Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 15 October 2020[1]

Case C-362/19 P

European Commission
v

Fútbol Club Barcelona

(Appeal – State aid – Aid implemented for certain professional football clubs – Article 107(1) TFEU – Concept of 'advantage' – Aid scheme – Preferential tax rate applied only to clubs authorised to benefit from the status of non-profit entity – Less advantageous tax deduction – Effect)

1. This case concerns an appeal brought by the European Commission requesting the Court of Justice to set aside the judgment of 26 February 2019, *Fútbol Club Barcelona* v *Commission* (T-865/16, EU:T:2019:113), by which the General Court of the European Union annulled, on the application of Fútbol Club Barcelona ('FC Barcelona'), 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] ('the decision at issue').

2. In the judgment under appeal, the General Court essentially found fault with the Commission for failing to examine properly, during its analysis of the tax regime applicable to football clubs which it considered to be beneficiaries of State aid, the extent of the tax deductions for the reinvestment of extraordinary profits permitted under that regime, in order to determine whether an advantage exists for the purposes of Article 107(1) TFEU. The General Court also found fault with the Commission for failing to request sufficient information in that respect during the investigation procedure.

3. The present case will enable the Court of Justice to provide clarification on the type of analysis that the Commission must carry out, and on the factors it must consider, when determining whether there is an advantage for the purposes of Article 107(1) TFEU, particularly in cases of special tax regimes granting a preferential tax rate for the entities subject to that regime.

I. Background to the dispute

4. Ley 10/1990 del Deporte (Law 10/1990 on sport) of 15 October 1990[3] ('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.

1 Original language: Italian.

2 OJ 2016 L 357, p. 1.

3 BOE No 249 of 17 October 1990, p. 30397.

5. 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. That exception allowed those clubs to continue to operate in the form of sports clubs. The only professional football clubs to fall within the exception were FC Barcelona and three other clubs (Club Atlético Osasuna, Athletic Club and Real Madrid Club de Fútbol ('Real Madrid')), all of which exercised that option.

6. 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.

7. 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 possible preferential tax treatment of professional football clubs subject to the tax regime of non-profit entities, when compared with those subject to the regime applicable to SLCs.

8. By the decision at issue, the Commission found that, by Law 10/1990, the Kingdom of Spain had unlawfully introduced aid in the form of a preferential corporate tax rate for certain football clubs, notably FC Barcelona, Club Atlético Osasuna, Athletic Club and Real Madrid, in breach of Article 108(3) TFEU.[4] The Commission also found that the scheme was incompatible with the internal market and therefore ordered the Kingdom of Spain to discontinue it 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 from the tax year 2000, subject, in particular, to the possibility that the aid in question constituted *de minimis* aid.[5]

II. The procedure before the General Court and the judgment under appeal

9. By application lodged at the General Court Registry on 7 December 2016, FC Barcelona brought an action for annulment of the decision at issue, in which it relied on five pleas in law.

10. By the judgment under appeal, the General Court, after dismissing the first plea in law raised by FC Barcelona,[6] upheld the second plea in relation, first, to an error of assessment in breach of Article 107(1) TFEU as to the existence, in the present case, of an advantage and, secondly, an infringement of the principle of sound administration in examining whether there was an advantage.

11. In that connection, the General Court found first of all that, in order to assess whether the measure introduced by Law 10/1990 was likely to confer an advantage, the various components of the tax regime for non-profit entities had to be assessed as a whole, as they formed an *indivisible whole*, which had been altered by Law 10/1990 only as regards its scope *ratione personae*.[7]

12. The General Court therefore held that it should be examined whether, in the decision at issue, the Commission had 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.[8]

4 Article 1 of the decision at issue.

5 See Articles 2 and 4(1) and (4) of the decision at issue.

6 The first plea in law raised by FC Barcelona concerned the infringement of Article 49 TFEU in conjunction with Articles 107 and 108 TFEU, and of Article 16 of the Charter of Fundamental Rights of the European Union. See paragraphs 25 to 37 of the judgment under appeal.

7 See paragraph 53 of the judgment under appeal.

8 Paragraph 54 of the judgment under appeal.

13. First, the General Court found that, during the period concerned, a preferential nominal rate of tax had actually been applied to the four clubs benefiting from the disputed scheme compared to the clubs operating in the form of an SLC.[9] However, the General Court also found that, during the administrative procedure, Real Madrid had shown that the tax deduction for the reinvestment of extraordinary profits was greater for SLCs than for non-profit entities and that, depending on the circumstances, that deduction could be very large.[10]

14. The General Court found that in the decision at issue, the Commission had ruled out any possibility of the relative advantage resulting from the higher ceiling on tax deductions applicable to SLCs offsetting the preferential tax rate enjoyed by non-profit entities on the grounds, first, that no evidence had been adduced to show that the tax deduction system was 'in principle and in the longer term more advantageous' and, secondly, that the tax credit was 'only granted under certain conditions which do not apply continuously'.[11]

15. Against that background, the General Court concluded that 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 could not 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.[12] In that regard, the General Court found that 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.[13]

16. As for the finding that the advantage conferred by the tax deduction was conditional, the General Court held that this was not sufficient to indicate that there was an advantage. First, it pointed out that a tax deduction may in itself constitute aid, which means that, although it is conditional, it can be taken into account in determining whether there is an advantage. Secondly, it held that the fact that the possibility of deferring tax deductions was not examined in the decision at issue means that no assessment was made of whether the effects of that tax mechanism might be levelled out over time, which could offset the alleged lack of 'continuity' referred to by the Commission.[14]

17. In the light of the foregoing, the General Court held that the Commission had failed to discharge, to the requisite legal standard, the burden of proving that the disputed measure conferred an advantage on its beneficiaries.

18. Consequently, the General Court annulled the decision at issue without examining the other arguments and pleas put forward by FC Barcelona.

III. Forms of order sought by the parties

19. By its appeal, the Commission claims that the Court of Justice should set aside the judgment under appeal, refer the case back to the General Court and reserve the costs.

20. FC Barcelona and the Kingdom of Spain contend that the Court of Justice should dismiss the Commission's appeal and order it to pay the costs.

9 Paragraph 55 of the judgment under appeal.

10 Paragraph 57 of the judgment under appeal.

11 Paragraph 58 of the judgment under appeal in reference to paragraph 68 of the decision at issue.

12 Paragraph 59 of the judgment under appeal.

13 Ibid.

14 Paragraph 60 of the judgment under appeal.

IV. Analysis of the appeal

A. Brief summary of the parties' arguments

21. In its appeal, the Commission puts forward a single ground of appeal relating to the infringement of Article 107(1) TFEU. That single ground of appeal is divided into two parts.

