



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

12 March 2020*

(State aid — Aid granted by Spain in favour of certain professional football clubs — Guarantee — Decision declaring the aid incompatible with the internal market — Indirect beneficiary — Whether imputable to the State — Advantage — Private investor test)

In Case T-901/16,

Elche Club de Fútbol, SAD, established in Elche (Spain), represented by M. Segura Catalán, M. Clayton and J. Morant Vidal, lawyers,

applicant,

supported by

Kingdom of Spain, represented by M. García-Valdecasas Dorrego, acting as Agent,

intervener,

v

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

defendant,

ACTION pursuant to Article 263 TFEU seeking annulment of Commission Decision (EU) 2017/365 of 4 July 2016 on the State aid SA.36387 (2013/C) (ex 2013/NN) (ex 2013/CP) implemented by Spain for Valencia Club de Fútbol, SAD, Hércules Club de Fútbol, SAD and Elche Club de Fútbol, SAD (OJ 2017 L 55, p. 12),

THE GENERAL COURT (Fourth Chamber),

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

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 15 January 2019,

gives the following

* Language of the case: Spanish.

Judgment

Background to the dispute

- 1 The applicant, Elche Club de Fútbol, SAD, is a professional football club based in Elche, province of Alicante (Community of Valencia, Spain).
- 2 The Fundación Elche Club de Fútbol ('the Fundación Elche') is a non-profit foundation with the corporate object of promoting and developing sports-related activities. The majority of the members of the applicant's Board of Directors were also members of the Board of the Fundación Elche.
- 3 On 17 February 2011, the Instituto Valenciano de Finanzas ('the IVF'), the financial institution of the Generalitat Valenciana (Regional Government of Valencia, Spain) provided a guarantee for two bank loans totalling EUR 14 million, from Caja de Ahorros del Mediterráneo for EUR 9 million and from Banco de Valencia for EUR 5 million, for the purposes of acquiring some shares issued by the applicant in the context of the capital increase decided by the latter. As a result of the capital increase, the Fundación Elche held 63.45% of the applicant's shares.
- 4 The guarantee covered 100% of the principal of the loans, plus interest and the costs of the guaranteed transaction. In return, an annual guarantee premium of 1% had to be paid by the Fundación Elche to the IVF. In addition, the IVF received, as a counter-guarantee, a pledge on the shares in the applicant acquired by the Fundación Elche. The duration of the underlying loan was five years. The interest rate of the underlying loans was the Euro Interbank Offered Rate (Euribor) 1-year + 3.5% margin. In addition, there was a 0.5% commitment fee. It was envisaged that repayment of the guaranteed loans (principal and interest) would be financed by the sale of the shares in the applicant acquired by the Fundación Elche.
- 5 Having been informed of the existence of alleged State aid granted by the Regional Government of Valencia in the form of guarantees on bank loans in favour of Elche Club de Fútbol, SAD, Hércules Club de Fútbol, SAD, and the applicant, the European Commission, on 8 April 2013, invited the Kingdom of Spain to comment on that information. The latter gave its response on 27 May 2013 and 3 June 2013.
- 6 By letter of 18 December 2013, the Commission informed the Kingdom of Spain of its decision to open the formal investigation procedure provided for in Article 108(2) TFEU. By letter of 10 February 2014, the Kingdom of Spain submitted its observations on that opening decision.
- 7 During the formal investigation procedure, the Commission received observations and information from the Kingdom of Spain, the IVF, Liga Nacional de Fútbol Profesional, Valencia Club de Fútbol and the Fundación Valencia.
- 8 By its Decision (EU) 2017/365 of 4 July 2016 on the State aid SA.36387 (2013/C) (ex 2013/NN) (ex 2013/CP) implemented by Spain for Valencia Club de Fútbol, SAD, Hércules Club de Fútbol, SAD and Elche Club de Fútbol, SAD (OJ 2017 L 55, p. 12, 'the contested decision'), the Commission found that the State guarantee provided by the IVF on 17 February 2011 to cover two bank loans to the Fundación Elche for the subscription of shares in the applicant in the context of the applicant's capital increase ('the measure in question' or 'the guarantee at issue'), constituted unlawful aid incompatible with the internal market, in the sum of EUR 3 688 000 (Article 1). Consequently, the Commission ordered the Kingdom of Spain to recover that aid from the applicant (Article 2), such recovery to be 'immediate and effective' (Article 3).

- 9 In the contested decision, the Commission, in the first place, considered that the measure at issue granted by the IVF involved State resources and was imputable to the Kingdom of Spain. In the second place, it took the view that the recipient of the aid was the applicant and not the Fundación Elche, which acted as a financial vehicle, bearing in mind, in particular, the aim of the measure consisting in facilitating the financing of the increase in the applicant's capital. The applicant's financial situation at the time the measure was granted was that of a firm in difficulty within the meaning of paragraph 10(a) or paragraph 11 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2, 'the Rescue and Restructuring Guidelines'). With regard to the criteria laid down in its Notice on the application of Articles [107] and [108 TFEU] to State aid in the form of guarantees (OJ 2008 C 155, p. 10, 'the Guarantee Notice'), and bearing in mind the applicant's financial situation and the conditions of the State guarantee which it benefited from, the Commission concluded that there was an unfair advantage which could have distorted or threatened to distort competition and affect trade between Member States. Moreover, in the contested decision, the Commission quantified the aid element allegedly given to the applicant, relying on the applicable reference rate in accordance with its Communication on the revision of the method for setting the reference and discount rates (OJ 2008 C 14, p. 6, 'Reference Rates Communication'), in default of any meaningful comparison on the basis of similar transactions in the market. When the aid in question was quantified, the Commission considered that the value of the shares in the applicant pledged to the IVF as a counter-guarantee was close to zero. Finally, in the contested decision, the Commission considered that the guarantee at issue was not compatible with the internal market, in particular with regard to the principles and conditions laid down in the Rescue and Restructuring Guidelines.

Procedure and forms of order sought

- 10 By application lodged at the Registry of the General Court on 21 December 2016, the applicant brought the present action.
- 11 By a separate document lodged at the Court Registry on 21 February 2017, the applicant submitted an interlocutory application for suspension of operation of Articles 2 to 4 of the contested decision in so far as they order the recovery from the applicant of the aid allegedly granted to it.
- 12 The Commission lodged its defence at the Court Registry on 17 March 2017.
- 13 By decision of 24 April 2017, the President of the Fourth Chamber of the Court granted the Kingdom of Spain leave to intervene in support of the form of order sought by the applicant.
- 14 The applicant lodged its reply at the Court Registry on 8 May 2017.
- 15 On 20 June 2017, the Commission lodged its rejoinder at the Court Registry.
- 16 The Kingdom of Spain lodged its statement in intervention at the Court Registry on 6 July 2017.
- 17 On 27 July 2017, the Commission lodged its observations on the statement in intervention at the Court Registry.
- 18 The applicant lodged its observations on the statement in intervention at the Court Registry on 21 September 2017.
- 19 By letter of 13 October 2017, the applicant stated that it wished to be heard at the hearing.
- 20 By order of 15 May 2018, *Elche Club de Fútbol v Commission* (T-901/16 R, not published, EU:T:2018:268), the President of the Court ordered suspension of the operation of the contested decision in so far as the recovery of aid from the applicant was concerned and reserved the costs.

