Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

26 February 2019*

(State aid — Aid granted by the Spanish authorities in favour of certain professional football clubs — Preferential income tax rate applied to clubs authorised to benefit from the status of non-profit entity — Decision declaring the aid incompatible with the internal market — Freedom of establishment — Advantage)

In Case T-865/16,

Fútbol Club Barcelona, established in Barcelona (Spain), represented initially by J. Roca Sagarra, J. del Saz Cordero, R. Vallina Hoset, A. Sellés Marco and C. Iglesias Megías, and subsequently by J. Roca Sagarra, J. del Saz Cordero, R. Vallina Hoset and A. Sellés Marco, lawyers,

applicant,

supported by

Kingdom of Spain, represented initially by A. Gavela Llopis and J. García-Valdecasas Dorego, and subsequently by A. Gavela Llopis, acting as Agents,

intervener,

v

European Commission, represented by G. Luengo, B. Stromsky and P. Němečková, acting as Agents,

defendant,

ACTION under Article 263 TFEU seeking annulment of Commission Decision (EU) 2016/2391 of 4 July 2016 on the State aid SA.29769 (2013/C) (ex 2013/NN) implemented by Spain for certain football clubs (OJ 2016 L 357, p. 1),

THE GENERAL COURT (Fourth Chamber),

composed of H. Kanninen (Rapporteur), President, J. Schwarcz and C. Iliopoulos, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 26 June 2018,

gives the following

* Language of the case: Spanish.

Judgment

Background to the dispute

1 Article 19(1) of Ley 10/1990 del Deporte (Law 10/1990 on sport) of 15 October 1990 (BOE No 249 of 17 October 1990, p. 30397) ('Law 10/1990') obliged all Spanish professional sports clubs to convert into public limited sports companies ('SLCs'). The purpose of the law was to encourage more responsible management of clubs through a change in legal form.

2 However, the seventh additional provision of Law 10/1990 provided an exception for professional sports clubs that had achieved a positive financial balance during the financial years preceding adoption of the law. The applicant, Fútbol Club Barcelona, and three other professional footballs clubs fell within the exception under Law 10/1990. Those four entities therefore had the option, which they chose to take, of continuing to operate in the form of sports clubs.

3 Unlike SLCs, sports clubs are non-profit legal persons which enjoy, in that capacity, a special rate of income tax. Until 2016, that rate remained below the rate applicable to SLCs.

4 By letter of 18 December 2013, the European Commission notified the Kingdom of Spain of its decision to initiate the procedure laid down in Article 108(2) TFEU with regard to the potentially preferential tax treatment of four professional football clubs, including the applicant, when compared with SLCs.

5 During the formal investigation procedure, the Commission received and analysed written observations from the Kingdom of Spain and from interested parties, including the applicant.

6 By Decision (EU) 2016/2391 of 4 July 2016 on the State aid SA.29769 (2013/C) (ex 2013/NN) implemented by Spain for certain football clubs (OJ 2016 L 357, p. 1) ('the contested decision'), the Commission found that, by Law 10/1990, the Kingdom of Spain had unlawfully implemented aid in the form of a preferential corporate tax rate for the applicant, Club Atlético Osasuna, Athletic Club Bilbao and Real Madrid Club de Fútbol, in breach of Article 108(3) TFEU (Article 1 of the contested decision). The Commission also found that the scheme was incompatible with the internal market and therefore ordered the Kingdom of Spain to discontinue it (Article 4(4)) and to recover from the beneficiaries the difference between the corporate tax actually paid and the corporate tax they would have been required to pay had they been SLCs, as of the tax year 2000 (Article 4(1)), subject, in particular, to the possibility that the aid in question constituted *de minimis* aid (Article 2). Lastly, the contested decision instructs its addressee to comply with the requirements set out in the operative part immediately and effectively with regard to recovery of the aid granted (Article 5(1)) and within 4 months following the date of notification with regard to implementation of the decision overall (Article 5(2)).

Procedure and forms of order sought

7 The applicant brought the present action by application lodged at the Court Registry on 7 December 2016.

8 As part of its application, the applicant also submitted to the Court a request for production of a document concerning the procedure for recovering the aid.

9 The Commission lodged its defence at the Court Registry on 27 February 2017.

10 The applicant lodged its reply at the Court Registry on 19 April 2017.

11 By decision of 25 April 2017, the President of the Fourth Chamber of the General Court granted the Kingdom of Spain leave to intervene in support of the form of order sought by the applicant.

