Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

4 March 2021 (*)

(Appeal – State aid – Aid granted to certain professional football clubs – Article 107(1) TFEU – Concept of 'advantage' – Aid scheme – Regulation (EU) 2015/1589 – Article 1(d) – Reduced tax rate – Non-profit entities – Less advantageous tax deduction – Effect – Cross-appeal – Articles 169 and 178 of the Rules of Procedure of the Court of Justice)

In Case C-362/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 May 2019,

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

appellant,

the other parties to the proceedings being:

Fútbol Club Barcelona, established in Barcelona (Spain), represented by R. Vallina Hoset, J. Roca Sagarra, J. del Saz Cordero, A. Sellés Marco and R. Salas Lúcia, abogados,

applicant at first instance,

Kingdom of Spain, represented by S. Centeno Huerta and M.J. Ruiz Sánchez, and by A. Rubio González, acting as Agents,

intervener at first instance,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, M. Ilešič, C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: G. Pitruzzella,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 24 June 2020,

after hearing the Opinion of the Advocate General at the sitting on 15 October 2020,

gives the following

Judgment

1 By its appeal, the European Commission requests the Court of Justice to set aside the judgment of the General Court of the European Union of 26 February 2019, *Fútbol Club Barcelona* v *Commission* (T-865/16; 'the judgment under appeal', EU:T:2019:113), by which the General Court annulled Commission Decision (EU) 2016/2391 of 4 July 2016 on the State aid SA.29769 (2013/C) (ex 2013/NN) implemented by Spain for certain football clubs (OJ 2016 L 357, p. 1; 'the decision at issue').

EU law

2 Article 1 of Council Regulation (EC) No 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9), entitled 'Definitions', provides:

'For the purposes of this Regulation, the following definitions shall apply:

…

(b) "existing aid" means:

(i) … all aid which existed prior to the entry into force of the TFEU in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the TFEU in the respective Member States;

…

(c) "new aid" means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

(d) "aid scheme" means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

(e) "individual aid" means aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;

…'

3 Articles 21 to 23 of that regulation are contained in Chapter VI thereof, which is devoted to the procedure regarding existing aid schemes.

4 Article 4 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation 2015/1589 (OJ 2004 L 140, p. 1), as amended by Commission Regulation (EU) 2015/2282 of 27 November 2015 (OJ 2015 L 325, p. 1), entitled 'Simplified notification procedure for certain alterations to existing aid', provides in the first sentence of paragraph 1 thereof, that, for the purposes of Article 1(c) of Regulation 2015/1589, 'an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market'.

Background to the dispute and the decision at issue

5 The background to the dispute, as set out in paragraphs 1 to 6 of the judgment under appeal, is as follows:

'1 Article 19(1) of Ley 10/1990 del Deporte (Law 10/1990 on sport) of 15 October 1990 (BOE No 249 of 17 October 1990, p. 30397) ('Law 10/1990') obliged all Spanish professional sports clubs to

convert into public limited sports companies (‘SLCs’). The purpose of the law was to encourage more responsible management of clubs through a change in legal form.

2 However, the seventh additional provision of Law 10/1990 provided an exception for professional sports clubs that had achieved a positive financial balance during the financial years preceding adoption of the law. … Fútbol Club Barcelona, and three other professional footballs clubs fell within the exception under Law 10/1990. Those four entities therefore had the option, which they chose to take, of continuing to operate in the form of sports clubs.

3 Unlike SLCs, sports clubs are non-profit legal persons which enjoy, in that capacity, a special rate of income tax. Until 2016, that rate remained below the rate applicable to SLCs.

4 By letter of 18 December 2013, the … Commission notified the Kingdom of Spain of its decision to initiate the procedure laid down in Article 108(2) TFEU with regard to the potentially preferential tax treatment of four professional football clubs, including the applicant, when compared with SLCs.

…

6 By [the decision at issue], the Commission found that, by Law 10/1990, the Kingdom of Spain had unlawfully implemented aid in the form of a preferential corporate tax rate for the applicant, Club Atlético Osasuna, Athletic Club Bilbao and Real Madrid Club de Fútbol, in breach of Article 108(3) TFEU (Article 1 of the [decision at issue]). The Commission also found that the scheme was incompatible with the internal market and therefore ordered the Kingdom of Spain to discontinue it (Article 4(4)) and to recover from the beneficiaries the difference between the corporate tax actually paid and the corporate tax they would have been required to pay had they been SLCs, as of the tax year 2000 (Article 4 (1)), subject, in particular, to the possibility that the aid in question constituted *de minimis* aid (Article 2). Lastly, the [decision at issue] instructs its addressee to comply with the requirements set out in the operative part immediately and effectively with regard to recovery of the aid granted (Article 5(1)) and within 4 months following the date of notification with regard to implementation of the decision overall (Article 5(2)).’

The procedure before the General Court and the judgment under appeal

6 By application lodged at the Court Registry on 7 December 2016, Fútbol Club Barcelona (‘FCB’) brought an action for annulment of the decision at issue.

7 By decision of 25 April 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 FCB.

8 FCB put forward five pleas in support of its action. The first plea in law alleged infringement of Article 49 TFEU, read in conjunction with Articles 107 and 108 TFEU, and of Article 16 of the Charter of Fundamental Rights of the European Union, in that the decision at issue had failed to take account of the fact that the measure at issue infringed the freedom of establishment. The second plea alleged infringement of Article 107(1) TFEU, in that the Commission had committed an error of assessment as to the existence of an advantage, and of the principle of sound administration in the examination of the existence of that advantage. The third plea alleged infringement of the principles of the protection of legitimate expectations and of legal certainty. The fourth plea alleged infringement of Article 107(1) TFEU, in that the Commission had not taken into account the fact that the measure at issue was justified by the internal logic of the tax system. Lastly, the fifth plea alleged infringement of Article 108 TFEU, in that the Commission had ordered the recovery of existing aid and had failed to comply with the procedure laid down for that type of aid.

9 By the judgment under appeal, the General Court, after having rejected, in paragraphs 25 to 37 thereof, the first plea, upheld the second plea.

