Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 24 October 2019[1]

Case C-244/18 P

Larko Geniki Metalleftiki kai Metallourgiki AE
v

European Commission

(Appeal – Measures of support taken by the Greek authorities in favour of the applicant in the context of a programme for the privatisation of the undertaking – State guarantees – Commission decision declaring that the measures constitute State aid incompatible with the internal market – Concept of 'economic advantage' for the purposes of Article 107(1) TFEU – Firm in difficulty – Guidelines on rescue and restructuring – Recovery of State aid – Quantification of the amount of aid to be recovered – Exceptional circumstances)

I. Introduction

1. By this appeal, Larko Geniki Metalleftiki kai Metallourgiki AE ('Larko' or 'the applicant') asks the Court of Justice to set aside the judgment of the General Court of the European Union of 1 February 2018, *Larko v Commission*[2] ('the judgment under appeal'), by which that court dismissed Larko's action for the annulment of Commission Decision 2014/539/EU of 27 March 2014 on the State aid SA.34572 (13/C) (ex 13/NN) implemented by Greece for Larco General Mining & Metallurgical Company SA[3] ('the decision at issue').

2. As requested by the Court of Justice, this Opinion will be limited to an analysis of (1) the first part of the second ground of appeal, alleging, primarily, that the General Court misinterpreted the concept of economic advantage for the purposes of Article 107(1) TFEU, and (2) the fourth ground of appeal, alleging, primarily, infringement of Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 [TFEU],[4] concerning recovery of aid.

3. At the end of my analysis, I will propose that the Court should reject the first part of the second ground of appeal, and the fourth ground of appeal, as unfounded.

1 Original language: French.
2 T-423/14, EU:T:2018:57.
3 OJ 2014 L 254, p. 24.
4 OJ 1999 L 83, p. 1.

II. Legal background

A. Regulation (EC) No 659/1999

4. Article 14(1) of Council Regulation No 659/1999, entitled 'Recovery of aid', states:

'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary …'

B. The guidelines on rescue and restructuring of firms in difficulty

5. Section 2.1, entitled 'Meaning of "a firm in difficulty"', of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ('the guidelines on rescuing and restructuring'),[5] provides, in points 9 to 11:

'9. There is no Community definition of what constitutes "a firm in difficulty". However, for the purposes of these Guidelines, the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.

10. In particular, a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of these Guidelines in the following circumstances:

…

11. Even when none of the circumstances set out in point 10 are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.'

C. The Guarantee Notice

6. The Commission Notice of 20 June 2008 on the application of Articles [107] and [108 TFEU] to State aid in the form of guarantees ('the Guarantee Notice')[6] states in point 2.1, which relates to Article 107 TFEU and is headed 'General remarks', in the third paragraph:

'In order to avoid any doubts, the notion of State resources should thus be clarified as regards State guarantees. The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if it turns out that no payments are ever made by the State under a guarantee, there may nevertheless be State aid under Article 87(1) of the Treaty. The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment when the guarantee is given.'

5 OJ 2004 C 244, p. 2.

6 OJ 2008 C 155, p. 10.

7. Point 3.2 of that notice, headed ‘Individual guarantees’, provides:

‘Regarding an individual State guarantee, the Commission considers that the fulfilment of all the following conditions will be sufficient to rule out the presence of State aid.

(a) the borrower is not in financial difficulty.

In order to decide whether the borrower is to be seen as being in financial difficulty, reference should be made to the definition set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty …

…

(d) A market-oriented price is paid for the guarantee.

As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium on the guaranteed or counter-guaranteed amount. When the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets, the guarantee does not contain aid.

If no corresponding guarantee premium benchmark can be found on the financial markets, the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, has to be compared to the market price of a similar non-guaranteed loan.

…’

8. Point 4.1 of the notice, which concerns general matters relating to guarantees with an aid element, states:

‘Where an individual guarantee or a guarantee scheme does not comply with the market economy investor principle, it is deemed to entail State aid. The State aid element therefore needs to be quantified in order to check whether the aid may be found compatible under a specific State aid exemption. As a matter of principle, the State aid element will be deemed to be the difference between the appropriate market price of the guarantee provided individually or through a scheme and the actual price paid for that measure.

The resulting yearly cash grant equivalents should be discounted to their present value using the reference rate, then added up to obtain the total grant equivalent.

When calculating the aid element in a guarantee, the Commission will devote special attention to the following elements:

(a) whether in the case of individual guarantees the borrower is in financial difficulty. Whether in the case of guarantee schemes, the eligibility criteria of the scheme provide for exclusion of such undertakings (see details in point 3.2(a)).

The Commission notes that for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted, charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee;

…’

III. Background to the dispute, the action before the General Court and the judgment under appeal

A. Background to the dispute

9. For the detailed background to the dispute I refer to the description given in the judgment under appeal.[7] The facts essential to and necessary for an understanding of this Opinion may be summarised as follows.

10. Larko is a company specialising in the extraction and processing of laterite ore, the extraction of lignite and the production of ferronickel and its by-products.

