Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

20 March 2019*

(State aid – Aid granted by Spain in favour of certain professional football clubs – Guarantee – Decision declaring the aid incompatible with the internal market – Advantage – Obligation to state reasons)

In Case T-766/16,

Hércules Club de Fútbol, SAD, established in Alicante (Spain), represented by S. Rating and Y. Martínez Mata, lawyers,

applicant,

supported by

Kingdom of Spain, represented initially by A. Gavela Llopis and M.J. García-Valdecasas Dorrego and subsequently by M.J. García-Valdecasas Dorrego, 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 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 L. Calvo-Sotelo Ibáñez-Martín, Judges,

Registrar: I. Dragan, Administrator,

having regard to the written part of the procedure and further to the hearing on 14 September 2018,

gives the following

* Language of the case: Spanish.

Judgment

Background to the dispute

1 The applicant, Hércules Club de Fútbol, SAD, is a professional football club based in Alicante, in the region of Valencia (Spain).

2 Fundación Hércules de Alicante ('Fundación Hércules') is a non-profit organisation whose object is connected with the activities of the applicant. Under the statutes and by-laws of Fundación Hércules, the members of the board of directors of the applicant are legally members of the governing body of Fundación Hércules.

3 On 26 July 2010, Instituto Valenciano de Finanzas ('IVF'), the financial institution of the Generalitat Valenciana (Autonomous Community of Valencia, Spain), provided Fundación Hércules with a guarantee in respect of a bank loan of EUR 18 million from Caja de Ahorros del Mediterráneo ('CAM') to finance the acquisition of shares issued by the applicant in the context of the latter's decision to increase its capital. Following the increase in capital, Fundación Hércules held 81.96% of shares in the applicant.

4 The guarantee covered 100% of the principal amount of the loan, plus interest and the costs of the guarantee transaction. In return, an annual guarantee premium of 1% was to be paid by Fundación Hércules to IVF. In addition, by way of counter-guarantee, IVF received a pledge on the shares in the applicant acquired by Fundación Hércules. Provisionally, until the pledge of the shares took place, it was agreed that IVF would receive a guarantee from the owner of the José Rico Pérez stadium, Aligestión Integral SA ('Aligestión'), and a pledge on the shares that Aligestión held in the applicant. The term of the underlying loan was five years. The interest rate of the underlying loan was a fixed rate of 4% for the first 36 months and the Euribor one-year rate plus 2% margin for the following 24 months. There was also a 0.5% commitment fee. Repayment of the guaranteed loan (capital and interest) was to take place through the sale of the shares in the applicant acquired by Fundación Hércules.

5 Following the grant by IVF of the State guarantee, Fundación Hércules did not repay the underlying loan. As a result, on 24 January 2012, IVF, in fulfilment of its legal obligations as guarantor, repaid the sum of EUR 18.4 million to CAM, replaced CAM as creditor of the loan in question and subsequently initiated legal proceedings against Fundación Hércules to recover the amount in question.

6 On 8 April 2013, the European Commission, having been informed of the existence of alleged State aid granted by the Autonomous Community of Valencia in the form of bank loan guarantees in favour of Valencia Club de Fútbol, SAD, the applicant and Elche Club de Fútbol, SAD, invited the Kingdom of Spain to comment on those allegations. The Kingdom of Spain responded to the Commission on 27 May and 3 June 2013.

7 By letter of 18 December 2013, the Commission informed the Kingdom of Spain that it had decided to initiate the procedure laid down in Article 108(2) TFEU. By letter of 10 February 2014, Spain submitted comments on the opening decision.

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

9 By Decision (EU) 2017/365 of 4 July 2016 on 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, inter alia, that the State guarantee given by IVF on 26 July 2010 in respect of a bank loan to Fundación Hercules for the subscription of shares in the applicant, in the context of the capital increase by the latter ('the measure at issue'), constituted State aid that was unlawful and incompatible with the internal market, in the amount of EUR 6 143 000 (Article 1 of the contested decision). The Commission accordingly ordered the Kingdom of Spain to recover the aid in question from the applicant (Article 2 of the contested decision), recovery to be 'immediate and effective' (Article 3 of the contested decision).

