Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

12 March 2020*

(State aid — Aid granted by Spain to certain professional football clubs — Guarantee — Decision declaring the aid to be incompatible with the internal market — Advantage — Firm in difficulty — Private investor test — Guidelines on State aid for rescuing and restructuring firms in difficulty — Amount of the aid — Recipient of the aid — Principle of non-discrimination — Duty to state reasons)

In Case T-732/16,

Valencia Club de Fútbol, SAD, established in Valencia (Spain), represented by J. García-Gallardo Gil-Fournier, G. Cabrera López and D. López Rus, lawyers,

applicant,

supported by

Kingdom of Spain, represented by M.J. García-Valdecasas Dorrego and M.J. Ruiz Sánchez, acting as Agents,

intervener,

v

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

defendant,

ACTION under Article 263 TFEU seeking annulment of Commission Decision (EU) 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 12 March 2019,

gives the following

* Language of the case: Spanish.

Judgment

Background to the dispute

1 The applicant, Valencia Club de Fútbol, SAD, is a professional football club whose head office is located in Valencia, Spain.

2 Fundación Valencia is a non-profit foundation whose primary aim is to preserve, disseminate and promote the sporting, cultural and social aspects of the applicant and its relationship with its fans.

3 On 5 November 2009, the Instituto Valenciano de Finanzas ('the IVF'), the financial establishment of the Generalitat Valenciana (Regional Government of Valencia, Spain), provided the Fundación Valencia with a guarantee for a bank loan of EUR 75 million from Bancaja (now Bankia), through which it acquired 70.6% of the applicant's shares.

4 The guarantee covered 100% of the principal of the loan, plus interest and the costs of the guaranteed transaction. In return, an annual guarantee premium of 0.5% had to be paid by the Fundación Valencia to the IVF. The IVF received, as a counter-guarantee, a second-rank pledge on the shares in the applicant acquired by the Fundación Valencia. The duration of the underlying loan was six years. To begin with, the interest rate of the underlying loan was 6% for the first year, and subsequently the Euro Interbank Offered Rate (Euribor) 1-year + 3.5% margin with a 6% minimum rate. In addition, there was a 1% commitment fee. The schedule provided for repayment of the interest starting in August 2010 and repayment of the principal in two tranches of EUR 37.5 million on 26 August 2014 and 26 August 2015, respectively. It was envisaged that repayment of the guaranteed loan (principal and interest) would be financed by the sale of the shares in the applicant acquired by the Fundación Valencia.

5 On 10 November 2010, the IVF increased its guarantee in favour of the Fundación Valencia by EUR 6 million so as to obtain an increase by the same amount in the sum already loaned by Bankia in order to cover payment of the overdue principal, interest and costs arising from the non-payment of interest on the guaranteed loan on 26 August 2010. As a result of that increase, the initial payment schedule was modified and supplemented by a repayment of EUR 40.5 million planned for 26 August 2014 and a repayment of EUR 40.5 million planned for 26 August 2015. The interest rate for the loan remained unchanged.

6 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 replied to the Commission on 27 May and 3 June 2013.

7 By letter of 18 December 2013, the Commission informed the Kingdom of Spain of its decision to initiate 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.

8 During the formal investigation procedure, the Commission received observations and information from the Kingdom of Spain, the IVF, the Liga Nacional de Fútbol Profesional ('the LFP'), the applicant and the Fundación Valencia.

9 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 5 November 2009 to cover the bank loan to Fundación

Valencia for the subscription of shares in the applicant, in the context of the capital increase decided by the applicant ('Measure 1) and its increase decided on 10 November 2010 ('Measure 4') (together 'the measures at issue') constituted unlawful State aid incompatible with the internal market, in the sum of EUR 19 193 000 and EUR 1 188 000 respectively (Article 1). Accordingly, 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).

10 In the contested decision, the Commission, in the first place, considered that the measures at issue granted by the IVF involved State resources and were 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 Valencia, which acted as a financial vehicle, bearing in mind, in particular, the aim of the measures at issue consisting in facilitating the financing of the increase in the applicant's capital. The applicant's financial situation at the time the measures at issue were 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 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 distort or threaten 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 aid 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. In that regard, the Commission stated that the applicant's viability plan of May 2009 was insufficiently complete to enable a return to viability within a reasonable time limit.

Procedure and forms of order sought by the parties

11 By application lodged at the Registry of the General Court on 20 October 2016, the applicant brought the present action.

12 By separate document lodged at the Court Registry on 28 October 2016, the applicant submitted an interlocutory application principally for suspension of operation of Articles 3 and 4 of the contested decision in so far as the Commission thereby orders the recovery from the applicant of the aid which was allegedly given to it.

13 The Commission lodged its defence at the Court Registry on 24 January 2017.

14 By order of 23 March 2017, the President of the Fourth Chamber of the General Court granted the Kingdom of Spain leave to intervene in support of the form of order sought by the applicant.

15 The applicant lodged a reply at the Court Registry on 29 March 2017.

16 The Kingdom of Spain lodged its statement in intervention at the Court Registry on 2 June 2017.

17 The Commission lodged its rejoinder at the Court Registry on 19 June 2017.

18 By documents lodged at the Court Registry on 1 February, 15 February, 5 April and 27 June 2017, the applicant requested confidential treatment of certain material in the application, the defence, the reply and the rejoinder, vis-à-vis the Kingdom of Spain. The Kingdom of Spain did not raise any objections to the requests for confidential treatment.

19 The Commission and the applicant submitted their observations on the statement in intervention at the Court Registry, respectively on 14 and 17 July 2017.

20 By order of 22 March 2018, *Valencia Club de Fútbol* v *Commission* (T-732/16 R, not published, EU:T:2018:171), confirmed on appeal (order of 22 November 2018, *Valencia Club de Fútbol* v *Commission*, C-315/18 P(R), EU:C:2018:951), the President of the General Court rejected the interlocutory application and reserved the costs.

21 By orders of 26 April 2018, *Valencia Club de Fútbol* v *Commission*, (T-732/16, not published, EU:T:2018:237); of 26 April 2018, *Valencia Club de Fútbol* v *Commission*, (T-732/16, not published, EU:T:2018:238); and of 26 April 2018, *Valencia Club de Fútbol* v *Commission*, (T-732/16, not published, EU:T:2018:239), the President of the Fourth Chamber rejected the applications for leave to intervene made by the Fundación Valencia, the LFP and Bankia.

22 By letter of 25 May 2018, the applicant indicated that it wished to be heard at the hearing.

23 By letters from the Court Registry of 5 February 2019, the Court sent written questions to all the parties by way of measures of organisation of procedure under Article 89 of its Rules of Procedure, to which they replied on 20 February 2019.

24 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.

25 The Commission contends that the Court should:

– dismiss the action as unfounded;

– order the applicant to pay the costs.

26 The Kingdom of Spain submits that the Court should:

– uphold the action and annul the contested decision;

– order the Commission to pay the costs.

Law

Admissibility of the action in so far as it refers to Annex A.2

27 The Commission submits that the application makes only a general reference to the report from the consultants instructed by the applicant, annexed to the application as Annex A.2.

28 According to consistent case-law, it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Although the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with Article 21 of the Statute of the Court of Justice of the European Union, applicable to the proceedings before the General Court in accordance with the first paragraph of Article 53 of that statute, and Article 76(d) of the Rules of Procedure, must appear in the application. The annexes may be taken into consideration only in so far as they support or supplement pleas or arguments expressly set out by applicants in the body of their pleadings and in so far as it is possible to determine precisely what are the matters they contain that support or supplement those pleas or arguments (see judgment of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission*, T-53/16, under appeal, EU:T:2018:943, paragraph 379 and the case-law cited).

29 In the present case, it should be pointed out that the application, far from making a general reference to Annex A.2, systematically identifies, when referring to that annex, its specific paragraph or paragraphs which supplement or support the argument set out in the application. In addition, entire extracts from the annex are reproduced a number of times in the body of the application. Therefore, it must be held that the applicant did not just make a general reference to Annex A.2, contrary to what the Commission contends, and that therefore the action is admissible in that respect.

The admissibility of the arguments set out in Annex A.2

30 The Commission submits that Annex A.2 is inadmissible in that it contains arguments which are not set out in the application.

31 A review of Annex A.2 shows that the arguments developed therein have already been expressly relied on in the body of the application. Moreover, the Commission did not identify the arguments which, in its submission, appear in that annex but have not been set out in the body of the application.

32 Accordingly, the Court rejects the Commission's plea of inadmissibility against the arguments put forward in Annex A.2.

The admissibility of the eighth plea in law, alleging infringement of the obligation to state reasons

33 The applicant submits that it is apparent from the considerations set out in the first to seventh pleas that the contested decision is vitiated by a failure to state reasons with regard to key aspects for assessing the existence of aid and its incompatibility.

34 When asked by the Court at the hearing about compliance with the requirements of clarity and precision, in the sense required by Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure, the applicant, in essence, indicated in the explanation of the present plea that it wanted to be concise by identifying, by reference to the other pleas in law, seven points which, in its opinion, demonstrate a failure to state reasons.

35 In the present case, the Court finds that the applicant merely repeated, in a general fashion, the considerations which form the basis of the other pleas in law. As the Commission rightly submits, the applicant does not identify the passages of the contested decision which fail to state reasons or, a fortiori, how they do not enable the interested parties to understand the reasoning adopted by the Commission.

36 Moreover, the applicant's references to the other pleas are aimed solely at the lack of analysis or verification and errors of assessment, which all concern the merits of the reasoning of the contested decision.

37 It must be borne in mind that the obligation to state reasons established by Article 296 TFEU is an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue. It follows that objections and arguments intended to establish that a measure is not well founded are irrelevant in the context of a ground of appeal alleging an inadequate statement of reasons or a lack of such a statement (judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 85).

38 In the light of the foregoing, the Court finds that the present plea, as set out, does not satisfy the requirements of clarity and precision, in the sense required by Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure.

