it should be borne in mind that the implementation of the system of supervising State aid, as it is established by Article 108 and the relevant case-law of the Court, is a matter for the Commission and for the national courts. As far as the role of national courts is concerned, the Court held (...) that proceedings may be commenced before national courts requiring those courts to interpret and apply the concept of aid contained in Article 107 in order to determine whether State aid introduced without observance of the preliminary examination provided for in Article 108(3) ought to have been subject to this procedure.”\textsuperscript{61} In the event the national court is uncertain as to whether the aid is within Article 107(1), it may make a reference according to Article 267 TFEU.

In 1995, the Commission issued a Notice on the cooperation between the Commission and the courts of the EU Member States in State aid cases. This Notice dealt primarily with the issue of non-notified aid. The Commission’s aim was to offer practical support in individual cases to the national courts and to explain their role as defined by the European courts. Moreover, guidance was provided in respect to the principles concerning the recovery of unlawful aid and the rules regarding the application of Article 108 TFEU.\textsuperscript{62}

3.8. Conclusion

The Procedural Regulation, created by the case-law of the European Courts and the decisional practice of the European Commission, contains rules regarding the interpretation of the procedural provisions of the Treaty concerning State aid.

An interesting point to note is that the State aid procedure is a matter between the Commission and the Member States. While the latter have the right to make comments, interested parties only have this right during the formal investigation procedure.

Article 108 TFEU is the main provision concerning the State aid procedure, which contains the following issues: the review of existing aid, the review of new or altered aid, the right to start a formal investigation procedure and the power to adopt general block exemptions.

Article 108(3) TFEU requires Member States that wish to grant an aid to notify the Commission


of such a measure, the so-called notification requirement. While the Commission will decide whether or not the notified aid is considered compatible with the common market, Member States are prohibited to put the notified measure into effect (the so-called stand-still obligation). The formal investigation procedure (Article 108(2) TFEU and Article 6 Procedural Regulation) means that the Commission initiates such a procedure after which the Member State concerned and other interested parties have to submit comments regarding the aid measure. Within 18 months from the opening of the procedure, the Commission has to take a decision, which can either be a decision stating that the measure does not constitute State aid, a ‘positive decision’, or a ‘negative decision’.

When a Member States fails to notify the Commission of the granting of an aid measure, the aid is considered to be unlawful. After the Commission has been informed about such an unlawful aid, it may take a decision which requires the suspension and/or the recovery of the aid. The duty to recover the aid lays with the Member State concerned.

National courts play an important role in the enforcement of the rules on State aid, especially when it involves non-notified aid. Nevertheless, national courts are often very reluctant when it comes to State aid cases as it is a difficult matter. Moreover, with regard to State aid in the sports sector there are very few decisions in which the Commission has applied Article 107.63

In the next chapter it will be described how State aid is granted to the sports sector and what the effects are of providing such aid.

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Chapter 4: State aid in the sports sector

4.1. Introduction
The granting of State aid occurs in all kinds of economic activities, thus also in the sports sector. In this chapter there will be an elaboration on that. This chapter will start with an explanation on how sport organisations are financed, followed by an outline on the application of the State aid rules regarding the financing of professional sport clubs. Moreover, the different forms of public support, provided with some examples, will be discussed, whilst the exemptions with regard to the granting of aid to the sports sector will follow. This chapter will end with a short conclusion.

4.2. The financing of sports
The Commission stated in its white paper on sports that “sport is a dynamic and fast-growing sector with an underestimated macro-economic impact”. Nowadays, the sports sector is more commercialised and professionalized than ever and this has an effect on the financial resources of sport organisations, both positive and negative. Sport clubs have many sources of income, such as transfer revenues, tickets sales, advertisements, sale of broadcasting rights and sponsorships. However, the negative impact of the commercialisation and professionalization of the sports sector is that sport organisations are forced to spend more money on contracts for players, sporting facilities and so on. The problem is that some sport clubs have much better access to financial resources than others, which gives them an advantage over the others. This means that many sport clubs depend on public financial support in order to run efficiently and continue with their sporting activities. Nevertheless, the financial support by public bodies must be provided within the boundaries imposed by the State aid rules.

4.3. Amateur versus professional sport clubs
As stated in the previous chapter, in order for the State aid rules to apply, there has to be an undertaking involved. A significant part of this public financial support is given to the sports club operating at a local level. As these local sport organisations are often non-profit organisations which are not engaged in economic activities, they cannot be considered as undertakings within the meaning of Article 107(1) TFEU. This means that the financial support granted to them is not covered by the State aid rules.

However, public financial support is also granted to professional sport clubs. It is settled case law that sports clubs who carry out certain economic activities, can be regarded as undertakings.

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within the meaning of Article 107(1) TFEU. With regard to professional football clubs, the CFI stated that “it is common ground that FIFA’s members are national associations, which are groupings of football clubs for which the practice of football is an economic activity. These football clubs are therefore undertakings within the meaning of Article 81 EC”. As professional sport clubs can be regarded as undertakings, the financial support granted to them is covered by the rules on State aid.

It must be noted however, that these rules will not apply when activities conducted by professional sports clubs constitute purely sporting activities. Or, as the ECJ stated: “the practice of sport is subject to Community law only in so far as it constitutes an economic activity”.

Nevertheless, there is a thin line between purely sporting activities and economic activities. Even the CFI has confirmed this approach in its Meca-Medina judgment by stating that “high-level sport has become, to a great extent, an economic activity”.

4.4. **State aid to professional sport clubs**

As stated in the previous chapter, Article 107(1) TFEU is the starting point for determining whether an aid is incompatible with the common market. In order to determine whether the public funding of professional sport clubs may constitute state aid, the requirements laid down in Article 107(1) TFEU will now be retraced.