12 The Commission lodged its rejoinder at the Court Registry on 6 June 2017.

13 The Kingdom of Spain lodged its statement in intervention at the Court Registry on 6 July 2017.

14 On 27 July and 23 August 2017 respectively, the Commission and the applicant lodged their observations on the statement in intervention.

15 By letter of 3 September 2017, the applicant requested to be heard at the hearing.

16 By way of the measures of organisation of procedure provided for in Article 89 of its Rules of Procedure, the Court put written questions to the Commission and the Kingdom of Spain, which replied within the prescribed period.

17 At the hearing, the Commission withdrew its claim that the action was inadmissible, formal note of which was taken in the minutes of the hearing.

18 By letter of 28 June 2018, the applicant submitted a request that certain information should not be disclosed to the public.

19 By decision of 23 July 2018, the President of the Fourth Chamber of the General Court declared the oral part of the procedure closed.

20 The applicant claims that the Court should:

– annul the contested decision;

– in the alternative, annul Articles 4 and 5 of the contested decision;

– order the Commission to pay the costs.

21 The Commission contends that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

22 The Kingdom of Spain contends that the Court should:

– uphold the action brought by the applicant and annul the contested decision;

– order the Commission to pay the costs.

Law

23 In support of its action, the applicant relies on five pleas in law:

– the first, alleging infringement of Article 49 TFEU, read in conjunction with Articles 107 and 108 TFEU, and of Article 16 of the Charter of Fundamental Rights of the European Union, in so far as the Commission failed to have due regard for its obligation to take account, in procedures relating to State aid, infringements of other Treaty provisions;

– the second, alleging, in essence, infringement of Article 107(1) TFEU, owing, first, to an error of assessment on the part of the Commission as to the existence of an advantage and, secondly, infringement of the principle of sound administration in examining whether there was an advantage;

– the third, alleging infringement of the principle of the protection of legitimate expectations and the principle of legal certainty;

– the fourth, alleging infringement of Article 107(1) TFEU, due to the fact that the measure at issue is justified by the internal logic of the tax system;

– the fifth, alleging infringement of Article 108(1) TFEU and of Articles 21 to 23 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9), in so far as the Commission did not comply with the procedure for existing aid.

The request for production of a document

24 At the hearing, the applicant stated, in response to a question from the Court, that the document which it had asked to be produced (see paragraph 8 above) did not yet exist, which was confirmed by the Kingdom of Spain. Therefore, it is not necessary to rule on that request for a measure of organisation of procedure.

The first plea in law, alleging infringement of Article 49 TFEU, read in conjunction with Articles 107 and 108 TFEU, and of Article 16 of the Charter of Fundamental Rights

25 The applicant maintains that, by ignoring the specific fact that Law 10/1990, to which the contested decision relates, is contrary to Article 49 TFEU in that it improperly imposes a legal form on professional sports clubs, the Commission infringed its obligation to take into account, in the procedure in question, infringements of other Treaty provisions. According to the applicant, Law 10/1990 restricts freedom of choice as to legal form and, therefore, freedom of establishment, but the Commission failed to take this into account.

26 The Commission disputes the applicant's arguments.

27 By its plea, the applicant alleges, in essence, that the Commission should have found the obligation placed on professional sports clubs to convert to SLCs to be contrary to Article 49 TFEU. Such a finding would have led to the Commission closing the present proceedings and instead applying Article 49 TFEU only to the State measure that obliged professional sports clubs to convert to SLCs. It should be noted that the applicant also alleges that Article 16 of the Charter of Fundamental Rights, concerning freedom to conduct a business, was infringed but does not put forward any further specific arguments independent of those raised in relation to Articles 49, 107 and 108 TFEU.

28 It should be noted from the outset that, when deciding whether or not to initiate infringement proceedings, the Commission has a discretion which precludes any right on the part of individuals to require it to adopt a specific position (see order of 24 November 2016, *Petraitis* v *Commission*, C-137/16 P, not published, EU:C:2016:904, paragraph 22 and the case-law cited). The procedural choices made by the Commission in the present case to pursue the application of Articles 107 and 108 TFEU, rather than of Article 49 TFEU, are therefore beyond the scope of review by the Court.