11. It was established in 1989 as a new corporate entity, following the liquidation of Hellenic Mining and Metallurgical SA. At the time of the relevant facts, it had three shareholders: the Greek State, which held 55.2% of its shares through the intermediary of Hellenic Republic Asset Development Fund, the National Bank of Greece SA, a private financial institution, which held 33.4% of its shares, and Public Power Corporation (the main electricity producer in Greece, of which the State is the majority shareholder), which held 11.4% of its shares.

12. In March 2012, Hellenic Republic Asset Development Fund informed the Commission about a programme for the privatisation of Larko.

13. In April 2012, the Commission initiated an *ex officio* preliminary investigation into that privatisation, in accordance with the rules on State aid.

14. The investigation concerned six measures, of which only the second, fourth and sixth, set out below, are relevant to this Opinion because only those three measures are relevant to the first part of the second ground of appeal and the fourth ground of appeal. They were as follows:

– the second measure concerned a guarantee for a loan of EUR 30 million made by ATE Bank to Larko; the guarantee was provided by the Greek State in 2008 ('measure No 2' or 'the 2008 guarantee'), covered 100% of the loan for up to three years and stipulated a guarantee premium of 1% per annum;

– the fourth measure concerned a guarantee of indefinite duration provided by the State in 2010 to fully cover a letter of guarantee that the National Bank of Greece was to provide to Larko for the sum of approximately EUR 10.8 million; a guarantee premium of 2% per annum was stipulated ('measure No 4').

– the sixth measure concerned two guarantees provided by the State in 2011 for two loans of EUR 30 million and EUR 20 million respectively granted by ATE Bank; the guarantees covered 100% of the loans and stipulated a premium of 1% per annum ('measure No 6').

15. In the course of that investigation, the Commission requested additional information from the Greek authorities, which they provided in 2012 and 2013. Meetings were also held between Commission staff and representatives of the Greek authorities.

16. By decision of 6 March 2013[8] ('the opening decision'), the Commission initiated the formal investigation procedure provided for in Article 108(2) TFEU.

7 See paragraphs 1 to 14 of the judgment under appeal.

8 OJ 2013 C 136, p. 27 concerning State aid SA.34572 (13/C) (ex 13/NN).

17. In the course of that procedure, the Commission invited the Greek authorities and interested third parties to submit their comments on the measures referred to in point 14 above. The Commission received comments from the Greek authorities on 30 April 2013. It received no comments from Larko.

18. On 27 March 2014, the Commission adopted the contested decision. In that decision, as regards measures Nos 2, 4 and 6, which are the only ones requiring analysis in this Opinion, the Commission concluded that, at the time when those three measures were granted, Larko was a firm in difficulty within the meaning of the rescue and restructuring guidelines. [9]

19. The Commission also concluded that those measures constituted State aid within the meaning of Article 107(1) TFEU, that they had been granted in breach of the notification and standstill obligations laid down in Article 108(3) TFEU, and that they constituted aid incompatible with the internal market which was required to be recovered in accordance with Article 14(1) of Regulation No 659/1999. Finally, the Commission fixed the amounts to be recovered in respect of that aid as being the entire sum covered by the guarantees. [10]

B. The action before the General Court

20. By application lodged at the Court Registry on 6 June 2014, Larko brought an action seeking annulment of the decision at issue and repayment, together with interest, of any sum recovered from it, directly or indirectly, pursuant to that decision.

21. By the judgment under appeal, the General Court dismissed the action in its entirety and ordered Larko to pay the costs.

C. Procedure before the Court of Justice and forms of order sought

22. By application lodged at the Court Registry on 4 April 2018, Larko asks the Court of Justice to set aside the judgment under appeal, refer the case back to the General Court and reserve the costs.

23. The Commission contends that the Court should dismiss the appeal and order Larko to pay the costs.

IV. Analysis

A. The first part of the second ground of appeal, concerning measure No 2

24. The issue raised by the first part of the second ground of appeal relates to the classification of measure No 2 as State aid within the meaning of Article 107(1) TFEU, and more specifically to the finding that that measure conferred an ‘economic advantage’ on Larko.

25. In the decision at issue, the Commission had classified that measure as State aid on the basis of point 3.2(a) and (d) of the Guarantee Notice. Given that Larko argues, in essence, that the Commission erred in law in applying that point to the aid granted, it may be helpful to begin with some preliminary remarks on that notice (section 1 below), before moving on to an analysis of the first part of the second ground of appeal (section 2).

9 For the meaning of ‘a firm in difficulty’ in relation to the classification of a measure as State aid, see points 26 to 28 of this Opinion.

10 That sum is made up of EUR 30 million in relation to measure No 2, approximately EUR 10.8 million in relation to measure No 4, and EUR 30 million plus EUR 20 million in relation to measure No 6. See point 14 of this Opinion.

1. Preliminary remarks on the Guarantee Notice

26. The Guarantee Notice set out the Commission's approach to State aid in the form of guarantees and the principles on which the Commission intended to base its interpretation of Articles 107 and 108 TFEU and their application to State guarantees.