10 In that regard, the General Court held, as is apparent, inter alia, from paragraphs 59 and 67 of that judgment, that the Commission had failed to discharge, to the requisite legal standard, the burden of proving that the national measure at issue, which resulted from the combination of the specific tax regime applicable to non-profit entities and the derogating rule, introduced by the seventh additional provision of Law 10/1990, allowing professional football clubs meeting the condition of having achieved a positive financial balance before the adoption of that law, not to have to convert themselves into SLCs in order to continue to operate as a non-profit entity ('the measure at issue'), provided an advantage to its beneficiaries, given the existence of a less favourable deduction rate for reinvestment of extraordinary profits for those entities than that applicable to SLCs.

11 Consequently, the General Court, without having examined the three other pleas put forward by FCB, annulled the decision at issue.

Forms of order sought by the parties

12 By its appeal, the Commission claims that the Court should:

– set aside the judgment under appeal;

– refer the case back to the General Court, and

– reserve the costs.

13 FCB and the Kingdom of Spain contend that the appeal should be dismissed and that the Commission should be ordered to pay the costs.

The appeal

14 In support of its appeal, the Commission raises a single ground, divided into two parts, alleging infringement by the General Court, in the judgment under appeal, of Article 107(1) TFEU, so far as concerns, first, the concept of an 'advantage' capable of constituting 'State aid', within the meaning of that provision, and, second, the Commission's duty of diligence in the context of the examination of the existence of aid and its burden of proving that there is an advantage.

Arguments of the parties

15 By the first part of its single ground of appeal, the Commission submits that the General Court erred in law when it assessed the examination which the Commission must carry out in order to determine whether a tax scheme confers an advantage on its beneficiaries and, consequently, whether that scheme is capable of constituting 'State aid' within the meaning of Article 107(1) TFEU.

16 In particular, the General Court wrongly held that the Commission was required to conduct not only an analysis of the criteria of the regime at issue which are such as to place the beneficiary in a more favourable position compared to other undertakings subject to the general regime, such as a reduced tax rate, but also an analysis of unfavourable elements of that regime which depend on circumstances extraneous to the regime and which are variable in each tax year, such as the tax deduction for the reinvestment of extraordinary profits, which depends on investment decisions taken by the beneficiary undertakings, and even when those unfavourable elements are uncertain and cannot systematically negate the advantage and cannot be foreseen in an *ex ante* review of the tax regime in question.

17 In the first place, the Commission submits that, contrary to what the General Court stated in paragraph 69 of the judgment under appeal, the analysis carried out in the decision at issue concerned only an aid scheme and not individual aid also. The General Court misinterpreted both the decision at issue and Article 1(d) of Regulation 2015/1589. Even if it is possible, in the present case, to identify the

beneficiaries of the aid scheme under examination, the measure at issue consists of a mechanism under which aid not linked to a specific project may be granted to one or more undertakings, for an indefinite period or for an indefinite amount, within the meaning of that provision. Consequently, the Commission could have confined itself to analysing the general characteristics of the tax regime at issue in order to demonstrate that the criteria constituting State aid were met and it was not required to examine whether the aid in question had actually materialised for each beneficiary. That matter must be determined only at the recovery stage.

18 In the second place, the Commission submits that, when it analyses a national measure capable of constituting State aid, it must take its position at the time of the adoption of the tax regime at issue and carry out an *ex ante* assessment to determine whether that regime is capable of conferring an advantage. After all, for the determination of the existence of State aid, a measure implemented without prior notification cannot be treated more favourably than a notified measure.

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

20 In accordance with those principles, the application of a lower rate of corporate income tax to certain undertakings would constitute an advantage, within the meaning of Article 107(1) TFEU, in so far as it would be liable to favour those undertakings directly or indirectly. That advantage would materialise whenever those undertakings generated profits forming the basis of assessment.

21 The Commission submits that, in the present case, it is true that the tax regime for non-profit entities provided for a tax deduction for reinvestment of extraordinary profits which was lower than that provided for by the general corporate tax regime. However, the General Court erred in law, in particular in paragraphs 53, 56, 60, 66 and 73 to 76 of the judgment under appeal, when it assessed the link between the favourable and unfavourable elements of the tax regime for non-profit entities. After all, where a particular regime entails also certain disadvantages or unfavourable elements which materialise only in circumstances extraneous to that regime and which vary from one tax year to the next, those elements cannot be regarded as neutralising the advantage unless they are linked to that advantage in such a way as to ensure that the advantage is neutralised in every tax year. However, that is not the case here.

22 The Commission submits, first of all, that although the tax rate and the rate of the tax deduction for reinvestment of extraordinary profits form part of both the general regime and the special regime for non-profit entities, the amount of the deduction depends on a factor extraneous to the regime which is unrelated to the application of the tax rate. That amount is linked to the reinvestment policy adopted by each club in the context of player transfers during a given tax year. It is therefore a random element unrelated to the advantage resulting from the application of the reduced tax rate, the effect of which can be measured only when the advantage materialises in each tax year. Contrary to what the General Court held, it is therefore impossible to assess that element indivisibly from the application of the reduced tax rate, which, in itself, is such as to confer an advantage on the clubs which benefit from it.

23 Next, the Commission submits that the tax regime for non-profit entities does not guarantee that the unfavourable elements of that regime systematically neutralise the advantages resulting from it. The tax rate is applied to profits, which are the result of the ordinary activity of the undertaking concerned, whereas the deduction is based on the reinvestment of certain extraordinary profits, which, in the specific area of football, originate, in practice, from the transfer of players. It follows that the two elements in question of that tax regime are not comparable and so cannot be neutralised.

24 Lastly, the Commission claims that the actual materialisation of the advantage is assessed for each tax year in the context of the annual tax due and is therefore likely to vary from year to year. That materialisation also includes the tax credits from which clubs may benefit for each tax year and which cannot be determined in advance.

25 In the third place, the Commission submits that it follows from the foregoing that the General Court, in paragraphs 72 to 75 of the judgment under appeal, misinterpreted the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811). Although it is true that the tax regime at issue in that judgment was different in certain respects from the one examined in the present case, it is nevertheless clear from that judgment that a special tax regime must be regarded as conferring an advantage on its beneficiaries where it may lead, at the time of its adoption, to their being taxed at a lower rate, even where the actual materialisation of that advantage depends on external circumstances.

26 By the second part of the single ground of appeal, the Commission claims that the General Court erred in law in misinterpreting the Commission's due diligence obligation and burden of proving that there is an advantage.