29 It is settled case-law that, although the procedure provided for in Articles 107 and 108 TFEU leaves a margin of discretion to the Commission for assessing the compatibility of an aid scheme with the requirements of the internal market, it is clear from the general scheme of the Treaty that that procedure must never produce a result which is contrary to the specific provisions of the Treaty (see judgment of 9 September 2010, *British Aggregates and Others* v *Commission*, T-359/04, EU:T:2010:366, paragraph 91 and the case-law cited).

30 That obligation on the part of the Commission is all the more necessary where the other provisions of the Treaty also pursue the objective of undistorted competition in the internal market, as Article 49 TFEU does in the present case, in seeking to preserve freedom of establishment and free competition between the economic operators of one Member State established in another Member State and the economic operators of the latter Member State. When adopting a decision on the compatibility of aid with the internal market, the Commission must be aware of the risk of individual economic operators undermining competition in the internal market (see, to that effect, judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-511/09, EU:T:2015:284, paragraph 215).

31 However, it should be noted that, in the present case, the applicant is not alleging that the outcome of the procedure in connection with the examination of the compatibility of the aid scheme infringed the principle of freedom of establishment enshrined in Article 49 TFEU. Instead, its complaint concerns the Commission's failure to examine whether Law 10/1990, which the Commission found infringed Articles 107 and 108 TFEU by establishing a scheme which provided exceptional arrangements for four professional football clubs, also amounted to an infringement of Article 49 TFEU by introducing the rule that Spanish professional sports clubs had to convert to SLCs.

32 In that regard, while the case-law referred to in paragraphs 29 and 30 above imposes an obligation on the Commission not to declare State aid certain conditions of which contravene other provisions of the Treaty compatible with the internal market (see judgment of 9 September 2010, *British Aggregates and Others* v *Commission*, T-359/04, EU:T:2010:366, paragraph 92 and the case-law cited), it does not, on the other hand, oblige the Commission to examine whether such an infringement also exists in a case where it has already classified the measure at issue as unlawful and incompatible State aid.

33 The obligation to take into account the infringement of other Treaty provisions in the context of a State aid procedure must be understood in the light of the need not to allow the procedure to produce a result that would be contrary to such Treaty provisions, by having a negative impact on the internal market (see, to that effect, judgment of 3 December 2014, *Castelnou Energía* v *Commission*, T-57/11, EU:T:2014:1021, paragraph 189) or, in the context of an infringement of Article 49 TFEU, by presenting a possible threat to competition on the part of individual economic operators.

34 In addition, it has been held that the fact that a measure, such as the one obliging professional sports clubs established in Spain to convert to SLCs, may be contrary to provisions of EU law other than Articles 107 and 108 TFEU does not mean that the exemption from that measure enjoyed by certain undertakings cannot be classified as 'State aid', as long as the measure in question produces effects vis-à-vis other undertakings and has not been either repealed or declared unlawful and, therefore, inapplicable (see, to that effect, judgments of 3 March 2005, *Heiser*, C-172/03, EU:C:2005:130, paragraph 38, and of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity*, C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 69).

35 It follows that the Commission does not have the power, in State aid procedures, to find that there has been an independent infringement of Article 49 TFEU and to draw the appropriate legal conclusions, except in the limited situation, to which the case-law referred to in paragraphs 29 and 30 above applies, where the incompatibility of the aid measure at issue arises from the infringement of Article 49 TFEU (see, to that effect, judgment of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraph 76).

36 It follows from the foregoing that the first plea is based on a misapprehension on the part of the applicant as to the scope of the obligation to take account, where appropriate, of the infringement of other TFEU provisions in the context of a State aid procedure.

37 Since the Commission was under no obligation, during the procedure leading to the contested decision, to examine whether there may have been infringement of Article 49 TFEU, given that the contested decision already classifies the measure concerned as unlawful and incompatible State aid, this plea must be rejected as unfounded.