4.4.1. **Forms of public support**

The first requirement is that there must be an aid. The financing of sport clubs by public bodies can occur in a variety of forms. Examples of such forms are: special tax rates; direct subsidies from public funds; the sales, donation or exchange of land for sport facilities; guarantees with a low commission and the public acquisition of advertisement space in sport facilities. Another example of public support is the acquisition or renting of a public facility for a low price, which means that sports organisations have the opportunity to purchase or rent a public sporting facility for a lower price than its actual market value. This may constitute State aid, as the sport clubs will have more money to spend on other activities, which gives them a possible advantage with regard to their competitors. The payment for the construction or renovation of sport facilities by the local council can also constitute aid as the sport organisations benefit financially from it. They have more money to invest and new sponsors and visitors will be attracted thanks to the positive

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impact of the new or renovated stadium on a club’s image. A last example is the public support in the form of a loan with a low interest rate.\textsuperscript{70} Sporting clubs will receive an economical advantage under favourable conditions than their competitors would have had. Moreover, in many cases, the loan is written off, which makes the economic advantage even bigger.

\textbf{4.4.2. The other requirements of Article 107(1) TFEU}

The second criterion is that the measure must be granted through state resources. This criterion is often easily fulfilled as any financial measures provided by a public body is essentially granted through state resources. Especially in the sports sector, as in many occasions there are tight links between the municipalities and their local football clubs and/or the football venue. This will be further discussed in the next chapter. Moreover, often the football club is not required to give the municipality anything in return.

Thirdly, the state intervention must be liable to affect inter-community trade. Dutch football clubs have the opportunity to compete on a European level. Moreover, clubs are often actively engaged on the international players market, which means that a possible state intervention may affect inter-community trade.\textsuperscript{71}

The fourth element of Article 107(1) TFEU is that the aid measure must be selective, as it favours only certain football clubs. Municipalities that grant an aid will only provide such a measure to the football club located in that city. As it concerns only the local football club, this club is favoured over the others, which makes it a selective measure.

The last criterion that must be fulfilled is that the intervention (threatens to) distort competition. Football clubs that have better access to financial resources have (often) also better sporting performances, as they have the possibility to purchase better players. However, in the event a football club that is financed through state recourses uses that money to purchase players, competition is (threaten to be) distorted.

\textbf{4.5. Exemptions}

As stated in the previous chapter, State aid is in principle considered to be incompatible with the internal market but there are certain exemptions. This means that financial support by municipalities does constitute aid, but can be considered compatible if certain conditions are met. In its letter to the Dutch Representative in Brussels, the European Commission stated that “under certain conditions financial aid to professional football clubs could be something other than State aid. This could be the case when the aid is granted in the context of the national

\textsuperscript{70} http://ec.europa.eu/sport/white-paper/swd-the-economic-dimension-of-sport_en.htm#3_2
system of education or when the aid may be regarded as funding for infrastructure.”72 These two exemptions and other types of exemptions will be further explained below.

An important aspect that has to be kept in mind when considering these exemptions is whether the State has acted as a private investor or public authority. In the event the municipality has acted as a private investor, the State aid rules apply, whereas if it has acted as a public authority, there would be no State aid. These exemptions can therefore only be taken into account when the State has acted as a private investor.

4.5.1. Training aid

As the European Commission stated in its letter, ‘training aid’, which means that the sport organisation receives financial support which is used for the training and education of young athletes, does not constitute State aid. However, additional requirements have to be fulfilled which are laid down in the general block exemption regulation on training aid.73

An example of such ‘training aid’ is the one granted to French professional sport clubs. France notified the Commission of a scheme which would enable local authorities to grant public subsidies to professional sports clubs with state-approved youth training centers. The Commission stated in a press release that it decided not to object to such a public subsidy scheme. “It was clear from an examination of the notification that the measures are designed to assist education and initial training and as such constitute an educational or comparable scheme”.74

4.5.2. Funding of infrastructure

Another exemption provided by the European Commission is the aid used for the funding of (sport) infrastructure. As the Commission has pointed out: “In principle State aid used for the construction of venue, which is considered to be an economic activity, is subject to the Community rules regarding State aid. However, the construction of a venue for public events, supporting different categories of activities, which in addition benefit the general public, can be considered as embodying a typical State responsibility with regard to the general public. 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. For these reasons 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) EU, provided that the operation did not selectively favour one or

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more specific undertakings or productions.”

Both the European legislation and the jurisprudence do not provide a standard definition of infrastructure. Nevertheless, the Commission has become stricter when assessing whether an infrastructure measure constitutes State aid. The assessment is done at different levels: at the level of the users, of the owner and the managers of the infrastructure.

The requirements that have to be fulfilled in order for such aid to be considered compatible are laid down in a Commission Decision from the European Commission’s Director-General for Competition regarding the State funding for a football stadium in Hanover. “Aid for the construction of stadiums or other sports infrastructure could be argued not to constitute aid, provided it fulfils the following criteria: (1) the type of infrastructure involved is generally unlikely to be provided by the market because it is not economically viable; (2) it is not apt to selectivity favour a specific undertaking: in other words, the site provides facilities for different types of activities and uses and is rented out to undertakings at adequate market based compensation; (3) it is a facility needed to provide a service that is considered as being part of the typical responsibility of the public authority to the general public”.

When the infrastructure is owned by the State, which is often the case when it comes to football venues, but constructed and/or managed by a private company, Article 107(1) TFEU will not apply if: (1) the operator pays an adequate fee at the market price level for the renting, (2) the market economy investor principle is met, and (3) if the funding is defined as service of general economic interest.

4.5.3. The de minimis aid

A first exemption is the 'de minimis aid', which exempts small amounts of aid. When a municipality grants an aid of no more than 200,00 Euro over a period of three years, it does not have the obligation to notify the aid to the Commission as the aid is not regarded as State aid within the meaning of Article 107(1) TFEU.