22. In the first part, the Commission submits that the General Court erred in law in its assessment of the examination that the Commission must carry out to determine whether a tax regime confers an advantage on its beneficiaries. The Commission complains that the General Court found that it was necessary to conduct not only an analysis of the criteria of the regime being examined (such as a preferential tax rate) which may place the beneficiaries in a more favourable position compared to other undertakings subject to the general regime, but also an analysis of unfavourable elements of that regime which depend on circumstances extraneous to the regime and which are variable in each tax year (such as the tax deduction for the reinvestment of extraordinary profits, which depends on investment decisions taken by the beneficiary undertakings), even when those unfavourable elements are uncertain and cannot systematically negate the advantage and cannot be foreseen in an *ex ante* review of the tax regime in question.

23. First, the Commission submits that, contrary to the General Court's finding,[15] the decision at issue only examined an aid scheme and not also individual aid. It argues that the General Court misinterpreted both the decision at issue and Article 1(d) of Regulation 2015/1589.[16] Consequently, according to the case-law, the Commission could simply analyse the general characteristics of the tax regime to determine whether the criteria for establishing the existence of State aid had been met. It was not required to examine whether the aid in question had actually materialised for each beneficiary, which should have been determined at the recovery stage.

24. Secondly, the Commission submits that it is clear from the case-law that, when it analyses a national measure that may constitute State aid, it must consider the point at which the tax regime was adopted and perform an *ex ante* assessment to determine whether that regime is likely to confer an advantage. Indeed, for the purpose of determining the existence of State aid, a measure implemented without prior notification cannot be treated more favourably than a notified measure.

25. It follows that the decisive factor for analysing whether an advantage exists is the ability of the measure to confer an advantage. Consequently, the fact that it can be demonstrated on the basis of subsequent factors that the advantage has not materialised in a number of cases cannot be decisive when assessing whether the advantage exists, particularly when the Commission has to analyse an aid scheme. If, during a given tax year, the advantages resulting from the regime at issue are fully offset by the disadvantages, then the advantage will not have materialised in that year and no recovery from the beneficiary will, therefore, be necessary for that year.

26. In accordance with those principles, the application of a lower rate of corporate income tax for certain undertakings would constitute an advantage for the purposes of Article 107(1) TFEU, since it would be likely to favour those undertakings directly or indirectly. Such an advantage would materialise whenever those undertakings generated profits that serve as the taxable amount.

15 See end of paragraph 69 of the judgment under appeal.

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

27. The Commission acknowledges that, in the present case, the tax regime for non-profit entities provided for a tax deduction for the reinvestment of extraordinary profits which was smaller than that provided for under the general corporate tax regime. Nevertheless, it argues that the General Court erred in law in assessing the link between favourable and unfavourable elements of the tax regime for non-profit entities. Where a particular regime also entails certain disadvantages or unfavourable elements which materialise only in circumstances extraneous to the regime and which vary from one tax year to the next, those elements cannot be regarded as neutralising the advantage unless they are linked to that advantage in such a way as to ensure that the advantage is neutralised in every tax year. According to the Commission, however, that is not so in the present case.

28. First, although both the tax rate and the percentage of the tax deduction for the reinvestment of extraordinary profits form part of both the general regime and the special regime for non-profit entities, the amount of the deductions depends on a factor extraneous to the regime which is unrelated to the application of the tax rate. Instead, this is linked to the investment policy adopted by each club in relation to the transfer of players during a given year. It is, therefore, a random element, which is unrelated to the advantage resulting from the application of the preferential tax rate, the effect of which can only be measured when the advantage materialises in each tax year. Contrary to the view taken by the General Court, therefore, it is not possible to assess that element indivisibly from the application of the preferential tax rate, which in itself is such as to confer an advantage on the clubs benefiting from it.

29. Secondly, the regime in question does not guarantee that the unfavourable elements of that regime systematically neutralise the advantages resulting from it. In the present case, the tax rate is applied to profits, whereas the deduction is based on the reinvestment of extraordinary profits, which in football originate in practice from player transfers. That means that the two elements in question of the tax regime are not comparable and so cannot be neutralised.

30. Thirdly, the actual materialisation of the advantage is assessed for each tax year in the context of the annual tax due and is, therefore, likely to vary from year to year. That materialisation also includes the tax credits that clubs can claim during each tax year, which cannot be determined *ex ante*.

31. In the second part of the single ground of appeal, the Commission submits that the General Court erred in law by misinterpreting the Commission's due diligence obligation and the burden of proof it has in showing that there is an advantage. The General Court wrongly criticised the Commission in paragraph 59 of the judgment under appeal for not requesting information that would have enabled it to establish 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 tax rate. In the light of the points made in the first part of the single ground of appeal, that evidence was unnecessary. In essence, the General Court requires the Commission to carry out an *ex post* assessment of the data after the adoption of the measure. When the tax regime at issue was adopted, it would have been materially impossible to foresee how the reduced tax rate would be combined with the amount deductible by way of a tax deduction for the reinvestment of extraordinary profits. However, an *ex post* analysis of the materialisation of the advantage, such as that essentially requested by the General Court, is not necessary to establish the existence of an advantage conferred by State aid. The solution adopted by the General Court therefore favours non-notified aid schemes over notified aid schemes.

32. Lastly, the Commission disputes FC Barcelona's assertions that certain arguments put forward by the Commission are ineffective. According to the Commission, although FC Barcelona considers those questions and arguments to be ineffective, it actually contends that they are inadmissible.

33. FC Barcelona contends as a preliminary point that some of the arguments and evidence put forward by the Commission in its appeal are ineffective. First, it argues that the Commission relies on new facts and adduces new evidence. Secondly, the Commission considers as proven points of fact that the judgment under appeal refuted. Moreover, some of the Commission's assertions concerning the decision at issue are untrue.

34. As to the substance, with regard to the first part of the Commission's single ground of appeal, FC Barcelona contends, first of all, that the disputed measure does not constitute an aid scheme, but consists of individual aid granted to four named clubs. In the decision at issue, the Commission described a measure intended only for four companies, stating that no other club could benefit from it.

35. FC Barcelona further argues that the tax regime for non-profit entities does not confer any advantage on those four clubs. From a legal point of view, the Spanish tax system is designed with a view to tax neutrality and therefore to ensure that the effective tax rate applicable to non-profit and commercial entities is the same. From a practical point of view, it is the effects, not the legal form, which determine whether there is an advantage. According to the case-law, it is necessary to analyse all the elements of the legal regime at issue, and thus both those that confer an advantage and those that offset it, as well as their cumulative effects.

36. In the present case, the obligation to become an SLC affected not only the rate of taxation, but also the level of tax deductions applicable. Consequently, in order to assess the national measure at issue properly, consideration had to be given not only to the indicia and evidence that pointed to the existence of State aid, but also to those that establish its absence. The Commission thus erred twice in its assessment of whether an advantage existed: first, it focused on the nominal tax rate, when the effective tax rate was the relevant rate; secondly, where a tax system, such as that at issue, provides for tax credits whose effects can be apportioned over several tax years, the analysis should have taken a medium-term and long-term view.