The second plea in law, alleging, in essence, infringement of Article 107(1) TFEU, owing, first, to an error of assessment on the part of the Commission as to the existence of an advantage and, secondly, to infringement of the principle of sound administration in examining whether there was an advantage

38 The applicant, supported by the Kingdom of Spain, considers that the Commission undertook a formal comparison of the tax rate applicable to public limited companies and that applicable to non-profit entities without examining the scope of the different tax deductions to which each of those two kinds of undertaking were entitled. It is the applicant's view that, in so doing, the Commission failed to check whether or not the effective tax rate placed the four football clubs concerned at an advantage during the period 1995 to 2016. The Commission thus failed to fulfil its obligation to carry out a complete and impartial analysis of all relevant evidence and did not take into account the cumulative consequences of the State intervention at issue or, therefore, its actual effects. According to the applicant, the Commission should also have actively gathered evidence both for and against, including through the use of requests for information. A comparative analysis of the cumulative effects of the tax rates and deductions applicable would show that in fact the scheme at issue had an adverse effect on the applicant, compared with the scheme applicable to public limited companies. Looking beyond the applicant's particular case, the Spanish tax system aims overall to neutralise the differences in tax rates between public limited companies and non-profit entities. The Kingdom of Spain adds that the disputed measure was intended only to establish a framework to improve the situation of professional football clubs.

39 The applicant also submits, as part of the second plea, that the contested decision infringed Article 107(1) TFEU, in the absence of any distortion of competition.

40 Lastly, the applicant claims that the contested decision infringes the presumption of innocence.

41 The Commission contends that the present plea should be rejected, on the ground that the Commission satisfied the requirements laid down by the case-law on aid schemes and that an analysis of individual aid granted does not take place until the recovery stage. The Commission also comments that the claim that it compared only the applicable tax rates, without taking the effective rates into account, is factually incorrect. A comparison of the effective rates, carried out on the basis of information supplied by the Spanish authorities during the administrative procedure, points to the existence of an advantage. The Commission adds that the measure at issue did not contain any automatic mechanism for eliminating the advantage thus conferred. In that regard, the applicant cannot validly claim that additional deductions under the tax scheme applicable to SLCs may have resulted from reinvesting profits in the acquisition of new players, since that is a matter of hypothesis. In general, the alleged neutralisation of the differences in tax rates between public limited companies and non-profit entities by means of deductions for reinvestment stems from a simplistic and potentially incorrect calculation by the applicant, which also fails to take into account the other differences between the schemes which may affect the effective tax rate. As regards the applicant's claim that the obligation to undertake a diligent and impartial examination was infringed, the

Commission contends that this has no basis in fact and that, in any event, the applicant did not submit during the administrative procedure that the difference in tax rates was offset by the difference in the cap on deductions for reinvestment.

42 According to settled case-law, 'State aid', as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the European Union judicature must in principle, having regard both to the specific features of the case before it and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (see judgment of 4 September 2014, *SNCM and France* v *Corsica Ferries France*, C-533/12 P and C-536/12 P, EU:C:2014:2142, paragraph 15 and the case-law cited).

43 This is the case with regard to the question whether or not a measure confers an advantage on an undertaking.

44 It should be recalled that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see judgment of 16 April 2015, *Trapeza Eurobank Ergasias*, C-690/13, EU:C:2015:235, paragraph 20 and the case-law cited).

45 The concept of aid embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect (judgments of 19 May 1999, *Italy* v *Commission*, C-6/97, EU:C:1999:251, paragraph 15; of 21 March 2013, *Commission* v *Buczek Automotive*, C-405/11 P, not published, EU:C:2013:186, paragraph 30; and of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 20).

46 In that regard, a measure by which the public authorities grant to certain undertakings favourable tax treatment which, although not involving a transfer of State resources, places the recipients in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 107(1) TFEU (judgments of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14, and of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 23).

47 It should also be noted that State intervention can take various forms and must be assessed according to its effects. Thus, where State intervention leads to various consequences for the beneficiaries, the Commission must take into account the cumulative effect of those consequences in order to assess whether there is a potential advantage (judgment of 13 September 2013, *Poste Italiane* v *Commission*, T-525/08, not published, EU:T:2013:481, paragraph 61). The Commission has a duty to consider complex measures in their entirety in order to determine whether they confer on the recipient undertaking an economic advantage which it would not have obtained under normal market conditions (judgment of 30 November 2009, *France and France Télécom* v *Commission*, T-427/04 and T-17/05, EU:T:2009:474, paragraph 199).

48 That also applies in relation to the assessment of an aid scheme. In that regard, while, in the case of an aid scheme, the Commission may confine itself to examining the general and abstract characteristics of the scheme in question without being required to examine each particular case in which it applies, in order to determine whether that scheme comprises aid elements (judgment of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 67), that assessment must nevertheless include an assessment of the various implications of the scheme at issue, both advantageous and disadvantageous, for its beneficiaries when the nature of the alleged advantage is unclear as a result of the inherent characteristics of the scheme.