27. In order to determine whether a guarantee confers an advantage for the purposes of Article 107(1) TFEU, the Commission should, according to point 3.1 of that notice, base its assessment on the principle of an investor operating in a market economy. Account should therefore be taken of the actual possibilities for a beneficiary undertaking to obtain equivalent financial resources by having recourse to the capital market. [11]

28. To facilitate the assessment of whether that principle is fulfilled for a given guarantee measure, the Commission requires, by point 3.2 of that notice, the fulfilment of a number of conditions in order to rule out the presence of State aid. In relation to individual guarantees, these include a condition that the borrower is not in financial difficulty (point 3.2(a)), and a condition that a market-oriented price is paid for the guarantee (point 3.2(d)). [12]

29. In accordance with the case-law of the Court of Justice, for the purposes of applying those two conditions, it is necessary to place oneself *in the context of the period during which the financial support measures were taken*, and thus to refrain from any assessment based on a later situation ('the temporal criterion'). [13]

30. In order to rule out the presence of aid in the guarantee, the first subparagraph of point 3.2(d) of the Guarantee Notice lays down a requirement that risk-carrying *should be remunerated by an appropriate premium on the guaranteed or counter-guaranteed amount* ('the remuneration criterion'). When the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets, the guarantee does not contain aid. Moreover, point 3.2 sets out two methods for determining whether a given guarantee meets that criterion: either the price paid for the guarantee should be compared with the guarantee premium benchmark found on the financial markets, or the total financial cost of the guaranteed loan, including the interest rate and the guarantee premium, should be compared with the market price of a similar non-guaranteed loan.

2. Analysis

31. Larko submits that the General Court erred in holding that measure No 2 conferred an advantage on Larko for the purposes of Article 107(1) TFEU. It argues that the Court erred in applying, first, the temporal criterion by classifying Larko as a 'firm in difficulty' when measure No 2 was granted (Section a below), and, second, when applying the remuneration criterion in holding that the 1% premium did not reflect the risk of default for the guaranteed loans, as required by point 3.2(d) of the Guarantee Notice (Section b below).

(a) The temporal criterion

32. The complaint relating to the temporal criterion is directed against paragraphs 77 to 80 of the judgment under appeal and alleges infringement of Article 107(1) TFEU.

11 See the second paragraph of point 3.1 of the Guarantee Notice.

12 See the third paragraph of point 3.1 of the Guarantee Notice.

13 See, in particular, judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 71), and of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission* (C-357/14 P, EU:C:2015:642, paragraph 50).

33. As a preliminary matter, I note that the General Court arrived at the conclusion, set out in paragraph 90 of the judgment under appeal, that the Commission had not erred in law when it classified Larko as a firm in difficulty when measure No 2 was granted, in two steps. First of all, in paragraphs 75 to 82 of the judgment under appeal, the General Court stated that, on the basis of the information available to the Commission, it had been entitled to conclude that Larko was a firm in difficulty. In paragraphs 83 to 89 of the judgment under appeal, it went on to hold that the Commission had not erred in law in concluding that, at the time of provision of the 2008 guarantee, the Greek State, as a shareholder of Larko, ought to have been aware that it was in difficulty.

34. Larko contends that the assessment made by the General Court in paragraphs 77 to 80 of the judgment under appeal is incorrect because it is based on matters of fact *post-dating* the guarantee of 22 December 2008, contrary to the requirements of the case-law of the Court of Justice.[14] In that regard, Larko puts forward the following three arguments:

35. First, the financial results referred to in those paragraphs cover the period up to 2012, and, in any event, the negative results of 2009. Secondly, the financial results for 2008 also post-date the 2008 guarantee, as the accounting year had not yet ended, and the accounts had not even been drawn up – and thus had not been brought to the attention of the Greek State – when that guarantee was provided. Accordingly, Larko submits, the General Court failed to place itself in the temporal context, as required by the case-law of the Court of Justice. Thirdly, and in any event, even if the 2008 figures were not subsequent to the grant of the guarantee in 2008, they were, at that stage, short-term figures. In that respect, Larko argues that it follows from points 9 to 11 of the rescue and restructuring guidelines that the analysis of the firm's assets and liabilities is required to be based on information relating to a sufficient period of time, and on a snapshot.

36. The Commission contends that that line of argument should be rejected.

37. I note at the outset that, since the guarantee in question was provided on 22 December 2008, it is appropriate, in accordance with the case-law of the Court of Justice, to have regard to matters arising before that date in determining whether Larko was a firm in difficulty when the guarantee was provided.

38. In that respect, with regard to Larko's first argument, I observe that the fact that the General Court refers, in paragraph 77 of the judgment under appeal, to the financial results up to the year 2012, does not in itself mean that its assessment as to Larko's financial position at the point in time when the 2008 guarantee was provided was based on those subsequent financial results.