39 The present plea must therefore be declared inadmissible. Furthermore, the facts of the case do not justify the Court raising of its own motion the issue of the Commission's compliance with its obligation to state reasons.

Substance

40 In support of its action, the applicant puts forward eight pleas in law:

– the first alleging, in essence, manifest errors of assessment in the characterisation of an advantage;

– the second, put forward in the alternative, alleging a manifest error of assessment in the examination of the compatibility of the alleged aid;

– the third to fifth pleas, put forward in the further alternative, alleging a manifest error of assessment when calculating the amount of the aid and other errors in the calculation of the principal and interest, and infringement of the principle of proportionality;

– the sixth, put forward in the alternative, alleging an error in identifying the recipient of the aid;

– the seventh, alleging infringement of the principle of non-discrimination;

– the eighth, alleging breach of the obligation to state reasons.

41 The Court will examine the pleas in the order in which they are presented, except for, first, the sixth plea which should be examined after the first plea, which the applicant invites the Court to do, and secondly, the seventh plea which concerns the merits of the classification of unlawful and incompatible aid, and which therefore should be examined before the third plea concerning the amount of the aid. Lastly, it should be recalled that the Court has already ruled on and dismissed the eighth plea (see paragraphs 33 to 39 above).

First plea in law alleging, in essence, manifest errors of assessment in the characterisation of an advantage

42 The first plea consists of three parts, alleging manifest errors on the part of the Commission, first, in that it classified the applicant as a firm in difficulty, second, in that it found that the measures at issue covered more than 80% of the amount of the loan and, third, in that it concluded that the applicant had not paid a market price.

– *The scope of the first plea in law and its admissibility in so far as it relates to Measure 4*

43 In answer to a question from the Court in the context of measures of organisation of procedure and subsequently at the hearing, the applicant indicated that the first plea related not only to Measure 1 but also to Measure 4. At the hearing, the Commission raised the inadmissibility of the present plea in so far as it relates to Measure 4.

44 When asked, in the same context, about the admissibility of the plea in so far as it relates to Measure 4 in view of the requirements of clarity and precision stemming from Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure, the applicant states that that measure is expressly referred to in the application, in the statement of the form of order it is seeking and in the introduction to its pleas in law. In addition, in the context of the first plea, the general references to 'the guarantee' and the mention of the 'guarantee measures at issue' must, in the applicant's submission, necessarily be understood as encompassing both Measure 1 and Measure 4. Moreover, the report attached as Annex A.2, for the purpose of supporting all the pleas at issue, including the first, contains an overall economic evaluation of both measures. Finally, the applicant refers to its second plea, in which it maintains that Measures 1 and 4 constitute one and the same aid measure.

45 In that regard, it should be recalled that, in accordance with the settled case-law cited in paragraph 28 above, if an action is to be admissible 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 basic legal and factual particulars relied on must be indicated, at least in summary form, coherently and intelligibly in the text of the application itself. Thus, a mere abstract statement of a plea in law does not satisfy the requirements of the Rules of Procedure (judgment of 12 September 2018, *De Geoffroy and Others* v *Parliament*, T-788/16, not published, EU:T:2018:534, paragraph 72).

46 In the present case, the applicant, by way of introduction to the part of its application entitled 'Law', indicates that it considers that Measures 1 and 4 do not constitute State aid, in that the existence of an advantage has not been demonstrated. It follows therefore that the first plea relating to demonstrating the existence of an advantage may be interpreted as being directed against the Commission's assessments concerning both Measure 1 and Measure 4.

47 However, as is apparent from the principles recalled in paragraph 45 above, for a plea to be admissible it is not sufficient if it is formulated in an abstract manner. It is also necessary that the essential elements of fact and law on which an action is based should emerge coherently and comprehensibly from the text of the application itself.

48 In that regard, it should first of all be noted that the matters set out under the first plea in the application never expressly refer to Measure 4. The Court next finds that the applicant's arguments in support of the first plea, including when it relies on the report attached as Annex A.2, is based entirely on the assumption that the relevant situation is the one prevailing on the date Measure 1 was granted, in November 2009, and, by contrast, does not cover the situation on 10 November 2010, when Measure 4 was granted. Although the applicant, in response to the question asked by the Court,

subsequently refers to its argument in support of the second plea, that Measures 1 and 4 in fact constitute one and the same aid measure, the fact remains that that argument is not relied on in the application in support of the first plea.

49 It follows from the foregoing that no argument directed expressly against the characterisation of an advantage arising from Measure 4 is set out in the application. Moreover, the arguments in support of the first plea, and allegedly directed against the characterisation of an advantage arising from Measure 4, are not sufficiently clear from the text of the application.

50 The Court must therefore declare the first plea inadmissible in so far as it relates to Measure 4.

– First part, alleging a manifest error on the part of the Commission in so far as it classified the applicant as a firm in difficulty

51 The applicant, supported by the Kingdom of Spain, highlights first of all the specific nature of the business model of professional football clubs, based on various non-financial factors, such as their social and educational functions, which, furthermore, the TFEU takes into consideration in the second subparagraph of Article 165(1) TFEU. Like the LFP during the administrative procedure, the applicant submits that, in view of that specific sectoral nature, the application of the Rescue and Restructuring Guidelines as such to the present case was not appropriate. In addition, the Commission should have found that the book value of professional football clubs did not necessarily reflect, first, the price which investors were ready to pay and, secondly, the expected profits if the club were to be resold.

52 Next, the applicant criticises the Commission for having rejected the significance of the market value of the players of a football club when assessing its financial situation. In particular, it is alleged that the Commission ignored the difference between the book value and the market value, even though that was explained by the applicant during the administrative procedure, and that it exaggerated the depreciation in the value of the players in the event of a forced sale following a difficult financial situation and the volatility which results from the risk of injury, a risk against which the applicant is insured.

53 Finally, the applicant invokes the soundness and the credibility of the 2009 viability plan for which the revenue and expenditure forecasts were satisfactory and in line with the profitability of comparable European and Spanish football clubs, and therefore sufficient to enable the club to function on a viable basis. In that regard, the Commission cannot rely on the risk of non-repayment of the 2009 guaranteed loan, in so far as it is the Fundación Valencia, and not the applicant, which is required to repay the loan. In addition, it is noted that the revenue and expenditure largely exceeded the forecasts of the viability plan and that that growth reflects, in particular, the conclusion of a broadcasting agreement, entered into before the guarantee was provided.

54 The Commission contends that none of the arguments advanced by the applicant call into question the conclusion that the applicant was in difficulty on the date the measures at issue were granted.

55 First of all, the case-law does not recognise any exception specific to sport when State aid rules are applied. In addition, the IVF's stated goal when granting the measures at issue is irrelevant, since the notion of aid, like the notion of financial difficulty, is objective. In any event, the Commission took into consideration factors relevant to the economic context of the football sector in its analysis of the viability plan. It maintains that the fact that investors are ready to purchase shares in clubs with a negative book value does not call into question the need to have available, before such an investment, viable and plausible financial forecasts, adding that no report on the value of the applicant's assets was submitted to it during the administrative procedure.

56 Next, the Commission states that, contrary to what the applicant maintains, it took into consideration the market value of its players, concluding, nevertheless, that their high value did not invalidate the conclusion that it was in difficulty. In that regard, the Commission maintains that the examples of transfers mentioned by the applicant essentially concern transfers which took place after the guaranteed loan granted by the IVF and demonstrate that the transfer of a player involves long negotiations, which has an impact when the transfer must take place quickly due to financial difficulties. Furthermore, the players cannot be transferred all at once, because they do not achieve a high market value at the same time. Finally, even though the club is insured against risks to its players, the fact remains that an injury has an impact on the sale value of a player and indirectly on the club's performance.

57 Finally, with regard to the 2009 viability plan, the Commission contends that the applicant has not provided any evidence to call into question the finding that that plan, first, did not contain any sensitivity analysis in relation to the risks which could affect the applicant's financial results and, second, was based on projections that do not allow for a return to long-term viability. In addition, the Commission takes issue with the comparative and sectoral approach adopted in the report attached as Annex A.2 which concludes that the applicant was not in difficulty. Finally, the Commission submits that the issue of the applicant's capacity to repay the guaranteed loan is relevant, contrary to what the applicant claims in the reply, in that it is common ground that the applicant is the recipient of that loan.

58 It should be recalled that, in the specific area of State aid, the Commission is bound by the guidelines and notices that it issues, to the extent that they do not depart from the rules in the Treaty (judgment of 2 December 2010, *Holland Malt* v *Commission*, C-464/09 P, EU:C:2010:733, paragraph 47). In particular, those texts cannot be interpreted in a way which reduces the scope of Articles 107 and 108 TFEU or which contravenes the aims of those articles (judgment of 11 September 2008, *Germany and Others* v *Kronofrance*, C-75/05 P and C-80/05 P, EU:C:2008:482, paragraphs 61 and 65).

59 Moreover, when conducting such a review, the Courts of the European Union must not substitute their own economic assessment for that of the Commission. The review by the European Union judicature of the complex economic assessments made by the Commission is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (see judgment of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 66 and the case-law cited).

60 In that regard, it is apparent from settled case-law that, in order to establish that a firm is in difficulty, the Commission relies on complex economic assessments over which the Court exercises only a limited review (see, to that effect, judgments of 24 September 2008, *Kahla/Thüringen Porzellan* v *Commission*, T-20/03, EU:T:2008:395, paragraph 133; of 3 March 2010, *Freistaat Sachsen* v *Commission*, T-102/07 and T-120/07, EU:T:2010:62, paragraphs 122 and 157; of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission*, T-267/08 and T-279/08, EU:T:2011:209, paragraph 153; and of 3 July 2013, *MB System* v *Commission*, T-209/11, not published, EU:T:2013:338, paragraph 37).