10 In the contested decision, in the first place, the Commission considered the measure at issue, implemented by IVF, to be a transfer of State resources and imputable to the Kingdom of Spain. In the second place, the beneficiary of the aid was the applicant and not Fundación Hércules, which acted as a financial vehicle, particularly in view of the purpose of the measure which was to facilitate the funding of the applicant's capital increase. The applicant's financial situation at the time that the measure at issue was implemented was that of a firm in difficulty within the meaning of points 10(a) and 11 of the Commission Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2; 'the R&R guidelines'). With regard to the criteria set out in the Commission 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 terms of the State guarantee from which it had benefitted, the Commission concluded that an undue advantage existed which was liable to distort or threaten to distort competition and affect trade between Member States. In addition, the Commission quantified, in the contested decision, the element of aid allegedly granted to the applicant using the reference rate applicable under its Communication on the revision of the method for setting the reference and discount rates (OJ 2008 C 14, p. 6), since a meaningful comparison on the basis of similar transactions on the market was impossible. When quantifying the aid at issue, the Commission considered that the value of the shares in the applicant pledged to IVF by way of counter-guarantee was close to zero. Lastly, the Commission found, in the contested decision, that the aid at issue was not compatible with the internal market, in particular with regard to the conditions and principles laid down in the R&R guidelines.

Procedure and forms of order sought by the parties

11 By application lodged at the Court Registry on 7 November 2016, the applicant brought the present action, claiming that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

12 By a separate document lodged at the Court Registry on the same day, the applicant made an application for interim measures seeking a stay of execution of Article 2 of the contested decision to the extent that it ordered recovery of the aid.

13 The Commission lodged its defence at the Court Registry on 20 January 2017, contending that the Court should:

– dismiss the action as unfounded;

– order the applicant to pay the costs.

14 The applicant lodged its reply at the Court Registry on 7 March 2017.

15 By decision of 29 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.

16 The Commission lodged its rejoinder at the Court Registry on 19 April 2017.

17 The Kingdom of Spain lodged its statement in intervention at the Court Registry on 19 June 2017.

18 It contends that the Court should:

– uphold the action and annul the contested decision;

– order the Commission to pay the costs.

19 The Commission lodged its observations on the statement in intervention at the Court Registry on 27 July 2017.

20 By letter of 17 August 2017, the applicant expressed its wish to be heard at the hearing.

21 By order of 22 March 2018, *Hércules Club de Fútbol* v *Commission* (T-766/16 R, not published, EU:T:2018:170), the President of the General Court dismissed the application for interim measures and reserved the costs.

22 By letters from the Court Registry of 13 July 2018, the Court put written questions to all the parties by way of measures of organisation of procedure pursuant to Article 89 of its Rules of Procedure.

23 The parties presented oral argument and answered the questions put by the Court at the hearing of 14 September 2018.

24 By order of 22 November 2018, *Hércules Club de Fútbol* v *Commission* (C-334/18 P(R), EU:C:2018:952), the judge hearing applications for interim measures at the Court of Justice set aside the order of 22 March 2018, *Hércules Club de Fútbol* v *Commission* (T-766/16 R, not published, EU:T:2018:170) and referred the case back to the General Court. On 28 November 2018, the President of the General Court made an order pursuant to Article 157(2) of the Rules of Procedure by which he ordered the suspension of the contested decision, in so far as it concerned the applicant, until the date of an order terminating the proceedings for interim measures.

Law

The request for a measure of organisation of procedure

25 As part of its application, the applicant requested the Court to adopt a measure of organisation of procedure so as to allow it to consult certain information in the file from the administrative procedure leading to the contested decision.