39. The General Court's reference to those financial results has to be read in the light of the fact that, in the decision at issue, the Commission had carried out an assessment of Larko's financial position in the period during which *all* the contested measures were taken, or in other words of its financial position in the years 2007 to 2012. Thus, before summarising those financial results in paragraph 77 of the judgment under appeal, the Court referred to the Commission's decision, stating that 'in the present case, in recitals 56 to 66 of the contested decision, the Commission concluded that Larko was a "firm in difficulty" at the time the contested measures [Nos 2, 4 and 6], *including the 2008 guarantee*, were granted'.[15]

14 As to that case-law, see point 29 of this Opinion, as well as footnote 13.

15 My emphasis.

40. However, I note that for the purposes of the assessment of Larko's financial position in paragraphs 78 to 80 of the judgment under appeal, the General Court proceeded on the basis of facts relating to 2008, namely the negative equity position in which Larko found itself, the significant decrease in turnover, and the significant losses it accumulated in 2008. [16]

41. Larko's first argument should therefore be rejected.

42. As to Larko's second argument, it seems to me that this has two aspects: first, the contention that the financial results for 2008 post-dated the 2008 guarantee, which was provided before the end of the accounting year, and, second, the contention that the Greek State was not aware of the information contained in the financial results for 2008.

43. As regards the first aspect, it should be noted that, as the Commission has pointed out, the 2008 financial statements present Larko's financial data for the period from 1 January 2008 to 31 December 2008, and most of that data thus pre-dates the provision of the guarantee on 22 December 2008. In that regard, I emphasise that matters of fact arising during a given period can, in general, also be proved by subsequent documents based on those earlier matters. [17] For that reason, the information contained in the financial results for 2008 cannot be regarded as post-dating the 2008 guarantee.

44. As regards the second contention, the General Court observed, in paragraph 85 of the judgment under appeal, that 'none of the evidence placed on the case file shows with certainty that the Member State was aware of Larko's difficulties at the time when it provided the 2008 guarantee', and that 'the question therefore arises whether the Commission has discharged its burden of proof by relying, in essence, on the presumption that the Greek State ought to have been aware of Larko's difficulties at the end of 2008, when it provided that guarantee'.

45. While the wording of that paragraph might give the impression that the Commission had mainly relied on a failure, on the part of the Greek authorities, to inform themselves about Larko's financial position, it is clear, in my view, that what the General Court meant was that the Commission had relied on the presumption that, *at the very least*, the Greek State ought to have been aware of Larko's difficulties when the guarantee was provided.

46. That paragraph can only be read in that way given that in paragraph 89 of the judgment under appeal, the General Court concluded that it was reasonable for the Commission to take the view that a prudent shareholder would at least have informed itself about the company's current economic and financial situation before providing it with a guarantee such as the 2008 guarantee. [18]

47. That said, I would note that, in so far as Larko, by the second part of its second argument, calls into question the Greek authorities' knowledge of Larko's financial position in 2008, which relates to the facts of the dispute, the General Court has jurisdiction only to make findings and assessment of fact in proceeding on the basis of subsequent facts, is the issue of the Greek authorities' knowledge of its financial position in 2008, which relates to the facts of the dispute. [19]

16 It is apparent from paragraph 56 of the decision at issue and paragraph 77 of the judgment under appeal that those matters relate to the year 2008.

17 See also, to this effect, the judgment of the General Court of 28 January 2016, *Slovenia* v *Commission* (T-507/12, not published, EU:T:2016:35, paragraph 180).

18 It is also clear from the submissions made by the Commission before the General Court that that is the correct reading. It is apparent from those submissions that the Commission's main argument was that the Greek authorities had never claimed that they were unaware of the difficulties that Larko was facing in December 2008. It was only in the alternative that the Commission submitted that, even if the Greek State had, at the time, been unaware of Larko's financial difficulties (which was not the case, according to the Commission), it should have verified that it was not a firm in difficulty.

19 I observe that, in so far as it challenges paragraphs 77 to 80 of the judgment under appeal, Larko's argument concerning the Greek authorities' knowledge of its position cannot be taken to relate to the General Court's assessment, in paragraphs 83 to 89 of the judgment under appeal, of whether the Commission had discharged the burden of proof.

48. The Court of Justice nevertheless has jurisdiction to determine whether the General Court distorted the scope of a contested decision. It is important to note that such a distortion must be obvious from the documents in the case without it being necessary to undertake a fresh assessment of the facts and evidence. [20]

49. In the present case, while the question of whether (or not) the Greek authorities were aware of Larko's financial situation in 2008 is one of fact, falling within the sole jurisdiction of the General Court, it is nevertheless open to the Court of Justice to review whether the General Court distorted the scope of the decision at issue on that point.

50. While that issue could be raised given that, at first sight, there is nothing in the decision at issue to indicate that the Commission's reasoning on that point was the same as that of the General Court, [21] I note that Larko has not argued any such distortion and, in any event, I do not consider that the General Court did distort the content of the decision at issue in the judgment under appeal.

51. It is common ground that, in the administrative procedure, the Greek State did not dispute that the Greek authorities had been aware of Larko's financial position in 2008; [22] that was noted by the General Court in paragraph 88 of the judgment under appeal, [23] and in all probability explains why the Commission did not address the matter in the decision at issue. [24]

52. Thus, it was in the light of those considerations that the General Court held, in essence, that in the circumstances of the present case, for the purposes of determining whether Larko was in financial difficulty within the meaning of point 3.2(a) of the Guarantee Notice, the Commission was entitled to proceed on the basis that the Greek State, as the majority shareholder of Larko, was aware of its financial position, or at least ought to have been aware of it, when the 2008 guarantee was provided.