- 21 By letters from the Court Registry of 30 October 2018, the Court sent written questions to all the parties, by way of measures of organisation of procedure provided for in Article 89 of its Rules of Procedure, to which they replied on 20 and 21 November 2018.
- 22 The applicant claims that the Court should:
- annul the contested decision in so far as it concerns the applicant;
 - order the Commission to pay the costs.
- 23 The Commission contends that the Court should:
- dismiss the action as unfounded;
 - order the applicant to pay the costs.
- 24 The Kingdom of Spain submits that the Court should:
- annul the contested decision in so far as it concerns the applicant;
 - order the Commission to pay the costs.

Law

- 25 In support of its action, the applicant relies on four pleas in law, alleging:
- first, an error of assessment and a failure to state reasons in the identification of the aid measure and the beneficiary;
 - second, infringement of Article 107 TFEU and a failure to state reasons, divided into five parts, alleging (i) that the conditions concerning the imputability to the State have not been satisfied, (ii) the existence of an advantage, (iii) the selective nature of that advantage, (iv) the existence of a distortion of competition, and (v) an effect on trade between Member States;
 - third, infringement of Article 107 TFEU in the quantification of the aid and of the amount to be recovered;
 - fourth, in the alternative, infringement of Article 107 TFEU in the assessment of the compatibility of the aid.

The first plea in law, alleging an error of assessment and a failure to state reasons in the identification of the aid and of the beneficiary

- 26 The applicant, supported by the Kingdom of Spain, maintains that the Commission has neither substantiated nor justified to the requisite legal standard the finding that it was the beneficiary of the contested aid.
- 27 First of all, the applicant observes that the Commission did not state, in the contested decision, why its doubts regarding the Fundación Elche's status of beneficiary, expressed in its decision initiating the formal investigation procedure, would have been dispelled.

- 28 Next, the applicant takes the view that the Commission, since it had not established a legal link between the loans granted to the Fundación Elche and guaranteed by the IVF, on the one hand, and the acquisition of the applicant's shares by the Fundación Elche, on the other, should examine the two transactions separately, in the light of their own, distinct characteristics. It cannot, in that regard, be deduced from the description of the purpose of the financing secured by the Fundación Elche that the loans which have been granted to it and its acquisition of the applicant's shares constitute a single legal transaction. The Kingdom of Spain adds that that information does not establish that the Fundación Elche sought to improve the applicant's financial situation. The Commission should have examined in particular whether the acquisition by the Fundación Elche of the applicant's shares constituted a transaction which was not devoid of any prospect of profitability.
- 29 Inasmuch as this is a question of two separate transactions, the applicant maintains that, in order to be able to find that it had benefited from the aid, the Commission should have established that the aid was transferred to the applicant when the Fundación Elche purchased its shares — which the Commission neither analysed nor explained.
- 30 Moreover, by maintaining that the applicant was the beneficiary of aid, the Commission should have found, following the same logic, that the applicant's creditors, ultimately, were also beneficiaries of the aid. The applicant adds, in its reply, that the Commission should also have assessed whether the lending banks have also benefited from the aid.
- 31 Additionally, the Commission failed to establish that the applicant and the Fundación Elche were one beneficiary and had not even fulfilled its obligation to state reasons in that regard. In this respect, the concept of economic unity on which the contested decision appears to be based, is not applicable to the relationship between the applicant and the Fundación Elche, which are separate entities with different corporate objects, since the Fundación Elche is not engaged in economic activities either.
- 32 The criteria, set out in recital 63 of the contested decision, for taking the view that an entity with a controlling shareholding in a company takes part in that latter's economic activity are not satisfied. Therefore, the Fundación Elche did not control the applicant, since its short-term aim was to resell its shares to repay the loans and it did not, in any event, own shares in the applicant at the time the guarantee at issue was granted. Nor did it appoint the members of the applicant's Board of Directors which, conversely, decided jointly with the Fundación Elche on the composition of the latter's governing body. Finally, the Fundación Elche did not, as the Commission maintains, 'manage' the loans which had provided the applicant with capital, since it acted as a borrower, merely to maintain a legal relationship with the IVF in the context of the guarantee granted to it alone and from which the applicant did not benefit. That guarantee was, inter alia, conditional on the pledge, in favour of the IVF, of the applicant's shares, since the IVF was authorised to give and did in fact give guidance to the Fundación Elche as regards the exercise of its rights over the applicant, for the purpose of safeguarding the IVF's financial interests. The contested steps taken, linked to the failure on the part of the Fundación Elche to pay part of the loans contracted directly concerned only the Fundación Elche to the exclusion of the applicant. In the absence of further evidence, no financial agreement, within the meaning of the criteria set out in recital 63 of the contested decision, thus existed between the applicant and the Fundación Elche.
- 33 Finally, the judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8) to which recital 63 of the contested decision refers, has no connection with the situation in the present case, to the extent that it was not a question of establishing whether the Fundación Elche was a company — which, moreover, it is as it carries out an economic activity which consists in purchasing shares — and that the Fundación Elche did not control the applicant.
- 34 The Commission disputes the applicant's arguments.

- 35 At the outset, it should be noted that the parties agree that the measure in question which is the subject of the contested decision is the guarantee granted by the IVF on 17 February 2011 for the two loans taken out by the Fundación Elche. However, they disagree on the actual beneficiary of that measure.
- 36 In that regard, it must be held that Article 107 TFEU prohibits aid granted by a State or through State resources in any form whatsoever, without drawing a distinction as to whether the aid-related advantages are granted directly or indirectly (judgment of 4 March 2009, *Italy v Commission*, T-424/05, not published, EU:T:2009:49, paragraph 108). Therefore, the Commission may take into account the allocation which should have been decided, as appropriate, at the time when the measure was granted in order to determine the recipient of the aid. In such a case, it is possible in particular that the beneficiary is not the person who took up the guaranteed loan (see, to that effect, judgment of 3 July 2003, *Belgium v Commission*, C-457/00, EU:C:2003:387, paragraphs 56 and 57). Ultimately, in order to determine the recipient of State aid, it is necessary to identify the undertakings which have actually benefited from it (judgment of 3 July 2003, *Belgium v Commission*, C-457/00, EU:C:2003:387, paragraph 55).
- 37 In the present case, the Commission found, in recitals 11 and 68 of the contested decision, that the purpose of the guarantee granted by the IVF, as is clear from the same wording of the guarantee contract of 17 February 2011, was to secure two loans to the Fundación Elche aimed solely at funding the applicant's capital increase. In that regard, neither the applicant, nor the Kingdom of Spain dispute that the guarantee granted by the IVF was applicable only if the guaranteed loans were used for the purposes referred to in the guarantee contract, that is to say participation in the applicant's capital increase.
- 38 It is also undisputed that the sums obtained through the guaranteed loans have in fact been set aside for the applicant's recapitalisation.
- 39 It follows that the Commission correctly held that the applicant was the beneficiary of the measure in question.
- 40 That finding cannot be called into question by the other arguments of the applicant and the Kingdom of Spain.
- 41 In the first place, the fact that the Commission has not, moreover, established that the Fundación Elche was the beneficiary of the State aid is irrelevant. Given that Article 107(1) TFEU prohibits aid granted by a Member State or through State resources in any form whatsoever, it is not necessary when reaching the conclusion that the guarantee at issue benefits another person than the borrower who was granted the guarantee, to first make a finding that the intervention constitutes State aid to the borrower (judgment of 3 July 2003, *Belgium v Commission*, C-457/00, EU:C:2003:387, paragraph 57).
- 42 In the second place, as regards the error made by the Commission in failing to identify other beneficiaries of the measure in question, among the applicant's lending banks and creditors, it must be noted that the applicant puts forward no information which substantiates the existence of several beneficiaries of the aid. In any event, the applicant's argument is ineffective, in so far as the fact, even if it were established, that other persons also benefited from the measure in question has no bearing, as such, on the finding that the applicant has also benefited from the measure in question.
- 43 In the third place, the applicant's argument concerning the reference, in the contested decision, to the judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8), and to the application of criteria which are listed there must also be dismissed as ineffective inasmuch as it is directed against a ground of the contested decision which must be regarded as being included for the sake of completeness, to the extent that the ground set out in paragraph 37 above is sufficient to support the finding that the applicant was the beneficiary of the measure in question.