37. As regards the second part of the Commission's single ground of appeal, FC Barcelona argues that the obligations of impartiality and diligence required the Commission to analyse all the effects of the measure, including those that offset or neutralise a possible advantage.

38. First, the Commission confuses the existence of an advantage with the quantification of the aid. The concept of advantage is the same for individual aid and for aid schemes. The case-law does not allow the Commission to conduct a partial analysis of the effects of a measure by considering only the effects that generate an advantage (such as the nominal tax rate) and not those that offset it (such as tax deductions). In the decision at issue, the Commission failed to analyse various general features of the scheme, such as the deductions applicable, the habitual nature of those deductions in the relevant market and the extent of the tax credits.

39. Secondly, the need to carry out an *ex ante* analysis does not prevent the tax deductions from being taken into consideration. Indeed, the Commission had the power to request from the relevant Member State estimates of the impact of the measure or calculations of its impact in previous years. In the case of measures implemented but not notified, the practical arrangements of the regime could be taken into account. In any event, no *ex ante* analysis is carried out in the decision at issue.

40. Thirdly, according to FC Barcelona, it follows from the Commission's duty to conduct the administrative procedure with diligence and impartiality that there is an obligation to assess with the same intensity the evidence indicating both the existence and absence of aid. The Commission cannot, therefore, focus solely on evidence of the existence of aid, but should have considered the effective tax rate, taking into account the tax deductions identified during the administrative procedure.

41. Fourthly, FC Barcelona notes that the Commission's burden of proof in showing that there is an advantage requires an analysis of all the cumulative effects of the measure on the beneficiaries. It is not, therefore, sufficient to analyse only the nominal tax rate. Moreover, evidence based solely on a comparison of nominal rates is inadequate, since a tax regime consists in a set of rules which also include tax deductions, rules for calculating the taxable amount and exemptions. If, as in the present case, evidence of the potential absence of an advantage is presented to the Commission, the Commission would be required to obtain the necessary information by requesting it from the relevant Member State.

42. The Kingdom of Spain makes the preliminary point that errors in the assessment of the State aid nature of tax measures are liable to affect the institutional balance provided for in the Treaties, since Article 107 TFEU does not confer on the Commission autonomous regulatory power in the area of corporate tax. The tax rate is an essential element of the legal arrangements governing taxation and falls within the fiscal autonomy and competence of the Member States. Consequently, the Commission's perfunctory examination undermines the competences of the Member States.

43. The Kingdom of Spain also contends that it is a mistake to conclude that the mere presence of a different tax rate implies the existence of State aid. It submits that although the tax rate is a fundamental element of any tax measure, it is not sufficient to base the existence of State aid on the finding that the tax regime in question, examined *ex ante*, is capable of conferring an annual advantage simply because a lower tax rate exists, irrespective of whether or not tax credits are applied. Such an approach leads to the conclusion that any difference in the tax rate between undertakings implies the conferral of an advantage, which is not the case. According to the Spanish Government, a rational national legislature would devise a tax measure taking into account the consequences of applying both the tax rate and tax deductions. Tax deductions cannot, therefore, be seen as extraneous to the setting of the tax rate, nor as a random element dependent on external factors.

44. In the case at issue, the analysis of tax deductions for the reinvestment of extraordinary profits under Spanish tax law, following the various legislative amendments made, shows that the legislature considered the factors delimiting tax liability when setting tax rates. As a result, there is a clear link between the determination of the tax rate and the applicable rate of tax deduction, which are regarded as determinants of the amount of tax liability and are therefore closely related. Consequently, the tax rate cannot be dissociated from other components of the tax regime, on account of both the extent of the deduction for the reinvestment of extraordinary profits, particularly in professional football, and the recurring nature of that deduction.

45. Lastly, the Kingdom of Spain contends that the standard of proof required by the General Court in the judgment under appeal is no higher than that required in the case-law. The diligent and impartial examination that the Commission is required to carry out should ensure that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose. That was not the case in this instance, however.

B. Legal analysis

46. Given the close link between the two parts of the single ground of appeal put forward by the Commission – the first relating to errors of law with regard to the analysis needed to establish the existence of an advantage for the purposes of Article 107(1) TFEU, and the second relating to an incorrect assessment of the due diligence obligation and the related burden of proof – I have decided to deal with both parts together. Before analysing that single ground of appeal, however, the arguments raised by FC Barcelona as to the admissibility of certain aspects of the Commission's case must be examined.

1. Admissibility of certain arguments raised by the Commission and of a document appended to the appeal

47. As a preliminary point, FC Barcelona submits that some of the assertions made by the Commission, as well as a document appended to the appeal as evidence, are ineffective. As the Commission points out, the arguments raised in that respect by FC Barcelona concern aspects relating to inadmissibility, rather than ineffectiveness.

48. In the first place, FC Barcelona contends that in its appeal the Commission relied on new facts and adduced new evidence. First, it asserted for the first time that the tax deduction for the reinvestment of extraordinary profits is a random factor and independent of the nominal rate of corporate tax. In support of its argument, the Commission adduced a new document containing the figures regarding the transfers made by FC Barcelona and Real Madrid between 1991 and 2016. In addition, it raised new points of fact, ineffective and in any case incorrect with regard to national law, asserting for the first time in the appeal that deductions for the reinvestment of extraordinary profits were applied to a different taxable amount from that to which the tax rate applied, that before 2011 the deduction could not exceed the total amount of tax, and that, from 2012, the deduction could not exceed 25% of that amount.

49. In that respect, it should be borne in mind, as is clear from the second subparagraph of Article 256(1) TFEU and from the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, that an appeal lies on points of law only. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence.[17] The Court of Justice is not entitled in particular, in the context of an appeal, to reassess the facts on the basis of evidence not adduced before the General Court.[18]

50. In addition, in accordance with Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. Accordingly, the appellate jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the General Court.[19] An appellant is, however, entitled to lodge an appeal relying, before the Court of Justice, on pleas arising from the judgment under appeal and which seek to criticise, in law, its merits.[20]

51. In the judgment under appeal, the General Court annulled the decision at issue essentially by criticising the Commission for failing to conduct a sufficiently thorough investigation and thus for failing to discharge, to the requisite legal standard, the burden of proving that the disputed measure conferred an advantage on its beneficiaries.[21] In particular, the Commission failed to take into account – thereby committing an error of law and a breach of its due diligence obligation – the specific nature of the sector to which the disputed measure relates (namely professional football) from the perspective of the extent of the tax deductions for the reinvestment of extraordinary profits.[22]

17 See, inter alia, judgment of 28 May 2020, *Asociación de fabricantes de morcilla de Burgos* v *Commission* (C-309/19 P, EU:C:2020:401, paragraph 10 and the case-law cited).

18 Order of 28 November 2018, *Le Pen* v *Parliament* (C-303/18 P, not published, EU:C:2018:962, paragraph 78 and the case-law cited).

19 See, inter alia, judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission* (C-654/17 P, EU:C:2019:634, paragraph 69 and the case-law cited).