26 The applicant claims that it needs access to all communications made to the Commission by the Spanish administrative authorities, both national and regional, during the administrative phase – except where they specifically concern Valencia Club de Fútbol or Elche Club de Fútbol – in order to be able to fully exercise its right of defence and to address the discriminatory treatment it faced at the hands of those authorities. The applicant also claims that the content of the contested decision makes it clear that the decision was based on incorrect statements by the Spanish authorities, or on a misinterpretation thereof, which renders its request all the more legitimate. According to the applicant, upholding its request for a measure of organisation of procedure is the only means by

which it can supplement its pleas and arguments at the appropriate point in the proceedings, bearing in mind that it had to bring the present action for annulment and apply for a stay of execution without being able to access the arguments put forward by the Spanish authorities during the administrative phase.

27 Under Article 88(1) of the Rules of Procedure, measures of organisation of procedure may be taken at any stage of the proceedings either of the Court's own motion or on the application of a main party. According to Article 89 of the Rules of Procedure, the purpose of those measures is to ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions. Such measures may, in particular, consist of asking the parties to produce any material relating to the case (Article 89(3)(d) of the Rules of Procedure).

28 It should also be recalled that the Court must assess the usefulness of the measures of organisation of procedure requested by one of the main parties (see, to that effect, judgment of 6 July 1999, *Séché* v *Commission*, T-112/96 and T-115/96, EU:T:1999:134, paragraph 284).

29 To enable the Court to determine whether it is conducive to proper conduct of the procedure to order the production of certain documents, the party requesting production must identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the proceedings (judgment of 17 December 1998, *Baustahlgewebe* v *Commission*, C-185/95 P, EU:C:1998:608, paragraph 93; see, also, judgment of 16 October 2013, *TF1* v *Commission*, T-275/11, not published, EU:T:2013:535, paragraph 117 and the case-law cited). The applicant must therefore inter alia put forward precise and relevant reasons to explain how the evidence in question could be relevant to the resolution of the dispute (see, to that effect, judgment of 20 July 2016, *Oikonomopoulos* v *Commission*, T-483/13, EU:T:2016:421, paragraph 253).

30 In the present case, the applicant merely puts forward general arguments claiming that it can be inferred from the alleged errors in the contested decision that there were errors in the observations submitted by the public authorities during the administrative phase or, at the very least, a misinterpretation thereof. In so doing, the applicant fails to show how the requested documents could be relevant to the resolution of the dispute.

31 There is all the more reason to take that approach given the general scheme of the contested decision and the process leading to its adoption. First, the contested decision already sets out, in recitals 36 to 45 thereof, the content of the comments of the Kingdom of Spain, IVF and the Autonomous Community of Valencia, the production of which is sought by the applicant. Secondly, the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file (judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 58).

32 In addition, if the applicant has failed to show how the requested measure of organisation of procedure could be relevant to the resolution of the dispute, it cannot claim that its rights of defence have been infringed by the lack of access to the documents in question (see, by analogy, judgment of 11 December 2014, *van der Aat and Others* v *Commission*, T-304/13 P, EU:T:2014:1055, paragraph 61).

33 Lastly, the fact that the applicant was refused access to the documents in question by the Autonomous Community of Valencia whereas, it claims, Valencia Club de Fútbol was informed of them, is irrelevant for the purposes of deciding on the present request for a measure of organisation of procedure. The alleged discrimination does not alter the irrelevance of the production of the documents in question to the resolution of the dispute.

34 The request for measures of organisation of procedure must therefore be refused.

Substance

35 In support of its action, the applicant relies on three pleas in law, all three alleging infringement of Article 107(1) TFEU; the first, on the basis that the Commission wrongly identified the existence of an advantage arising from the measure at issue, the second, raised in the alternative, on the basis that the Commission wrongly found the said measure to distort competition and affect trade between Member States and the third, also raised in the alternative, on the basis of an incorrect valuation of the aid granted.

The first plea, alleging an error in the identification of an advantage

36 The applicant, supported by the Kingdom of Spain, divides the first plea into two parts, which it is appropriate to consider in turn.