49 Furthermore, it is also settled case-law that the Commission is required, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible for that purpose (see judgment of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 63 and the case-law cited).

50 It should also be noted that the legality of a Commission decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (judgments of 14 September 2004, *Spain* v *Commission*, C-276/02, EU:C:2004:521, paragraph 31, and of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 91; see also, to that effect, judgment of 10 July 1986, *Belgium* v *Commission*, 234/84, EU:C:1986:302, paragraph 16).

51 It is in the light of the principles set out above that the second plea must be examined, without there being any need to distinguish the part of the plea alleging an error of assessment from the part alleging infringement of the principle of sound administration.

52 In the present case, it must first of all be noted that the measure to which the contested decision relates is the combined result of applying to non-profit entities special tax treatment, which existed before Law 10/1990 came into force, and restricting the use of that legal form to certain professional football clubs falling within the exception introduced by Law 10/1990. While Law 10/1990 confers the benefit of the legal form of non-profit entity, and therefore the tax regime associated with it, only on the four football clubs covered by the exception, it does not contain any provisions relating to taxation and therefore leaves untouched, in particular, the content of the tax regime for non-profit entities, which is governed by different laws. It follows that the measure at issue amounts to a tightening-up, within the Spanish professional sports sector, of the scope *ratione personae* of the tax regime for non-profit entities.

53 Against that background, in order to assess, in particular, whether that measure is likely to confer an advantage, the various components of the tax regime for non-profit entities must be assessed as a whole, as they form an indivisible whole, which was altered by Law 10/1990 only indirectly as regards its scope *ratione personae*.

54 It is therefore necessary to examine whether, in the contested decision, the Commission established to the requisite legal standard that the tax regime for non-profit entities, considered as a whole, was liable to place its beneficiaries in a more advantageous position than if they had had to operate in the form of SLCs.

55 The contested decision points out a difference between the tax rate applicable to non-profit entities and that applicable to SLCs. It states, in recitals 8 and 34, that the rates differed from the date of adoption of the measure at issue, in 1990, until the financial year 2015, the Ley 27/2014 del Impuesto sobre Sociedades (Law 27/2014 on corporate tax) of 27 November 2014 (BOE No 288 of 28 November 2014, p. 96939) having ended the discrepancy with effect from 2016. That rate, which remained at 25% for non-profit entities, was, in the case of SLCs, 35% until 2006, 32.5% in 2007, 30% in 2008 and then 28% in 2015. Although different, the rates applicable in both the Territorio Histórico de Bizkaia (Spain) and in Navarra (Spain), where two of the four clubs concerned by the contested decision are established (see recital 42), are also lower when the club subject to tax is a non-profit entity. It is therefore true that the four clubs that were beneficiaries of the disputed scheme were, during the period concerned, subject to a preferential nominal rate of tax compared to the clubs operating in the form of a SLC.

56 However, as stated in paragraphs 53 and 54 above, given the nature of the disputed measure, an examination of the advantage resulting from the preferential tax rate cannot be carried out separately from an examination of the other components of the tax regime for non-profit entities.

57 With regard in particular to tax deduction for the reinvestment of extraordinary profits, Real Madrid Club de Fútbol points out, as mentioned in recital 68 of the contested decision, that the deduction was greater for SLCs than for non-profit entities. Thus, although a maximum of 12% of extraordinary profits reinvested by a SLC could be deducted from the amount of tax due, by way of a tax credit, the limit was 7% for non-profit entities. Those rates were altered on several occasions, only the most recent applicable rates appearing in the contested decision. Real Madrid Club de Fútbol, as an interested party in the administrative procedure, claimed (recitals 26 and 27 of the contested decision) that that deduction could, depending on the circumstances, be very large, which would explain, inter alia, why, for the period from 2000 to 2013, the tax regime for non-profit entities was 'significantly more disadvantageous' than that for SLCs. The interested party relied in that respect on a report drawn up by its tax advisors. In that regard, the Commission's claim, made for the first time at the hearing, that Real Madrid Club de Fútbol in fact benefited from the disputed aid scheme for the majority of the financial years in question is not substantiated and, in any event, was not made in the contested decision.