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77 http://ec.europa.eu/sport/white-paper/swd-the-economic-dimension-of-sport_en.htm#3_2
4.5.4. Aid for the development of certain economic activities

Further exemptions can be made in accordance with the legal basis provided by Article 107(3)(c) of the TFEU. According to this provision, “aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest”, may be considered compatible with the internal market.

The Commission provided in its general block exemption regulation of August 6, 2008, that public financing related to sport clubs which are in financial difficulties can be considered not to constitute State aid, provided that certain requirements are met. However, it must be noted that “aid granted to firms in difficulty must not be allowed to become the rule. The exit of inefficient firms is a normal part of the operation of the market”. In order for such ‘rescue and restructuring aid’ to be compatible with the State aid rules, the aid must be limited in time.

Moreover, a restructuring plan must be provided and the aid must be reimbursed in 12 months after the payment. Depending on the size of the company, thresholds determine the amount of contribution to the overall costs of the restructuring and they may differ from 25% to 50% of the overall costs. Another important feature of these guidelines is the ‘one time, last time’ principle. According to this principle, a sport clubs which has received restructuring aid may not receive any additional aid for a period of ten years.

Another example of this exemption is provided in the Hungarian C(2011) 7278 case. In order to encourage the development of sport, the Hungarian authorities designed an aid scheme which provided undertakings with tax benefits. These tax benefits could be used for the following three purposes: the training of youth, personnel costs and investments to create or modernize sport infrastructure. The European Commission has reviewed this aid scheme, thereby stating that the scheme does constitute an aid in the meaning of Article 107(1) TFEU, but that it “decided not to raise objectives as the State aid contained therein is compatible with Article 107(3)(c) TFEU”. The Hungarian scheme is “necessary and proportionate” and the “positive effects for the common objective outweigh the negative effects on competition and trade”.

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4.5.5. SMES-aid

A last exemption relates to granting of aid to small and medium-sized enterprises (so called SMEs). SMEs consist of “enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million”.\textsuperscript{85} This kind of aid granted to professional sport organisations can be considered compatible when the following condition is fulfilled: “the aid intensity shall not exceed: 20% of the eligible costs in the case of small enterprises, or 10% of the eligible costs in the case of medium-sized enterprises”.\textsuperscript{86}

4.6. Conclusion

The sports sector is considered to be an important contributor to the health of citizens and the European Union acknowledges the importance of sports. It stated that “the Union shall contribute to the promotion of European sporting issues, while taking account of its specific nature, its structure based on voluntary activity and its social and educational function”.\textsuperscript{87} The sports sector is a professional and commercialised sector with many sources of income. Nevertheless, some sport clubs have worse access to financial resources than others, which makes them dependent on public financial support. However, it must be noted that the financial support granted by public bodies falls within the scope of State aid law.

As State aid can only be granted to undertakings, local non-profit organisations (like amateur sport clubs) are exempted from the rules on State aid. Professional sports clubs are, however, engaged in economic activities, and can thus be regarded as undertakings within the meaning of Article 107 (1) TFEU. This means that in the event financial support is granted to these clubs, it is covered by the rules on State aid.

Professional sports clubs can be financed publicly in a variety of ways. Public bodies can provide them with more favourable tax rates, guarantees with a low commission or loans with a very low interest rate. Another example is that sport clubs have the opportunity to rent or acquire a public (sporting) facility for a price lower than its actual market value. Public authorities can also grant the undertaking direct subsidies from public funds. Other means of public financing is the sales, donation or exchange of land for sport facilities or the public acquisition of advertisement space in sport facilities.

Municipalities often justify their actions by stating that the football club has recreational, social,

\textsuperscript{86} European Commission, ‘Commission Regulation on declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty’, No. 800/2008, Article 15, p.25.
\textsuperscript{87} Artıcle 165(1) TFEU
cultural and sportive meaning, as well as economic significance for the town. Moreover, emotional factors also play a big role when deciding whether financial support is granted. Nevertheless, these grounds are not justifiable when it comes to the compatibility of an aid with the common market. There are, however unsurprisingly, some exceptions regarding the granting of aid to professional sports clubs. Under certain conditions, the granted aid may be considered compatible with the State aid rules. An example of such an exemption is the granting of small amounts of aid, in other words ‘de minimis aid’. Other examples are aid which constitutes ‘training aid’ or ‘rescue and restructuring aid’. Aid granted to small and medium sized companies may not constitute State aid when certain conditions are met. The public financing regarding the construction of sport infrastructure is exempted from the State aid rules if the requirements laid down in the Commission Letter are fulfilled.

In the event an aid does not fulfil these criteria, the public authority must notify the Commission of such a granting. It is then up to the Commission to decide whether or not the aid may be exempted from the State aid rules.

In the next chapter the rules on how State aid rules are applied in the Netherlands and how the Dutch municipalities grant aid to professional sport clubs, thereby evading the State aid rules, will be explained.

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Chapter 5: State aid in the Dutch football sector

5.1. Introduction

The European Commission has started a preliminary investigation regarding the granting of unlawful aid (ex Article 108 TFEU) to football clubs in the Netherlands. Dutch municipalities are willing to invest significant amounts of public monies in football clubs and their venues. The reason why? The clubs’ financial mismanagement?

This chapter will elaborate on the public financing of municipalities to professional football clubs in the Netherlands. First, the structure of professional football in the Netherlands will be explained, followed by an outline of the (current) financial situation of the Dutch football clubs and the way they are financed by their municipalities. In addition, the Dutch position regarding public financing of football clubs is discussed, whilst a description of the National Guidelines will follow. At the end of this chapter, there will be a short conclusion.