53. The assessment thus made by the General Court seems to me to be entirely logical. Indeed, as stated, in essence, by the General Court in paragraphs 86 to 89 of the judgment under appeal, a prudent private investor [25] providing a guarantee such as that at issue would self-evidently have enquired about Larko's financial position when doing so. Accordingly, in order to be acting as a prudent private investor, the Greek authorities would in any event have had to inform themselves as to Larko's financial position. On this point, I note that, according to settled case-law of the Court of Justice, it is for the Member State itself to establish that it acted as a prudent private investor. [26]

54. In the light of the foregoing, Larko's second argument must be rejected.

20 See, in particular, judgments of 21 December 2011, *Iride* v *Commission* (C-329/09 P, not published, EU:C:2011:859, paragraph 36 and the case-law cited), and of 19 September 2019, *Poland* v *Commission* (C-358/18 P, not published, EU:C:2019:763, paragraphs 44 and 45).

21 See point 44 of this Opinion.

22 In the course of the administrative procedure, the Commission, taking the view that Larko had been a firm in difficulty on 22 December 2008 and that the private investor test could be applicable to the measure in question, asked the Greek authorities to provide it with all the necessary information to verify whether that was in fact the case (see sections 5.1, 5.2.2 and 6 of the opening decision). Subsequently, the Greek authorities sent comments on 30 April 2013 (see point 17 of this Opinion and point 6 of the opening decision), from which it is apparent that they did not accept that Larko had been a firm in difficulty in the years 2008 and 2009, arguing that its difficulties had been caused by an unexpected fall in the price of ferronickel (see paragraph 24 of the decision at issue). Thus, while the Greek authorities disputed the classification of Larko as a 'firm in difficulty', they did not raise any dispute as regards knowledge of the financial position of the undertaking in itself, or as regards Larko's financial results for 2008 as set out in the opening decision.

23 It follows from that, in essence, that the Greek authorities did not demonstrate, in the course of the administrative procedure, that they could not have been aware of the financial difficulties faced by the applicant.

24 In that regard, I reiterate that Larko did not submit comments at the administrative stage, and it therefore appears that the issue of the Greek authorities' knowledge of Larko's financial position in 2008 was raised for the first time before the General Court.

25 I note that, as is apparent from paragraph 56 of the judgment under appeal, the private investor test is based on economic evaluations comparable to those which, in the circumstances, *a rational and prudent private investor* in a situation as close as possible to that of the Member State would have had carried out, before making the investment (see, in particular, judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 71), and of 5 June 2012, *Commission* v *EDF* (C-124/10 P, EU:C:2012:318, paragraphs 82 to 84)).

26 See, in particular, judgment of 5 June 2012, *Commission* v *EDF* (C-124/10 P, EU:C:2012:318, paragraphs 82 to 84).

55. Larko's third argument, to the effect that the 2008 figures related to the short term, must likewise be rejected. It is common ground that the deterioration in Larko's financial position began to manifest itself in mid-2008,[27] and there is nothing to indicate that the General Court based its assessment on a snapshot, as Larko submits.

56. It follows that the line of argument concerning the temporal criterion which attaches to the concept of 'a firm in difficulty' must be rejected.

(b) The remuneration criterion

57. The line of argument relating to the remuneration criterion is directed against paragraphs 94 to 98 of the judgment under appeal, and alleges infringement of Article 107(1) TFEU and Article 296(2) TFEU.

58. In those paragraphs, the General Court held that the Commission had been entitled to conclude that the annual guarantee premium of 1% could not be regarded as reflecting the risk of default for the guaranteed loans, and accordingly that the condition in point 3.2(d) of the Guarantee Notice was not met.

59. Larko argues that the General Court misapplied that condition in that it had itself found, in paragraph 95 of the judgment under appeal, that the Commission had not used either of the two methods contemplated by the condition, those being comparison with the guarantee premium benchmark found on the financial markets, and comparison of the total financial cost of the guaranteed loan with the market price of a similar unsecured loan.

60. Consequently, it submits that, when the General Court nevertheless held that the decision at issue was not vitiated by a manifest error of assessment, because of Larko's difficult economic and financial situation and the lack of evidence submitted in the course of the administrative procedure, it was both disregarding point 3.2(d) of the Guarantee Notice, and imposing on Larko and the Greek State the burden of proving that the premium was an adequate sum, thus releasing the Commission from its obligation to examine for itself whether that was so. Larko argues, furthermore, that the General Court infringed Article 296(2) TFEU in that it did not annul the decision at issue even though that decision did not state the reasons on which it was based.

61. The Commission contends that that line of argument should be rejected. For the reasons which follow, I take the same view.

62. First, as the Commission rightly observes, the General Court did not depart from point 3.2(d) of the Guarantee Notice and did not impose the burden of proof on Larko in that respect. The only requirement of point 3.2(d) is that a market-oriented price is paid for the guarantee. As set out in paragraphs 96 to 98 of the judgment under appeal, in view of Larko's financial difficulties and of the fact that neither the applicant nor the Greek authorities adduced evidence, during the formal investigation procedure, capable of showing that the premium in question corresponded to a premium that could be found on the financial markets or to the market price of a similar non-guaranteed loan, it was not necessary for the Commission to apply one of the two methods for establishing the precise amount of such a premium in order to determine whether the guarantee met that requirement.