– *The first part of the first plea, concerning the mis-categorisation of the applicant as a firm in difficulty*

37 The applicant submits that it was not a firm in difficulty at the date on which the disputed guarantee was issued. First of all, the criteria set out in point 10(a) of the R&R guidelines do not apply to the football market. Only the method used by the Union of European Football Associations (UEFA) and the Liga Nacional de Fútbol Profesional which compare the accounts of one club with the average of the other clubs participating in tournaments in the same Member State are relevant, in view of the specific features of the football market. The applicant was in a better situation than the average club in the first division and second division A of the Spanish football championship and, moreover, in a situation similar to the average for European football overall.

38 In addition, the applicant claims that, at the date on which the disputed guarantee was issued, neither the outstanding amount of the debt nor the debt/equity ratio constituted relevant financial indicators, bearing in mind the borrowing capacity of clubs, which to this day remains detached from the financial rationality prevailing in most other sectors, and the injection of funding for clubs from shareholders or third parties, which was not capped until the financial fair play regulations came into force. Lastly, the applicant maintains that, in its financial evaluation of the applicant, the Commission should also have taken into account the fact that, at the date on which the disputed guarantee was issued, the applicant had qualified for the first division of the Spanish football championship the following season. The Kingdom of Spain adds that the contested decision does not contain a sufficient statement of reasons in that the Commission did not respond to the arguments raised during the administrative phase concerning the uniqueness of the type of economic model found in football clubs.

39 The Commission disputes the applicant's arguments.

40 It should be recalled that, in the specific area of State aid, the Commission is bound by the guidelines and notices that it issues, inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States. 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).

41 In the present case, the Commission relied, in recital 78 of the contested decision, on points 10(a) and 11 of the R&R guidelines to categorise the applicant as a firm in difficulty at the date on which the disputed guarantee was issued.

42 As is apparent from recitals 71 and 85 of the contested decision, the Commission believed that categorisation to be relevant, first, to determining the benchmark market price against which the premium of the disputed guarantee could be compared and, secondly, to assessing whether the conditions for ruling out the existence of State aid (point 3.2 of the guarantee notice) were satisfied, as was maintained by the Kingdom of Spain.

43 The criteria stipulated in paragraphs 10(a) and 11 of the R&R guidelines reflect, in concrete terms the general consideration set out in paragraph 9 thereof, according to which 'a firm [is] in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term'.

44 By its line of argument, the applicant does not dispute that, under normal circumstances, the application of the aforementioned paragraphs of the R&R guidelines would lead to it being categorised as a firm in difficulty. On the contrary, the applicant disputes the applicability of the criteria in question to a sector – the football sector – which is essentially characterised by a greater capacity of firms to raise capital and debt, regardless of their financial situation, and by a greater volatility in their revenue and assets, which are essentially linked to their sporting results.

45 That line of argument must be rejected, for the following reasons.

46 First, the risk of fluctuations in revenue and asset value, raised by the applicant, is a situation also faced regularly by firms active in markets other than the professional football market.

47 Secondly, the one-off occurrence of behaviour extraneous to market logic, like sponsorship, is insufficient to call into question either the economic nature of the activity in question, which has already been recognised with regard to the practice of football by professional clubs (see, to that effect, judgment of 26 January 2005, *Piau* v *Commission*, T-193/02, EU:T:2005:22, paragraph 69) or the use of a private operator in a market economy as a reference framework when assessing the existence of an advantage. As the Commission submits, the existence of the measure at issue at most attests to the fact that investment behaviour extraneous to market logic – assuming it were established – did not obviate the applicant's need to resort to a State guarantee in order to increase its capital.

48 Thirdly, the concept of firm in difficulty, as defined in point 9 of the R&R guidelines, is an objective notion that must be assessed solely in the light of the specific indices of the financial and economic situation of the undertaking in question (judgment of 6 April 2017, *Regione autonoma della Sardegna* v *Commission*, T-219/14, EU:T:2017:266, paragraph 184). The applicant essentially relies on general claims about the capacity of football clubs to raise funds and to borrow which in themselves are not such as to invalidate the finding reached by the Commission in the contested decision on the basis of the applicant's individual financial data.