58 However, the contested decision rules out any possibility of the relative advantage resulting from the higher ceiling on tax deductions applicable to SLCs being offset by the preferential tax rate enjoyed by non-profit entities on the grounds, first, that no evidence was adduced to show that the tax deduction system 'is in principle and in the longer term more advantageous' and, secondly, that the tax credit 'is only granted under certain conditions which do not apply continuously' (recital 68).

59 The Commission, which had the burden of proving that an advantage arose from the tax regime for non-profit entities — the various components of which cannot be analysed in isolation in the present case — was not entitled to conclude that such an advantage existed without establishing that capping tax deductions at a level less beneficial for non-profit entities than for SLCs did not offset the advantage derived from a lower nominal tax rate (see, to that effect, judgments of 25 June 1970, *France* v *Commission*, 47/69, EU:C:1970:60, paragraph 7, and of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 43). In that regard, the Commission was, within the limits of its investigative obligations in the administrative procedure, entitled to request the information which seemed relevant to the assessment to be carried out (judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 71).

60 In the present case, the mere finding that the advantage conferred by the tax deduction was conditional is not sufficient to satisfy the requirements referred to in the preceding paragraph. First, a tax deduction may in itself constitute aid (judgment of 15 July 2004, *Spain* v *Commission*, C-501/00, EU:C:2004:438, paragraph 120). Therefore, a difference in the ceiling on tax deductions can constitute an element of aid, which means that, although it is conditional, it can be taken into account in determining whether there is an advantage deriving from the disputed scheme. Secondly, while the making of investments which justify the grant of the tax deduction is not necessarily an occurrence likely to be repeated 'continuously', the same may be said of making a profit. Suffice it to note, by way of example, that the exemption from the obligation to convert to an SLC permitted under Law 10/1990, which was conditional on achieving a positive financial balance in the financial years preceding the adoption of the law, applied only to four clubs in the whole of the Spanish professional sports sector. What is more, the fact that the possibility of deferring tax deductions was not examined means that no assessment was made of whether the effects of this tax mechanism might be levelled out over time, which could offset the alleged lack of 'continuity' referred to in the contested decision. Therefore, the factors set out in recital 68 of the contested decision cannot rule out the possibility that the fact that there were fewer opportunities for tax deductions under the regime for non-profit entities might offset the advantage derived from the lower nominal tax rate.

61 The contested decision also relies on a study submitted by the Kingdom of Spain during the administrative procedure, data from which are set out in recital 35, and from which it is apparent that, between 2008 and 2011, with the exception of 2010, the effective rate of tax for entities subject to the general tax regime was higher than that for non-profit entities. The Commission concluded, in

recital 70, that, even taking into account the various possibilities with regard to tax deductions, 'the effective taxation from which the four sport clubs benefited [under the disputed scheme] … tends to be lower in comparison to the normal taxation for [SLCs]'. This follows a similar assertion in recital 67 that, on the basis of the figures supplied by the Kingdom of Spain, 'in most years the effective taxation of professional football clubs taxed as non-profit organisations was lower than that of comparable entities under the general tax regime'.

62 As noted by the applicant and the Kingdom of Spain, the figures supplied by the latter do not substantiate the above conclusion since they relate to aggregated data from all sectors and operators, whereas the Commission's assessment in the contested decision relates to the effective tax rate for the four beneficiary clubs in comparison with that for SLCs. Furthermore, those data relate to four financial years, from 2008 to 2011, whereas the period covered by the disputed scheme runs from 1990 to 2015 and the period covered by the recovery order, as permitted under the rules on limitation, starts from the financial year 2000 (recital 93). The Commission was therefore not in a position to state, on the basis of the report supplied by the Kingdom of Spain, that 'in most years the effective taxation of professional football clubs taxed as non-profit organisations was lower than that of comparable entities under the general tax regime' (recital 67). It follows that the Commission erred in its assessment of the facts.

63 It remains to be ascertained whether, despite that error, the Commission was entitled, as it claims, to rely solely on the data supplied by the Kingdom of Spain in concluding that there was an advantage.

64 As was noted in paragraph 46 above, for a tax treatment to be classified as advantageous presupposes that it is likely to place the recipients in a more favourable financial situation than that of other taxpayers. Given the nature and scope of the disputed measure, that presupposes, in the present case, that the tax regime for non-profit entities is likely to place the four beneficiary clubs in a more advantageous position than comparable entities subject to the general tax regime (see, to that effect, judgment of 11 June 2009, *ACEA* v *Commission*, T-297/02, EU:T:2009:189, paragraph 64).