- 44 The first plea must therefore be rejected in so far as it is directed against the validity of the Commission's assessment.
- 45 It should moreover be noted that the contested decision is sufficiently reasoned as regards determination of the State aid. It is clear, *inter alia*, from the examination of the various pleas raised by the applicant that the contested decision enabled it to be aware of the reasons for the measure taken in that regard and enabled the Court to exercise its power of review. Therefore, the first plea, in so far as it alleges infringement of Article 296 TFEU, must be dismissed.

The second plea, alleging infringement of Article 107 TFEU and a failure to state reasons

- 46 The present plea is divided into five parts, alleging (i) that the conditions concerning the imputability to the State of the measure in question have not been satisfied, (ii) the existence of an advantage, (iii) the selective nature of that advantage, (iv) the existence of a distortion of competition, and (v) the existence of an effect on trade between Member States.

The first part, alleging infringement of Article 107 TFEU and a failure to state reasons in the imputation of the measure in question to the State

- 47 The applicant takes the view that the Commission erred in finding that the measure adopted by the IVF was imputable to the State by relying on entirely organic criteria and did not sufficiently explain how it arrived at such a conclusion, limiting itself to general assumptions. In so far as the IVF carries out both commercial activities and activities of a public nature, the Commission should have ensured that the grant of the guarantee at issue was not part of activities carried out in competition with other private operators, judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8), which in that regard constitutes a decisive reference point.
- 48 According to the case-law, for advantages to be capable of being categorised as aid within the meaning of Article 107(1) TFEU, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State (judgment of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, paragraph 24).
- 49 In the present case, it must be examined whether the measure in question could rightly be regarded as the result of conduct imputable to the State.
- 50 It is settled case-law that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of sufficiently precise and consistent indicators, arising from the circumstances of the case and the context in which that measure was taken and justifying the presumption of the existence of the specific involvement of the public authorities in the adoption of that measure (see judgment of 25 June 2015, *SACE and Sace BT v Commission*, T-305/13, EU:T:2015:435, paragraph 45 and the case-law cited).
- 51 In that regard, paragraphs 55 and 56 of the judgment of 16 May 2002, *France v Commission* (C-482/99, EU:C:2002:294), contain a list of non-mandatory and non-exhaustive indicators which have been taken into consideration in the case-law or which are likely to be, such as the fact that a public undertaking which granted the aid could not take that decision without taking account of the requirements of the public authorities, the fact that the undertaking was linked to the State by factors of an organic nature, that it had to take account of directives issued by an inter-ministerial committee, the nature of the activities of the public undertaking and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the authorities over its management or its integration into the structures of the public administration.

- 52 In the present case, the Commission relies, in recitals 54 to 56 of the contested decision, on various indicators.
- 53 The IVF was established by law in the form of a legal body governed by public law subject to the Regional Government of Valencia, some of whose representatives participate in the IVF's General Council and Investment Committee. The IVF is attached to the department responsible for economic affairs.
- 54 Pursuant to the law, the IVF is intended to act as the main instrument of public credit policy and contribute to the exercise of the powers of the Regional Government of Valencia on the financial system.
- 55 The guarantee at issue and the conditions its grant was subject to were in line with the budgets approved in accordance with the commitment ceilings imposed by the applicable legislation.
- 56 From the outset, it must be concluded from the information recalled in paragraphs 53 to 55 above, that the Commission did not rely exclusively on the existence of organic links in order to conclude that the measure in question is imputable to the State, contrary to what the applicant maintains.
- 57 Next, first, as regards the IVF's legal status, the contested decision states that it is a legal body governed by public law, established by law.
- 58 Second, as regards the nature of the activities carried out by the IVF, it is clear from the wording of the law which established it that the IVF pursues an objective of public policy consisting in maintaining, by public financing, the economy of the region of Valencia. Additionally, the IVF assists the Regional Government of Valencia in the exercise of its powers to supervise the local finance system.
- 59 It follows that the IVF acts as a development bank pursuing public policy objectives and not as a credit institution with purely commercial objectives (see, to that effect, judgment of 27 February 2013, *Nitrogénművek Vegyipari v Commission*, T-387/11, not published, EU:T:2013:98, paragraph 63). The IVF's remit as regards prudential supervision additionally confirms that its activity is part of the objectives defined by the public authorities.
- 60 Third, apart from the consequences which may result from the IVF's public law status, the organic links between the IVF and the Regional Government of Valencia and the intensity of the supervision exercised by the latter are evident from the presence of representatives of the Regional Government of Valencia in several of the IVF's governance structures and from the IVF's attachment to the department responsible for economic affairs.
- 61 In respect of the foregoing, the view must be taken that the Commission was justified in finding that the guarantee at issue was imputable to the State.
- 62 That finding is not called into question by the applicant's argument that the IVF also carries out activities in competition with private operators which are presented as commercial. First, the applicant makes a mere assertion without adducing any evidence which may call into question the legal definition of the IVF's public policy objectives, as set out in recital 54 of the contested decision. It has therefore not established that part of the IVF's activities take place outside the context of implementing tasks of public policy which have been conferred upon it, or a fortiori that they were of a purely commercial nature. Second, the mere fact that the IVF carried out its activities in competition with private operators does not preclude the measures the IVF is likely to adopt from being imputed to the State (see, to that effect, judgment of 28 January 2016, *Slovenia v Commission*, T-507/12, not published, EU:T:2016:35, paragraph 92).

63 Finally, it must be held that the contested decision is sufficiently reasoned as regards the imputation to the State of the measure in question. It is clear, *inter alia*, from the examination of the various pleas raised by the applicant that the contested decision has enabled it to be aware of the reasons for the measure taken in that regard and has enabled the Court to exercise its power of review.