61 However, although the Commission enjoys a broad discretion the exercise of which involves economic assessments which must be made in a European Union context, that does not imply that the European Union judicature must refrain from reviewing the Commission's interpretation of economic data. According to the case-law, not only must the European Union judicature establish, amongst other things, whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it

(judgments of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraphs 64 and 65, and of 2 March 2012, *Netherlands* v *Commission*, T-29/10 and T-33/10, EU:T:2012:98, paragraph 102).

62 In the present case, the Commission, in recitals 73 to 77 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 Measure 1 was adopted.

63 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, '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'.

64 First of all, the Commission states in recital 73 of the contested decision that, although the applicant's registered capital was not reduced during the three fiscal years preceding the grant of Measure 1, it had negative equity at the end of the fiscal years 2006/2007 and 2008/2009. It states further that 'more than one quarter of [the registered capital] had been lost in the fiscal year ending June 2009'. According to the Commission, taken together, those elements are sufficient to conclude that the criteria laid down in paragraph 10(a) of the Rescue and Restructuring Guidelines were met, in that if the applicant had adopted appropriate measures to restore its assets by capitalising its losses, for example, all of its registered capital would have been lost, since it was lower than the accumulated losses (recital 74).

65 Next, the Commission states in recital 75 of the contested decision that the criteria laid down in paragraph 11 of the Rescue and Restructuring Guidelines were also met. In that regard, it states that the applicant had suffered significant losses in the fiscal years 2006/2007 and 2008/2009 of EUR 26.1 million and EUR 59.2 million, respectively, and that its turnover had decreased by more than 20% from EUR 107.6 million (fiscal year 2006/2007) to EUR 82.4 million (fiscal year 2008/2009). The Commission adds that the applicant was heavily indebted, as demonstrated by its debt-to-equity ratio which was 73.5 in June 2008 and negative in June 2007 and June 2009.

66 In the present case, it is necessary to examine, first, whether the criteria laid down in paragraph 10(a) of the Rescue and Restructuring Guidelines have been met. It is only if those criteria are not met that it is necessary, as the case may be, to examine the applicant's situation in the light of paragraph 11 of those guidelines.

67 For the purposes of determining whether those criteria are met, it is necessary to define first the scope of the notions of disappearance and loss of registered capital referred to in paragraph 10 of the Rescue and Restructuring Guidelines (see paragraph 63 above), in so far as it is discussed by the parties in relation to, in particular, the finding in recital 73 of the contested decision that the applicant's registered capital had not been reduced before Measure 1 was granted (see paragraph 64 above). The Commission thus argued at the hearing that the statement 'more than half of its registered capital has disappeared' should be understood as covering a situation in which the net worth of an undertaking was so reduced that it was less than half its registered capital. The fact that the value of the registered capital remains constant is irrelevant. By contrast, the Kingdom of Spain argues, in essence, that the Commission confuses the notions of registered capital and own equity, so that the finding in the contested decision that the applicant's registered capital was not reduced should have led it to exclude the application of paragraph 10(a) of the Rescue and Restructuring Guidelines to the present case.

68 In that regard, the provisions of paragraph 10(a) of the Rescue and Restructuring Guidelines refer 'by analogy' to Article 17 of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1), now, since the adoption of the contested decision, Article 19 of Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 2012 L 315, p. 74), which provides that 'in the case of a serious loss of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States, to consider whether the company should be wound up or any other measures taken', and the amount of that loss may not be set by the Member States 'at a figure higher than half the subscribed capital'. In the context of the above directives, the notion of 'subscribed capital' is confused with the notion of 'registered capital' (see, to that effect, judgment of 23 March 2000, *Diamantis*, C-373/97, EU:C:2000:150, paragraphs 3 and 32). In view of the objective pursued by those provisions, laying down a specific obligation to convene a general meeting, and the structure of the text of which they form part, which is aimed distinctly and separately at cases of 'reduction of [registered] capital' and affirms that the general meeting is competent in that respect, it is readily apparent that the 'serious loss of the [registered] capital' referred to in Article 17 of Second Directive 77/91 is not tantamount to a reduction in the registered capital decided by the competent executive bodies, but rather covers a situation where the own equity is reduced, which may lead, as the case may be, to the adoption by those executive bodies of a decision to reduce the registered capital of the company concerned. In view of the link established by paragraph 10(a) of the Rescue and Restructuring Guidelines with the provisions of the above directives, the notions of disappearance and loss of registered capital in paragraph 10(a) of those guidelines must be interpreted in a manner consistent with the notion of 'serious loss of the [registered] capital' referred to in those directives.

69 Furthermore, the Court has already held that the level of own equity was a relevant indicator for determining whether there was a disappearance or loss of registered capital for the purposes of paragraph 10(a) of the Rescue and Restructuring Guidelines, despite the absence of a finding of a reduction in the registered capital (see, to that effect, judgments of 15 June 2005, *Corsica Ferries France* v *Commission*, T-349/03, EU:T:2005:221, paragraph 196, and of 3 March 2010, *Freistaat Sachsen* v *Commission*, T-102/07 and T-120/07, EU:T:2010:62, paragraph 106).

70 In the light of the foregoing, it must be held that the Commission could rely on the level of the applicant's own equity in order to determine whether the criteria laid down in paragraph 10(a) of the Rescue and Restructuring Guidelines were met.

71 In the present case, the Commission finds in recital 73 of the contested decision that the applicant's annual accounts show negative equity as a result of accumulated losses of more than its entire registered capital at the end of the fiscal year 2008/2009. The Commission also states in the same recital that 'more than one quarter of [the registered capital] had been lost in the fiscal year ending June 2009'. That assertion is supported by the applicant's financial data set out in recital 15 of the contested decision. The applicant's own equity amounted to a little over half of its registered capital in June 2008 (respectively, EUR 5.9 million and EUR 9.2 million) and became negative in June 2009, as has just been stated, with the consequence that over half of the registered capital and therefore a fortiori more than a quarter of its own equity was 'lost' in the fiscal year 2008/2009.

72 It remains to be assessed whether the three arguments relied on by the applicant in the present part of the plea, alleging, first, the specific nature of the professional football sector, second, the fact that the market value of the applicant's players was disregarded and, third, the soundness and credibility of the 2009 viability plan are, in whole or in part, capable of calling into question the Commission's conclusion that, on the basis of the level of its own equity, the applicant was a firm in difficulty according to the criteria defined in paragraph 10(a) of the Rescue and Restructuring Guidelines.

73 In the first place, with regard to the specific nature of the professional football sector, it must be observed, first of all, that the second subparagraph of Article 165(1) provides that the 'Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport … and its social and educational function'.

74 In that regard, although the requirements laid down by the second subparagraph of Article 165(1) TFEU presuppose, as the case may be, that the Commission will assess the compatibility of aid in the light of the objective of promoting sport, as part of its broad discretion at that stage (see, to that effect, judgment of 9 June 2016, *Magic Mountain Kletterhallen and Others* v *Commission*, T-162/13, not published, EU:T:2016:341, paragraphs 79 and 80), the fact remains that, at the preliminary stage of the classification of a measure as aid, Article 107(1) TFEU does not make a distinction according to the causes or aims of the measures of State intervention concerned but defines them according to their effects (judgment 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 94).

75 The Court has thus held, in connection with the need arising from the TFEU to take account of the requirements relating to environmental protection, that that need could not justify the exclusion of a measure from the scope of Article 107(1) TFEU, as such requirements may usefully be taken into account when the compatibility of the measure is being assessed in accordance with Article 107(3) TFEU (see, to that effect, judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 92).

76 Furthermore, the economic nature of football played by professional clubs, already 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), is not disputed by the applicant.

77 In the light of the foregoing, it should be noted that the Commission was not required under the second subparagraph Article 165(1) TFEU to take account of the specific characteristics of the applicant as a professional football club, other than those which are directly relevant for the examination of the objective notion of a firm in difficulty.

78 The applicant, however, criticises the Commission for having omitted in its approach to take into consideration a series of factors presented as 'non-financial' and specific to professional football clubs, such as the challenges of sporting performance or the number of supporters and season ticket holders.

79 It should be pointed out that here the applicant is merely relying on parameters which have a direct effect on the economic performance and therefore on the financial results of a professional football club. Moreover, in its pleadings, the applicant refers to the substantial downturn in its revenue caused by the fact that it did not compete in the Union of European Football Associations (UEFA) Champions League in the 2008-2009 season. It follows that the Commission's examination of the applicant's financial results necessarily takes into consideration the parameters relied on above in so far as they have an effect on the financial soundness of the applicant.

80 In addition, the Commission specifically referred to a number of those factors, such as sporting performance or the ability of fans to pay for single-match or season tickets in its analysis of the 2009 viability plan (recital 110 of the contested decision). Therefore, applicant's argument has no basis in fact.

81 Furthermore, it must be stated that the applicant's line of argument is based on general claims common to the whole sector, which do not call into question the Commission's conclusions relating to the applicant's particular economic and financial situation.

82 The applicant also argues that the book value of professional football clubs does not necessarily reflect the purchase or resale price. Thus, private investors are prepared to pay significant sums in order to take control of football clubs with a negative book value.

83 The applicant, however, merely supports that claim with two examples of English football clubs with a negative book value which were bought back between 2007 and 2009. In any event, by its general nature, such a line of argument does not invalidate the finding which the Commission made after the examination of the applicant's individual situation (see paragraphs 64 and 65 above), and it should be recalled that the notion of a firm in difficulty is to be assessed only on the basis 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).

84 In the second place, with regard to the argument relating to the Commission's disregard of the market value of the applicant's players in the assessment of its financial situation, it should be made clear, as a preliminary point, that the Rescue and Restructuring Guidelines, in the version applicable to the present case, provide that the Commission will 'in principle' take the view that a firm is in difficulty when it is faced with the circumstances referred to in paragraph 10(a). In doing so, the Commission adopted a guideline the actual wording of which makes it possible to depart from that guideline (see, to that effect, judgment of 6 April 2017, *Saremar* v *Commission*, T-220/14, EU:T:2017:267, paragraph 174 (not published)).