5.2. Football in the Netherlands

The Dutch professional football scene consists of two leagues, the Honorary Division and the First Division. There is also one semi-professional league and of course amateur football, consisting of seven different levels.89

The two professional leagues each consist of 18 professional football clubs, divided over 33 municipalities (the municipalities of Rotterdam and Eindhoven have multiple football clubs in their community).

The Royal Dutch Football Association (KNVB), founded in 1889, is the governing body of football in the Netherlands. This association is in charge of organising all leagues, both amateur and professional, and the national football team.90

The KNVB developed a licensing system, which requires football clubs to fulfil certain technical and financial conditions. In the event a club is unable to meet these requirements, the licensing committee will withdraw the club from the football competition and ensure that the club ceases its operation. In addition, a football club that wishes to enter and compete in a professional league, also has to meet these requirements, in order to obtain a license. These requirements are drafted by the KNVB in order to ensure a certain competitive balance under relatively equal circumstances. Moreover, it prevents that clubs are withdrawn from the competition as they are in financial and/or technical problems.91

89 http://www.knvb.nl/competities/betaaldvoetbal/erdivisie
90 http://www.knvb.nl/wiezijnwij/historie
Professional football clubs that want to compete on a European level, also have to meet the criteria which are laid down in the 2010 UEFA Club Licensing and Financial Fair Play Regulation, which has been confirmed by the European Commission to be in line with European Union State aid policy. Moreover, these rules are similar to the rules laid down in the Dutch football association. A remarkable thing hereto is that football clubs as FC Barcelona and Chelsea (both active on the highest European level) have debt worth more than €570 million!

As seen in the previous chapter, the State aid rules also apply to the sports sector. However, this sector has a characteristic which distinguishes it from undertakings active in other sectors. Professional competition cannot exist without the willingness of other clubs to compete. “Even the fittest clubs always need another club or clubs to achieve a match or a competition.”

Normally, it is all in the game that less prosperous undertakings are the casualties in the race of the survival of the fittest. But when it comes to professional football, this may not be the case.

5.3. Financial situation of Dutch football clubs

Football clubs are financially vulnerable, as there is a structural unbalance between income and expenditure. Clubs are facing higher costs for player contracts and their venues, while the revenues out of sponsor contracts and TV earnings are diminished. Recent bankruptcies of football clubs like HFC Haarlem and RBC Roosendaal, show that the sports sector is also affected by the financial crisis. Nevertheless, municipalities in the Netherlands are closely involved when it concerns their local football club. There are many examples in which the municipalities provide a helping hand when the club is in financial troubles. Sometimes it is the football club itself which receives the aid, other times it is the venue.

In 2003, KPMG conducted a research concerning the financial relations existing between the Dutch municipalities and professional football clubs and/or their venues. The investigation was conducted after a request made by the Ministry of Interior and Kingdom Relations which received a letter from the European Commission.

The research shows that of the 33 municipalities investigated, all of them are engaged in financial transactions between the football clubs and/or their venues. Only one football club out of the 36 has no (direct) financial relationship with its municipality. The total value of financial contributions by all the municipalities exceeds even €300 million.

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5.3.1 Different types of financial relations

The research distinguishes 6 different types of financial relations:

1. Donation to the football club or the venue, which means that the recipient does not have to provide any compensation;
2. A loan to the football club or the venue, which can be provided against market conditions or below the standard market requirements;
3. Warranties for the football club or the venue;
4. A financial contribution from the municipality in which a compensation is required, such as a sponsorship agreement. It is the proportion between the financial contribution and the value of the compensation which determines whether or not (illegal) State aid is involved;
5. A financial contribution to the municipality with a compensation. An example is the rent paid by the football club for the venue. When the rent is below the actual market value, State aid is involved; or
6. A symbolic contribution to the municipality with a compensation. There are examples in which the municipality provided the football club a venue or a piece of land for a symbolic amount. Sometimes, this gesture is an element of a wider financial transaction. Therefore, it is necessary to examine the whole financial package and the compensation of the football club.\(^{94}\)

5.3.2 How much money is involved?

The table below sets out the total dimension of financial transactions between the Dutch municipalities and the football clubs and their venues during the period of 1993 to 2003.

<table>
<thead>
<tr>
<th>Type of transaction</th>
<th>Number of transactions</th>
<th>Total value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Donation</td>
<td>69</td>
<td>€102.2 mln</td>
</tr>
<tr>
<td>Loan</td>
<td>25</td>
<td>€47.4 mln</td>
</tr>
<tr>
<td>Warranties</td>
<td>19</td>
<td>€27.1 mln</td>
</tr>
<tr>
<td>Financial contribution to the football club/venue with compensation</td>
<td>16</td>
<td>€78.8 mln</td>
</tr>
<tr>
<td>Financial contribution to the municipality with compensation</td>
<td>29</td>
<td>€50.8 mln</td>
</tr>
<tr>
<td>Symbolic contribution to the municipality with compensation</td>
<td>20</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>178</strong></td>
<td><strong>€306.3 mln</strong></td>
</tr>
</tbody>
</table>

From the table above it can be concluded that one-third of the financial relations consists of donations from the municipalities to the football club or the venue. The average financial contribution is €1.5 million. With regard to the 20 symbolic transactions, it must be noted that the value of these transactions is unknown.95

5.3.3. Who is the recipient?

From a legal perspective it is important to make a distinction regarding financial transactions between municipalities and football clubs and financial transactions between municipalities and a football stadium. With regard to the recipients there are 4 options. The municipality can have financial relations with:
- The football club;
- The football stadium;
- Both the football club and the football stadium; or
- Neither with the municipality or the football stadium.96