64 The first part of the second plea must therefore be rejected.

The second part, alleging infringement of Article 107 TFEU and a failure to state reasons concerning the existence of an advantage

65 The applicant takes the view that the Commission did not verify whether the conditions set out in the Guarantee Notice were applicable in the present case. More generally, no specific assessment of the existence of an advantage flowing from the measure in question is included in the contested decision.

66 The applicant first of all relies on the lack of an assessment of the Fundación Elche's situation, even though it was the sole beneficiary of the guarantee granted by the IVF. According to the applicant, it is apparent from the contested decision that the Fundación Elche carried out no economic activities, has not encountered any financial difficulties following the grant of the guarantee and has also not benefited from any advantage.

67 Next, the applicant maintains that the Commission did not compare the terms of the guarantee at issue with the conditions which prevailed on the market and has also not taken into account counter-guarantees offered by the Fundación Elche, that is to say a pledge on its shares and a mortgage on a six-hectare land plot.

68 Finally, if the applicant were the beneficiary of the guarantee at issue, the information included in the contested decision concerning its economic situation did not make it possible to retain its classification of 'firm in difficulty' or to attribute a CCC credit rating to it. The applicant notes, in this respect, the lack of reference in the contested decision to an assessment by a third party of its solvency and provides, as evidence to the contrary, a loan contract it concluded with Banco de Valencia in October 2010. The applicant disputes in any event the connection established between its credit rating and the value of its shares.

69 The Kingdom of Spain supports the applicant in its plea and adds, as regards the assessment of its economic situation, that it should have been assessed by the Commission in the light of the particular features of the professional football sector, since the lack of reply to the arguments in that regard in the contested decision constitutes, according to the Kingdom of Spain, a failure to state reasons. Furthermore, the Kingdom of Spain states that, notwithstanding the failure to comply with the condition prescribed by the Guarantee Notice not to cover more than 80% of the guaranteed loan, the IVF has acted as a private operator in the market economy since it took into account, in order to define the scope of the guarantee, significant counter-guarantees granted by the Fundación Elche.

70 The Commission contends, first of all, that the applicant relies on the erroneous premiss that it is not the applicant itself, but the Fundación Elche which should have been the beneficiary of the measure in question and states that the Fundación Elche did not, in any event, have the financial capacity to manage the debt flowing from the loans which have been granted to it.

71 Next, the Commission argues that it did examine, in the contested decision, whether the guarantee had been granted on market terms, by relying on the applicant's financial situation in the light of which no financial establishment would have agreed to grant a loan such as those in question, without a State guarantee. It should have also compared the measure in question with transactions carried out in market conditions, which the explanations in the contested decision on the calculation of the amount of aid demonstrate, it being noted that neither the Kingdom of Spain nor the applicant have claimed

during the administrative phase that similar loans had been granted to the latter. As regards the counter-guarantees offered, the Commission states that, first, the value of the applicant's pledged shares reflected the club's financial situation and should, on that basis, be regarded as being almost close to zero. Second, the mortgage relied on by the applicant had not been mentioned by the Kingdom of Spain during the administrative phase and was, moreover, of low value (EUR 600 000) compared with the amount of the loans granted to the Fundación Elche (EUR 14 million).

72 In addition, the Commission submits that it correctly classified the applicant as a firm in difficulty at the time the guarantee at issue was granted, since the improvement of its financial situation only took effect after the adoption of the contested measure. The financial difficulties encountered by the applicant warranted that it was attributed a CCC credit rating. As regards Banco de Valencia's loan granted without a State guarantee, which the applicant relies on, it is not comparable, in particular in the light of its duration and the date it was concluded.

73 Finally, in reply to the arguments relied on by the Kingdom of Spain, the Commission notes that the assessment of an undertaking's difficulties must be made objectively in respect of the particular situation of the undertaking in question, and neither the Kingdom of Spain nor the applicant have established that another method applies as regards football clubs. In respect of the Kingdom of Spain's argument that the coverage provided by the guarantee at issue could not exceed 80% of the guaranteed loan, taking into account the circumstances of the case, the Commission contends that the context, and, in particular, the low value of the proposed counter-guarantees, does not permit to evade that condition prescribed by the Guarantee Notice, a fortiori because that notice recommends, in such a situation, to notify the measure to the Commission in advance.

74 This part of the plea concerning the existence of an advantage is divided into three complaints, directed, first, against the failure to take into account the Fundación Elche, second, against the lack of assessment, on the one hand, of the wording of the guarantee at issue and securities granted in return and, on the other, of the conditions in which similar transactions were carried out on the market and, third, against the incorrect assessment of the applicant's financial situation at the time the guarantee at issue was granted. The Court will examine the third complaint before the second complaint, in so far as the contested decision relies in part on the prior finding of the applicant's financial difficulties in order to draw the conclusions disputed in the context of the second complaint.

– Admissibility of the second part in so far as it concerns a breach of the obligation to state reasons

75 Following a question by the Court during the hearing, the Commission disputed the admissibility of this part in so far as it concerns a breach of the obligation to state reasons.

76 In that regard, it must be held that the applicant's arguments concerning the failure to state reasons or an inadequate statement of reasons are not distinct, in its written pleadings, from those which refer to the merits of the reasons set out in the contested decision.

77 According to settled case-law, the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (judgments of 22 March 2001, *France v Commission*, C-17/99, EU:C:2001:178, paragraph 35, and of 18 January 2005, *Confédération Nationale du Crédit Mutuel v Commission*, T-93/02, EU:T:2005:11, paragraph 67).

78 In addition, the application emphasises, in the headings connected with the present part, the lack of an assessment carried out by the Commission and sets out, in the arguments related to it, either a lack of assessment or verification, or the Commission's allegedly erroneous assessments. It must be observed that all of those considerations relate to the merits and not to the statement of reasons of the

contested decision. Finally, the application sporadically contains a reference to the lack or inadequacy of the statement of reasons, but those are systematically linked to considerations concerning the merits of the contested decision.

- 79 It must be borne in mind in that regard that, under Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure, the application initiating proceedings must contain a brief statement of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The application must, accordingly, specify the nature of the grounds on which it is based, with the result that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (judgments of 16 September 2013, *British Telecommunications and BT Pension Scheme Trustees v Commission*, T-226/09 and T-230/09, not published, EU:T:2013:466, paragraph 232, and of 11 September 2014, *Gold East Paper and Gold Huasheng Paper v Council*, T-444/11, EU:T:2014:773, paragraph 93).
- 80 In respect of the principles and information recalled in paragraphs 75 to 79 above, in connection with this part, the complaints directed against the statement of reasons of the contested decision must therefore be dismissed as inadmissible and the arguments alleging, in essence, an error of assessment by the Commission in determining an advantage must be examined.
- 81 Moreover, the Commission did not fail to comply with its obligation to state reasons as regards the existence of an advantage. The following arguments confirm, first, that the applicant was in a position to challenge the merits of the reasons of the contested decision and, second, that the Court was able to carry out its review in that regard.