20 See judgments of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission* (C-176/06 P, not published, EU:C:2007:730, paragraph 17); of 10 April 2014, *Commission* v *Siemens Österreich and Others* (C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 102); and, most recently, of 19 March 2020, *ClientEarth* v *Commission* (C-612/18 P, not published, EU:C:2020:223, paragraph 15).

21 See paragraphs 59 to 67 of the judgment under appeal.

22 See paragraph 69 of the judgment under appeal.

52. In the judgment under appeal, however, the General Court did not take a definitive position on the substance of whether or not, in the present case, there was an advantage for the beneficiaries of the disputed measure. The General Court did not indeed determine whether or not the deductions actually offset the benefit of applying a preferential tax rate to the four clubs in question and, therefore, whether the regime at issue favoured those clubs over comparable entities subject to the general regime.

53. In that context, with regard to FC Barcelona's argument that the Commission categorises, for the first time in the appeal, the deduction at issue as a random factor independent of the nominal rate of corporate tax, it must be noted that, in the first part of its single ground of appeal, the Commission argues that the General Court erred in law, in finding that the Commission is required, in order to determine the existence of an advantage resulting from a special tax regime, to take into account an unfavourable element (in this case, the deduction in question) – since it is inextricably linked to other elements of the regime – which would materialise only in variable circumstances extraneous to the regime (in this case, the investment policy decisions of the clubs) and which are unable to neutralise the advantage in every tax year. It is in that sense – that is to say, in the sense of an element of the tax regime which is dependent on circumstances extraneous to that regime which vary from year to year – that the Commission categorises the deduction at issue as a random factor which is independent of the corporate tax rate.

54. The ground of appeal put forward by the Commission concerns the issue of which elements it is required to take into account in its analysis of a tax regime in order to determine whether or not that regime is capable of conferring an advantage on its beneficiaries. That ground of appeal is intended to challenge the validity of the findings of law contained in the General Court's judgment and is, therefore, admissible. It is also linked both to the analysis carried out in the decision at issue (especially in paragraph 68) and to the reasoning contained in the judgment under appeal.[23] In view of those considerations, in my view, the objection raised by FC Barcelona on that point cannot be upheld.

55. However, with regard to the new document appended to the appeal, it should be noted that, as the Commission itself admits in its reply, this is intended to show that, in certain tax years, the deductions at issue would not have effectively neutralised the advantage resulting from the application of the preferential tax rate to the clubs in question. This is, therefore, evidence not adduced before the General Court and which aims to substantiate points of fact and, as such, is inadmissible according to the case-law referred to in point 49 above.

56. As regards the Commission's new assertions concerning national law, I consider that, in so far as they are intended to supplement the reasoning of the decision at issue as regards the content of the legislation on tax deductions for the reinvestment of extraordinary profits, they should be considered inadmissible and may not, therefore, be taken into account.[24]

57. In the second place, FC Barcelona contends that the Commission considers as proven points of fact that the judgment under appeal refuted. FC Barcelona argues, in particular, that it is not true that the Commission established in the decision at issue that the tax regime applicable to non-profit entities was more favourable than that applicable to commercial companies.

23 See paragraphs 57 to 60 of the judgment under appeal, which support the conclusion reached by the General Court in paragraph 67.

24 It is clear from the case-law that the failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the EU courts (see judgment of 13 June 2013, *Versalis* v *Commission*, C-511/11 P, EU:C:2013:386, paragraph 141 and the case-law cited).

58. In that regard, I consider that the Commission's assertion criticised by FC Barcelona is not intended to call into question a finding of fact made by the General Court, which, as is clear from point 52 above, did not rule on the issue of which regime was more favourable in practice. Rather, that assertion must be understood in the context of the question of whether or not, in the present case, the Commission has proven to the requisite legal standard the existence of an advantage for the purposes of Article 107(1) TFEU – a question linked to the very subject matter of the Commission's appeal.

59. Lastly, in the light of point 52 above, all the arguments put forward by the parties in their submissions concerning the issue of whether or not the special tax regime at issue actually gives rise to disadvantages of such a nature as to offset the advantage resulting from the preferential tax rate applicable to non-profit entities must, in my view, be regarded as inadmissible, since they do not relate to the findings of law of the General Court given in the judgment under appeal.

2. Principles derived from case-law regarding the finding of an advantage, particularly a tax advantage, for the purposes of Article 107(1) TFEU

60. In order to analyse the substance of the objections raised by the Commission in respect of the General Court's judgment, it is worth noting some of the principles developed in the case-law regarding the finding of an advantage, particularly a tax advantage, for the purposes of Article 107(1) TFEU.

(a) Concept of advantage, particularly a tax advantage

61. According to the settled case-law of the Court, classification of a national measure as State aid, within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer a selective advantage on the beneficiary. Fourthly, it must distort or threaten to distort competition. [25]

62. The present case concerns only the third condition, and specifically the requirement that the disputed measure must confer an advantage on its beneficiaries.

63. Regarding such a requirement, it should be borne in mind that, according to the settled case-law of the Court, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings, or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions, are regarded as State aid. [26]

64. In particular, measures which, in various forms, mitigate the charges that are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid. [27]

25 See judgments of 21 December 2016, *Commission* v *World Duty Free Group SA and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53 and the case-law cited), and of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 19).

26 See, inter alia, judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 65). See also judgment of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraphs 74 and 83 and the case-law cited).

27 See, inter alia, judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 66 and the case-law cited), 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 40 and the case-law cited).

65. It follows that, again according to the settled case-law, national measures that confer a tax advantage which, although not involving the transfer of State resources, place the recipients in a more favourable financial position than other taxpayers, are capable of procuring a selective advantage for the recipients and, consequently, of constituting State aid, within the meaning of Article 107(1) TFEU. [28]

66. The Court of Justice has thus recognised that national measures that grant certain undertakings a tax exemption, [29] that cap the amount of a tax, [30] or allow tax relief [31] or a tax deduction [32] or even the possibility of deferral of liability to tax that would otherwise be payable [33] may, for example, constitute State aid. In essence, the criterion for assessing the existence of a tax advantage is that the measure is capable of placing the beneficiaries in a more favourable financial position by making them subject to a different tax burden compared with other relevant taxpayers. [34]

67. Moreover, it is clear from the settled case-law that the concept of advantage that is intrinsic to the classification of a measure as State aid is an objective one, irrespective of the motives of the persons responsible for the measure in question. [35] Indeed, State aid, as defined in the TFEU, is a legal concept which must be interpreted on the basis of objective factors. [36] In addition, it is apparent from the case-law that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used. [37]

(b) The principles governing proof and the Commission's obligations of diligence and impartiality

68. It follows from the case-law of the Court that it is for the Commission to provide proof of the existence of State aid within the meaning of Article 107(1) TFEU, [38] and thus also to prove that the requirement to confer a selective advantage on the recipients is met.