27 See, to that effect, paragraph 77 of the judgment under appeal.

63. Secondly, as regards Article 296(2) TFEU, it must be borne in mind that the purpose of the obligation to state the reasons on which an act adversely affecting an individual is based is, first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the Courts of the European Union and, second, to enable those Courts to review the legality of that act.[28] In that regard, the obligation to state reasons must be distinguished from the issue of whether the reasons are correct.[29]

64. In the present case, as the Commission submits, the decision at issue was fully reasoned. Moreover, I note that, when it sought the annulment of that decision, it was entirely open to Larko to challenge the validity of the reasons on which the Commission had based the contested decision. The General Court therefore did not fail to comply with its obligation under Article 296(2) TFEU.

65. It follows from the foregoing that the complaint relating to the remuneration criterion, and thus the first part of the second ground of appeal, relating to measure No 2, must be rejected as unfounded.

B. The fourth ground of appeal, relating to measures 2, 4 and 6

66. The fourth ground is directed against paragraphs 180 to 195 of the judgment under appeal and concerns the quantification of the State aid granted under measures 2, 4 and 6; it relates more specifically to the General Court's conclusion that the Commission had been entitled, pursuant to point 4.1 of the Guarantee Notice, to find that the amount of that State aid was the full amount of the guaranteed loans.

67. As a preliminary remark, I note that, with regard to the quantification of aid, the first paragraph of point 4.1 states that 'as a matter of principle, the State aid element will be deemed to be the difference between the appropriate market price of the guarantee provided individually or through a scheme and the actual price paid for that measure'.

68. It is apparent from part (a) of the third paragraph of point 4.1 that, for the purposes of calculating the aid element in a guarantee, the Commission will devote special attention to whether the borrower is in financial difficulty. In this regard, where a company is in difficulty, a market guarantor, if any, would, at the time the guarantee is granted, charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, that market rate may not exist and in *exceptional circumstances*, the aid element of the guarantee may turn out to be as high as the amount actually covered by that guarantee.[30]

69. Larko submits, in essence, that, in holding that the amount of aid to be recovered had been quantified, in the decision at issue, in a manner compliant with Article 14(1) of Regulation No 659/1999 and part (a) of the third paragraph of point 4.1 of the Guarantee Notice, the General Court infringed Article 14(1) of that regulation, as well as Article 108(2) TFEU and Article 296(2) TFEU.

28 See, in particular, judgments of 15 November 2012, *Council* v *Bamba* (C-417/11 P, EU:C:2012:718, paragraph 49), and of 18 February 2016, *Council* v *Bank Mellat* (C-176/13 P, EU:C:2016:96, paragraph 74).

29 See, in particular, judgments of 22 March 2001, *France* v *Commission* (C-17/99, EU:C:2001:178, paragraph 35); of 18 June 2015, *Ipatau* v *Council* (C-535/14 P, EU:C:2015:407, paragraph 37); and of 30 April 2019, *Italy* v *Council* (Fishing quota for the Mediterranean swordfish) (C-611/17, EU:C:2019:332, paragraph 48).

30 Similarly, I note that the Court of Justice has held that where, owing to an undertaking's precarious financial circumstances, no credit institution would agree to lend to it without a State guarantee, *the entire amount* of the secured loan which it obtains must be regarded as aid (see judgment of 5 October 2000, *Germany* v *Commission* (C-288/96, EU:C:2000:537, paragraph 31)).

70. In support of that ground of appeal, Larko puts forward several arguments which seem to me to be lacking in structure and clarity. As I understand them, those arguments essentially relate to two matters: first, the determination of whether there were 'exceptional circumstances' within the meaning of point 4.1 of the Guarantee Notice, and, second, the conclusion that the aid element of the guarantees was the entire amount guaranteed, despite the fact that the Greek State had not had to make any payment under the guarantees.

71. As regards the first of those matters, Larko argues that the General Court made several errors of law in holding, in paragraph 193 of the judgment under appeal, that the Commission was dealing with 'exceptional circumstances' within the meaning of point 4.1 of the Guarantee Notice. [31]

72. Larko submits, first, that the General Court substituted its own reasoning for that of the decision at issue, which had been non-existent or, at the very least, insufficient – a failing which was noted by the General Court in paragraph 189 as well as in paragraphs 192 and 194 of the judgment under appeal,. It submits that the General Court's reasoning on that point is also contradictory and insufficient, and that the Court infringed Article 296(2) TFEU in declining to annul the decision at issue despite it being incorrect in law and inadequately reasoned. [32]

73. Second, it is argued that the General Court imposed the burden of proof as to whether there were 'exceptional circumstances' on Larko, when a finding that such circumstances existed ought to be supported by a full and specific statement of reasons from the Commission, which has the burden of proof, and cannot be based on the Commission's 'doubts' as to whether the beneficiary of the aid would, in the absence of the guarantees, have been able to obtain finance on the market. Larko accordingly submits that in holding, in paragraphs 186 to 188 of the judgment under appeal, that the reasons given by the Commission and referred to above were sufficient, the General Court erred in law with regard to the requisite standard of proof. [33]

74. As regards the admissibility of those arguments, I do not think that, contrary to the Commission's argument, in essence, they should be rejected as inadmissible. In my view, they do not relate to findings of fact, [34] but to questions of law, on which the Court of Justice has jurisdiction to rule.