85 Moreover, as is stated in paragraph 9 of the Rescue and Restructuring Guidelines, the notion of a firm in difficulty means a firm which is unable, whether through its own resources or with the funds it is able to obtain from its owners, shareholders or creditors, to stem losses which, without outside intervention by public authorities, will almost certainly condemn it to going out of business in the short or medium term. Although the Commission is entitled to set out certain particularly significant indices of financial difficulties in paragraphs 10 and 11 of the Rescue and Restructuring Guidelines, which provide a concrete illustration of the notion of a firm in difficulty, it cannot, however, waive its discretion when it conducts complex economic assessments, as it does in the present case, concerning the examination of the applicant's financial situation (see paragraph 60 above).

86 Bearing that in mind, it should first be noted that the Commission did not overlook either the market value or the book value of the applicant's players, in so far as it took those into consideration in order to conclude that the applicant's financial rating could not be regarded as being below the CCC category on the date the measures at issue were granted (recitals 80 and 81 of the contested decision).

87 However, the Commission considers in recital 82 of the contested decision, that 'the relatively high book value of Valencia's football players (assets) cannot mean that the club was not in financial difficulty'. It indicates, in that regard, that 'a "fire sale" value of the [Valencia CF players] would be relatively low because buyers would use the known fact of the seller's (Valencia CF) difficulties in order to push for low prices'. In addition, it states that the market value of those players was subject to significant unknown factors, in particular in the event of injuries.

88 It follows that, although, contrary to what the applicant claims, the Commission did not refuse to take into consideration the market value of its players to conclude in recitals 80 and 81 of the contested decision that the applicant's financial rating could not be below the CCC category, it found, by contrast, in recital 82, on the basis of depreciation risks in the event of a forced sale and the unknown factors making the value of the players more volatile, that the existence of those assets did not call into question its conclusion that the applicant was a firm in difficulty. The Commission explained at the

hearing that, for the purposes of determining whether the applicant was in difficulty, it had relied only on the book value of its players and had considered, for the reasons just given, that the market value was irrelevant.

89 Accordingly, it remains to be examined whether those assessments made by the Commission on the scope and viability of the valuation of the applicant's players at their market value are vitiated by manifest errors.

90 First, with regard to the risks of the players' value depreciating in the event of a forced sale, it should be stated at the outset that, regardless of the classification of a firm in difficulty at issue in the present case, it is common ground that the applicant was experiencing at least a need for liquidity at the end of the fiscal year 2008/2009. It is plausible that such circumstances, in particular if they are known to a potential purchaser, will be used by that purchaser to negotiate a resale price of the players which is below the estimated market value.

91 The above finding is not called into question by the applicant's reliance on a number of examples of transfers of players which took place at a price close to their estimated market value. First of all, most of the examples given concern either the period after the decision to grant Measure 1, or a period before the period considered in the contested decision, or a fiscal year in which the applicant's financial results had improved. Those examples cannot therefore invalidate the finding that, where there are documented, known financial difficulties such as those identified at the end of the fiscal year 2008/2009, the clubs with which the applicant negotiates a transfer would profit from that information in order to obtain a price below the market value of the player concerned. In addition, although it is true that the applicant in the course of the present action refers to a case of a transfer which took place before the grant of Measure 1 at a price higher than the estimated market value of the player, it must be observed, as the Commission did, that that was an isolated example and also that, conversely, a transfer took place at the same time for a price below the estimated market value.

92 Secondly, with regard to the volatility of the market value of the players, in view of the unknown factors capable of affecting them, it should also be noted that that assertion is not unlikely. The arguments put forward by the applicant do not call that finding into question. First, the applicant's assertion that it is insured against the risk of death or the total permanent invalidity of its players is not capable of immunising the applicant against the risk of loss of value of the players associated with an injury which only temporarily diminishes the performance of the player concerned. Secondly, the scope of the applicant's argument that the volatility of the market value of a player is evened out must be viewed in context since it is appropriate to think in terms of the team. As the Commission submits, a player's performance, and therefore his value, is, at the very least in part, dependent on the condition and performance of the rest of the team.

93 Moreover, the Court has held that, in the context of its discretion when dealing with complex economic assessments, the Commission may, for the purposes of assessing an undertaking's financial situation, choose to favour the valuation of its assets as they appear in the accounts, on the ground that that valuation is more cautious than one based on an estimation of the market price.

94 It follows from the foregoing that the Commission's assessments of the scope and viability of the valuation of the applicant's players at their market value are free from manifest errors.

95 In the third place, and finally, with regard to the reliance on the soundness and credibility of the 2009 viability plan, it should be pointed out that that argument, developed in the context of the first part alleging an error in the classification of the applicant as a firm in difficulty, also supports the second plea, raised in the alternative, relating to the compatibility of the aid at issue.

96 In that regard, although, as is apparent from paragraph 34 of the Rescue and Restructuring Guidelines, aid to firms in difficulty must be linked to a restructuring plan in order to be compatible with Article 107(3)(c) TFEU (see, to that effect, judgment of 22 March 2001, *France* v *Commission*, C-17/99, EU:C:2001:178, paragraph 45), it should be pointed out that the existence and content of such a plan also constitute relevant factors in the present case for determining whether, in the light of Article 107(1) TFEU, an advantage stems from the guarantee at issue (see, to that effect, judgment of 13 June 2000, *EPAC* v *Commission*, T-204/97 and T-270/97, EU:T:2000:148, paragraphs 72 to 74). The prospects of the recovery of the applicant's financial situation, resulting, as the case may be, from the 2009 viability plan, have at the very least an indirect effect on the risk of activating that guarantee, in so far as the repayment of the underlying loan by the Fundación Valencia was to be made through the resale of the applicant's shares (see paragraph 4 above), the value of which is necessarily affected by the applicant's financial situation.

97 In the present case, the Commission, in recitals 58 and 59 of the contested decision, states that the viability plan, first, did not contain any sensitivity analysis and, secondly, was based on prospects that would not permit a return to long-term viability.

98 With regard to the first ground, the applicant does not dispute that the viability plan did not contain a sensitivity analysis, but argues that the projections in the plan were nevertheless adequate, in that they were based on plausible trends of its revenues and costs.

99 In doing so, the applicant's criticism cannot call into question the ground, adopted in the contested decision, that there was no sensitivity analysis, which the Commission could rightly consider to be evidence that the forecasts in the viability plan were not reliable. The applicant does not claim in that respect that the market in which it operates is free from any unknown factors or risks to such an extent that it would not be necessary to establish a number of scenarios for expenditure and revenue developments reflecting best-case, worst-case and intermediate assumptions (see, in that regard, paragraph 36 of the Rescue and Restructuring Guidelines).

100 Moreover, it is apparent from the applicant's answers to the written questions asked by the Court in the context of measures of organisation of procedure that the forecasts in the viability plan which it describes as 'conservative' are in fact based, for a number of parameters, in particular with regard to revenues, on projections which do not in any way take into account the potential for negative events to occur.

101 With regard to the second ground referred to in paragraph 97 above, the applicant disputes the Commission's analysis by highlighting the predicted return of profits within five years and the fact that the club's profitability matched the averages observed in the sector.

102 In that regard, it should be noted, first of all, that the time frame used in the 2009 viability plan for a return to profit, that is to say, five years, does not appear unreasonable in the absence of evidence to the contrary provided by the Commission.

103 Next, it should be noted that the applicant's line of argument is essentially based on the assumption that, after the implementation of the viability plan, its financial results will be in line with the average profitability found in the sector, notwithstanding the Commission's finding, in the contested decision, that the applicant's profitability will remain weak, bearing in mind the expected operating margin and pre-tax profit after the implementation of the viability plan.

104 As the Commission submits, in essence, the reference to average profitability in the sector is inappropriate in that Member States could then justify any investment in declining or loss-making sectors or those with low profitability, as long as their outlook for profits is around average for the sector (see, to that effect, judgment of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraph 44). In the present case, the information provided

by the applicant, assuming that it is intended to establish that the expected performance in the 2009 viability plan is around average for the sector, does not call into question the finding that the expected profitability on any view remains very low.

105 In the light of the foregoing, the Court concludes that the Commission did not commit a manifest error of assessment in finding that the 2009 viability plan was not sufficiently sound and credible to demonstrate the applicant's capacity to restore its financial situation.

106 Therefore, the first part of the present plea must be rejected.

– Second part, alleging a manifest error on the part of the Commission in so far as it found that Measure 1 covered more than 80% of the underlying loan

107 The applicant, supported by the Kingdom of Spain, denies that Measure 1 covers 100% of the EUR 75 million loan from Bankia. In that regard, the applicant relies on the value of the Fundación Valencia's shareholding in its capital and pledged to the IVF which, regardless of the valuation method used, has the effect of reducing IVF's exposure to less than 80% of the loan amount.

108 The Kingdom of Spain adds that, even assuming that the guarantee covers 100% of the loan at issue, that level of cover was justified by the terms of Measure 1 as a whole, bearing in mind the value of the club, the applicant's significant rights and means of control thus conferred on the IVF, the forecasts for contributions and revenues, and the high value of the shares pledged to the IVF.

109 In the present case, the Commission found in recital 86(b) of the contested decision that the guarantee covered more than 100% of the underlying loan, that is to say, the principal, plus interest and the costs of the guaranteed transaction (recital 8 of the contested decision).

110 At the outset, it must be pointed out that the applicant's line of argument in support of this part is based on confusion between, on the one hand, the question of the extent of the cover by the guarantee at issue relating to Fundación Valencia's obligation to repay the EUR 75 million loan from Bankia and, on the other, the separate question of the financial risk to which the IVF is exposed in the event that Fundación Valencia does not fulfil its repayment obligation. The first concerns assessing what the IVF is legally liable for. The second concerns assessing the financial risk to which the IVF is exposed.