69. In particular, it is apparent from the Court's case-law relating to the principles governing the administration of proof as regards State aid that the Commission is required 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. [39]

28 See judgments of 21 December 2016, *Commission* v *World Duty Free Group SA and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 56 and the case-law cited), and of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 21). See also judgment 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 41 and the case-law cited).

29 See judgments of 15 March 1994, *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 14), and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 90).

30 See judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 12, 100 and 108).

31 See judgment of 15 December 2005, *UniCredito Italiano* (C-148/04, EU:C:2005:774, in particular paragraphs 8 and 50).

32 See judgment of 15 July 2004, *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 117).

33 See, to that effect, the Opinion of Advocate General Jääskinen in *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:554, point 45).

34 To that effect, in addition to the case-law cited in footnote 28, see judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 93 and 103). I will not address here the delicate question of the selective nature of the tax measure, which is not the subject of this appeal.

35 Judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 17).

36 See, inter alia, judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 111).

37 See, inter alia, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 87 and the case-law cited). See also judgment of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407, paragraph 86 and the case-law cited).

38 Judgment of 19 September 2018, *Commission* v *France and IFP Énergies nouvelles* (C-438/16 P, EU:C:2018:737, paragraph 110).

39 See judgments of 2 September 2010, *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraph 90); of 3 April 2014, *France* v *Commission* (C-559/12 P, EU:C:2014:217, paragraph 63); and of 19 September 2018, *Commission* v *France and IFP Énergies nouvelles* (C-438/16 P, EU:C:2018:737, paragraph 110).

70. It is also clear from the case-law that, when analysing the various constituent elements of aid, it is necessary to consider all the legal and factual circumstances surrounding that aid.[40] As regards, in particular, the assessment of a tax regime as State aid, the Court has clarified that the regime must be analysed as a whole[41] and in view of the specific features of that regime.[42]

71. The Court has further clarified that, when assessing the existence of an advantage in relation to Article 107(1) TFEU, the Commission has a duty to carry out a global assessment of the aid measure at issue, according to the information available and developments foreseeable at the time when the decision to grant that aid was taken, taking into account, inter alia, the context of that aid.[43]

72. On that basis, the Commission is required to examine the relevant information provided to it in the course of the investigation procedure which may serve to clarify whether or not the disputed measure is likely to confer an advantage for the purposes of Article 107(1) TFEU.[44]

73. It is apparent from the case-law that, in the specific case of an aid scheme, the Commission may merely study the characteristics of the scheme at issue in order to assess, in the grounds for its decision, whether, by reason of the arrangements provided for under the scheme, the latter gives an appreciable advantage to beneficiaries. It follows that, in a decision which concerns an aid scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned.[45]

74. It follows from that case-law that, in the case of an aid scheme, although the Commission is certainly required, by virtue of the case-law referred to in points 68 to 72 above, to prove that all the criteria constituting State aid, including the existence of a selective advantage, have been met, on the basis of an overall analysis which takes into account all the legal and factual circumstances surrounding that aid, the Commission may confine itself to examining the general 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.[46]

(c) The need for an ex ante *analysis*

75. It is clear from the case-law that, in the case of tax regimes such as the one at issue in the present case, which apply on an annual or periodic basis, it is necessary to make a distinction between, on the one hand, the adoption of an aid scheme, and, on the other, the grant of annual aid on the basis of that regime.[47]

40 Judgment of 25 June 1970, *France* v *Commission* (47/69, EU:C:1970:60, paragraph 7).

41 See, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 98).

42 See, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 101), and of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraphs 19 and 24).

43 See judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission* (C-357/14 P, EU:C:2015:642, paragraph 104). On the need to take into account, in the appraisal of a measure in the light of Article 107 TFEU, all relevant matters and their context, see also Opinion of Advocate General Jääskinen in *France* v *Commission* (C-559/12 P, EU:C:2013:766, point 51).

44 See, to that effect, and by analogy with regard to the application of the private investor test, judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission* (C-357/14 P, EU:C:2015:642, paragraphs 103 and 105 and the case-law cited).

45 See judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63 and the case-law cited therein), and of 13 June 2013, *HGA and Others* v *Commission* (C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 114).

46 See judgment of 15 December 2005, *UniCredito Italiano* (C-148/04, EU:C:2005:774, paragraph 67).

47 See, to that effect, judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 22).

76. According to the case-law, in cases of this type, the analysis to be carried out in order to ascertain whether the State aid criteria and, in particular, the requirement to confer an advantage have been met must be carried out at the time of adoption of the tax regime in question.[48] It is, therefore, an *ex ante* analysis.[49]

77. Since, in order to qualify as State aid within the meaning of Article 107(1) TFEU, the measure must be capable of favouring its beneficiaries,[50] the purpose of that *ex ante* assessment is to ascertain whether, in the light of the characteristics of the tax regime at issue, at the time of its adoption, the application of that regime could, or would, lead to the liability to tax of its beneficiaries being less than it would have been had they been subject to the general tax regime.[51]

78. In the light of the foregoing, it is apparent that, based on an *ex ante* analysis, proof of whether the special tax regime is likely to confer an advantage will be independent of the finding that individual annual aid has actually been granted under that regime and, therefore, of the proof of the actual materialisation of the advantage itself in the individual cases in which that regime applies, which, moreover, is consistent with the case-law referred to in points 73 and 74 above.

79. Furthermore, in some regimes, such as those referred to in point 75 above, depending on the particular characteristics of that regime, it may be impossible to determine, at the date of introduction of the special regime and thus on the basis of an *ex ante* analysis, whether or not the advantage resulting from the application of the special regime will actually materialise in each tax year.[52]

80. Nevertheless, the impossibility of determining on the basis of an *ex ante* assessment the precise quantification of the advantage and, therefore, its actual materialisation in each tax year cannot prevent the *ex ante* analysis from being carried out in order to determine whether the regime at issue may constitute State aid within the meaning of Article 107(1) TFEU. A distinction must be drawn between the possibility of examining the draft measures at issue from the perspective of Article 107(1) TFEU and the possibility of quantifying the exact amount of the aid. Such an impossibility cannot, therefore, exempt either the Member State from notifying the measure or the Commission from assessing such a scheme under that provision.[53]

81. In that regard, it should also be noted that, according to the case-law, the analysis to be carried out by the Commission in its State aid decisions to determine whether the conditions laid down in Article 107(1) TFEU have been fulfilled cannot favour those Member States which grant aid in breach of the duty to notify laid down in Article 108(3) TFEU to the detriment of those which do notify aid at the planning stage.[54]

48 Judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 22). On the need for an analysis of the existence of an advantage carried out at the time when the decision to grant the aid was taken, see also judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission* (C-357/14 P, EU:C:2015:642, paragraph 104).

49 See, to the same effect, Opinion of Advocate General Jääskinen in *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:554, points 48 and 51).

50 See the case-law referred to in point 63 above.

51 See, to that effect, judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 24; see also paragraph 19).

52 See, for example, judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 19).

53 See, to that effect, Opinion of Advocate General Jääskinen in *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:554, points 48 to 53).