65 Even if the data contained in the report supplied by the Kingdom of Spain and reproduced in recital 35 of the contested decision seem to substantiate the finding of an advantage deriving, in general, from the tax regime for non-profit entities, they must be considered in the light of the facts set out in paragraph 57 above, which were also presented to the Commission during the administrative procedure. It is clear from that information that one of the four beneficiary clubs stated — and was not contradicted by the Commission — that it had found the regime for non-profit entities significantly more disadvantageous than the general regime for the period between July 2000 and June 2013. That period, referred to by the Commission as 'a certain period' (recital 68), in fact covers all the financial years ended but not time-barred at the date that the report was drawn up by the tax advisors of the club in question, as was confirmed by the Commission in response to a written question from the Court. The same club maintained, as did the applicant in its written pleadings, that tax deductions could be very significant in the sector concerned, in particular as a result of the practice of transferring players. In that regard, the Commission's arguments calling into question the lawfulness of the practice of transferring players in the professional football sector, raised for the first time at the hearing, are not substantiated and, in any event, were not put forward in the contested decision.

66 It follows that, at the time the contested decision was adopted, the Commission had at its disposal information highlighting the specific nature of the sector in question as regards the extent of tax deductions, which should have led it to question the feasibility of applying to that sector findings made in respect of all sectors taken as a whole concerning the effective taxation of non-profit entities and that of entities subject to the general regime.

67 In the light of the foregoing, it must be held that the Commission failed to discharge, to the requisite legal standard, the burden of proving that the disputed measure conferred an advantage on its beneficiaries.

68 No argument put forward by the Commission is such as to undermine that conclusion.

69 In the first place, the case-law established by the judgment of 15 December 2005, *Unicredito Italiano* (C-148/04, EU:C:2005:774), according to which the Commission may confine itself to examining the general and abstract characteristics of the scheme in question, without being required to examine each particular case in which it applies, does not exonerate it, in a case such as the present, from examining all the implications, both advantageous and disadvantageous, of the inherent characteristics of the disputed scheme (see paragraph 48 above), bearing in mind that the burden of proving that there is an advantage falls on the Commission. What is more, that case-law must be read in conjunction with the obligation on the Commission to conduct a diligent and impartial examination of the contested measure, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose (see the case-law cited in paragraph 49 above; see also, to that effect, judgment of 28 November 2008, *Hotel Cipriani and Others* v *Commission*, T-254/00, T-270/00 and T-277/00, EU:T:2008:537, paragraph 210). It follows that the case-law cited does not call into question the finding, in the present case, that the Commission erred in its assessment of whether there was an advantage. In any event, reliance on the case-law established by the judgment of 15 December 2005, *Unicredito Italiano* (C-148/04, EU:C:2005:774) is ineffective since the error found does not relate to a failure to examine the situation of each of the beneficiaries but to the failure to take into account the specific nature of the sector to which the disputed measure relates, from the perspective of the extent of the tax deductions. It must be noted in addition that the contested decision does not merely classify the scheme at issue as an aid scheme but also expresses a view, in its grounds (recital 90) and its operative part (Article 1), on the aid individually granted to the four clubs named as beneficiaries, stating that 'it [was], therefore, to be considered as unlawful and incompatible aid'. Consequently, contrary to the Commission's assertion, the contested decision can be regarded as a decision relating both to an aid scheme and to individual aid.

70 In the second place, even if, as the Commission maintains, the applicant did not put forward any arguments itself during the administrative procedure in relation to the tax deductions, the fact remains, as is clear from the foregoing considerations, that the factual argument concerning the extent of the tax deductions in the assessment of the effect of the disputed measure had indeed been raised during that procedure. The Court is therefore at liberty to determine, on the basis of the information available to the Commission at the time the contested decision was adopted, whether the Commission established to the requisite legal standard that there was an advantage, taking into account the differences in the way tax deductions operated between regimes (see, to that effect, order of 12 December 2012, *Adriatica di Navigazione and Comitato 'Venezia vuole vivere'* v *Commission*, T-231/00, not published, EU:T:2012:667, paragraphs 40 and 41).