111 As the Commission rightly observes, without being challenged on this point by the applicant, the IVF would be required to repay the full amount of the outstanding debt if Bankia decided to enforce the guarantee. It follows that the guarantee granted by the IVF by way of Measure 1 covered 100% of the loan at issue.

112 Furthermore, acceptance of the interpretation proposed by the applicant regarding the extent of the cover of a guarantee, consisting essentially of incorporating the value of the counter-guarantees which may be activated by the public guarantor, would be contrary to the objective of taking that parameter into account, as is apparent from point 3.2(c) of the Guarantee Notice. This involves encouraging the lender to properly assess, secure and minimise the risk arising from the lending operation, and in particular to assess properly the borrower's creditworthiness. The fact that the public guaranteeing entity has a number of counter-guarantees is not something that will encourage the lender to be more diligent when evaluating its own risk.

113 That conclusion cannot be called into question by the line of argument of the Kingdom of Spain that cover exceeding 80% of the amount of the underlying transaction was, in the present case, justified by the conditions for granting the guarantee concerned.

114 It is apparent from the examination of the first part of the plea that the Commission could, without committing a manifest error of assessment, classify the applicant as a firm in difficulty and find that the viability plan is not sufficiently sound and credible. It follows that neither the applicant's enterprise value on the date Measure 1 was granted, nor the forecasts for contributions and revenues in the viability plan, nor a fortiori the rights conferred on the IVF to ensure the implementation of that plan could justify cover for the entire loan at issue. As to the issue of the value of the shares pledged to the IVF, bearing in mind what was stated in paragraph 112 above, the fact that the public guaranteeing entity has a counter-guarantee for a certain value cannot on its own justify the underlying transaction being covered in its entirety.

115 In the light of the foregoing, this part of the plea must be rejected.

– Third part, alleging a manifest error on the part of the Commission in so far as it found that Measure 1 had not been granted at a market price

116 The applicant, supported by the Kingdom of Spain, submits that the Commission should have referred to the rates for comparable loans and credits which it had obtained in the period 2008-2009, since resorting to the 'traditional methodology' of rating agencies was inappropriate in the present case. The average rate at which the applicant financed itself during that period corresponds to the sum of the floor rate provided for in the loan agreement concluded with Bankia and the guarantee premium rate paid to the IVF. The applicant states, in that regard, that Euribor and, more broadly, the rates offered on the market were on the downside when Measure 1 was granted in November 2009, something the Commission did not take into account. In its reply, the applicant explains that a loan comparable in size to the loan given by Bankia had been agreed at an equivalent rate.

117 The Kingdom of Spain adds that the fact that Measure 1 did not come into effect until several weeks after the transfer of the funds loaned to the Fundación Valencia, together with the lengthy suspension of its effects as a result of court decisions, demonstrate that the loan made by Bankia could have been granted regardless of the existence of a State guarantee. The guarantee premium paid to the IVF in fact reflects the value of the counter-guarantees which it received.

118 The Commission argues that, due to the lack of similar transactions observed on the market, it resorted, in accordance with the Reference Rates Communication, to the reference rate applicable to an undertaking in the applicant's situation, that is to say, one whose financial rating comes under category CCC. In that regard, the Commission disputes the relevance of the comparisons made by the applicant with other credit transactions to which it was party in the period 2008-2009, in view of the particular features of those operations and in particular the fact that they were for an amount much lower than the loan guaranteed by Measure 1. In addition, it states that no reference had been made to those loans during the administrative phase. Finally, with regard to Euribor's downward trend, the Commission notes that it was not possible to predict how it would evolve on the date Measure 1 was granted.

119 In its rejoinder, the Commission adds that the applicant's decision to suspend the construction of a new stadium in February 2009 was a turning point and that the applicant was more likely to secure a loan before that date. It should be noted, moreover, that the fiscal year 2007-2008 closed with a profit. Specifically with regard to the example relied on by the applicant of a loan for an amount close to the amount loaned by Bankia, the Commission contends that, far from calling into question its analysis, on the contrary, it tends to support it, in so far as, first, the values of the guarantees offered to the lender were higher, according to the Commission, than the value of the shares pledged under the loan granted by Bankia and, second, the rate applied was itself also higher. In addition, according to the Commission, that example demonstrates the difficulties encountered by the applicant in obtaining sufficient funds, even by pledging its most valuable assets.

120 In reply to the line of argument put forward by the Kingdom of Spain in its statement in intervention, the Commission submits that the date Measure 1 came into effect is irrelevant, since it is established that the IVF has committed itself to providing the guarantee at issue before Bankia grants the loan to Fundación Valencia.

121 The Court has already held that a borrower which 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 bear if it had to obtain that same financing and that same guarantee at market prices (judgment 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).

122 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, in particular, the amount and duration of the transaction, the security provided 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 its prospects.

123 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 paragraph 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 paragraph of point 3.2(d) of the Guarantee Notice). Finally, if there is no market price for a similar non-guaranteed loan, it is appropriate to use the reference rate, defined in accordance with the Reference Rates Communication (see the second paragraph of point 4.2 of the Guarantee Notice).

124 In the present case, the Commission, in recital 86(c) of the contested decision, excludes the possibility that the guarantee premium paid to the IVF reflects the applicant's financial difficulties and the associated risk of default for the guaranteed loans, after stating in recital 85 that 'where the borrower is a firm in financial difficulty, it would not find a financial institution prepared to lend on any terms, without a State guarantee'.

125 The Commission does not in any way identify in those recitals, or anywhere else in the arguments relating to the characterisation of an advantage (paragraph 7.1.2 of the contested decision), what the market price is in respect of which it evaluates the premium at issue. 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. When asked by the Court in the context of the measures of organisation of procedure, the Commission confirmed that, bearing in mind the financial situation of the applicant, which was a firm in difficulty, it considered that there was no market price which could serve as a benchmark for the guarantee premium paid to the IVF.

126 In order to establish whether the premium paid to the IVF concealed an advantage the Commission, first, therefore failed to take into consideration all of the relevant characteristics of the guarantee and the underlying loan, in particular the existence of securities provided by the borrower, and second, omitted to look for a market price with which to compare the premium at issue because it considered that, for a firm in difficulty, such a price did not exist.

127 On the latter point, it should be noted that the assertion that there is no market price which could serve as a benchmark, where the guarantee transaction is for the benefit of a firm in difficulty, is contradicted by point 4.1(a) of the Guarantee Notice, concerning the calculation of the aid component of a guarantee granted to a firm in difficulty. In it the Commission distinguishes the situation of firms in difficulty according to their default risk which is not uniform. The notice thus distinguishes a case where there is a guarantor on the market from one in which it is likely that there is not. It is therefore accepted that there may be a market price, including where the guarantee is granted to a firm in difficulty.

128 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 recitals 74 and 77 that it was a firm in difficulty within the meaning 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 127 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 recitals 74 and 77 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.

129 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.

130 Notwithstanding the omissions found in paragraph 126 above in the part of the contested decision relating to establishing whether aid exists, it is true that, in recital 93, the Commission carries out a more detailed analysis when quantifying the aid at issue. Although the Commission does not look to see if there is a corresponding guarantee premium benchmark that can be found on the financial markets, it precludes a market price for a similar non-guaranteed loan (see paragraph 123 above) 'due to the limited number of observations of similar transactions on the market' which do not 'provide a meaningful comparison'. Therefore, in accordance with point 4.2 of the Guarantee Notice, it uses the reference rate applicable under the Reference Rates Communication (see paragraph 123 above) by comparing it with the total financial cost of the guaranteed loan, including the interest rate and the guarantee premium. Finally, the Commission takes into consideration the pledge of the applicant's shares and concludes that its value is close to zero and therefore has no effect on the reference rate which should be adopted in the present case.

131 In particular with regard to the finding that there were not enough similar transactions to allow for a meaningful comparison, the Court questioned the Commission in the context of the measures of organisation of procedure in order to ascertain the nature and extent of the investigations which it conducted in order to reach that conclusion. In reply, the Commission first indicated with regard to a possible reference guarantee premium that financial establishments did not support operations as risky as those which involve acting as a guarantor for firms with a CCC rating and that nothing in the administrative file suggested otherwise. Next, with regard to a possible market price for a similar non-guaranteed loan, the Commission contends that no information on interest rates for loans granted in similar situations was apparent from the administrative investigation. When questioned

again on that point at the hearing, the Commission referred to the content of the decision to initiate the formal investigation procedure in which it expressed its doubts on the existence of a market price for a transaction of that nature.

132 It follows from the foregoing, first, that the Commission did not inquire whether there was a 'corresponding guarantee premium benchmark that can be found on the financial markets', as it presumed that no financial establishment would act as a guarantor for a firm in difficulty and, second, that the Commission considered that it had fulfilled its investigative obligations relating to the existence of a market price for a similar non-guaranteed loan, expressing doubts to that effect in the decision to initiate the formal investigation procedure.

133 As was observed in paragraph 123 above, point 3.2(d) and point 4.2 of the Guarantee Notice require a prior search to be carried out for a possible market price, either in terms of the guarantee or in terms of the underlying loan, with which to compare the provisions of the transaction at issue. As was stated in paragraph 127 above, that notice does not make provision for a general presumption that, when dealing with a firm in difficulty, there is no market price.

134 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, disregarded 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 investor (see, to that effect, judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 73).

135 Similarly, the Court finds that the Commission was wrong to exclude in recital 93 of the contested decision the existence of a market price for a similar non-guaranteed loan 'due to the limited number of observations of similar transactions on the market' in so far as it is apparent from the replies provided by the Commission during the present proceedings (see paragraph 131 above) that that finding is not substantiated to the requisite legal standard.

136 In that regard, the burden of proof that the conditions for applying the private operator test have been fulfilled 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 addition, 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 operator 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).