– *Complaint directed against a failure to take into account the Fundación Elche's situation in the assessment of the existence of an advantage*

- 82 First of all, it is recalled that the Court found, in response to the first plea, that the Commission did not make errors of assessment by identifying, in the contested decision, the applicant as being the beneficiary of the measure in question. Therefore, the applicant's arguments seeking to challenge the grant of an advantage to the Fundación Elche, in so far as they are founded on the premiss that that foundation is the only beneficiary of the guarantee at issue, must be rejected as ineffective.
- 83 However, the applicant, by that complaint, also relies on the fact that the IVF granted the guarantee to the Fundación Elche, which warranted the examination of its financial situation for the purposes of assessing the existence of an advantage.
- 84 In that regard, it must be found, contrary to the Commission's assertions (see paragraph 70 above), that the fact that the applicant is the beneficiary of the measure in question in terms of State aid law, as has been confirmed in connection with the first plea, does not depend on whether the Fundación Elche is a party to the guarantee contract entered into with the IVF and is identified in that contract as the beneficiary, as is clear from paragraph 3 above. In other words, the fact that the Fundación Elche is not identified as being the actual beneficiary of the measure in question has no bearing on the fact that it benefits from the guarantee at issue as provided in the contract concluded with the IVF on 17 February 2011.
- 85 It follows that the Fundación Elche must be accountable to the IVF for the consequences of non-payment of the underlying loans of the guarantee contract and for the invocation of the guarantee by the lending banks. Furthermore, it must also be noted, that that fact is illustrated by the

action for recovery referred to by the applicant in its pleadings, which has since been brought by the IVF against the Fundación Elche, claiming repayment of the sums it paid to the lending banks which had called in the guarantee following the Fundación Elche's failure to pay part of the guaranteed loans.

- 86 In light of the above, the financial and economic situation of the Fundación Elche therefore constitutes, in principle, a relevant characteristic for the purposes of evaluating the risk taken by the State guarantor and, thereby, the guarantee premium which a private operator would claim in those circumstances.
- 87 In addition, it must be borne in mind that the EU judicature is required, inter alia, to establish that the Commission has carried out an overall assessment taking into account all relevant evidence in the case enabling it to determine whether the measure in question confers an advantage (see, to that effect, judgments of 24 January 2013, *Frucona Košice v Commission*, C-73/11 P, EU:C:2013:32, paragraph 73, and of 15 December 2009, *EDF v Commission*, T-156/04, EU:T:2009:505, paragraph 221).
- 88 The Court must review the relevance in the present case of the information which allegedly was not taken into account during the administrative procedure, and, if so, whether the Commission took account of it (see, to that effect, judgment of 24 January 2013, *Frucona Košice v Commission*, C-73/11 P, EU:C:2013:32, paragraph 77).
- 89 First, as is evident from paragraphs 84 to 86 above, the Fundación Elche's economic and financial situation constitutes, in principle, a relevant fact for the purposes of assessing the existence of an advantage resulting from the conditions governing the grant of the guarantee at issue.
- 90 The Commission submits, however, in its written pleadings that the Fundación Elche did not, in any event, have the financial capacity to manage the debt arising from the loans which have been granted to it, in the light of, inter alia, its low equity.
- 91 Assuming that to be true, the fact remains that the probability of the borrower's default, in the present case the Fundación Elche, owing to its financial situation is, in itself, a relevant fact that the Commission was required to examine (see, in that regard, point 3.2(d) of the Guarantee Notice), bearing in mind that a decision must be sufficient in itself and the reasons on which it is based may not be stated in explanations given subsequently when the decision in question is already the subject of proceedings brought before the EU judicature (judgment of 16 September 2013, *Wabco Europe and Others v Commission*, T-380/10, EU:T:2013:449, paragraph 107). Moreover, it must be stated, in response to the Commission's argument concerning the Fundación Elche's financial situation, that the latter's own equity, admittedly limited, was nevertheless positive, at the time the guarantee at issue was granted, at EUR 1.4 million, unlike the applicant's situation at the same time (recitals 20 and 22 of the contested decision).
- 92 Second, once the relevance of the Fundación Elche's economic and financial situation has been established, it must be examined whether the Commission took into account in its assessment the existence of an advantage.
- 93 First of all, the contested decision contains, in recital 11 listed in Section 2 concerning the description of the measures and beneficiaries, the measure in question by stating the information described in paragraphs 3 and 4 above, and then sets out, in recital 22, the key financial data of the Fundación Elche between December 2009 and December 2011, after referring to the shareholding and organisational links between itself and the applicant (recital 21). Next, it is concluded, as a result of the analysis carried out in recitals 63 and 66 to 69 of the contested decision, that the beneficiary of the measure in question is not the Fundación Elche but the applicant. The explanations which follow

that finding, in recitals 70 to 88, concern the characteristics of an advantage, whereas recitals 91 to 95 refer to the quantification of the aid element. At that stage, no further reference is made to the Fundación Elche, or a fortiori to its economic and financial situation.

94 It is apparent from examining the contested decision, that it does not take into account the Fundación Elche's situation for the purposes of establishing the existence of an advantage, since the only analytical information in that regard is located earlier, in recital 68, pursuant to which it was found that the Fundación Elche's situation was not improved following the grant of the guarantee at issue, which, together with the fact that the risk for the triggering of the guarantees depended, according to the Commission, on the applicant's performance, warrants that the Fundación Elche is regarded as the only beneficiary of the aid measure. By contrast, the contested decision does not in any way determine the relevance of the Fundación Elche's individual position in assessing the risk associated with the grant of the guarantee at issue.

95 In view of all of the foregoing, it must be held that the Commission failed to take into account the relevant fact which constitutes the Fundación Elche's economic and financial situation for the purposes of assessing the existence of an advantage and, in doing so, committed a manifest error of assessment (see, to that effect, judgment of 30 November 2016, *Commission v France and Orange*, C-486/15 P, EU:C:2016:912, paragraphs 88 and 89).

– Complaint directed against the erroneous assessment of the applicant's financial situation at the time the guarantee at issue was granted

96 In the present case, the Commission, in recital 79 of the contested decision, relied on paragraph 10(a) and paragraph 11 of the Rescue and Restructuring Guidelines to classify the applicant as a firm in difficulty on the date the guarantee at issue was adopted.

97 Paragraph 10(a) of the Rescue and Restructuring Guidelines provides that, a firm is, in principle and irrespective of its size, regarded as being in difficulty, 'in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months'. Next, under paragraph 11 of those guidelines, 'even when none of the circumstances set out in [paragraph] 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'.

98 In the present case, in recital 79 of the contested decision, the Commission submits that the applicant has diminishing turnover between the financial year ending in June 2008 and the one ending in June 2010 (from EUR 7.1 million to EUR 4.4 million), a negative earnings before tax result in the financial years ending in June 2007, 2008, 2009 and 2010 (from EUR –6.2 million in the financial year 2006/2007 to EUR –1.1 million in the financial year 2009/2010) and negative own equity in the financial years ending in June 2009 and 2010 (EUR –10.2 million for each of the financial years referred to). It must also be noted that the registered capital of the applicant, which is a limited liability company, has diminished by more than half between the 2008/2009 financial year and the 2009/2010 financial year, as is evident from recital 20 of the contested decision.