The type of relation in which there is only a financial connection between the municipality and the football club, does not exist, at this moment, in the Netherlands, as well as the type when there is no relationship between the municipality and the football club/venue at all. 17 of the 33 investigated municipalities have a relationship with the football stadium, while the other 16 municipalities have a financial relationship with both the club and the venue. The following table will show how the amounts are distributed over the venue and the football club:

<table>
<thead>
<tr>
<th>Type of transaction</th>
<th>To the venue</th>
<th>To the football club</th>
</tr>
</thead>
<tbody>
<tr>
<td>Donation</td>
<td>€74.0 mln</td>
<td>€28.2 mln</td>
</tr>
<tr>
<td>Loan</td>
<td>€21.9 mln</td>
<td>€25.5 mln</td>
</tr>
<tr>
<td>Warrantes</td>
<td>€18.7 mln</td>
<td>€8.3 mln</td>
</tr>
<tr>
<td>Financial contribution to the football club/venue with compensation</td>
<td>€77.9 mln</td>
<td>€0.9 mln</td>
</tr>
<tr>
<td>Financial contribution to the municipality with compensation</td>
<td>€50.8 mln</td>
<td>-</td>
</tr>
<tr>
<td>Symbolic contribution to the municipality with compensation</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>€243.3 mln</td>
<td>€62.9 mln</td>
</tr>
</tbody>
</table>

96 KPMG, ‘De gemeente als twaalfde man’, 2003, p.16.
From the above table it can be concluded that of the €306.3 million financed by public authorities, 80% is provided to the football stadiums, while the remainder 20% is granted to the football clubs.  

As mentioned above there is a distinction between State aid to a football club and to a venue from a legal perspective. However, this distinction is not that easily made from an economic viewpoint. The football club and the venue constitute one entity. While a football club cannot operate without a football stadium, a stadium will not be economically viable without the revenues it receives from the club. This interdependence has some interesting consequences. The bankruptcy of a football club, for example, will lead to some serious consequences for the venue as there are no revenues available. In the event of the bankruptcy of a venue, the consequences for the football club will not be so severe as the venue will not disappear all of a sudden but will continue to exist and can still be used by the football clubs, bankrupt or not.

5.4. Position of the Netherlands towards public funding

The above paragraph shows that all Dutch municipalities with a professional football club in their community are somehow engaged in the public financing of that club (either through the club or through the venue).

Municipalities have several underlying motivations for the public financing of professional football clubs. In many occasions, it is the stadium that plays an important role, as it is seen as a symbol of creating the possibility of professional football in a community and the opportunity to organize other (massive) events. Another important argument put forward by municipalities to justify the public funding of stadiums is that the football clubs and the stadium will create an economic advantage. Due to the money that visitors will spend new jobs will be created.

Moreover, activity near the stadium will be encouraged, such as catering establishments and business locations. A third economic impact is that professional football in a community can contribute to the publicity and image of a community. Lastly, it is an amenity that a lot of people want. This economic impact “does not totally justify the investment, but justifies a piece of it. Taken together, it makes a very compelling argument for going ahead with this”. Nevertheless, studies regarding the American sports leagues have shown that only few stadiums are economically viable. Moreover, these arguments will not be accepted by the European Commission to justify the public funding of a local football stadium. As seen in the previous

chapter, other criteria have to be fulfilled.
Some municipalities even argue that although the football club is financed through state resources, there is no actual State aid involved as the intervention is unlikely to affect trade between the Member States. Especially those football clubs who play in the First Division have a rare chance to compete on a European level, and thus inter-community trade is unlikely to be affected.\textsuperscript{102} Nevertheless, it can be argued that these clubs do have the opportunity to be active on the international player transfer market, in which inter-community trade does play a role.

5.4.1. Letter from Netherlands to the Commission

On June 3, 2002, the Dutch Representative in Brussels wrote a letter to the European Commission, stating that “financial aid granted by Municipalities to professional football associations to prevent clubs from financially going under and, or to support the renovation or construction of a stadium, does not constitute State aid under Article 87 of the EC Treaty (now: 107 TFEU) and does therefore not need to be notified.”\textsuperscript{103}

5.4.2. Reaction from the Commission

The Commission stated in its response to the Dutch Representative that: “in principle, financial support to professional football clubs falls under the state aid rules, on the condition that all criteria of Article 87 of the EC Treaty (now 107 TFEU) are fulfilled. The Commission services cannot agree with the general observations of the Dutch authorities that public support to professional football clubs should not be considered as notifiable State aid. Without a full examination of the details in a specific case, the Commission is not in a position to take a view on the question whether or not public support for football clubs is compatible with the Treaty rules on State aid. Legal certainty can only be obtained on the basis of a formal Commission Decision.” However, as stated in chapter 3, “under certain conditions financial aid to professional football clubs could be something other than State aid”.\textsuperscript{104} The European Commission reached thus a different conclusion than the Dutch government regarding the public funding of professional football clubs.

As a response to this letter, the Dutch government drafted a document incorporating National Guidelines for State aid to professional football clubs, which will be discussed in the next part.

5.5. National Guidelines

On May 17, 2004, the Ministry of Interior and Kingdom Relations published the National Guidelines concerning State aid to professional football. The National Guidelines were drafted in collaboration with the Ministry of Sports, the association of Dutch Municipalities and the KNVB with the purpose to provide guidance regarding the decision whether or not financial resources should be granted to football clubs.\(^5\)

Starting point of the guidelines is that it is the professional football clubs which are responsible for their sound financial management. Moreover, the municipalities should be autonomous when it comes to the decision of financial aid and the granting of such aid should be limited in order to minimize the granting of unlawful aid.

The National Guidelines provide the municipalities with some ‘safe zones’, in which it is lawful to grant financial aid to football clubs. However, all aid that falls within Article 107 TFEU should still first be notified to the European Commission.\(^6\)

In the following paragraphs, the ‘safe zones’ contained in the National Guidelines will be explained.