137 The Commission merely expressed its doubts in the decision to initiate the formal investigation procedure regarding the existence of similar transactions without asking, as it was entitled to do once the formal procedure was initiated, the Member State concerned or other sources for information

relating to the existence of loans similar to the loan underlying the transaction at issue. Furthermore, the Commission does not adduce any other information obtained during the administrative procedure which would have supported its findings relating to the lack of comparable transactions.

138 In the light of the foregoing, the Court concludes that the Commission committed a manifest error of assessment in finding, first, that no corresponding guarantee premium benchmark could be found on the market and, secondly, that there was no market price for a similar non-guaranteed loan. Accordingly, the third part of the first plea must be upheld.

– Conclusions on the first plea in law and on the scope of the annulment

139 The Court considers that the third part of the present plea is well founded and that it should therefore be upheld.

140 Furthermore, it is apparent from paragraph 50 above that this plea is admissible only in so far as it refers to Measure 1. Consequently, the plea, the merits of which were examined and upheld by the Court, relate only to one specific aspect of the act concerned, in the present case Measure 1.

141 Consequently, in those circumstances, the remaining pleas raised in support of the action are examined only in so far as they concern Measure 4.

Sixth plea in law, alleging an error in identifying the recipient of the aid

142 The applicant criticises the Commission for not having concluded that Bankia was the only genuine recipient of Measures 1 and 4 and for not examining that point in the contested decision. In its reply, the applicant indicates that Bankia might at least be regarded as an indirect co-beneficiary of the aid at issue.

143 In that regard, the applicant highlights the pecuniary interests of Bankia in the completion of the loan transaction underlying the measures at issue. It also emphasised the influence acquired by Bankia over the Fundación Valencia and indirectly over the applicant through that transaction. The pledge in its favour of the shares in the applicant held by the Fundación Valencia also ensured that it had a right of veto over any proposed subsequent transfer of the shares in the club. Bankia's involvement in the negotiations relating to the buy-out of the applicant in 2014 by Meriton (see recitals 24 to 28 of the contested decision), in particular with a view to safeguarding its financial interests bearing in mind that it was the club's main creditor, attest to that claim.

144 At the reply stage, the applicant indicated that, even if the Commission's assessment of the value of the pledge is fair, Measures 1 and 4 limited the risk of it becoming insolvent and the risk which that posed for Bankia, its largest creditor.

145 Finally, the applicant does not accept that its sale in 2014 had the effect of transferring the aid included in Measures 1 and 4 to the new majority shareholder, Meriton. The applicant thus argues that, since the purchaser acquired the firm in receipt of the aid at a market price, the Fundación Valencia, as seller, or Bankia should be regarded as the actual recipient of the aid.

146 First of all, it should be observed that the applicant's arguments in support of the present plea are to be examined only in so far as they concern the beneficiary of Measure 4 (see paragraph 141 above).

147 In its sixth plea, the applicant claims first of all, in essence, that the beneficiary of Measure 4 is Bankia, either exclusively or as a co-beneficiary of the measure (first part). The applicant claims next that, in view of its sale in 2014 at a market price, the aid was transferred to the seller, in that instance Fundación Valencia, or to Bankia, jointly with that foundation or on an exclusive basis, and not to Meriton (second part).

148 At this stage, it is appropriate to examine the first part of the plea, concerning the identity of the beneficiary on the date the measure was granted. The second part, which relates to the possible transfer of the aid simultaneously with the resale of the applicant, will have to be examined, where appropriate, only at a later stage in order to determine from which undertaking the aid will be recovered. Moreover, it was also at that stage that the argument, already advanced by the applicant during the administrative phase, was examined in the contested decision (see recitals 129 and 130 of the contested decision).

149 In the present case, it is apparent from recitals 6 to 8 of the contested decision that Measure 1 consists of a guarantee granted in order to cover a loan to finance an operation to increase the applicant's capital. It is apparent from recital 12 that Measure 4 is intended to increase the guarantee granted in order to cover an additional credit line for paying the overdue principal, interest and costs, arising from the non-payment of the interest due in accordance with the schedule agreed originally under that loan.

150 In that regard, it must be pointed out 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). Thus, the Commission may take into consideration the allocation decided, where appropriate, at the time the measure was granted in order to determine the beneficiary of the aid. In such a case, it is possible, in particular, that the beneficiary is not the person who took out 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 beneficiaries of State aid, it is necessary to identify each of the undertakings which have actually benefited from the aid (judgment of 3 July 2003, *Belgium* v *Commission*, C-457/00, EU:C:2003:387, paragraph 55).

151 In the present case, the Commission found in recitals 7 and 68 of the contested decision that the aim of the guarantee granted by the IVF, as is apparent from the IVF's decision to grant that guarantee, was to guarantee a loan to the Fundación Valencia solely in order to finance the increase in the applicant's capital. In that regard, the applicant does not dispute that the guarantee granted by the IVF applied only if the guaranteed loan was used for the purposes set out in the decision granting the guarantee, that is to say, participating in the applicant's capital increase. Moreover, it is common ground that the sums obtained through the guaranteed loan were actually allocated to the applicant's recapitalisation.

152 Specifically with regard to Measure 4, it is apparent from the contested decision — and this is not contested by the applicant — that its sole purpose was to enable the Fundación Valencia to continue to meet its obligations under the loan originally taken out. The sole purpose of that loan was to enable the Fundación Valencia to participate in the capital increase decided by the applicant, as is observed in paragraph 151 above.

153 It follows that the Commission was correct in finding that the applicant was the beneficiary of Measure 4.

154 That conclusion is not called into question by the applicant's other arguments.

155 First, it must be stated that the fact that Bankia may be the 'co-beneficiary' or the indirect beneficiary of the measure concerned does not, as such, call into question the finding that the applicant also benefited from it. As the applicant rightly states in its pleadings, the same measure may favour one undertaking directly and favour another indirectly (see, to that effect, judgment of 13 June 2002, *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraphs 61 and 62). It follows that the applicant's line of argument seeking to establish that Bankia benefited indirectly from the grant of Measure 4 must be rejected as ineffective.

156 In any event, it must be stated that it is not apparent either from the conditions for granting the guaranteed loan or the conditions for its increase in 2010 that the loan was used to repay the loans subsequently taken out by the applicant with Bankia. It follows therefore that, contrary to what the applicant argues, the IVF's guarantee did not necessarily have the effect of reducing the risk for Bankia in respect of claims already in existence.

157 Secondly, the applicant has not demonstrated that the remuneration from the guaranteed loan, by payment of the principal and the interest, would be capable of concealing the aid element, as the applicant merely stated that the rate applied, of at least 6%, was 'high'.

158 Thirdly, the influence allegedly acquired by Bankia over the applicant and over the process for the subsequent resale of the shares in the applicant, is independent of the conditions for granting Measures 1 and 4. In that regard, it is not apparent either from the IVF's decision to grant the guarantee, or the guarantee agreement concluded on 5 November 2009, as amended on 10 November 2010, that the grant of the guarantee at issue was conditional upon Bankia being given extended control over the applicant's activity. Moreover, the applicant does not demonstrate in any way that such an influence could constitute, as such, an advantage coming within the scope of Article 107(1) TFEU, nor does the applicant adduce any evidence to establish that this is consideration which is disproportionate to the loan granted to the Fundación Valencia.

159 In the light of the foregoing, the first part of the sixth plea must be rejected.

Second plea in law, alleging a manifest error of assessment in the examination of the compatibility of the alleged aid

160 The applicant's arguments in support of the present plea are set out below and will be examined only in so far as they deal with the compatibility of Measure 4.

161 The applicant submits, first of all, that the 'one time, last time' condition set out in paragraph 3.3 of the Rescue and Restructuring Guidelines was not infringed since Measure 4 did not benefit the applicant given that it did not receive any money after the measure was adopted. Furthermore, the applicant's situation improved considerably on the date that measure was adopted. Finally, the applicant submits that, in the light of the earlier decisions and the framework adopted by the Commission, and the case-law of the Court of Justice, Measures 1 and 4 should be regarded as one single intervention, part of a single restructuring strategy, justifying the application of the exception set out in paragraph 73 of the Rescue and Restructuring Guidelines in cases of exceptional and unforeseeable circumstances not attributable to the firm.

162 In the present case, the Commission states in recital 124 of the contested decision that the 'one time, last time' principle, according to which a firm which has received rescue or restructuring aid in the past 10 years is not eligible for new rescue or restructuring aid, was not complied with in relation to Measure 4. In the same recital, the Commission rejects the line of argument of the Kingdom of Spain that Measures 1 and 4 should be regarded as a single aid measure on the ground that Measure 4 was neither envisaged nor planned on the date Measure 1 was granted, but was decided on an ad hoc basis in order to cover the non-payment of interest on the guaranteed loan due on 26 August 2010.

Furthermore, the Commission explains in recital 98 of the contested decision that neither the Kingdom of Spain nor the interested parties submitted any observations during the administrative procedure, specifically concerning the compatibility of Measure 4. In particular, they did not claim that a restructuring plan was submitted or modified at the time Measure 4 was granted.

163 First of all, the Court notes that the premiss which forms the basis of the finding in recital 124 of the contested decision that Measure 4 infringes the 'one time, last time' principle, is vitiated by errors, given that it is apparent from the examination of the first plea that the Commission committed a manifest error of assessment in classifying Measure 1 as State aid (see paragraph 138 above). Therefore, reliance on the 'one time, last time' principle cannot prevent Measure 4 from being regarded as compatible with Article 107(3)(c) TFEU.

164 That being said, it must be emphasised at the same time that it is settled case-law that, in order to be declared compatible with Article 107(3)(c) TFEU, aid for firms in difficulty must be linked to a restructuring plan designed to reduce or redirect their activities (see judgments of 22 March 2001, *France* v *Commission*, C-17/99, EU:C:2001:178, paragraph 45; of 11 June 2009, *ACEA* v *Commission*, T-297/02, EU:T:2009:189, paragraph 137; and of 11 June 2009, *ASM Brescia* v *Commission*, T-189/03, EU:T:2009:193, paragraph 116; see also, to that effect, judgment of 11 June 2009, *AEM* v *Commission*, T-301/02, EU:T:2009:191, paragraph 141).