99 In view of the foregoing, the Commission committed no manifest error of assessment in finding that the applicant was, at the time the guarantee at issue was granted, a firm in difficulty within the meaning of paragraph 10(a) and paragraph 11 of the Rescue and Restructuring Guidelines.

100 None of the arguments submitted by the applicant is capable of calling into question that finding.

- 101 First of all, as the Commission correctly maintains, the financial data highlighted by the applicant in respect of the 2010/2011 financial year relate to a financial year which ended prior to the grant of the guarantee at issue on 17 February 2011. However, the applicant does not explain how those data would nevertheless constitute a relevant factor for the purposes of assessing its situation at the time that guarantee was granted.
- 102 Furthermore, the fact that the contested decision observes, in recital 80, that the losses registered by the applicant between 2007 and 2010 have decreased to find that the latter was not in a situation of extreme difficulty ('situación de crisis grave' in the Spanish version, which is the only authentic version) within the meaning of the Guarantee Notice, does not contradict the finding, in recital 79, that the applicant's financial situation satisfies the criteria of a firm in difficulty within the meaning of the Rescue and Restructuring Guidelines. As was confirmed by the Commission in its reply to a written question by the Court in the context of measures of organisation of procedure, the findings in recital 80 are intended, as evidenced by the quantification of the aid to be recovered in the remainder of the contested decision, to establish whether it is necessary to apply point 2.2 and point 4.1(a) of the Guarantee Notice and to hold, exceptionally, that the applicant received an advantage equal to the total amount of the guaranteed loans (see, to that effect, judgment of 1 February 2018, *Larko v Commission*, T-423/14, under appeal, EU:T:2018:57, paragraphs 189 and 190).
- 103 Next, as regards the loan without a guarantee obtained by the applicant from Banco de Valencia in October 2010 (see paragraph 68 above), to the extent that the applicant seeks by its claim to dispute that it was in financial difficulty at the time the measure in question was granted, it must be noted, as the Commission has done without being challenged in that respect, that that loan has in fact the effect of increasing the applicant's level of debt in relation to the state of its situation at the end of the 2009/2010 financial year. Moreover, it must be observed that that loan was granted for the duration of one year, that is to say, a period significantly shorter than that of the contested loans, of a duration of five years, which makes any comparison between them uncertain, in particular in the light of their respective rates and conditions. Moreover, the applicant fails to explain how the conditions of a loan with a short maturity date granted several months before the guarantee at issue are capable of calling into question the Commission's findings on its financial situation at the time the measure was granted.
- 104 As regards the Commission's failure to take into account the analysis of the applicant's solvency which should have been carried out, as the case may be, by a rating agency or by one of the banks granting the guaranteed loans, it must be held that, according to point 3.2(d) of the Guarantee Notice to which the applicant refers, the analysis which allows 'the borrower to be classified by means of a risk rating ... may be provided by an internationally recognised rating agency or, where available, by the internal rating used by the bank providing the underlying loan'. It follows that the Guarantee Notice does not, in this connection, impose an obligation on the Commission to investigate and to take into account ratings established by such entities.
- 105 Finally, as regards the Kingdom of Spain's argument that, in essence, the applicant's economic situation should have been assessed by the Commission in the light of the particular features of the professional football sector, it is sufficient to note, first, that the economic nature of the practice of football by professional clubs has previously been recognised by the Court (see, to that effect, judgment of 26 January 2005, *Piau v Commission*, T-193/02, EU:T:2005:22, paragraph 69) and, second, that the meaning of 'a firm in difficulty', as defined in paragraph 9 of the Rescue and Restructuring Guidelines, is an objective notion that must be assessed solely in the light of the specific indices of the financial and economic situation of the undertaking in question (judgment of 6 April 2017, *Regione autonoma della Sardegna v Commission*, T-219/14, EU:T:2017:266, paragraph 184), since the general considerations concerning the particular features of the sector in question put forward by the Kingdom of Spain are not suitable to disprove the findings made on the basis of the applicant's individual financial facts.
- 106 In the light of the foregoing, this complaint must be rejected.

– Complaint directed against the lack of assessment, on the one hand, of the wording of the guarantee at issue and the securities granted in return and, on the other, of the conditions in which similar operations were carried out on the market

- 107 As regards, first, the alleged lack of assessment of the wording of the guarantee at issue and the securities granted in return, it must, first of all, be stated, as the Commission has correctly pointed out, that the contested decision states, in recital 86, that ‘the annual guarantee premiu[m] of ... 1% charged for the guarante[e] in question cannot be considered as reflecting the risk of default for the guaranteed loans, given the difficulties’ of the applicant. It follows that the level of guarantee premiums required in connection with contracts concluded between the Fundación Elche and the IVF has been taken into account by the Commission and that the applicant’s complaint thus has no factual basis.
- 108 As regards the specific obligation, provided for by the IVF’s guarantee certificate of 10 November 2010 and allegedly overlooked by the Commission, that the guaranteed loans were to be granted on conditions which ‘do not deviate significantly from those applied on the market for transactions of that nature’, this is irrelevant, in that the contested decision is not based on the finding that the lending banks, by granting the loans in view of the guarantee offered by the IVF, have themselves acted in a manner that is not in line with market conditions.
- 109 Next, as regards the counter-guarantees offered, the complaint that the Commission failed to take into account the applicant’s pledging of the shares, in so far as it is expressly stated in recital 93 of the contested decision that ‘the value of [the] shares [of clubs named as beneficiaries] as loan security was close to zero’, also lacks any factual basis.
- 110 However, the applicant also refers to the Commission’s alleged error in the link made by it in the contested decision between the credit rating attributed to the applicant, on the one hand, and the value of its shares, on the other.
- 111 It must be noted in this respect that, in order to conclude that the applicant’s shares are of a low value, the contested decision relies on the fact that it was a firm in difficulty at the time the measure in question was granted, for which there was no credible viability plan in place to demonstrate that its activity was likely to generate a profit for its shareholders.
- 112 However, as is apparent from the examination of the third complaint of this part of the plea in paragraphs 96 to 106 above, the applicant’s classification as a firm in difficulty in the contested decision is free from manifest errors of assessment.
- 113 It remains to be determined whether the method used by the Commission in this case which consists in deducing a value ‘close to zero’ of the applicant’s shares from the fact that it was in difficulty without a viability plan also being drawn up — that point not being disputed — is vitiated by a manifest error. For that purpose, the Court asked the Commission a question in the context of measures of organisation of procedure, requesting it to provide further details on the method which it used to assess the value of the applicant’s shares and to state whether the 2011 capital increase had an impact on that value. On that last point, the Commission replied that the impact of the applicant’s capital increase could not be taken into account in determining the shares’ value at the time the guarantee at issue was granted, in so far as it predated the capital injection.
- 114 In that regard, it is settled case-law that for the purposes of applying the private creditor test in a market economy, the relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to proceed with the transaction was taken (see judgment of 20 September 2017, *Commission v Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 61 and the case-law cited).