54 See judgments of 14 February 1990, *France* v *Commission* ('Boussac Saint-Frères', C-301/87, EU:C:1990:67, paragraph 33); of 29 April 2004, *Italy* v *Commission* (C-298/00 P, EU:C:2004:240, paragraph 49); and of 1 June 2006, *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* (C-442/03 P and C-471/03 P, EU:C:2006:356, paragraph 110).

82. Although that principle, addressed in the case-law with regard to determining the conditions for the impact of the measure on trade between Member States and on competition, does not of course exempt the Commission from the requirement to prove that the condition relating to advantage has been met,[55] it nevertheless requires, in the case of non-notified measures, an analysis of all the criteria of the concept of State aid which does not favour the Member State which has not notified the measure. In that respect, it should be borne in mind that the Court has on several occasions found that the obligation to notify is one of the fundamental features of the system of control put in place by the TFEU in the field of State aid.[56]

83. Such favourable treatment would, in my view, exist if the Commission, when assessing a tax regime such as that referred to in point 75, which has not been notified by the Member State concerned, had to consider, on the basis of data gathered *ex post*, whether under the regime at issue the advantage actually materialised for the beneficiaries in each tax year in question, or, in any event, whether the advantages that materialised in certain tax years were offset by the disadvantages recorded in other tax years. As is clear from the case-law mentioned in points 73, 74 and 78 above, in such cases, the advantage – and thus its actual materialisation in the relevant individual tax years – must be quantified at the recovery stage.

84. In conclusion, it follows from the foregoing considerations that, according to the case-law of the Court, in the case of special tax regimes which apply on an annual or periodic basis, the existence of the advantage is considered to have been shown where, by referring to the general regime applicable in the reference framework under review, the Commission demonstrates, on the basis of an *ex ante* analysis in accordance with the principles set out in the previous section, that the disputed measure is likely to place its beneficiaries in a more favourable financial position than that of the other relevant taxpayers. The precise quantification of the advantage, and therefore whether that advantage actually materialises in each tax year at issue, will be determined at the recovery stage on the basis of all the relevant information.[57]

85. In the light of the principles set forth in the present section, I will analyse, in the next section, the objections raised by the Commission in respect of the judgment under appeal.

3. Analysis of the single ground of appeal

(a) The question of whether the decision at issue examined only an aid scheme or also individual aid

86. First, it is necessary to examine the Commission's argument that the General Court wrongly held, in paragraph 69 of the judgment under appeal, that the decision at issue must be regarded as a decision relating both to an aid scheme and to individual aid. In fact, if it were to be found that in the decision at issue, the Commission had examined only one aid scheme, as noted in points 73 and 74 above, despite being required to prove that all the conditions laid down in Article 107(1) TFEU had been met, it could, to that end, merely study the general characteristics of the scheme itself, without having to examine each individual case in which it is applied in order to ascertain whether the scheme involved aid elements.

55 In that regard, see Opinion of Advocate General Jääskinen in *France* v *Commission* (C-559/12 P, EU:C:2013:766, points 65 to 67), the analysis of which was substantially confirmed by the Court in paragraph 103 of the judgment of 3 April 2014, *France* v *Commission* (C-559/12 P, EU:C:2014:217).

56 See judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 56 and the case-law cited).

57 See, to the same effect, Opinion of Advocate General Jääskinen in *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:554, point 54).

87. It should be noted in that regard that at the end of paragraph 69 of the judgment under appeal, the General Court held that, in addition to classifying the scheme in question as an aid scheme, the decision at issue had ruled, in the grounds and in the operative part,[58] on the individual aid granted to the four clubs named as beneficiaries, stating that the individual aid was 'to be considered as unlawful and incompatible aid'. The General Court inferred from this that, contrary to the Commission's assertion, the decision at issue had to be regarded as a decision relating both to an aid scheme and to individual aid.

88. It should be noted in that respect that, in accordance with Article 1(d) of Regulation 2015/1589, an 'aid scheme' comprises any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.

89. In the case at hand, there is no doubt that the decision at issue analysed an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589. That can be inferred from the wording of the seventh additional provision of Law 10/1990,[59] from which the application of the special regime to the clubs in question is derived and which falls within the definition of scheme given in the preceding point. In addition, the decision at issue classifies, at several points, the tax regime resulting from the disputed measure as an aid scheme.[60]

90. For that matter, the General Court itself does not deny that the decision at issue analysed an aid scheme, but holds that the Commission also took a position on individual aid.

91. In that respect, it should, however, be recalled that, in accordance with Article 1(e) of Regulation 2015/1589, two types of aid constitute 'individual aid': aid not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme. Since there is no doubt, in the light of the observations made in the preceding points, that the individual aid awards – if they can be categorised as such[61] – granted to the four clubs in question (namely, the calculation of taxes, for each tax year, resulting from the application of the tax regime for non-profit entities) were granted on the basis of an aid scheme, only the second case provided for in that provision is potentially relevant.

92. However, it follows from the case-law that individual measures implementing an aid scheme – which scheme should, as such, have been notified by the Member State – are merely measures implementing the general aid scheme which, in principle, do not need to be notified to the Commission.[62] It can be inferred from this that the individual aid awards granted to the clubs in question, as a result of the automatic application of the tax regime at issue which may be categorised as an aid scheme, should not have been notified to the Commission and so cannot be categorised as 'individual aid' within the meaning of Article 1(e) of Regulation 2015/1589.

93. In the decision at issue, the Commission was, therefore, mistaken in categorising the measures implementing the scheme at issue as individual aid. Consequently, the General Court erred in finding, in paragraph 69 of the judgment under appeal, that the decision at issue related both to an aid scheme and to individual aid.

58 The General Court refers to recital 90 and Article 1 of the decision at issue. In fact, even in Articles 2 and 3 of the decision at issue, in the authentic Spanish version, the Commission uses the term 'individual aid' ('*ayuda individual*').

59 The text of that provision is reproduced in footnote 4 of the decision at issue.

60 See recitals 47, 78 and 90 and Articles 2 to 6 of the decision at issue.

61 Evidently, that depends on the outcome of the action brought by FC Barcelona against the decision at issue.

62 See, to that effect, judgment of 5 October 1994, *Italy* v *Commission* (C-47/91, EU:C:1994:358, paragraph 21).

94. It must, therefore, be concluded that in the decision at issue the Commission only analysed an aid scheme and, having identified the beneficiaries of that scheme, or at least some of them,[63] took a position on individual measures implementing that aid scheme.

(b) The Commission's arguments concerning errors of law on the part of the General Court regarding the analysis the Commission must carry out to determine the existence of an advantage

95. In the light of the foregoing, it is necessary to examine the Commission's complaint that, in the judgment under appeal, the General Court erred in law in its assessment of the examination the Commission must carry out to determine whether a tax regime confers an advantage on its beneficiaries, with particular reference to the assessment of the link between favourable and unfavourable elements of the tax regime.