27 The Commission argues that, in paragraph 59 of the judgment under appeal, the General Court wrongly criticised it for not having requested information which would have enabled it to establish that capping tax deductions at a level less beneficial for non-profit entities than for SLCs did not offset the advantage derived from the lower tax rate. In the light of the considerations set out in the first part of the single ground of appeal, such proof was not necessary. When the tax regime at issue was adopted, it would have been materially impossible to foresee how the reduced tax rate would be combined with the amount deductible by way of a tax deduction for the reinvestment of extraordinary profits. An *ex post* analysis of the materialisation of the advantage, such as that required by the General Court, is not necessary to establish the existence of an advantage conferred by State aid. The solution adopted by the General Court in the judgment under appeal favours non-notified aid schemes over notified aid schemes.

28 FCB contends, as a preliminary point, that certain of the arguments and evidence put forward by the Commission in its appeal are ineffective.

29 First of all, FCB submits that the Commission relies on new facts and produces new evidence. The latter claims for the first time that the deduction for reinvestment of extraordinary profits is a random factor independent of the nominal rate of corporate tax, and it produces for the first time, as an annex to its reply, a document relating to the transfers carried out, inter alia, by FCB. The Commission also makes a series of new allegations regarding the national legislation on the deduction for reinvestment of extraordinary profits.

30 Next, FCB submits that the Commission regards as established points of fact that were refuted in the judgment under appeal. In particular, it is not true that the Commission demonstrated, in recital 35 of the decision at issue, that the tax regime applicable to non-profit entities is more favourable than the common tax regime for SLCs. Moreover, that claim calls into question the assessment of the facts carried out by the General Court in paragraphs 61 and 62 of the judgment under appeal.

31 Lastly, FCB submits that the Commission makes assertions relating to the decision at issue which are untrue. Neither in recital 95 of that decision nor elsewhere in it did the Commission find that the amount to be recovered is determined by the Spanish authorities and must be assessed on a case-by-case basis.

32 As regards the merits of the appeal, FCB, so far as concerns the first part of the Commission's single ground of appeal, submits, in the first place, that the measure covered by the decision at issue does not constitute an aid scheme, but consists in individual aid granted to the four named clubs. In the decision at issue, the Commission described a measure intended only for four clubs, stating that no other club could benefit from it. Where national legislation has the sole objective of favouring specific and named undertakings, however, that legislation should be regarded not as an aid scheme, but as constituting one or more individual aid measures.

33 FCB submits, in the second place, that the tax regime for non-profit entities did not provide any advantage to the four clubs in question. From a legal point of view, the Spanish tax system is designed to aim for tax neutrality and therefore to ensure that the effective tax rate applicable to non-profit entities is the same as the effective rate applicable to commercial entities. From a practical point of view, it is the effects, and not the legal form, which are decisive in assessing the existence of an advantage. The Commission is required to analyse all the elements of the legal regime in question, both those conferring an advantage and those offsetting it, as well as their cumulative effects.

34 FCB contends that, in the present case, the obligation to convert into SLCs had an effect not only on the tax rate, but also on the level of deductions applicable. Consequently, in order to assess the national measure at issue properly, consideration had to be given not only to the indicia and evidence pointing to the existence of State aid, but also to those demonstrating its absence. In particular, given the importance of transfers in the professional football sector, the tax regime which offers the largest transfer-related deductions, namely that applicable to commercial entities, is always beneficial in the long term. The Commission therefore committed a double error in its assessment of the existence of an advantage. First, it focussed on the nominal tax rate, whereas it was the effective tax rate that matters. Second, since the tax system provides for tax credits whose effects may be spread over several tax years, the analysis should have focussed on the medium or long term.

35 FCB contends, in the third place, that the tax regime at issue in this case bears no similarity to the tax regime analysed in the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811). First of all, the four clubs in question do not benefit from an exception to the common tax regime, but are subject to the usual rules applicable to non-profit entities. Next, there is no evidence to show that the tax regime applicable to those four clubs is more favourable. Lastly, in the present case, it is not the amount of the aid that is at issue, but whether that aid actually exists.

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

37 In the first place, FCB claims that the Commission confuses the existence of an advantage and the quantification of the aid. The concept of 'advantage' is the same for individual aid and for aid schemes. The fundamental criterion lies in the effects of the measure on the potential beneficiary. According to FCB, the Commission cannot therefore carry out a partial analysis of the effects of a measure taking account of the effects which generate an advantage, such as the nominal tax rate, but excludes those which offset it, such as deductions. In the decision at issue, the Commission failed to analyse various general features of the regime at issue, such as the deductions applicable, the habitual nature of those deductions in the relevant market and the extent of the tax credits.

38 In the second place, FCB argues that the need to carry out an *ex ante* analysis does not preclude the tax deductions from being taken into consideration. The Commission has the power to request from the relevant Member State estimates of the effect of the measure or calculations of its effect during previous years. In the case of measures implemented – but not notified – account can be taken of the manner in which the regime works in practice. In any event, no *ex ante* analysis was carried out in the decision at issue.

39 In the third place, FCB submits that the Commission, being under an obligation to conduct the administrative procedure with diligence and impartiality, must assess with the same intensity the evidence indicating both the existence and the absence of aid. Accordingly, the Commission cannot focus solely on evidence which demonstrates the existence of aid. It should therefore have considered the effective tax rate, taking into account the tax deductions identified during the administrative procedure.

40 In the fourth place, FCB submits that the Commission's burden of proving the existence of an advantage requires an analysis of all the cumulative effects of the measure on the beneficiaries. It is therefore not sufficient to analyse only the nominal tax rate. Moreover, evidence based solely on a comparison of

nominal rates is inadequate, since a tax regime consists of a set of norms which also include tax deductions, rules for calculating the taxable amount and exemptions. Where, as in the present case, evidence of the potential absence of an advantage is submitted to the Commission, the Commission is required to obtain the necessary information, by requesting it from the relevant Member State.

41 The Kingdom of Spain notes, in the first place, that errors in the assessment of the State aid nature of tax measures are liable to affect the institutional balance provided for in the Treaties, since Article 107 TFEU does not confer on the Commission autonomous regulatory power in the area of corporate tax. The tax rate is an essential element of a tax levy's legal regime and falls within the fiscal autonomy and competence of the Member States. The Commission's perfunctory examination therefore undermines the competences of the Member States.