- 115 Since the applicant's recapitalisation is the purpose and the intended effect of the guarantee at issue, it is a predictable factor at the time the guarantee at issue was granted and which a private operator in the IVF's situation would have taken into account for the purposes of assessing the value of the pledged shares. It follows that, by failing to take this into account, the Commission committed a manifest error of assessment.
- 116 In addition, the applicant criticises the Commission for not having examined the existence of a mortgage on a six-hectare land plot also given to the IVF as a counter-guarantee by the Fundación Elche.
- 117 From the outset, the Commission's argument alleging that the Kingdom of Spain did not mention that mortgage in its observations submitted during the administrative procedure must be rejected. It is sufficient in that regard to point out that, first, the existence of a mortgage is apparent from the information available during the administrative procedure, in the present case, the guarantee contract concluded between the Fundación Elche and the IVF on 17 February 2011, second, it is for the Commission to provide proof that there was State aid (see, to that effect, judgment of 12 September 2007, *Olympiaki Aeroporia Ypiresies v Commission*, T-68/03, EU:T:2007:253, paragraph 34) and, third, the Commission is required to conduct a diligent and impartial administrative procedure, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose (judgment of 3 April 2014, *France v Commission*, C-559/12 P, EU:C:2014:217, paragraph 63).
- 118 Next, the case-law referred to in paragraphs 87 to 88 above must be applied with a view to assessing whether the mortgage in question constitutes a relevant factor for the purposes of assessing the existence of an advantage and whether, as the case may be, the Commission took account of it.
- 119 In the present case, the mortgage given by the Fundación Elche, a security granted by the guaranteed borrower, constitutes as such a characteristic of the guarantee at issue which the Commission is required to examine (see, in this respect, point 3.2(d) of the Guarantee Notice). Moreover, it is not disputed by the Commission that the contested decision contains no mention of that mortgage. The fact, put forward by the Commission, that the value of the mortgaged land is clearly inadequate to serve as a guarantee on the loans of EUR 14 million, is not connected a fortiori with any assessment featuring in the contested decision (see, to that effect, judgment of 24 January 2013, *Frucona Košice v Commission*, C-73/11 P, EU:C:2013:32, paragraph 87).
- 120 It follows that the Commission did not take into account the relevant fact of the mortgage granted by the Fundación Elche to the IVF for the purposes of assessing the existence of an advantage, and, in doing so, committed a manifest error of assessment.
- 121 Finally, still in the context of this complaint, as regards the Commission's failure to take into account the conditions in which similar transactions were carried out on the market, the applicant raises the issue of the rate applicable in 2011, according to Banco de España, to transactions of a duration of five years or less for loans in excess of EUR 1 million, which is only slightly lower than that granted in connection with the loans guaranteed by the Fundación Elche.
- 122 However, since the applicant does not explain how its situation is comparable to that of borrowers covered by the statistics from Banco de España, it is impossible, in the present case, to derive useful guidance from the applicant's assertions.
- 123 The applicant also criticises the Commission for not having determined whether the guarantee premium payable by the Fundación Elche, set at 1% of the amount covered, 'complied with market forces'. It is necessary to examine that argument together with the line of argument developed in

support of the third plea, according to which, in essence, the Commission erred in finding that there were no similar transactions enabling the existence of a guarantee premium benchmark to be established.

- ¹²⁴ In that regard, the Court has previously held that a borrower who subscribes to a loan guaranteed by the public authorities of a Member State normally obtains an advantage inasmuch as the financial cost that it bears is less than that which it would have borne if it had had to obtain that same financing and that same guarantee at market prices (judgments of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 39, and of 3 April 2014, *France v Commission*, C-559/12 P, EU:C:2014:217, paragraph 96).
- ¹²⁵ As is stated in point 3.2(d) of the Guarantee Notice, in order to determine the corresponding market price, the characteristics of the guarantee and of the underlying loan should be taken into consideration, which include, inter alia, the amount and duration of the transaction, the security given by the borrower and the other factors affecting the recovery rate evaluation and the probability of default of the borrower due to its financial position, its sector of activity and prospects.
- ¹²⁶ 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 (see the second subparagraph of point 3.2(d) of the Guarantee Notice). 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 (see the third subparagraph of point 3.2(d) of the Guarantee Notice). Finally, where there is no market price of a similar non-guaranteed loan, it is appropriate to use as a proxy the reference rate, defined in accordance with the Reference Rates Communication (see the second paragraph of point 4.2 of the Guarantee Notice).
- ¹²⁷ In the present case, it must be observed that the contested decision excludes the possibility that the requested guarantee premium reflects the applicant's financial difficulties and the associated risk of default for the guaranteed loans (recital 86(c)). In recital 85 of the contested decision, the Commission states that a firm in difficulty is unlikely to find a financial institution prepared to lend on any terms, without a State guarantee. The Commission does not state anywhere in those recitals, or elsewhere in the arguments relating to the characteristics of an advantage (point 7.2 of the contested decision), what the market price is at which it assesses the premium in question. Nor at that stage does the Commission examine the pledge made to the IVF as a counter-guarantee (see paragraph 4 above). Overall, the Commission merely carries out an evaluation of the applicant's financial situation to conclude that, in view of the amount of the guarantee premium paid to the IVF, that premium is not in line with market conditions.
- ¹²⁸ Before the Court, the Commission states, in essence, that the contested decision dispenses with the need for a comparison between the guarantee premium due and the market price, taking into account the applicant's situation, which is a firm in difficulty. In other words, there is a presumption that the premium guarantee does not comply with market conditions where the borrower being granted the guarantee, or in this case the beneficiary of the advantage within the meaning of Article 107(1) TFEU, is a firm in difficulty.
- ¹²⁹ As was recalled in paragraph 126 above, point 3.2(d) and point 4.2 of the Guarantee Notice require a prior search for a possible market price against which to compare the terms of the contested transaction. Specifically as regards firms in difficulty, the Commission distinguishes, in point 4.1(a) of the Guarantee Notice, the situation of firms in difficulty according to their risk of default, which is not uniform. That notice thus distinguishes the situation where there is a guarantor on the market for a firm in difficulty from one in which it is likely that no such guarantor exists. It is therefore accepted that there may be a market price including where the guarantee is granted to a firm in difficulty.