5.5.1. Financing of a venue

The building/renovation of a football venue solely by means of private financing is hardly feasible. Private investors are unable to achieve the (economic) effects that municipalities do, which makes them more reticent when it comes to the financing of such a venue.\(^7\)

As seen in the previous chapter, the public financing of a sporting venue is under certain conditions permitted. The starting point is that the aid should be provided to enhance the ‘infrastructure as a whole’, in which the venue becomes a multifunctional place.

The National Guidelines (as well as the European Commission) do not specify the criteria regarding the multifunctional use (no minimum number of events is necessary). What is decisive is that the venue is used in a non-discriminatory way.

In the event the football club is the sole user, it is prohibited to receive any financial advantage, which means that the club has to pay a market-based rent.\(^8\) In 2004, the football clubs of Tilburg received €2.4 million from their municipality. While the municipality of Tilburg is the owner of the venue, it was concluded that the rent paid by the football clubs was much higher.

\(^5\) http://www.nl-prov.eu/nl-prov/news.nsf/_/97A9F31ACE128837C1256EA000584986


than the market-based rental. Therefore, the municipality returned the overpayment. Significant
detail is that at that time, the football club was in financial trouble.109

5.5.2. Rescue and restructuring aid

Another possibility is that Municipalities can argue that the aid granted for the
rescue/restructuring of the football club is in the interests of the community, because, for
example, the municipality has financial interests in the venue, which otherwise would be
‘worthless’.

However, this type of aid may never exceed the amount necessary to help out the football club
on a short term basis. Moreover, the aid may only be granted once every 10 years.110

Many football clubs in the Netherlands have been in financial distress, and many of them have
been helped out by their municipalities. The football clubs of Arnhem, Breda and Kerkrade, for
example, all provided their club with financial resources through rescue and restructuring aid.

5.5.3. Training aid

As stated in chapter 3, aid used for the training of young athletes does not constitute State aid.
Additional requirements have to be fulfilled in order to apply for this exemption. However, it can
be noted that at this moment, no professional football club applies for this exemption as their
training does not satisfy the Dutch requirements regarding general education.111

5.5.4. Financial compensation in exchange for provision of services

There are examples in which the football club receives a financial compensation when it fulfils a
certain counterpart. When the financial compensation is equal to the counterpart, no State aid is
involved. However, in the event the counterpart is over compensated, State aid may be involved.
An examples of such a counterpart is the active participation of the football club for the purpose
of certain community projects. Another example is the promotion of the city in which the
football club plays an important role, for example, by wearing the name of the city (VVV Venlo
and NAC Breda).112

110 Dutch Ministry of Interior and Kingdom Relations, ‘National Guidelines concerning State aid to professional
111 Dutch Ministry of Interior and Kingdom Relations, ‘National Guidelines concerning State aid to professional
112 Dutch Ministry of Interior and Kingdom Relations, ‘National Guidelines concerning State aid to professional
football’, 2004, p.16.
5.6. Conclusion

The Commission has informed the Dutch municipalities that it has started a preliminary investigation regarding the granting of unlawful aid to professional football clubs. However, this is not the first investigation that is conducted by the Commission regarding this topic. In 2003 the Commission also started a preliminary investigation due to the public funding of a football stadium in Alkmaar. That investigation was terminated because “the subject of the investigation has been dissolved, with the result that the formal investigation procedure no longer serves any useful purpose”.

Many football clubs in the Netherlands have received financial aid from the municipalities. All 33 municipalities that have a professional football club in their community are somehow involved in a financial relationship with their club. The total value of the aid granted exceeds €300 million! Nevertheless, the Dutch municipalities still try to justify their involvement by stating that the clubs’ recreational, sportive, cultural, social and economic contribution is of significant importance.

In a letter to the European Commission, the Dutch government even stated that “financial aid granted by Municipalities to professional football associations to prevent clubs from financially going under and, or to support the renovation or construction of a stadium, does not constitute State aid under Article 87 of the EC Treaty (now: 107 TFEU) and does therefore not need to be notified.” The European Commission did not share this view and argued that it “cannot agree with the general observations of the Dutch authorities that public support to professional football clubs should not be considered as notifiable State aid. In principle, financial support to professional football clubs falls under the state aid rules, on the condition that all criteria of Article 87 of the EC Treaty (now 107 TFEU) are fulfilled”.

As a reaction, the Dutch authorities drafted the National Guidelines concerning State aid to professional football, which have the aim to provide guidance for the municipalities. However, until now all municipalities fail to meet one (and the most important) requirement: notifying the European Commission of the intention to grant an aid to a football club, which make the aid automatically unlawful.

The next chapter will be a conclusive chapter in which also some recommendations will be provided in order to enhance the obeying of the municipalities to and the enforcement of the State aid rules.

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Chapter 6: Conclusions and recommendations

6.1. Introduction

This chapter will provide a retrospection of the foregoing chapters, after which some conclusions will be drawn. In addition, several recommendations will be given which relate to the question whether adjustments are necessary to make the European State aid rules clearer and more effective.

6.1.1. European State aid law: conclusions drawn from chapter 2 and 3

The European Union’s fundamental goal is the creation of a common market, based on the four freedoms. Effective competition between undertakings is an effective tool to constitute such a common market, but there are different causes which can distort competition. State intervention, for example in the form of State aid, is one of them.

The rules on State aid are laid down in the Treaty on the Functioning of the European Union, and Articles 107, 108 and 109 are the ones applicable in such cases.

A remarkable point that can be made, is that the TFEU does not provide a definition of the concept of an aid. Instead, Article 107(1) lays down five requirements that have to be fulfilled in order for this article to apply. Moreover, both Articles 107(2) and (3) TFEU give some categories of exemptions in which the aid is considered to be compatible with the common market.