42 The Kingdom of Spain considers, in the second place, that it is a mistake to conclude that the mere presence of a different tax rate implies the existence of State aid. Although the tax rate is an essential element of any tax measure, it is not sufficient to base the existence of State aid on the finding that the tax regime at issue, examined *ex ante*, is liable to confer an annual advantage simply because of the existence of a lower levy rate, irrespective of whether or not tax credits are applied. Applying such an approach leads to the conclusion that any difference in tax rate between undertakings involves the conferral of an advantage, which is incorrect. A rational legislature would devise a tax measure taking into account the consequences of applying both the tax rate and tax deductions. Tax deductions therefore cannot be seen as extraneous to the setting of the levy rate or as a random element dependent on external factors.

43 The Kingdom of Spain submits that, in the present case, the analysis of the deduction for reinvestment of extraordinary profits under Spanish tax law, following the various legislative amendments made, shows that the national legislature took into account factors delimiting tax liability when setting levy rates. There is therefore a clear link between the determination of the levy rate and the applicable rate of tax deduction, regarded as key elements of the amount of tax liability and being, as a result, interrelated. Consequently, the levy rate could not be dissociated from the other components of the tax regime, on account of both the extent of the deduction for reinvestment of extraordinary profits – in the football sector in particular – and the recurring nature of that deduction.

44 In the third place, the Kingdom of Spain considers the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811) irrelevant to the present case. Unlike the case giving rise to that judgment, which raised questions relating to the identification of an advantage in the context of specific tax measures applicable to a single economic operator, the present case concerns a rule, namely the obligation for professional football clubs to convert themselves into SLCs, not having a tax purpose, in which the very existence of an advantage is disputed.

45 In the fourth place, the Kingdom of Spain asserts that the standard of proof required by the General Court in the judgment under appeal is no higher than that required by the Court of Justice in its case-law, as is apparent, inter alia, from the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 54 and 123). The diligent and impartial examination which the Commission is required to carry out, in particular with respect to the existence of a true economic advantage, should ensure that, when it adopts its final decision, it has at its disposal the most complete and reliable information possible for that purpose. In the present case, this was not the case, the Commission merely identifying the existence of a reduced tax rate.

Findings of the Court

Admissibility

46 As regards the admissibility of certain of the evidence and arguments presented by the Commission in support of the present appeal, which is disputed by FCB on account of the alleged ineffective nature of that evidence and those arguments, it should be recalled that it follows from the second subparagraph of Article 256(1) TFEU and from the first paragraph of Article 58 of the Statute of the Court of Justice of the

European Union that an appeal is to be limited to points of law only. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts and evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, inter alia, judgment of 4 March 2020, *Buonotourist* v *Commission*, C-586/18 P, EU:C:2020:152, paragraph 67 and the case-law cited).

47 Moreover, in accordance with Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. The Court of Justice's jurisdiction in an appeal is, after all, limited to assessing the findings of law on the pleas argued at first instance. A party cannot, therefore, put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court since that would allow that party to bring before the Court of Justice, whose jurisdiction in appeal proceedings is limited, a wider case than that heard by the General Court (see, inter alia, judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 69 and the case-law cited). However, an appellant is entitled to lodge an appeal relying, before the Court of Justice, on grounds which arise from the judgment under appeal itself and seek to criticise, in law, its correctness (see, in particular, judgment of 26 February 2020, *SEAE* v *Alba Aguilera and Others*, C-427/18 P, EU:C:2020:109, paragraph 54 and the case-law cited).

48 In the first place, in so far as FCB criticises the Commission for arguing for the first time, by the line of argument it develops in support of the first part of the single ground of its appeal, that the deduction for reinvestment of extraordinary profits is a random factor independent of the reduced rate of corporate tax applicable to non-profit entities, it should be recalled that, as is apparent from paragraphs 59 and 67 of the judgment under appeal, the General Court annulled the decision at issue, on the ground, in essence, that the Commission, which bears the burden of proving that there is an advantage, had not demonstrated to the requisite legal standard, having failed to carry out a sufficiently detailed investigation, that the measure at issue conferred such an advantage on its beneficiaries.

49 In particular, it is apparent, in particular from paragraphs 57 to 60, 65, 66 and 69 of that judgment, that the General Court found, in that regard, that the Commission had failed to take into consideration, in breach of Article 107(1) TFEU and of the principle of sound administration, the specific nature of the professional football sector owing to the importance of the deduction for reinvestment of extraordinary profits, whereas, according to the General Court, that deduction constitutes an inseparable component of the tax regime for non-profit entities liable to offset the advantage resulting from the lower tax rate enjoyed by those entities.

50 In those circumstances, it appears that the Commission's line of argument is aimed at calling into question the findings made by the General Court, in the judgment under appeal, as regards the evidence which it was required to take into account, specifically as regards the deduction for reinvestment of extraordinary profits, for the purposes of determining whether the measure at issue confers an advantage on its beneficiaries and is therefore capable of falling within the concept of 'State aid', within the meaning of Article 107(1) TFEU.

51 In so doing, the Commission raises a point of law by which it challenges the merits of the legal solution adopted by the General Court in the judgment under appeal. In accordance with the case-law cited in paragraph 47 of the present judgment, the Commission's line of argument on that point is therefore admissible.

52 In the second place, in so far as FCB criticises the Commission for claiming, by the line of argument it sets out in support of the first part of its single ground of appeal, that it has demonstrated, in the decision at issue, that the tax regime applicable to non-profit entities was more favourable than that applicable to SLCs, it is sufficient to state that, contrary to what FCB contends, the Commission in no way seeks, by that line of argument, to call into question a finding of fact made by the General Court.

53 After all, as is apparent from paragraphs 48 and 49 of the present judgment, the General Court did not rule, in the judgment under appeal, on whether the measure at issue actually conferred an advantage on its beneficiaries, but confined itself to finding that the Commission had not proved to the requisite legal standard the existence of such an advantage, since it had not examined whether the deduction for reinvestment of extraordinary profits was such as to offset, in the case of FCB, the benefit resulting from the application of the reduced tax rate.

54 In those circumstances, it appears that the Commission's line of argument is aimed at challenging the findings by which the General Court found, in the judgment under appeal, that the Commission had not demonstrated to the requisite legal standard the existence of an advantage falling within the scope of Article 107(1) TFEU. In accordance with the findings set out in paragraph 46 of the present judgment, examination of such a point of law is admissible at the appeal stage.