- 130 In that regard, the Court notes that the Commission indicates in recital 80 of the contested decision that the applicant was ‘not in an extreme difficult situation, in the sense of point 2.2 and point 4.1 letter (a) of the 2008 Guarantee Notice’, after stating in recital 79, that it ‘was in financial difficulty in the sense of [paragraph] 10(a) and [paragraph] 11 of the [Rescue and Restructuring] Guidelines’. In doing so, the Commission also concurs with the interpretation made in paragraph 129 above of point 4.1(a) of the Guarantee Notice as tending to distinguish, among those firms in difficulty within the meaning of the Rescue and Restructuring Guidelines, two sub-categories of firms according to their risk of default. That is all the more evident in the Spanish version of the contested decision, the only authentic version, which refers in recital 80 to the fact that there is no ‘situation of severe crisis’ (*situación de crisis grave*), with the adjective ‘severe’ qualifying the word ‘crisis’ and distinguishing more clearly the situation envisaged in recital 80 from the one envisaged in recital 79 of the contested decision by adopting a category of firms in difficulty within the meaning of the Rescue and Restructuring Guidelines which are not in a situation of severe crisis within the meaning of point 4.1(a) of the Guarantee Notice.
- 131 In addition, contrary to what the Commission maintains, it is not apparent from point 3.3 of the Guarantee Notice that there is no market price for guarantees granted to a firm in difficulty. Point 3.3 concerns the simplified evaluation system which applies, by way of exception, to small and medium-sized firms and merely indicates that it is not to be applied to firms with a rating of CCC/Caa or below.
- 132 Consequently, the Commission, in presuming that no financial establishment would act as a guarantor for a firm in difficulty and, therefore, that no corresponding guarantee premium benchmark could be found on the market, failed to have regard to the Guarantee Notice by which it is bound (see, to that effect, judgment of 11 September 2008, *Germany and Others v Kronofrance*, C-75/05 P and C-80/05 P, EU:C:2008:482, paragraphs 60 and 61 and the case-law cited). For the same reasons, it also failed to fulfil its obligation to carry out an overall assessment, taking into account all relevant evidence in the case, enabling it to determine whether the applicant would manifestly not have obtained comparable facilities from such a private creditor (see, to that effect, judgment of 24 January 2013, *Frucona Košice v Commission*, C-73/11 P, EU:C:2013:32, paragraph 73).
- 133 Since that error has been established, it must be held that the Commission, in recital 93 of the contested decision, carried out a more detailed analysis in connection with the quantification of the aid element. Thus, the Commission excludes the existence of a market price of a similar non-guaranteed loan (see paragraph 126 above), ‘due to the limited number of observations of similar transactions on the market’, which ‘will not provide a meaningful comparison’.
- 134 In its application, the applicant disputed the lack of analysis by the Commission of the market conditions for the purpose of establishing the market price of a similar non-guaranteed loan. In its defence, the Commission argues that, ‘contrary to what the applicant implies, [it] found that the guarantees in question conferred an advantage, after comparing transactions carried out in market conditions which is clearly reflected in the calculation of the aid amount’ by referring to recital 93(c) of the contested decision.
- 135 It must be noted in that regard that, in recital 93(c) of the contested decision, the Commission applied the reference rate applicable in this case, established in accordance with the Reference Rates Communication. As has been recalled in paragraph 126 above, recourse to the reference rate constitutes a default method where there is no market price identified on the basis of similar transactions. Therefore, the Commission cannot rely on the application of that method in connection with calculating the amount of aid to argue that it did in fact proceed to compare the contested transaction with transactions carried out in market conditions.

- 136 Nevertheless, the Court, in the context of measures of organisation of procedure, put questions to the Commission in order to ascertain the nature and scope of the investigations which it conducted to arrive at its finding concerning the absence of a market price for a similar non-guaranteed loan. In response, the Commission merely stated that no information concerning interest rates on loans granted in similar situations had been supplied in the course of the investigation, without providing any indication as to the investigative measures taken, if any at all.
- 137 It should be borne in mind that the burden of proving that the criteria pertaining to the application of the private operator test have been fulfilled — which is applicable in the present case — lies with the Commission, which must ask for all relevant information during the administrative procedure (see, to that effect, judgments of 21 March 2013, *Commission v Buczek Automotive*, C-405/11 P, not published, EU:C:2013:186, paragraphs 33 and 34, and of 20 September 2017, *Commission v Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 24). In that regard, the Commission cannot rely on the fragmentary nature of the information it received during the administrative procedure to justify its decision, since it has not exercised all the powers at its disposal to obtain the necessary information (see, to that effect, judgment of 13 April 1994, *Germany and Pleuger Worthington v Commission*, C-324/90 and C-342/90, EU:C:1994:129, paragraph 29). That applies all the more strongly where the contested decision is based not on a failure to produce evidence which had been requested by the Commission from the Member State concerned, but on the finding that a private creditor would not have behaved in the same way as the authorities of that Member State, a finding which presupposes that the Commission had all the relevant information necessary to draw up its decision (see, to that effect, judgment of 21 March 2013, *Commission v Buczek Automotive*, C-405/11 P, not published, EU:C:2013:186, paragraph 35).
- 138 In the present case, the Court inferred from the answers given by the Commission in its defence, and then in connection with measures of organisation of procedure, that, during the administrative procedure, it did not ask the Kingdom of Spain or other sources of information about the existence of similar loans to the loans underlying the contested transaction. The Commission could therefore not rely on a failure to produce evidence requested by it to draw the conclusion, in recital 93 of the contested decision, that there are a ‘limited number of observations of similar transactions on the market’ which did not ‘provide a meaningful comparison’.
- 139 Furthermore, the Commission does not adduce any other information obtained during the administrative procedure which would have supported its conclusion concerning the lack of comparable transactions.
- 140 Therefore, the conclusion in question drawn by the Commission in recital 93 of the contested decision is not substantiated to the requisite legal standard.
- 141 In the light of the foregoing, the second part of the second plea must be upheld in so far as the Commission’s assessment of the existence of an advantage is vitiated by manifest errors to the extent that, first, it did not take into account the situation of the Fundación Elche, second, it did not take into account the mortgage granted by the Fundación Elche as a counter-guarantee, third, it did not take into account the applicant’s recapitalisation for the purposes of assessing the value of the shares pledged to the IVF, fourth, the Commission assumed that no financial institution would act as a guarantor for a firm in difficulty and, therefore, that no corresponding guarantee premium benchmark could be found on the market and, fifth, it did not sufficiently substantiate its conclusion concerning the lack of comparable transactions to establish the market price of a similar non-guaranteed loan.
- 142 Consequently, it is necessary to order the annulment of the contested decision in so far as it concerns the applicant, without there being any need to examine the remaining arguments and pleas raised in support of this action.

Costs

- ¹⁴³ Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the applicant, including those relating to the interlocutory proceedings, in accordance with the form of order sought by the applicant.
- ¹⁴⁴ Article 138(1) of those rules provides that Member States and institutions which have intervened in the proceedings are to bear their own costs. Therefore, the Kingdom of Spain is to bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

- 1. Annuls Commission Decision (EU) 2017/365 of 4 July 2016 on the State aid SA.36387 (2013/C) (ex 2013/NN) (ex 2013/CP) implemented by Spain for Valencia Club de Fútbol, SAD, Hércules Club de Fútbol, SAD and Elche Club de Fútbol, SAD, in so far as it concerns Hércules Club de Fútbol, SAD;**
- 2. Orders the European Commission to bear its own costs and to pay those incurred by Elche Club de Fútbol, including those relating to the interlocutory proceedings;**
- 3. Orders the Kingdom of Spain to bear its own costs.**

Kanninen

Schwarcz

Iliopoulos

Delivered in open court in Luxembourg on 12 March 2020.

[Signatures]