49 Fourthly, in so far as the applicant relies on a comparison of its financial situation with the average of other football clubs, first Spanish and then European, it should be noted that such a comparison is likewise not in line with the principles, referred to in paragraph 48 above, underpinning the concept of a firm in difficulty within the meaning of the R&R guidelines. That comparative approach is not based primarily on the applicant's individual situation and, if followed, would lead to measures taken in sectors in decline, in deficit or showing low profitability eluding State aid control.

50 In that regard, the applicant's allegation that, in failing to use that comparative methodology, the Commission infringed paragraph 97 et seq. of its notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ 2016 C 262, p. 1) must be rejected as unfounded. The comparative analysis referred to in that notice relates to the transaction in question being assessed against a benchmark transaction and not against the financial situation of the beneficiary.

51 Lastly, as regards the fact – moreover relied on by the applicant – that it had, at the date on which the disputed guarantee was issued, qualified for the first division of the Spanish football championship the following season amounted to an uncertain financial development prospect which was, in any event, incapable in itself of calling into question the conclusion reached by the Commission on the basis of the applicant's negative equity and increasing losses.

52 In the light of the foregoing, the first part of the plea must therefore be rejected.

53 The same applies to the Kingdom of Spain's allegation of a failure to state sufficient reasons. First, as has been noted in paragraphs 41 to 43 above, the Commission specified the criteria by which it assessed the applicant as a firm in difficulty, explaining, in recital 78 of the contested decision, how those criteria were applied in the present case. Secondly, it is settled case-law that the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see judgment of 30 April 2014, *Hagenmeyer and Hahn* v *Commission*, T-17/12, EU:T:2014:234, paragraph 173 and the case-law cited). As is apparent from the Court's examination of the present part of the plea, it is without committing any error and, therefore, relying on the relevant factual and legal circumstances that the Commission concluded, in the contested decision, that the applicant was, at the time of the issue of the guarantee in question, a firm in difficulty.

– The second part of the first plea, concerning the incorrect assessment of the counter-guarantees offered

54 The applicant submits that, in the contested decision, the Commission misconstrued the nature and scope of the counter-guarantees provided to IVF in return for the issue of the disputed guarantee. The counter-guarantee provided by Aligestión, which was the principal shareholder in the applicant, should not be regarded as a provisional guarantee but as collateral security binding Aligestión until such time as the Autonomous Community of Valencia, the supervisory authority for Fundación Hércules and the indirect beneficiary of the collateral security through IVF, had authorised the pledging of the shares in the applicant acquired by Fundación Hércules.

55 First, Aligestión was a solvent undertaking with substantial property holdings and the beneficiary, in particular, of a percentage of the applicant's gross revenue, which was set to increase when the club entered the first division of the Spanish football championship. Secondly, the fact that the Autonomous Community of Valencia had the power to authorise the pledging of shares in the applicant enabled it in practice to make termination of the supposedly provisional guarantee given by Aligestión conditional on the applicant's debt first being restructured by Aligestión, in such a way as to ensure the value, for the Autonomous Community of Valencia, of the shares pledged.

56 The guarantee from IVF was therefore issued on market conditions. In that regard, it is immaterial, according to the applicant, that the cap of 80% of the underlying loan set by the guarantee notice was not adhered to, as the Commission could not rely on that alone as a reason for failing to analyse whether the disputed guarantee complied with market conditions in the context of a sector – the sports sector – that was subject to specific protection under Article 165 TFEU. At the stage of the reply, the applicant produced a court decision which suggested that IVF called on Aligestión in its capacity as co-surety, and continues to do so to this day.