55 It follows that the present appeal and, in particular, the first part of its single ground of appeal taken as a whole, to which the objections raised by FCB relate, is admissible.

56 As to the remainder, in so far as FCB challenges, more specifically, as is apparent from paragraphs 29 and 31 of the present judgment, the admissibility, first, of a document produced by the Commission as an annex to its reply concerning the transfers made, inter alia, by FCB and, second, of certain claims relating to the facts or provisions of national law concerning the deduction for reinvestment of extraordinary profits, its arguments will, in so far as necessary, be examined in the context of the assessment of the merits of the appeal.

Substance

57 According to the Court's settled case-law, classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be satisfied. First, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the beneficiary. Fourth, it must distort or threaten to distort competition (see, inter alia, judgment of 17 September 2020, *Compagnie des pêches de Saint-Malo*, C-212/19, EU:C:2020:726, paragraph 38 and the case-law cited).

58 As regards the condition that the measure in question must be regarded as conferring an advantage on its beneficiary, it follows from the Court's equally settled case-law that measures which, whatever their form, are likely directly or indirectly to benefit undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see, inter alia, judgment of 17 September 2020, *Compagnie des pêches de Saint-Malo*, C-212/19, EU:C:2020:726, paragraph 39 and the case-law cited).

59 The concept of 'State aid' is thus broader than that of 'subsidy', since it may include not only positive benefits such as subsidies, loans or direct investment in the capital of undertakings, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect (see, inter alia, judgments of 16 July 2015, *BVVG*, C-39/14, EU:C:2015:470, paragraph 26, and of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 20).

60 It follows that national measures that confer a tax advantage which, although not involving a transfer of State resources, place the recipients in a more favourable financial situation than other taxpayers, are capable of conferring a selective advantage on the recipients and therefore constitute State aid, within the meaning of Article 107(1) TFEU (see, inter alia, judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 56, and of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 21).

61 It should also be borne in mind that the concept of 'advantage', which is intrinsic to the classification of a measure as State aid, is an objective one, irrespective of the motives of the persons responsible for the measure in question. Accordingly, the nature of the objectives pursued by State measures and their grounds of justification have no bearing whatsoever on whether such measures are to be classified as State aid. Article 107(1) TFEU does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects (see, inter alia, judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 17 and the case-law cited).

62 According to the settled case-law of the Court, it is for the Commission to prove the existence of 'State aid' within the meaning of Article 107(1) TFEU and thus also to prove that the condition of granting an advantage to the beneficiaries is fulfilled. In particular, the Commission is required to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible for that purpose (see, to that effect, judgment of 19 September 2018, *Commission* v *France and IFP Énergies nouvelles*, C-438/16 P, EU:C:2018:737, paragraph 110 and the case-law cited).

63 In that regard, it is apparent from the case-law of the Court that, for the purposes of examining the various constituent elements of a measure likely to constitute 'State aid', within the meaning of Article 107(1) TFEU, it is necessary to consider all points of law or fact which are attached to that measure, in particular, the profits and costs resulting therefrom (see, by analogy, judgment of 25 June 1970, *France* v *Commission*, 47/69, EU:C:1970:60, paragraph 7) and, therefore, to carry out an assessment of that measure as a whole, taking into account all its characteristics (see, to that effect, judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 98 and 101, and of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraphs 18, 19 and 24).

64 Thus, the Court has already held that, when assessing the existence of an advantage in relation to Article 107(1) TFEU, the Commission has a duty to carry out a global assessment of the aid measure at issue, according to the information available and developments foreseeable at the time when the decision to grant that aid was taken, taking into account, inter alia, the context of that aid (judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission*, C-357/14 P, EU:C:2015:642, paragraph 104).

65 It is, however, settled case-law that, in the specific case of an aid scheme, the Commission may merely study the characteristics of the scheme at issue in order to assess, in the grounds for its decision, whether, by reason of the arrangements provided for under the scheme, the latter gives an appreciable advantage to beneficiaries in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (see, inter alia, judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63, of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 114, and of 29 July 2019, *Azienda Napoletana Mobilità*, C-659/17, EU:C:2019:633, paragraph 27).

66 Accordingly, in the case of such an aid scheme, a distinction must be drawn between the adoption of such a scheme, on the one hand, and the grant of aid on the basis of that scheme, on the other (see, to that effect, judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 22).

67 It is in the light of those principles that the merits of the single ground of appeal in the present appeal, the two parts of which must be examined together, must be assessed.

68 In the first place, in so far as the Commission criticises the General Court for having ruled, in paragraph 69 of the judgment under appeal, that the decision at issue had to be construed as a decision relating both to an aid scheme and to individual aid, it should be recalled that, under Article 1(d) of

Regulation 2015/1589, an ‘aid scheme’ means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.

69 In the present case, the measure at issue concerns an ‘aid scheme’ within the meaning of that provision, since the specific tax provisions applicable to non-profit entities, in particular the reduced tax rate, are capable of benefitting, by virtue of that measure alone, each of the eligible football clubs, defined in a general and abstract manner, for an indefinite period of time and an indefinite amount, without further implementing measures being required and without those provisions being linked to the realisation of a specific project.

70 In that respect, it should furthermore be noted that it is common ground that both the tax provisions applicable to non-profit entities and the derogating rule allowing certain clubs to continue to benefit from that regime are contained in a measure of general scope, namely, first, the Law on corporate tax and, second, the seventh additional provision of Law 10/1990.

71 In that context, it is irrelevant, contrary to what the General Court held in paragraph 69 of the judgment under appeal, that, in its decision, the Commission not only classified the measure at issue as an aid scheme, but also expressed its view, in the grounds and operative part of its decision, on the aid individually granted to the four clubs named as beneficiaries, stating that that aid was to be considered unlawful and incompatible aid with the internal market.

72 Admittedly, under Article 1(e) of Regulation 2015/1589, the concept of ‘individual aid’ covers, in addition to aid that is not awarded on the basis of an aid scheme, notifiable awards of aid on the basis of an aid scheme.

73 However, that fact is irrelevant in determining the extent of the Commission’s obligations in respect of proving the existence, in a particular case, of an advantage under Article 107(1) TFEU.