75. However, in my opinion, those arguments should be rejected as unfounded, as the Commission also submits.

76. In my view, the General Court did not add to or substitute elements not appearing in the decision at issue itself in paragraph 193 of the judgment under appeal. [35] In that paragraph, the General Court rightly read the decision at issue as a whole, holding in essence that despite the imperfect formulation of some of that decision's recitals, it was apparent from the decision as a whole, and particularly

31 Thus, what Larko is challenging is not point 4.1 of the Guarantee Notice itself, but the way point 4.1 was applied to the facts of the case.

32 As I understand those arguments, Larko is effectively raising the issues of infringement by the Commission and the General Court of the obligation to state reasons – an essential *procedural requirement* – and of the *correctness* of the reasons given by the General Court and the Commission (as to that distinction, see point 63 of this Opinion). I would point out that, while the obligation to state the reasons for an act is laid down in Article 296(2) TFEU, the obligation to state reasons for judgments is laid down in Article 36 of the Statute of the Court of Justice of the European Union, which applies to the General Court by virtue of Article 53 of that statute.

33 I understand that argument regarding the standard of proof as relating, in essence, to the contention that the General Court imposed on Larko the burden of proof as to whether there were 'exceptional circumstances'.

34 More specifically, according to the Commission, the General Court held in paragraphs 192 to 194 of the judgment under appeal that the decision at issue had demonstrated that, at the time when the contested measures were granted, Larko had been in an '*extremely precarious position*' because of the steady decrease in its turnover and the existence of negative equity, which gave the impression that all of the company's capital would be lost. The company's extremely precarious position resulted in it being 'impossible for Larko to repay the entirety of the loan from its own resources'. The Commission submits that in challenging those conclusions, the applicant is disputing the Court's findings of fact.

35 It must be borne in mind that, in the context of an action for annulment brought under Article 263 TFEU, the Courts of the Union must confine themselves to checking the legality of the contested act. Consequently, it is not for the General Court to make up for the possible lack of a statement of reasons or to complete the Commission's statement of reasons by adding to it or substituting it with elements that do not come from the decision itself (see also judgments of the General Court of 7 June 2006, *UFEX and Others* v *Commission* (T-613/97, EU:T:2006:150, paragraph 70), and of 22 October 2008, *TV2/Danmark and Others* v *Commission*, T-309/04, T-317/04, T-329/04 and T-336/04, EU:T:2008:457, paragraph 182).

recitals 56 to 66, that Larko had been in an extremely precarious position when the measures at issue had been taken. In those circumstances, it could not be said that the Commission erred in concluding that there were 'exceptional circumstances', as a result of which Larko was unable to repay the entirety of the loan from its own resources.

77. In that regard, and as also stated, in essence, in paragraph 191 of the judgment under appeal, I would point out that the corollary of the existence of exceptional circumstances within the meaning of point 4.1 of the Guarantee Notice is precisely that the borrower is unable to repay the guaranteed loan out of its own resources.

78. As to the Commission's alleged 'doubts' concerning Larko's ability to obtain financing on the market in the absence of guarantees, the General Court rightly rejected the argument put forward by the applicant in that regard and held in paragraphs 187 and 188 of the judgment under appeal that, reading the decision at issue as a whole, it was sufficiently clear that the Commission regarded it as unlikely, at the very least, that Larko would have been able to obtain a loan on the market without the intervention of the Greek State.

79. As the Commission submitted before the General Court, and now before the Court of Justice, it is apparent, reading the contested decision as a whole, that that was its position. As regards measure No 2, the sentence immediately following the one containing the word 'doubtful' states that 'in other words,' the Commission considers that Larko received an advantage equal to the amount of the guaranteed loan, because without the State guarantee it would not have been able to receive any other guarantee from the market. With regard to measure No 6, the sentence containing the word 'doubtful' refers to the same reasoning adopted for measure No 2.

80. Furthermore, as the General Court stated in paragraph 193 of the judgment under appeal, it should be pointed out that the Commission's finding that there were exceptional circumstances had not been contradicted in any way by the Greek authorities or the applicant during the administrative procedure.

81. For the reasons set out above, it is clear in my view that the General Court neither substituted its own reasoning for that of the Commission, nor imposed the burden of proof on the applicant as to whether there were 'exceptional circumstances'. Furthermore, the General Court's reasoning on that point is not contradictory. The fact that it refers to certain aspects of the Commission's reasoning being imperfectly or succinctly formulated does not contradict its conclusion that, notwithstanding its formulation, that reasoning was not vitiated by errors of law.