Rules regarding the enforcement of State aid rules are laid down in Article 108 TFEU and the Procedural Regulations. Article 108(1) sets outs that the State aid procedure is a procedure between the Commission and the Member States. While the beneficiary and the public authority (often a municipality) are equally involved, it is only the Member State (and hence the public authority) which is responsible. No other party than the Member State concerned has the right to submit comments during the preliminary investigation procedure, which makes the procedural part a bit user-unfriendly. The path to private enforcement of the State aid rules remains difficult for the interested parties. While beneficiaries have in some occasions the possibility to team-up with the Member State to clarify things, competitors only have the possibility to lodge a complaint. Moreover, the locus standi remains a difficult hurdle when it comes to private enforcement as it is often difficult to prove sufficient connection to and harm from the aid.


measure.\textsuperscript{116} It is not until the formal investigation procedure that competitors, complainants and the beneficiary have the opportunity to submit comments.

Unless a measure is exempted by a BER, Member States have the obligation to notify the Commission of an aid measure they want to grant to an undertaking. Although the non-notification will not lead to sanctions or penalties, the measure adopted is considered to be ‘unlawful aid’ as it contravenes Article 108(3) TFEU. Moreover, the Commission may even demand recovery of the granted aid measure. However, the recovery of unlawful aid often remains difficult as the rules concerning the recovery are decentralised.

Although national courts are not allowed to make a judgement concerning the compatibility of an aid measure (this right is exclusively reserved for the Commission), they do play a role in the enforcement of the State aid rules as the ‘standstill’ obligation of Article 108(3) has direct effect. Even thought the review of an aid is exclusively reserved for the Commission, national courts do have to decide whether the measure is an aid within the meaning of Article 107(1) in order to require recovery.

While national courts have the possibility to award damages to competitors in the event of a breach of the State aid rules, damage claims remain limited. This is mainly caused due to the fact that there is a lack of clear legal basis under Dutch national law. The requirement that the claimants have to prove causation between the granted aid and its economic loss also remains an obstacle. But even when competitors lodge a damage claim, it is uncertain whether this claim will be awarded as until now there have not been any cases in which monetary compensation has been actually awarded to competitors.\textsuperscript{117}

6.1.2. State aid in the sports sector: conclusions drawn from chapter 4

As the sports sector is a commercialised sector, sporting clubs (and thus professional football clubs) are seeking for financial recourses. While all sports clubs earns money through sponsorship contracts, ticket sales, transfer revenues and broadcasting rights, some have better access to financial resources than other. Moreover, the financial crisis has also affected the sports sector, as undertakings are less willing to enter into expensive sponsorship contracts with sports clubs. In addition, football clubs are not focussed on value creation, and the unbalance between income and expenditure is easy to explain.

This growing expenditure of sporting clubs forces them to resort to their municipality for financial support. Although financial support to sports clubs is under certain circumstances


allowed, it must be noted that financial support may fall within the scope of Article 107(1) TFEU. The funding of infrastructure, for example, is allowed when the infrastructure provides facilities for different types of activities and the funding must be according to market value. The proposed measure of the municipality of Alkmaar, was, therefore, not allowed as the sale of a piece of land for €1,00 cannot be considered to be at market value.\textsuperscript{118} Whereas the funding of infrastructure is subject to strict rules, many municipalities are willing to provide public money for the building of a venue.

The granting of compensation for a clubs’ active participation in community projects is also allowed. However, it must be noted that it is often difficult to determine the value of such participation and thus the value of the compensation. This type of aid is therefore often used to legitimise public financial support.

The Commission adopted a strict application of the State aid rules. However, it is this strict application which encourages municipalities to look for escape measures to evade the State aid rules.\textsuperscript{119}

\section{6.1.3. State aid in the Dutch football sector: conclusions drawn from chapter 5}

The Dutch football sector consists of 36 professional football clubs divided over 33 municipalities. In 2003, KMPG conducted a research which showed that all 33 municipalities are engaged in a financial transaction with their local football club and/or their venues. Whereas the total value of financial contribution exceeds the €300 million, Dutch municipalities argue that they have good and compelling reasons which justify their actions. Often it is the club’ social and cultural function that is adduced by municipalities. Nevertheless, the financial support must be granted within the boundaries imposed by the State aid rules.

As the research conducted by KMPG shows, municipalities can have financial relations with a football club, a venue or both. Moreover, six different types of relations can be distinguished in the Netherlands. The type of relation which is used in one-third of the cases is a donation to the club and/or venue.

The argument propounded by the Dutch Representative in Brussels that the financial aid granted to Dutch football clubs does not constitute aid and does not need to be notified, was rejected by the Commission. It stated that the financial support to football clubs does fall within Article 107(1) TFEU and that notification was necessary in order for the Commission to review the measure.

Another argument that was put forward by the Dutch municipalities was that the measures often do not constitute State aid, as there is no interstate trade involved. Although many football clubs do not have the opportunity to compete on a European level, interstate trade still may be involved due the international player transfer market. All clubs have the opportunity to contract football players from all sorts of countries, which means that there is interstate trade. “The fact that the main playing field is the national market, does not change the fact that clubs are also (potentially) active on international markets.”  

6.2. Recommendations

In the following paragraphs some recommendations will be given which things should be changed and/or improved in order to make the State aid rules clearer and to enhance the effectiveness of these rules.

6.2.1. Recommendation 1: Is it necessary to change the State aid rules or should they remain the same?

It follows from the foregoing that there is a difference between the way the State aid rules are drafted at the European level and the way they are applied in the Member States. This difference in application causes conflicts, especially with regard to their understanding and enforcement. Member States are often unaware whether their intended measure constitutes an (possible unlawful) aid measure within the meaning of Article 107(1) and often fail to notify the Commission of their intentions. Moreover, beneficiaries and competitors have unfriendly procedural rights, which makes it difficult for them to lodge a complaint and to submit comments. Maintaining the existing State aid rules would therefore, in my opinion, be undesirable.