57 The Commission counters that the applicant's classification of Aligestión as a co-surety, apart from being contradicted by the very terms of the security and the confirmation provided by the Spanish authorities during the administrative procedure, is also difficult to reconcile with IVF's decision to institute proceedings against Fundación Hércules and not against Aligestión, after IVF repaid the loan from CAM. Furthermore, the Commission notes that, if Aligestión was truly able to guarantee the loan directly, as the applicant maintains, then it made no sense for IVF to provide a guarantee. In any event,

the Commission considers that the fact that Aligestión's collateral security was ultimately not 'provisional' in nature is the result of matters subsequent to the issue of the guarantee which are, therefore, irrelevant to determining the existence of an advantage.

58 It should be noted at the outset, before any examination of the supposedly incorrect assessment made by the Commission in the contested decision of the counter-guarantee provided by Aligestión, that the contested decision does not contain any analysis of the impact of the counter-guarantee on the determination of an advantage.

59 It has consistently been held that an absence of or inadequate statement of reasons constitutes an infringement of essential procedural requirements for the purposes of Article 263 TFEU and is a plea involving a matter of public policy which may, and even must, be raised by the EU judicature of its own motion (see judgment of 2 December 2009, *Commission* v *Ireland and Others*, C-89/08 P, EU:C:2009:742, paragraph 34 and the case-law cited).

60 In the light of the foregoing, the Court is bound to rule on the existence of a possible failure to state reasons and to hear the parties to that effect, as it did in the context of the measures of organisation of procedure of 13 July 2018 and then at the hearing on 14 September 2018.

61 It should be recalled that, according to settled case-law, the scope of the duty to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution, so as to enable the persons concerned to ascertain the reasons for it so that they can defend their rights and ascertain whether or not the measure is well founded and to enable the EU judicature to exercise its power of review. It is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 18 January 2012, *Djebel – SGPS* v *Commission*, T-422/07, not published, EU:T:2012:11, paragraph 52 and the case-law cited).

62 In the present case, the contested decision makes only one mention of the counter-guarantee provided by Aligestión, under the description of the measure at issue, and never refers to it again. Thus, the parts of the contested decision dealing with the determination of the existence and quantification of aid make no reference to the counter-guarantee. In particular, as can be seen from recital 93 of the contested decision, for the purposes of assessing the amount of the guarantee fee required by IVF in the context of the measure at issue, in view of market conditions, the contested decision mentions only one security, the pledge in favour of IVF on the shares in the applicant subscribed by Fundación Hércules, and excludes any other security, in particular, the counter-guarantee provided by Aligestión.

63 In response to the written question raised by the Court on that point, however, the Commission maintained that it could be inferred from the reference to the 'provisional' nature of the counter-guarantee at issue and from the description in recital 10 of the contested decision of the consequences of the failure to pay by Fundación Hércules, namely IVF's choice to replace the creditor of the foundation and to bring proceedings against the latter, that the counter-guarantee provided by Aligestión was not 'effective' and therefore did not need to be examined any further.

64 In the Commission's view, that lack of 'effectiveness' was confirmed during the administrative phase by the observations of the Kingdom of Spain, which stated that 'IVF [had] received counter-guarantees for the guarantees in question, in particular pledges on the shares acquired by the Fundaciones with the guaranteed loans' (recital 38 of the contested decision), and by the terms of the counter-guarantee provided by Aligestión, from which it is clear, in the Commission's view, that the counter-guarantee was provided for a limited time and was to come to an end on fulfilment of a number of conditions which, according to the Commission's information, were to take place within a short space of time.

65 By its line of argument, therefore, the Commission maintains, in essence, that it is sufficiently clear from the contested decision that the counter-guarantee provided by Aligestión was irrelevant for the purposes of determining the existence of an advantage, which explains why it is not specifically discussed in the contested decision.

66 In that regard, it must first be noted that the Commission's assertion, raised before the Court, that the conditions on which Aligestión's involvement as co-surety would end were to be fulfilled within a short time is not apparent from the contested decision.

67 Next, the reference in recital 10 of the contested decision to the fact that IVF repaid the amount of the debt contracted by Fundación Hércules, then replaced the lending bank and initiated proceedings against the said foundation does not contain any information about any security that may have been activated by IVF and, in any event, in no way supports the conclusion that, at the end of the administrative procedure, the Commission considered the counter-guarantee provided by Aligestión to be ineffective.