82. As regards Article 296(2) TFEU, it must be held that the contested decision was fully reasoned.[36] As regards the reasons given by the General Court in the judgment under appeal, that judgment must also be held to have been fully reasoned. That, moreover, is clear from the numerous arguments put forward by Larko in relation to the correctness of the General Court's reasoning. On that point, the fact that the General Court arrived at a conclusion differing from that of the applicant as regards the merits cannot, in itself, vitiate the judgment under appeal for failure to state reasons.[37]

83. As regards the second matter, Larko puts forward, in essence, three arguments in relation to the judgment under appeal.[38]

36 See, as regards the scope of Article 296(2) TFEU, point 63 of this Opinion.

37 See, in particular, judgment of 20 May 2010, *Gogos* v *Commission* (C-583/08 P, EU:C:2010:287, paragraphs 35 and 36).

38 I note that Larko also puts forward various arguments against the decision at issue, though it does so without indicating the extent to which the judgment under appeal is vitiated by an error of law, which prevents the Court of Justice from exercising its power of judicial review.

84. First, it submits that although it was clear when the contested decision was adopted that there had been no calls on the guarantees, the General Court endorsed the approach of the Commission, which, without contacting the Greek authorities, had simply observed that it did not have any evidence to indicate that the guarantees had been called on.[39] The General Court thus disregarded the Commission's obligation to conduct a diligent and impartial examination of the case under Article 108(2) TFEU.

85. I do not share the Commission's view that that argument is inadmissible. It is true that it relates to findings of fact, which the General Court has sole jurisdiction to make.[40] Nevertheless, the question of whether the General Court should have had regard to that information is one of law.

86. I do, however, agree with the Commission that the argument should be rejected as unfounded.

87. The questions of whether (or not) the guarantees were called on, and whether (or not) the loans were repaid, relate to events post-dating the measures at issue, and thus cannot be taken into consideration either for the purposes of classifying the measures as aid, or for the purposes of quantifying the element of aid granted by those measures. The General Court correctly reached that conclusion, referring to the relevant case-law, in paragraphs 181 and 182 of the judgment under appeal.

88. Moreover, I note that the evidence relied on by the applicant, with regard to the repayment of the loans and the absence of any call on the guarantees, had not been submitted to the Commission during the administrative procedure. In that respect, it must be borne in mind that the legality of a Commission decision is to be assessed in the light of the information that was available to it when the contested decision was adopted.[41]

89. Secondly, Larko submits that the judgment under appeal is vitiated by a failure to state reasons, in that the General Court failed to consider the observations made by the applicant, first, as to the fully binding nature of the decision at issue as regards the amount to be recovered on the basis of the judgment in *Mediaset*,[42] and, second, as to the fact that the Commission itself admitted that the decision contained errors in that regard.

90. In that respect, I note that while the review conducted by the Court of Justice on an appeal involves, inter alia, determining whether the General Court responded to the entirety of the arguments put forward by the applicant to the requisite legal standard, the General Court's obligation to give reasons for its decisions cannot be interpreted as requiring it to respond in detail to every single argument put forward by a party,[43] which, in my view, is how Larko is seeking to interpret it.

91. Thirdly, Larko submits that the effect of fixing the amount of aid as the full amount of the guaranteed loan, in circumstances where the guarantees had not been called on, was contrary to the case-law of the Court of Justice under which Commission decisions ordering the recovery of State aid are intended to restore the prior situation and cannot constitute a sanction going beyond the advantage actually received.[44]

39 According to Larko, it was apparent from the 2008 loan agreement (measure No 2), which was available to the Commission, that the loan was to be fully repaid by 31 March 2012, which was well before the adoption of the contested decision on 27 March 2014. All the information necessary to conclude that the loan had already been repaid was therefore available to the Commission. As to repayment of the loan advanced under the 2010 loan agreement (measure No 4), that was to be completed 45 days after the adoption of the decision at issue. As at the date of adoption, the Commission was in a position to make a finding that the loans advanced under the 2011 loan agreement (measure No 6) had already been repaid in part.

40 See, in particular, judgment of 1 June 1994, *Commission* v *Brazzelli Lualdi and Others* (C-136/92 P, EU:C:1994:211, paragraph 49).

41 See, to that effect, judgment of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission* (C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 168).

42 Judgment of 13 February 2014 (C-69/13, EU:C:2014:71).

43 See, in particular, judgment of 11 September 2003, *Belgium* v *Commission* (C-197/99 P, EU:C:2003:444, paragraph 81).

44 Larko refers in particular to the judgment of 17 June 1999, *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 65).

92. On that point I note, for the sake of completeness, that in addition to the arguments I have already set out in points 87 and 88 of this Opinion, which are sufficient to reject Larko's third argument, it seems to me that the applicant is wrong in contending that it is obliged to repay the aid twice. As the Commission observes, it appears that Larko has conflated two separate payment obligations which are incumbent on an undertaking that has received aid in the form of a State guarantee. On the one hand, the beneficiary undertaking is obliged to reimburse the State for the amount of aid it has received. On the other hand, its obligation to repay the loan it obtained by virtue of the State guarantee to the bank continues, naturally, to exist.

93. It follows from all of those considerations that the fourth ground of appeal must be rejected as unfounded.

V. Conclusion

94. In the light of the foregoing considerations, and without prejudice to the merits of the other grounds of appeal, I propose that the Court should reject the first part of the second ground of appeal, and the fourth ground of appeal, as unfounded. Costs are reserved.