165 First, it follows from the lack of a legitimate challenge from the applicant to the classification of Measure 4 as State aid (see paragraph 50 above) that the Court must take the view that neither that classification nor the findings on which it is based in the contested decision are in dispute. Thus, for the purposes of examining the present plea, the Court will proceed on the basis that Measure 4 is State aid which benefits a firm in difficulty.

166 Secondly, it is apparent from the contested decision — and this is not contested by the applicant — that no restructuring plan was drawn up in respect of the grant of Measure 4 (see paragraph 162 above).

167 The applicant, like the Kingdom of Spain during the administrative procedure, claims, however, that Measures 1 and 4 amounted to one single intervention that was part of a single restructuring strategy. Although that line of argument is no longer applicable in so far as it seeks to call into question the infringement of the 'one time, last time' principle when Measure 4 was granted — that infringement being based on an erroneous premiss, as is stated in paragraph 163 above — it is still relevant for the purposes of determining whether Measure 4 may be regarded as being part of the implementation of a restructuring plan, in the present case the viability plan drawn up in May 2009.

168 In that regard, the Court has previously ruled that it cannot be excluded that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention. That could be the case, in particular where consecutive interventions, having regard to their chronology, their purpose and the circumstances of the firm at the time of those interventions, are so closely linked to each other that they are inseparable from one another (judgment of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 97).

169 In the present case, it must first be stated that Measures 1 and 4 were not adopted simultaneously, since more than a year had elapsed between the grant of the two guarantees. Moreover, it is not disputed by the applicant that the increase of the guarantee decided in the context of Measure 4 was not envisaged when Measure 1 was granted and was not covered by the 2009 viability plan. In addition, it must be pointed out that Measure 4 was adopted in order to cover the financial consequences of a non-payment on the due date of the guaranteed loan, attributable to the Fundación Valencia. In that regard, it is true that there is a link between the objective of enabling the Fundación Valencia to deal with the financial consequences of that non-payment and the initial objective of injecting new capital into the applicant, in so far as the non-payment occurs in the context of the

repayment of a loan granted in order to finance that injection of new capital. However, the fact remains, as the applicant itself states, that the purpose of Measure 4 is distinguished from that of Measure 1 in that it is primarily intended to cover the payment by the Fundación Valencia of the overdue principal, interest and costs arising from that non-payment which itself, according to the applicant, stems from the fact that the Fundación Valencia was not in a position to transfer a block of the applicant's shares in a timely manner. Finally, with regard to the applicant's situation at the time of the interventions at issue, account must be taken of the fact that the capital increase had already taken place on the date Measure 4 was granted, with the consequence that the applicant's financial situation on that date was distinguished from its own on the date Measure 1 was granted.

170 Accordingly, the Commission's assessment that Measures 1 and 4 cannot be regarded as being part of the same intervention is free from error.

171 It follows that the finding that Measure 4 was not connected to a restructuring plan must be upheld, with the consequence that, in the light of the case-law recalled in paragraph 164 above, it cannot be regarded as being compatible with the internal market on the basis of Article 107(3)(c) TFEU.

172 No other argument put forward by the applicant is capable of undermining that conclusion.

173 In the first place, with regard to the argument relating to an allegedly significant improvement in the applicant's financial situation between the financial years 2008-2009 and 2009-2010, it is appropriate to refer to the finding in paragraph 50 above that the applicant's challenge to the classification of State aid used in relation to Measure 4 is inadmissible and, accordingly, to find that the reason underlying that classification — that the applicant was a firm in difficulty on the date the measure was granted — cannot be regarded as being in dispute (see paragraph 165 above). In those circumstances, reliance on the improvement of its financial situation, when it should be taken for granted that the applicant was in difficulty, is misconceived. In any event, the applicant's line of argument is particularly brief and is essentially limited to referring to the financial indicators in recital 15 of the contested decision. It is therefore not capable of reversing the finding that the applicant was a firm in difficulty on the date Measure 4 was granted.

174 In the second place, the applicant claims that it did not receive any sums in connection with the increase of the guarantee or the new credit line opened under Measure 4, since, in the applicant's submission, they benefited the Fundación Valencia. In that regard, suffice it to state that the applicant's challenge to the Commission's assessments relating to the identity of the beneficiary of Measure 4 have already been rejected in the examination of the sixth plea.

175 The second plea must therefore be rejected as unfounded.

Seventh plea in law, alleging infringement of the principle of non-discrimination

176 The applicant criticises the Commission for treating the situations of the three professional football clubs covered by the contested decision as equal, even though their respective situations diverged considerably.

177 With regard to the Fundación Hércules, the applicant notes that it never repaid the loan guaranteed by the IVF. As regards the Fundación Elche, the applicant states that, despite the existence of two guarantees from the IVF for two separate loans, the Commission found that there was only one single aid measure in that particular case. Finally, neither of the two other clubs submitted a restructuring or investment plan, or compensatory measures for the purposes of the Rescue and Restructuring Guidelines.

178 Furthermore, the applicant compared the contested decision with Commission Decision (EU) 2016/1847 of 4 July 2016 on the State aid SA.41612 — 2015/C (ex SA.33584 (2013/C) (ex 2011/NN)) implemented by the Netherlands in favour of the professional football club MVV in Maastricht (OJ 2016 L 282, p. 53), stating that in that particular case the Commission had identified a single measure even though a number of measures had been adopted by the public authorities in question. The applicant also relies on differences, in both cases, relating to the use of the classification of small and medium-sized undertaking and the application of the compatibility criteria set out in the Rescue and Restructuring Guidelines.

179 As a preliminary point, it should be recalled that, according to settled case-law, the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 14 April 2005, *Belgium* v *Commission*, C-110/03, EU:C:2005:223, paragraph 71 and the case-law cited).

180 By the present plea, the applicant alleges that the Commission, first, infringed the principle of non-discrimination by authorising, through a separate decision, the aid granted to the Netherlands football club MVV, when it prohibited the aid granted to the applicant, allegedly in the same circumstances, and second, infringed that same principle by treating in the same way the different situations of the three clubs covered by the contested decision.

181 In the first place, with regard to the discrimination allegedly arising from the different treatment given to the applicant in the contested decision and to the club MVV in the decision cited in paragraph 178 above, it should be noted that the legality of a Commission decision finding that new aid does not meet the conditions for that derogation must be appraised only in the context of Article 107(3)(c) TFEU, and not by reference to its previous decision-making practice. The concept of State aid and the conditions necessary for ensuring the restoration of the beneficiary's viability reflect an objective situation which must be appraised on the date on which the Commission takes its decision. Thus, the reasons why the Commission had made a different assessment of the situation in a previous decision can have no impact on the assessment of the legality of the contested decision (judgments of 17 July 2014, *Westfälisch-Lippischer Sparkassen- und Giroverband* v *Commission*, T-457/09, EU:T:2014:683, paragraph 368, and of 11 December 2014, *Austria* v *Commission*, T-251/11, EU:T:2014:1060, paragraph 125).

182 It follows that the applicant cannot reasonably rely on the solution which the Commission reached in the decision cited in paragraph 178 above in order to infer that the principle of non-discrimination was infringed. In any event, as the Commission rightly submits, the club MVV fell within the category of small and medium-sized undertakings, both with regard to its legal form, and the number of its employees and its turnover, which distinguishes it from the applicant, which moreover does not claim before this Court to come within that category. That fact alone has an effect on the compatibility criteria to be applied under the Rescue and Restructuring Guidelines, in particular on the need to provide compensatory measures. Accordingly, the applicant's situation and that of the club MVV are not comparable.

183 In the second place, with regard to the discrimination arising from the equal treatment of the allegedly different situations of the three clubs covered by the contested decision, it should be pointed out that the evidence provided by the applicant cannot bring about a differentiation that would prevent the situations of the three clubs being treated equally, bearing in mind that, in the present case, the Commission applies two sets of guidelines, one for establishing that the aid exists and the other for examining its compatibility, from which it may not, as a rule, depart without specifically infringing the principle of equal treatment (see, to that effect, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 211).

184 Thus, first of all, the fact that the Fundación Hércules, unlike the Fundación Valencia, did not repay the guaranteed loan comes under events which took place after the grant of the aid measure at issue. It was therefore not information which was available on the date the IVF had undertaken to guarantee the underlying loan granted to the Fundación Hércules. In addition, it is not claimed by the applicant that that fact contributed to a development which was foreseeable from the moment the guarantee at issue was granted. Consequently, that fact in itself cannot prevent the Commission from regarding the respective situations of the applicant and Hércules Club de Fútbol, SAD, as being similar when applying the market economy investor test and in accordance with the criteria specified by the Commission in the Guarantee Notice.

185 Next the applicant does not explain how the fact that the Fundación Elche was granted two guarantees by the IVF for two different loans amounts to a differentiating factor precluding the applicant itself and Elche Club de Fútbol, SAD, from being treated equally.

186 Finally, with regard to the examination of the compatibility of the measures taken for the benefit of the two other clubs covered by the contested decision, it should be noted that the Commission did indeed take into consideration the fact that they had not submitted a restructuring plan or proposed compensatory measures, as is evident from recitals 113 and 118 of the contested decision in which it is stated that the conditions laid down in paragraphs 34 and 38 of the Rescue and Restructuring Guidelines were not complied with by the two clubs. At the same time, account has been taken of the applicant's factual circumstances to infer that, as a result of their inadequacy — but not their omission — those conditions have likewise not been fulfilled as far as the applicant is concerned. Thus, the fact that the differences observed between the situations of the applicant and the two other clubs concerned ultimately led to them being treated identically is objectively justified.