74 After all, as has been noted in paragraph 66 of the present judgment, in the case of an aid scheme, a distinction must be drawn between the adoption of that scheme and the aid granted on the basis of it. It is clear from the case-law of the Court that individual measures which merely implement an aid scheme which, as such, should have been notified to the Commission by the Member State concerned, constitute mere measures implementing the general scheme which do not, in principle, have to be notified to that institution (see, to that effect, judgment of 5 October 1994, *Italy* v *Commission*, C-47/91, EU:C:1994:358, paragraph 21).

75 Accordingly, the mere fact that, in the present case, aid was granted individually to the clubs on the basis of the aid scheme at issue cannot have any bearing on the examination which the Commission is required to carry out, under Article 107(1) TFEU, as regards proof of the existence of an advantage, since that grant is merely the consequence of the automatic application of that aid scheme.

76 It follows that, in order to determine the existence of such an advantage, the Commission was required to examine, in the decision at issue, exclusively the ‘aid scheme’, within the meaning of Article 1(d) of Regulation 2015/1589, established by the measure at issue, and not the ‘individual aid’, within the meaning of Article 1(e) of that regulation, granted on the basis of that scheme.

77 Consequently, the General Court erred in law when it found, in paragraph 69 of the judgment under appeal, that the decision at issue was to be construed as a decision relating both to an aid scheme and to individual aid.

78 The effect of that error of law on the legality of the judgment under appeal depends, however, on the outcome of the examination of the other objections put forward by the Commission in support of its

appeal.

79 In the second place, in so far as the Commission complains, in essence, that the General Court erred in law in its assessment of the link between the favourable elements, such as a reduced tax rate, and the unfavourable elements, such as a lower rate of deduction, of an aid scheme such as the measure at issue, for the purposes of determining whether that scheme confers on its beneficiaries an advantage falling within the scope of Article 107(1) TFEU, it should be recalled that the General Court held, in paragraphs 47, 48 and 69 of the judgment under appeal in particular, that, in order to conclude that such an advantage existed, the Commission was required to carry out a global assessment of the aid scheme at issue, taking into account both the favourable and unfavourable consequences of that scheme for its beneficiaries.

80 Thus, in paragraphs 53 and 54 of that judgment, the General Court held that, in order to be able to determine whether the measure at issue was capable of conferring an advantage on its beneficiaries by placing them in a more advantageous situation than they would have been had they had to operate in the form of SLCs, it was necessary to examine the various components of the tax regime applicable to non-profit entities as a whole, since those components form an indivisible whole.

81 In that regard, the General Court found, in paragraph 55 of that judgment, that the Commission had rightly observed that, during the period in question, between 1990 and 2015, the clubs eligible for the measure at issue had been subject to a reduced nominal tax rate in comparison with clubs operating in the form of SLCs.

82 However, in paragraphs 56, 59, 65, 66 and 69 of the judgment under appeal, the General Court found that, in the context of the assessment of the tax regime applicable to non-profit entities as a whole, the examination of the advantage deriving from the reduced tax rate could not be carried out separately from that of the other components of that tax regime and, in particular, from that of the deduction for reinvestment of extraordinary profits. It was apparent from the information provided by another club benefitting from the measure at issue during the administrative procedure before the Commission, set out in paragraph 57 of that judgment, that the maximum share of profits that could be deducted was lower for non-profit entities than that applicable to SLCs and that that fact was of a specific significance in the professional football sector.

83 In those circumstances, the General Court concluded, in paragraphs 58 to 60 and 67 of the judgment under appeal, that, in merely stating, in recital 68 of the decision at issue, first, that it had not been proved that that deduction '[was] in principle and in the longer term more advantageous' and, second, that that deduction was 'only granted under certain conditions which do not apply continuously', the Commission, which had the burden of proving the existence of an advantage, had not demonstrated to the requisite legal standard that it could be ruled out that the slightest possibility of deduction would offset the advantage derived from the reduced tax rate, whereas it would have been entitled to request from the Kingdom of Spain any relevant information in that regard.

84 That reasoning is vitiated by errors in law.

85 Admittedly, as the General Court rightly considered, in essence, in paragraphs 47, 48, 53, 54 and 69 of the judgment under appeal, as regards an aid scheme, the Commission, even if it may confine itself to examining, in order to ascertain whether the aid scheme at issue confers an advantage on its beneficiaries, the general characteristics of that scheme, without being required to examine each particular case, must nevertheless, as is apparent from paragraphs 63 to 65 of the present judgment, carry out a global assessment of that scheme, taking into account all the components which constitute its specific features, both favourable to its beneficiaries and unfavourable to them.

86 However, since, in the case of such an aid scheme, the examination which the Commission is required to carry out under Article 107(1) TFEU relates exclusively, as is apparent from paragraphs 66 and 68 to 77 of the present judgment, to that scheme and not to aid subsequently granted on the basis of it, the question

whether that scheme confers an advantage on its beneficiaries cannot depend on the financial situation of the beneficiaries at the time of the subsequent grant of that aid, but must necessarily be assessed, as the Advocate General stated in point 76 of his Opinion, with reference to the time of adoption of the scheme in question, by carrying out an *ex ante* analysis (see, to that effect, judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 22).

87 Thus, where the tax aid scheme applies on an annual or periodic basis, the Commission need only demonstrate, in accordance with the case-law referred to in paragraphs 58 to 60 and 64 of the present judgment, that the aid scheme is such as to favour its beneficiaries, by ascertaining that the scheme, taken as a whole, is, given its particular characteristics, capable of resulting, at the time of its adoption, in the tax liability being lower than it would have been if the general tax regime had been applied, irrespective of whether, in view of those characteristics, that institution is not in a position to determine, in advance for each tax year, the precise level of taxation for that tax year (see, to that effect, judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraphs 19 and 24).

88 In accordance with the case-law of the Court cited in paragraph 65 of the present judgment, it is at the stage of the possible recovery of the aid granted on the basis of that aid scheme that the Commission is required to determine whether that scheme has actually conferred an advantage on its beneficiaries taken individually, since such recovery requires the exact amount of aid actually enjoyed by the beneficiaries in each tax year to be established.