6.2.2. Recommendation 2: How should the rules be amended?

The existing State aid rules should be amended in such a way that Member States can better comprehend them. Providing a definition of the concept of an aid could be a good starting point, although it might be difficult to define the exact scope of application. The European Commission already propounded a notion to widen the scope of application by including measures which do not wholly fall within Article 107(1) TFEU but that nevertheless have the same effect. However, this notion was rejected by the ECJ as it held that there is no scope for measures having the same effects as aids but which are subject to different rules.  

Although this reasoning makes sense, the ECJ already adopted a effects-based approach. Therefore it would be


better to apply the State aid rules also to those measures which may not fulfil all criteria of Article 107(1) TFEU, but that do have the same effect as a State aid measure. This will avoid that Member States will create escape mechanism to avoid the application of the State aid rules. The rules on State aid enforcement should also be more clear, in order to make them more effective. Another problem worth solving concerns the rules regarding the recovery of unlawful aid. At this moment the rules on recovery are decentralised, which means that each Member States has the possibility to draft its own rules. It would therefore be recommended to draft centralised guidelines in order to solve this issue.

At this moment, there are no penalties or sanctions for public authorities that have failed to notify the Commission of an aid measure and/or failed to observe the stand-still obligation. Whereas beneficiaries could be sanctioned with the obligation to return the granted aid with interests, public authorities are not sanctioned. Drafting rules which enables the Commission to sanction a public authority which has failed to observe this obligation under the State aid rules would therefore be recommended, as this will make the authorities more cautious and creates an incentive on the part of the Member State.

Supplementary policy in the field of sport is also desirable. An example could be the drafting of guidelines related to (sports-)infrastructure. Such a guideline could set out the definition and scope of ‘multifunctional use’ and could determine how many ‘other events’, for example, should be organised in order to consider a venue as being multifunctional. Another guideline could clarify the role of public financing in local community projects. While football clubs are often rewarded for their participation in community projects, it remains difficult to estimate the amount of compensation. The drafting of EU thresholds for different types of projects could therefore be a good solution.

The Commission acknowledges the importance of private enforcement as it “considers that private enforcement actions can offer considerable benefits for State aid policy. Proceedings before national courts give third parties the opportunity to address and resolve many State aid related concerns directly at national level”. Nevertheless, the role of actual private enforcement in national courts is limited due the many hurdles third parties have to take. More flexible rules regarding the rights of third parties would enhance the (number of) private enforcement actions. The creation of a block exemption regulation in the area of sport could also be an improvement as it exempts public authorities from the obligation of notifying the Commission. Nevertheless, according to the Commission such a general block exemption is not possible at this stage as this is “possible only in an area where the Commission and Member States have acquired a good

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experience through an established practice and case law”. As this is not the case in the area of sport, it would be difficult to draft such a general block exemption. Nevertheless, this could be a good option at a later stage.

6.2.3. Recommendation 3: What else should change in order to enhance the effectiveness of the EU State aid rules in the sports sector?

In addition to the fact that the State aid rules should be amended, other (additional) things should change in order to enhance the effectiveness of the EU State aid rules in the sports sector. First of all, there should be more State aid awareness both among the public authorities, undertakings and the public. As shown by the research of KPMG, Dutch municipalities are up to a certain level aware of the fact that financial aid to football clubs is not allowed and aid to infrastructure is allowed when certain requirements are fulfilled. However, the awareness concerning the economic impact of owning a club and/or venue differs among the Member States. In order to enhance the awareness, it would therefore be recommended to exchange knowledge among the municipalities with regard to the economical and legal aspects of such State aid issues.

Another aspect that should change is that in many cases the Member State has not notified the Commission of an aid measure, whereas competing clubs have failed to lodge complaints. While football clubs need each other to establish an effective football competition, it is this specific nature of sport that impedes the enforcement of the State aid rules. Although the lack of jurisprudence gives municipalities a certain latitude, it also leads to uncertainty and impasse. Public accountability of a club’s financial policy could be another effective tool in the enhancement, especially when they received some form of public financing. While many organisations already put their financial policy online, professional football clubs have failed to do so, even when they received public money. Transparency regarding financial policy and financial results would therefore help.

In many respects, professional football clubs act in the same way as other undertakings. However, whereas those undertakings have the risk to go bankrupt, history shows that not that many professional football clubs go bankrupt. Football clubs should, as all other undertakings, have the possibility to go bankrupt, as this will ensure that boards will not only strive for sporting prizes, but also financial victory.

The last thing that should change in order to enhance the effectiveness of the State aid rules in the sports sector is the way municipalities justify their actions with regard to granting aid. Municipalities often argue that the club’s social and cultural function in town is essential, that public financing is in the public interests. While endorsing a club’s function with regard to State aid, it has to be kept in mind that municipalities should act in an European Union interest, not only a municipality interest.125

6.3. Final conclusion
The central research question

*Is there a conflict between European Union State aid law and its application in the Member States in the sports sector and are adjustments necessary to make these rules clearer and more effective?*

can be answered as follow:

There is indeed a conflict between European Union State aid law and the way the Member States apply them in the sports sector. As described in chapters four and five, Dutch municipalities grant public money to football clubs that (often) are in financial difficulty. In many occasions State aid is involved, which is not notified to the European Commission. In order to enhance the effectiveness of the State aid rules it would therefore be recommended to change the State aid rules and to provide supplementary rules. Moreover, there should be more State aid awareness among the public authorities, undertakings and the public.

Let’s ensure that there will not only be fair rules with regard to sports competition, but also fair rules when it comes to the financial aspects of sports!

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