187 It follows from all the foregoing that the seventh plea must be rejected.

Third plea in law, alleging a manifest error of assessment in the calculation of the amount of the aid

188 The applicant, supported by the Kingdom of Spain, alleges that the Commission did not correctly evaluate the value of the counter-guarantees offered by the Fundación Valencia to the IVF. It thus claims that the collateralisation of its shares held by the Fundación Valencia was at the very least 'normal', according to the classification in the Reference Rates Communication, which has the effect of reducing the amount of the aid to be recovered by at least EUR 6 million. In its reply, the applicant refers, first, to the purchase price paid by the other private subscribers at the time of its 2009 capital increase and, second, to its valuation carried out by the consultants which it instructed for the purposes of the present procedure, based on a method known as 'multiples' from a sample of clubs presented as comparable. It adds that, even if those shares are to be valued solely on the basis of its financial statements, account must be taken of the capital contribution of the Fundación Valencia. The applicant also refers to a number of suspensive conditions provided for in the guarantee agreement aimed at providing the IVF with a certain number of additional assurances.

189 The Commission contends that nothing put forward by the applicant calls into question the findings made in recital 93 of the contested decision, in view of the information available during the administrative procedure. In that regard, it submits that the value of the shares became practically zero as a result of the club's losses. It adds that they would have had value only if the applicant had not been in difficulty or if it had had credible prospects for recovery. The price paid by the private shareholders who subscribed to the 2009 capital increase is not relevant, in view of the context of that subscription and the likely nature of the subscribers. In any event, it is not plausible, in the Commission's opinion, that the applicant's shares, even if their value is not zero, will cover at least 40% of the loan, as is required by the Reference Rates Communication for capitalisation to be

'normal'. The Commission contends further that, where appropriate, it is necessary to deduct from the value of those shares the value of the applicant's assets already provided as collateral for loans which had been granted to it before the capital increase.

190 In the present case, the Commission states the following in recital 93 of the contested decision concerning the value of the applicant's shares pledged to the IVF:

'[The] loan [at issue] was securitised with a pledge on the acquired shares in [Valencia CF]. However, [Valencia CF was] in difficulty, i.e. [it was] conducting operations resulting in losses, and there was no credible viability plan in place to demonstrate that those operations would turn to producing profits for [its] shareholders. Therefore [the] losses [of Valencia CF] were encompassed in the value of [its] shares, thus the value of those shares as loan security was close to zero.'

191 In the present plea, the applicant disputes the Commission's conclusions on the value of the counter-guarantees offered by the Fundación Valencia through the pledge of its shares, claiming that, regardless of the valuation method used, the shares pledged equate to collateralisation that is at least 'normal' for the purposes of the Reference Rates Communication. The three valuation methods referred to by the applicant in its pleadings operate, first, by comparison with the purchase price of the private subscribers in 2009, second, by application of the multiples method, on the basis of a sample of clubs presented as comparable and, third, by assessing its financial situation.

192 First of all, it is appropriate to examine the applicant's criticism of the method of valuing its shares adopted by the Commission in the contested decision, based on an assessment of its financial situation (see paragraph 190 above).

193 In that regard, the nature of the review by the Court of the Commission's assessment of the value of a counter-guarantee when calculating the exact amount of aid is identical to that referred to in paragraph 59 above.

194 Furthermore, there is no need to rule on the Commission's subsidiary argument that it is not plausible that the shares at issue cover at least 40% of the loan, since the contested decision is not based on such a ground, but on the conclusion that, in absolute terms, the value of the shares is 'close to zero'. Indeed, it is settled case-law that a decision must be self-sufficient and that 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 (judgments of 12 December 1996, *Rendo and Others* v *Commission*, T-16/91, EU:T:1996:189, paragraph 45; of 12 September 2007, *Olympiaki Aeroporia Ypiresies* v *Commission*, T-68/03, EU:T:2007:253, paragraph 254; and of 16 September 2013, *Wabco Europe and Others* v *Commission*, T-380/10, EU:T:2013:449, paragraph 107).

195 Next, it should be recalled that the applicant's criticisms revolve around the Commission's allegedly erroneous assessments relating to the effect of the 2009 capital increase of EUR 92.4 million on its financial situation and therefore on the value of its shares.

196 As a preliminary point, it should be recalled that the Court examines the applicant's arguments only in so far as they concern Measure 4 (see paragraph 141 above). On the date that measure was granted, 10 November 2010, the 2009 capital increase had already been decided and the new shares issued had been subscribed. Those events were reflected in the applicant's financial statements for the fiscal year 2009/2010, reproduced in recital 15 of the contested decision, from which it is clear that at the end of that year its registered capital had grown compared with the previous fiscal year from EUR 9.2 million to EUR 101.7 million and its own equity went from –EUR 33.3 million to EUR 57.3 million. Moreover, its profits before taxes went from –EUR 59.2 million to EUR 17.9 million.

197 It must be inferred from the above findings that the Commission's assertion in recital 93 of the contested decision and reproduced in paragraph 190 above that the applicant was operating at a loss is incorrect since the fiscal year immediately preceding the grant of Measure 4 clearly resulted in a profit.

198 Furthermore, the applicant's own equity at the end of the fiscal year 2009/2010 was significant, in the order of EUR 57.3 million, according to the contested decision. In response to a question put by the Court, by way of measures of organisation of procedure, the Commission maintains that on the date Measure 4 was granted 'the club's liabilities were greater than its assets'. If by that the Commission means that the club's debts exceed all of its assets, it must be observed that that assertion is not in any way supported and is contradicted by the Commission itself, which accepted at the hearing that the applicant's net assets were positive on that date. Still in the context of that response, the Commission relies on the fact that the losses recorded during the fiscal year 2008/2009 represented two thirds of the 2009 capital increase, with the negative own funds recorded at the end of the same fiscal year corresponding to around one third of that amount. However, it should be pointed out that that fact does not call into question the finding that, at the end of the last complete fiscal year before Measure 4 was granted, the applicant's own equity was EUR 57.3 million.

199 At the hearing, the Commission emphasised the fact that the applicant 'was operating at a loss', the lack of any credible restructuring plan and, even if it were possible to rely on such a plan, the fact that the implementation of that plan was, in any case for the first four years, based on losses being made, all of which justify the applicant's shares being considered to have a value close to zero. It should be recalled that the fiscal year which ended before Measure 4 was granted closed with a profit, which, first, invalidates the Commission's contention that the applicant was operating only 'at a loss' and, second, puts into perspective the relevance of the projections made previously in relation to the 2009 viability plan.

200 Finally, it is apparent from recital 76 of the contested decision that the classification of the applicant as a firm in difficulty on the date Measure 4 was granted is based on evidence that is more limited than that relied on by the Commission on the date Measure 1 was granted, which moreover led it to apply to the first only the criteria set out in paragraph 11 of the Rescue and Restructuring Guidelines, whereas it considered that both paragraph 10 and paragraph 11 of those guidelines applied to the second (see paragraphs 64 and 65 above). Thus, where the Commission relied on the existence of losses, on the decline in turnover, on negative own funds and on the applicant's level of indebtedness in order to conclude that it was in difficulty on the date Measure 1 was granted, only the latter factor and the 'profits close zero' support the Commission's conclusion relating to the applicant's situation when Measure 4 was granted.

201 In view of the foregoing, the Court considers that the evidence on which the Commission's conclusions are based in recital 93 of the contested decision relating to the 'close to zero' value of the applicant's shares on the date Measure 4 was granted are partly incorrect, in so far as the fiscal year preceding that grant closed with a profit. The Court also considers that, by concluding in recital 93, on the basis of grounds common to Measures 1 and 4, that the value of the applicant's shares was 'close to zero', without taking into consideration relevant factors, namely the existence of significant own equity and the generation of a profit before taxes in the fiscal year preceding the grant of Measure 4, the Commission committed a manifest error of assessment.

202 The Commission's argument that it is necessary to deduct from the value of the applicant's shares the value of its assets already provided as collateral for loans which it had been granted beforehand does not invalidate that conclusion. First, it should be noted that this is a new ground compared with those set out in the contested decision, which in itself does not remedy the shortcomings of that decision established above (see the case-law recalled in paragraph 194 above). Second, and in any event, the Commission does not explain why it is appropriate to establish such a close link between the value of the applicant's assets provided as collateral and the value of its pledged shares. Third, loans which

come with such guarantees are assumed to be already taken into account in the applicant's financial data set out in recital 15 of the contested decision, on which the Commission relies in order to reach its conclusions on the value of the shares at issue.

203 Therefore, and without it being necessary to examine the applicant's other arguments, the third plea must be upheld in so far as the Commission's assessment relating to the value of its pledged shares is based on a substantive inaccuracy and is vitiated by manifest errors.

204 In view of that finding and in the interests of economy of procedure, there is no need to examine the fourth and fifth pleas or the second part of the sixth plea which relate to a later stage of the analysis and assume that the characteristics of the guarantee at issue were correctly identified.

205 Moreover, although it is apparent from the third plea that it covers only the calculation of the amount of the aid measure at issue and not the actual existence of that aid, it must also be stated that the manifestly erroneous nature of the Commission's assessment of the value of the counter-guarantee offered to the IVF, as established by the Court, may have an effect on the classification of the measure at issue as State aid, in view of the advantage condition. It is not inconceivable that a re-examination of the value of the counter-guarantee offered may result in the Commission making a fresh assessment on whether Measure 4 involves State aid. In that respect, the determination of the value of the applicant's pledged shares is of essential importance in the general scheme of the contested decision (see, by analogy, judgment of 15 June 2005, *Corsica Ferries France* v *Commission*, T-349/03, EU:T:2005:221, paragraphs 319 and 320).

206 Therefore, it is necessary to annul the contested decision in so far as it concerns Measures 1 and 4 granted to the applicant.

Costs

207 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 before the Court, in accordance with the form of order sought by the applicant.

208 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 Valencia Club de Fútbol, SAD;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by Valencia Club de Fútbol, including those relating to the interlocutory proceedings before the Court;**

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]

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