(1) The reasoning of the General Court

96. In the judgment under appeal, the General Court held, first, that, in order to determine whether the tax regime applicable to non-profit entities was capable of placing its beneficiaries (in other words, the clubs to which it applied by virtue of the special exemption under Law 10/1990) in a more advantageous position than they would have been in had they been required to operate in the form of an SLC, it was necessary to examine the various components of the tax regime as a whole. That approach is in line with the case-law mentioned in points 70 and 71 above. The General Court has, moreover, characterised the components of the regime in question as an indivisible whole.[64]

97. The General Court then held that the Commission had correctly found that, during the period concerned, a preferential nominal rate of tax had been applied to the four beneficiary clubs compared to clubs operating in the form of an SLC.[65] This finding of fact is uncontested (and, moreover, in principle, cannot be contested in the appeal procedure).

98. In the following paragraphs,[66] however, the General Court found that, in its analysis of the tax regime for non-profit entities as a whole, an examination of the advantage resulting from the preferential tax rate could not be carried out separately from an examination of the other components of that tax regime and, in particular, from the examination of the tax deduction for the reinvestment of extraordinary profits. On the basis of the finding that, during the administrative procedure, the ceiling for that deduction had been shown to be lower for non-profit entities than for SLCs, the General Court criticised the Commission for failing to examine fully the impact of that deduction. It found that the Commission's analysis could not rule out that the fewer opportunities for tax deductions under the regime for non-profit entities could offset the advantage derived from the lower nominal tax rate. Consequently, the General Court also found fault with the Commission for not requesting sufficient information from the Kingdom of Spain in that respect and thus infringing its due diligence obligation in the handling of the investigation procedure. It is on those points that the Commission's appeal is focused.

63 I note that the wording of Article 1 of the decision at issue, and specifically the use of the word 'notably', leaves room for other beneficiaries of the general regime at issue to be identified.

64 Paragraphs 53 and 54 of the judgment under appeal.

65 Paragraph 55 of the judgment under appeal.

66 Paragraphs 56 to 59 of the judgment under appeal.

(2) The type of analysis to be carried out by the Commission and the factors to be taken into account in that analysis

99. In that regard, however, as is clear from points 75 to 77 above, in the case of a tax regime such as that applicable to non-profit entities, the analysis to be carried out by the Commission to verify that the State aid conditions have been fulfilled and, in particular, that the requirement to confer an advantage has been met is an *ex ante* analysis, conducted with reference to the time of adoption of the tax regime in question.

100. Admittedly, as is apparent from the case-law referred to in points 69 to 72 above, that analysis must be carried out diligently and impartially, by examining the regime as a whole, making an overall assessment of the regime in question, taking into account all the characteristics which distinguish it in order to verify whether it constitutes aid and on the basis of an examination of all the relevant information provided in the course of the investigation procedure.

101. It follows that, in order to establish whether the tax regime for non-profit entities is likely to place its beneficiaries in a more favourable financial position than other professional football clubs, the Commission had to consider all the elements of that tax regime that might make it possible, on the basis of an *ex ante* analysis, to determine the existence of an advantage, and therefore both favourable and unfavourable factors.

102. However, it also follows from points 78 to 80 above, first, that evidence of whether, on the basis of an *ex ante* analysis, the special tax regime is likely to confer an advantage does not depend on evidence of the actual materialisation of the advantage in the individual cases in which that regime is applied, and that, secondly, the impossibility of determining, at the date of introduction of the special regime, whether or not the advantage resulting from the application of that regime will actually materialise in any given tax year cannot exempt the Commission from its obligation to analyse whether the regime in question may constitute State aid within the meaning of Article 107(1) TFEU.

103. It is on the basis of those considerations that it is necessary to assess a case such as the present one in which a special tax regime provides for the application of a preferential tax rate and at the same time includes components, such as tax deductions, which are potentially capable of offsetting the advantage resulting from the application of that preferential rate.

104. In a case of this type, if, during an *ex ante* analysis – that is to say, with reference to the time of adoption of the tax regime – it is not possible to determine the precise scope of those components and thus their impact on taxation, because that scope depends on the occurrence of elements, outside the tax regime, which may vary from year to year[67] and which will occur only after the adoption of the regime itself, then it will not be possible to determine *ex ante* whether those components will, in each tax year, offset the advantage conferred by the application of the preferential tax rate provided for by the regime at issue. In other words, if it is not possible to determine *ex ante* the extent of the deductions, it will be impossible to know, *ex ante*, whether they will offset, in each tax year, the advantage resulting from the application of the preferential tax rate. As a result, it will be impossible to conclude *ex ante* that no advantage exists in each relevant tax year.

105. It is only if those components – alone or in conjunction with other elements of the tax regime at issue – are able to neutralise, continually and systematically, the advantage resulting from the application of the preferential rate that it can be concluded, following an *ex ante* analysis and as a result of the application of those components, that the advantage does not actually materialise in each tax year.

67 Such as the commercial policy chosen by the beneficiary of the exemption or the determination of tax rates by local authorities, as in the case which gave rise to the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811; see in particular paragraphs 20 to 23).

106. Otherwise, the actual impact of such factors on the advantage cannot be analysed with reference to the time of adoption of the measure; instead, their impact can only be assessed *ex post* when the aid is recovered.

107. As elements of the tax regime, such components clearly cannot be ignored when analysing the tax regime at issue. However, they cannot be taken into account in the *ex ante* analysis of that regime concerning the existence of the advantage. Conversely, the impact of those factors will be material in quantifying the aid, and thus in determining whether it actually materialises. As noted in point 80 above, this differs from the *ex ante* analysis of whether the advantage can be found to exist.[68]

(3) The Commission's analysis of the tax regime applicable to non-profit entities

108. In the present case, as is apparent from point 97 above, the General Court found that the Commission had correctly determined that the special tax regime provided for the application of a preferential tax rate for clubs benefiting from that regime, which in itself is likely to place them in a more favourable financial position than clubs subject to the general tax regime.

109. Furthermore, it is common ground that, since it is not possible to determine *ex ante* the actual impact of tax deductions for the reinvestment of extraordinary profits, on the basis of an analysis with reference to the time of adoption of the regime at issue, the Commission was unable to determine in advance for each tax year the precise level of taxation under the special tax regime.[69] Accordingly, it was unable to rule out that, due to the application of tax deductions for the reinvestment of extraordinary profits, the clubs to which that tax regime applied would benefit, in each tax year, from lower taxation compared to other clubs. In other words, the Commission could not rule out, in each tax year, that there was an advantage for clubs benefiting from the preferential tax rate. In that regard, I also note that it is common ground that the deduction in question was not designed to neutralise systematically, in each tax year, the advantage conferred by the application of a preferential tax rate.[70]

110. In that context, as is clear from points 104 to 107 above, the Commission was unable – and so could not be required – to take those deductions into account when establishing the existence of the advantage; rather, they had to be taken into consideration when quantifying the aid, so as to verify whether it actually materialised in the relevant tax years.