89 It follows that the impossibility of determining, at the time of the adoption of an aid scheme, such an amount cannot prevent the Commission from finding that the scheme was likely, from that moment, to confer an advantage on those beneficiaries and cannot, accordingly, exempt the Member State concerned from notifying such a scheme under Article 108(3) TFEU.

90 In that regard, it should be recalled that the notification requirement is one of the fundamental features of the system of control put in place by the FEU Treaty in the field of State aid. Within that system, Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid for the purposes of Article 107(1) TFEU and, secondly, not to implement such a measure, in accordance with Article 108(3) TFEU, until that institution has taken a final decision on the measure (see, inter alia, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 56 and the case-law cited).

91 Thus, that notification requirement is essential to enabling the Commission to exercise fully the supervisory function entrusted to it by Articles 107 and 108 TFEU in the field of State aid and, in particular, to assess, in the exercise of its exclusive competence in that respect, subject to review by the Courts of the European Union, the compatibility of aid measures with the internal market under Article 107(3) TFEU (see, to that effect, judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraphs 79 and 146).

92 The Commission's examination of the conditions for the existence of State aid falling within the scope of Article 107(1) TFEU therefore cannot favour Member States which pay aid in breach of Article 108(3) TFEU to the detriment of those which, in accordance with that provision, notify the aid at the planning stage and refrain from implementing it pending the final decision adopted by that institution (see, to that effect, inter alia, judgments of 29 April 2004, *Italy* v *Commission*, C-298/00 P, EU:C:2004:240, paragraph 49, and of 1 June 2006, *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, C-442/03 P and C-471/03 P, EU:C:2006:356, paragraph 110).

93 As the Advocate General observed in point 83 of his Opinion, Member States which introduce aid schemes in breach of their obligation under Article 108(3) TFEU would nevertheless be favoured over those which comply with that obligation if the Commission were required to verify, for the purposes of assessing the existence of an aid scheme, on the basis of data collected after the adoption of the scheme, whether the advantage has actually materialised in all subsequent tax years under the scheme in question,

or whether the advantages that would have materialised in certain tax years have been offset by the disadvantages recorded in other tax years.

94 In the present case, it is common ground that, as the General Court found in paragraph 55 of the judgment under appeal in the context of its sovereign appraisal of the facts, recalled in paragraph 81 of the present judgment, from the time of its adoption, the aid scheme resulting from the measure at issue, in so far as it granted certain clubs eligible for that scheme – including FCB – the possibility of continuing to operate, by way of derogation, as a non-profit entity, allowed them to benefit from a reduced tax rate compared to that applicable to clubs operating as SLCs.

95 In so doing, the aid scheme at issue was, from the moment of its adoption, liable to favour clubs operating as non-profit entities over clubs operating in the form of SLCs, thereby providing them with an advantage capable of falling within the scope of Article 107(1) TFEU.

96 Admittedly, it is also common ground that, from that same moment, that scheme provided for a lower rate of deduction for reinvestment of extraordinary profits than that applicable to SLCs.

97 However, as follows from paragraphs 86 to 93 of the present judgment, that fact is not such as to call into question the conclusion that the aid scheme at issue conferred, from the date on which it was adopted, an advantage on its beneficiaries.

98 After all, lest aid schemes implemented in breach of the obligation laid down in Article 108(3) TFEU be favoured, the examination, for the purposes of the application of Article 107(1) TFEU, of the effect of the deduction in question, in respect of which it is common ground that it depends on the subsequent occurrence of random and variable circumstances, on the reduced tax rate provided for by the aid scheme at issue and, in particular, the assessment as to whether that reduced rate would be neutralised by that deduction, cannot, in the case of a tax aid scheme such as that at issue, which applies on an annual basis, be conducted at the time of the adoption of that scheme, that effect being only liable to materialise at the end of each of the subsequent tax years.

99 That is all the more the case, as the Advocate General observed, in essence, in points 112 and 113 of his Opinion, where, as in the present case, the aid scheme at issue is intended to apply for an indefinite period, such that, account being had of the potential possibilities of deferral in the form of a tax credit, highlighted by FCB and the Kingdom of Spain, it can never be entirely ruled out, as the General Court itself pointed out in paragraph 60 of the judgment under appeal, that the deduction in question will lead to the effects of the measure at issue being levelled out over time, which could offset, at one point or another, the reduced tax rate. It is only once such a scheme has ultimately ceased to apply – if this indeed happens – that it will be possible to determine definitively whether that deduction has effectively neutralised the application of the reduced tax rate.

100 It is irrelevant, in that context, contrary to what the General Court stated in paragraphs 65, 66 and 69 of the judgment under appeal, that the deduction for reinvestment of extraordinary profits – which was also pointed out by FCB at the hearing – is particularly significant in the professional football sector, in view, in particular, of the practice of player transfers. As is apparent from the case-law of the Court, that fact is in no way such as to alter the conditions of application of Articles 107 and 108 TFEU (see, to that effect, judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 28).

101 It follows that, to demonstrate to the requisite legal standard that the aid scheme at issue confers on its beneficiaries an advantage falling within the scope of Article 107(1) TFEU, the Commission was not required to examine, in the decision at issue, the effect of the deduction for reinvestment of extraordinary profits or that of the possibilities of deferral in the form of a tax credit and, in particular, whether that deduction or those possibilities would neutralise the advantage resulting from the reduced tax rate. The possibility of such neutralisation cannot have the consequence that the Commission could not establish the existence of an aid scheme, or, moreover, that it could not order the recovery of individual aid in so far as

that aid had been granted to beneficiary clubs on the basis of that scheme in respect of certain tax years, as from the adoption of the decision at issue. After all, it is precisely at the stage of any recovery of the aid granted on the basis of that aid scheme that the Commission must take those effects into account, where it is necessary to determine the exact amount of aid which the beneficiary has actually obtained.

102 Accordingly, it must be held that, in ruling, in paragraphs 59 and 67 of the judgment under appeal, that the Commission was obliged to carry out such an examination, the General Court erred in law, without it being necessary, in that regard, to take into account the document produced by the Commission in the annex to its reply concerning the transfers, inter alia, of FCB, or the evidence put forward by FCB concerning the scope of the decision at issue or certain facts and provisions of national law concerning the deduction for reinvestment of extraordinary profits, the admissibility of which FCB disputes.