68 Lastly, the summary of the Kingdom of Spain's observations set out in recital 38 of the contested decision sheds no further light on the Commission's assessment of the relevance of the counter-guarantee provided by Aligestión for the purposes of determining an advantage, either (see, to that effect, judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 84). Furthermore, it should be noted that, even though the French version of the contested decision – specifically mentioned by the Commission – gives the impression that the Kingdom of Spain was referring exclusively to security in the form of pledges on shares in the applicant and equivalent security provided in the context of the other measures covered by the contested decision, the Spanish version of that decision – the only authentic version – can, on the contrary, be read as meaning that the Kingdom of Spain acknowledged the existence of other security.

69 It follows that the reasoning contained in the contested decision in respect of the counter-guarantee provided by Aligestión is limited to the finding that the counter-guarantee was provisional until the pledging of the shares in the applicant by Fundación Hercules. It does not specify whether that is in itself the reason why the counter-guarantee was not taken into account for the purposes of establishing the existence of aid or the amount thereof. A fortiori, it fails to explain why that would be the case.

70 It is apparent from points 3.2(d) and 4.2 of the guarantee notice that the security given at the time of adoption of the guarantee or of the operation of the underlying loan is a factor relevant to determining the existence and level of aid. The counter-guarantee provided by Aligestión is therefore, in principle, a relevant factor. What is more, nothing in the guarantee notice suggests that a security should be dismissed as irrelevant on the grounds that it is only 'provisional' in nature.

71 It follows that, with regard to the legal rules governing the matter in question, in this case Article 107(1) TFEU and the guarantee notice, the interested parties, on the one hand, and the Court, on the other, were entitled to expect that the contested decision would make reference to the Commission's reasoning concerning the impact of the counter-guarantee provided by Aligestión on the finding as to the existence of aid and, where applicable, the amount thereof.

72 Furthermore, one aspect of the reasoning is of fundamental importance in the context of the contested decision, account being had that it concluded that the value of the only security examined was 'close to zero' (recital 93 of the contested decision), even though the level of collateral provided to IVF was all the more crucial given that the rating of the undertaking in question, in this case the applicant, was poor (category CCC, see recital 83 of the contested decision).

73 It should, moreover, be noted that the contested decision makes no mention of a time limit within which the shares in the applicant had to be pledged to IVF by Fundación Hércules, even though it indicates that it was that event that would release Aligestión from its obligations under the 'provisional' counter-guarantee granted to IVF. The contested decision therefore contains no information indicating the period during which the 'provisional' counter-guarantee was to apply or, therefore, the likelihood of it being in force in the event that the guarantee issued by IVF were activated.

74 Therefore, the contested decision neither expressly states (see paragraph 67 above) nor implies that the counter-guarantee provided by Aligestión was of short term. Even supposing, as the Commission appears to argue, that the indication of the term of the counter-guarantee provided by Aligestión could constitute a contextual factor liable to reduce the extent of its obligation to state reasons, it must be pointed out that the contested decision contains no such indication.

75 It follows that the Commission should have explained, in the contested decision, how, if it all, it took that counter-guarantee into account.

76 In the light of the foregoing, the contested decision must be found to be vitiated by a failure to state reasons.

77 In view of that failure to state reasons, the Court is not in a position to rule on the merits of the arguments put forward by the applicant under the second part of its first plea.

78 It is therefore appropriate to annul the contested decision, to the extent that it affects the applicant, for failure to state reasons, without there being any need to examine the rest of the action.

Costs

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

80 Article 138(1) of the Rules of Procedure provides that the 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 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, to the extent that it concerns Hércules Club de Fútbol, SAD;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by Hércules Club de Fútbol;**

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

Kanninen Schwarcz Calvo-Sotelo Ibáñez-Martín

Delivered in open court in Luxembourg on 20 March 2019.

[Signatures]