71 In the third place, at the hearing, the Commission referred to the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811) and in particular paragraphs 24, 45 and 50 thereof, stating that, in its view, the facts in the two cases were very similar and therefore called for the same solution.

72 In paragraph 24 of the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811), the Court of Justice held that 'on account of its specific features, as described at paragraph 18 above, the special tax regime could have resulted in [France Télécom]'s liability to tax being less than it would have been had it been subject to business tax under the general law regime'. In reaching that conclusion, the Court of Justice noted, in particular, that it was undisputed that the regime at issue was capable of resulting, and in fact resulted, in France Télécom's tax liability being lower (paragraph 19), in the context of a plea raised by the applicant in that case criticising the fact that the General Court had found that regime to be advantageous in itself whereas, according to the applicant, it depended on factors extraneous to the regime. The Court of Justice also noted that the regime at issue amounted 'in all circumstances' to an advantage by way of a reduced rate in respect of management costs (paragraph 20), irrespective of the other features of the regime connected with the

calculation of a single weighted average rate of business tax, which, depending on factual circumstances, namely the location of premises or land in the various local authorities and the tax rate applicable in those authorities, could also be to France Télécom's advantage (paragraph 23).

73 It follows from the foregoing that it is necessary to distinguish between the circumstances of the case giving rise to the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811) and those in the present case. First, the parties to the present proceedings do not agree as to the advantage, even a potential advantage, arising from the disputed scheme. Secondly, whereas under the regime that was the subject of the case giving rise to the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811), an advantage 'in all circumstances' was combined with an advantage which depended on variable factors, in the present case there is no agreement even as to whether there is an advantage, as can be seen simply from the sector-specific data referred to in the contested decision, as noted in paragraph 65 above. Consequently, the Commission cannot rely on an alleged similarity between the two cases to conclude that the finding made by the Court of Justice in paragraph 24 of the aforementioned judgment is transposable, as such, to the present case.

74 The same goes for paragraphs 45 and 50 of the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811), from which the Commission concluded, for the purposes of the present case, that, in the absence of any mechanism for offsetting the benefit derived from the lower taxation rate against the burden resulting from reduced tax deductions, the disputed regime necessarily entails the conferral of an advantage. It is apparent from paragraph 50 of that judgment that such a mechanism was needed, according to the Court of Justice, due to a difference in time frames between the burden allegedly borne by France Télécom as a result of over-taxation over a finite period and the advantage derived from the tax regime applicable subsequently, which was intended to be of indefinite duration. The inevitable consequence was that, at a given point, the more beneficial regime, being of indefinite duration, would produce an advantage that went beyond offsetting the burden borne previously over a finite period. It was therefore essential, in the view of the Court of Justice, to have a way of calculating in advance the point at which offsetting was no longer required.

75 By contrast, in the present case, the various components of the disputed scheme apply concurrently and have no temporal limitation. In other words, it cannot be claimed that the relationship between the various elements, both advantageous and disadvantageous, of the tax regime for non-profit entities, as applied to the four beneficiary clubs, will necessarily lead to an advantage being conferred on those clubs, which makes this situation different from the facts underlying paragraph 50 of the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811). It follows, again, that the findings made by the Court of Justice in paragraph 50 of its judgment cannot, contrary to what the Commission claims, be transposed to the present case.

76 The second plea must therefore be upheld, without there being any need to examine the other arguments put forward by the applicant, namely, first, that the Spanish tax system aims overall to neutralise the differences in tax rates between public limited companies and non-profit entities and, secondly, that a comparative analysis of the cumulative effects of the tax rates and deductions applicable would show that the regime at issue had an adverse effect on the applicant's individual situation, compared with the regime applicable to SLCs. Similarly, it is unnecessary to examine the third, fourth and fifth pleas raised by the applicant.

Costs

77 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

78 Article 138(1) of those rules provides that Member States and institutions which have intervened in the proceedings are to bear their own costs. Therefore, the Kingdom of Spain is to bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls Commission Decision (EU) 2016/2391 of 4 July 2016 on the State aid SA.29769 (2013/C) (ex 2013/NN) implemented by Spain for certain football clubs;**

2. **Orders the European Commission to bear its own costs as well as those incurred by Fútbol Club Barcelona;**

3. **Orders the Kingdom of Spain to bear its own costs.**

Kanninen Schwarcz Iliopoulos

Delivered in open court in Luxembourg on 26 February 2019.

[Signatures]