111. Contrary to the General Court's finding, any consideration of those deductions could not have led the Commission to conclude, on the basis of an *ex ante* analysis, that the fewer opportunities for tax deductions under the regime for non-profit entities could always – that is to say, in each tax year – offset the advantage resulting from the application of a preferential tax rate, thereby precluding the existence of an advantage in each tax year.

112. I also note in that regard that the Commission was under less of an obligation, when assessing the ability of the measure to confer an advantage on its beneficiaries on the basis of an *ex ante* analysis, to verify whether, taking into account all the tax years in question, the overall taxation resulting from the application of the special tax regime was higher or lower than that resulting from the application of the general regime.

68 To the same effect, see Opinion of Advocate General Jääskinen in *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:554, point 51).

69 See, to the same effect, judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 19).

70 As is apparent from points 35 and 44 above, FC Barcelona and the Kingdom of Spain merely argue that the Spanish system provided for nominal tax rates and tax deductions which were designed with a view to tax neutrality and to ensure that the effective tax rate applicable to non-profit and commercial entities was the same. However, it does not appear from their submissions that they contest the Commission's argument that the deductions in question were not capable of neutralising, in each tax year, the advantage conferred by the application of a preferential tax rate. As for the argument raised by FC Barcelona that the tax regime applicable to commercial entities analysed as a whole would have been more favourable for that club, see points 112 and 113 below.

113. Aside from the impossibility of that type of *ex ante* verification, since it is impossible to establish *ex ante* the level and thus the impact of the deductions in question for each tax year, it must be noted that the exception to the general regime applicable to football clubs – from which the preferential tax rate provided for by the tax regime for non-profit entities was applied to the beneficiary clubs – was intended to be of indefinite duration.[71] It follows that the determination of the cumulative effects of the different rates of taxation resulting from the application of the two separate regimes (the general regime for SLCs and the special scheme for non-profit entities) – and therefore any overall offsetting of the advantages resulting from more favourable taxation in certain years with the disadvantages resulting from unfavourable taxation in other years – could only have been carried out *ex post* at the point when the special regime ceased to apply.

114. It follows, in my view, from all the foregoing considerations that the General Court's finding that the Commission could not conclude that there was an advantage resulting from the application of a preferential tax rate to clubs benefiting from the tax regime for non-profit entities, without establishing that capping the tax deductions at a less favourable level compared to the SLCs, provided for by that regime, did not offset the advantage resulting from the application of that rate, is vitiated by an error of law.

115. It also follows that, since the Commission is not required to take those deductions into account when establishing whether an advantage exists, it cannot be criticised for not requesting additional information in breach of its due diligence obligation and for not establishing to the requisite legal standard that an advantage exists because those deductions were not taken into account.

116. In that regard, it must still be found that the fact, correctly pointed out by the General Court in paragraph 60 of the judgment under appeal, that the provision of a tax deduction may, in certain conditions, itself constitute aid in no way detracts from the fact that, if the extent of a deduction cannot be verified *ex ante*, it cannot be considered in the context of an analysis with reference to the time of the adoption of the tax regime in question in order to rule out the advantage conferred by applying a preferential tax rate. Again with reference to paragraph 60 of the judgment under appeal, in a case such as that referred to in point 109 above, the assessment of the impact of any levelling out over time of the possibility of deferring tax deductions will be carried out, but at the time of recovery of the aid.

117. In my view, the conclusions reached in points 114 and 115 above are not called into question by the other arguments put forward by FC Barcelona and the Kingdom of Spain.

118. First, regarding the arguments put forward by the Kingdom of Spain concerning the fiscal autonomy of the Member States, it should be borne in mind that, according to the settled case-law, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law.[72] They must, therefore, refrain from adopting, in that context, measures which may constitute State aid and which are incompatible with the internal market.

119. Secondly, as regards the need – highlighted on several occasions by both FC Barcelona and the Kingdom of Spain – for the analysis of the existence of the advantage to take into account the effective tax rate and not just the nominal tax rate, I would reiterate that, as noted in points 69 to 71 and 100 and 101 above, evidently the Commission must take into account all the relevant elements of the tax regime at issue and therefore not just the nominal tax rate. However, the fact remains (as noted in points 104 to 107 above) that where – on the basis of the examination of a component of that tax

71 See, by analogy, the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 50), where the special tax regime was also intended to be of indefinite duration. However, that regime differed from the one at issue in this case, as pointed out in paragraphs 74 and 75 of the judgment under appeal.

72 See judgment of 12 July 2012, *Commission* v *Spain* (C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited).

regime – it is not possible to exclude *ex ante* the existence of the advantage conferred by the preferential tax rate, that element cannot be taken into account in the *ex ante* analysis, but its impact must be considered in the *ex post* analysis at the time of recovery. The same reasoning applies to arguments relating to tax credits resulting from the application of this type of component of the tax regime at issue.

(c) Conclusion on the single ground of appeal

120. It follows from all the foregoing considerations that, in my view, the Commission's appeal must be upheld and the judgment under appeal must, therefore, be set aside.

V. The action before the General Court

121. Under the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the latter may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

122. Accordingly, with regard to the objections raised at first instance by FC Barcelona, supported by the Kingdom of Spain, in the context of the second plea in law, upheld by the General Court in the judgment under appeal,[73] I consider that those objections may be analysed in the light of points 99 to 119 above.

123. In that regard, I note that the Commission, at the end of recital 68 of the decision at issue, found that, under the tax regime applicable to non-profit entities, the tax credit linked to the tax deduction for the reinvestment of extraordinary profits was not granted automatically, but only under certain conditions which did not apply continuously.[74] That implies that it was not able to neutralise systematically, in each tax year, the advantage conferred by the preferential tax rate. Moreover, in recital 95 of the decision at issue, the Commission further stated that the actual impact of those deductions would have been taken into account when the aid was quantified by verifying for each financial year whether the aid materialised. It can be inferred from this that the approach taken by the Commission in the decision at issue is in line with the findings set out in points 99 to 113 above. Consequently, the objections referred to in the previous point must be definitively rejected.

124. However, the state of the proceedings does not seem to allow the Court to rule definitively on the other arguments raised in the second plea in law, set out in paragraphs 39 and 40 of the judgment under appeal, or on the third, fourth and fifth pleas raised at first instance by FC Barcelona.

125. It follows that, in my view, the case must be referred back to the General Court so that it may examine those arguments and pleas.

VI. Conclusion

126. In the light of the foregoing considerations, I propose that the Court should:

1. Set aside the judgment of the General Court of the European Union of 26 February 2019, *Fútbol Club Barcelona* v *Commission* (T-865/16, EU:T:2019:113);

73 See paragraph 38 of the judgment under appeal.

74 See point 15 of this Opinion.

2. Refer the case back to the General Court of the European Union;

3. Reserve the costs.