103 That error of law led the General Court to commit a further error of law when it criticised the Commission, in paragraph 59 of the judgment under appeal, for not having requested from the Kingdom of Spain the relevant information enabling that effect to be assessed.

104 It follows, moreover, from the foregoing that the General Court also erred in law when it held, in paragraphs 72 to 75 of the judgment under appeal, that the differences between the aid scheme resulting from the measure at issue and the aid scheme at issue in the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811), precluded the Court's findings, in particular, in paragraphs 19 to 24 of that judgment, from being applied to the present case. In fact, apart from factual differences which are irrelevant for the application of Article 107(1) TFEU, that judgment, as is apparent, in particular from paragraphs 86 and 87 of the present judgment, also concerned an aid scheme which, from the time it was adopted, conferred an advantage on its beneficiary by granting it a reduced tax rate, even though it was not possible for the Commission to determine, in advance and for each tax year, the precise level of taxation relating to that scheme.

105 Those findings can in no way be called into question by the line of argument put forward by the Kingdom of Spain, both in its written submissions and at the hearing, based on the fiscal autonomy of the Member States. In accordance with the established case-law of the Court, the Member States must exercise their competence in the field of direct taxation in compliance with EU law (see, to that effect, judgment of 24 October 2019, *État belge*, C-35/19, EU:C:2019:894, paragraph 31 and the case-law cited) and, in particular, the rules established by the FEU Treaty on State aid (see, to that effect, judgment of 29 March 2012, *3M Italia*, C-417/10, EU:C:2012:184, paragraphs 25, 29 and 36). The Member States must therefore refrain, in the exercise of that competence, from adopting measures which may constitute State aid incompatible with the internal market within the meaning of Article 107 TFEU.

106 For all of those reasons, the judgment under appeal must be set aside to the extent that it upholds the second plea in law relied on at first instance and annuls the decision at issue consequently.

The action before the General Court

107 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

108 In the present case, in view of, in particular, the fact that the action for annulment brought by FCB in Case T-865/16 is based on pleas that were the subject of an exchange of arguments before the General Court and whose examination does not require any further measure of organisation of procedure or inquiry to be taken in the case, the Court of Justice considers that the state of the proceedings is such that it may give final judgment in the matter and that it should do so (see, by analogy, judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 130), within the limits of the matter before it (see, to that effect, judgment of 1 July 2008,

Chronopost and La Poste v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 134).

109 That action is based on five pleas in law, set out in paragraph 8 of the present judgment. The General Court having rejected the first of those pleas, without the FCB or the Kingdom of Spain challenging, in the context of a cross-appeal, the merits of that part of the judgment under appeal, the setting aside of that judgment by the Court of Justice does not affect that judgment inasmuch as the General Court rejected that plea (see, by analogy, judgment of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 138).

110 Article 178(1) of the Rules of Procedure provides that the forms of order sought in the cross-appeal are to seek the annulment, in whole or in part, of the decision of the General Court, without limiting the scope of those forms of order to the decision of the General Court as set out in the operative part of that decision, unlike Article 169(1) of those rules, which relates to the forms of order sought in the appeal. It follows that, in the present case, FCB and the Kingdom of Spain could have brought a cross-appeal challenging the rejection by the General Court of the first plea in law put forward at first instance. In the absence of such a cross-appeal, the judgment under appeal has the force of *res judicata* in so far as the General Court rejected the first plea in law relied on at first instance.

111 In those circumstances, it is necessary only to examine the four other pleas put forward by FCB at first instance.

The second plea, alleging infringement of Article 107(1) TFEU, in so far as the Commission committed an error of assessment as to the existence of an advantage, and of the principle of sound administration in the examination of the existence of that advantage

Arguments of the parties

112 FCB, supported by the Kingdom of Spain, criticises the Commission for having found that the measure at issue had conferred on it an advantage falling within the scope of Article 107(1) TFEU. The Commission carried out a formal comparison of the tax rates applicable to public limited companies and non-profit entities, respectively, without however examining the scope of the tax deductions to which each of them was entitled. In so doing, the Commission failed to ascertain whether, during the period concerned, the effective tax rate of the four football clubs in question conferred an advantage on them. A comparative analysis of the cumulative effects of the tax rates and deductions applicable would show that the scheme at issue has had an adverse effect on FCB, compared with the scheme applicable to SLCs. The Commission thus failed to fulfil its obligation to conduct a full and impartial analysis of all the relevant evidence in the file. As a result, it also infringed Article 107(1) TFEU, because of the absence of a distortion of competition, and it disregarded the presumption of innocence.

113 The Commission disputes that line of argument.

Findings of the Court

114 It is sufficient to state, in that regard, that, for the reasons set out, in essence, in paragraphs 79 to 106 of the present judgment, the Commission was not required, in order to demonstrate to the requisite legal standard that the aid scheme resulting from the measure at issue confers on its beneficiaries an advantage falling within the scope of Article 107(1) TFEU, to examine, in the decision at issue, the effect of the deduction for reinvestment of extraordinary profits and, in particular, whether that deduction would neutralise the advantage resulting from the reduced tax rate. Accordingly, it was not for the Commission, for the purposes of the adoption of that decision, to require the Kingdom of Spain to produce relevant evidence enabling such an assessment to be carried out.

115 The Commission was therefore right to find, in recital 68 of that decision, that the deduction for reinvestment of extraordinary profits applicable to non-profit entities ought not be taken into account in

determining whether the measure at issue conferred an advantage on its beneficiaries, on the ground that, since it was granted only under certain conditions which were not always met, that deduction was not such as to neutralise systematically, for each tax year, the advantage conferred by the reduced tax rate. As the Commission rightly pointed out in recital 95 of that decision, any effect of that deduction should, by contrast, be taken into account, on a case-by-case basis, in the context of the recovery procedure, for the purpose of determining, for each tax year, the exact amount of aid to be recovered.

116 As to FCB's assertions relating to the absence of any distortion of competition and to the disregard for the presumption of innocence, which the General Court mentions in paragraphs 39 and 40 of the judgment under appeal, it should be pointed out that they are not based on any independent consideration but are entirely consistent with the other arguments put forward in support of the second plea in law aimed at demonstrating an error of assessment concerning the existence of an advantage and the infringement of the principle of sound administration, respectively. Those assertions must therefore be rejected on the same grounds.

117 It follows that the second plea in law must be rejected as unfounded.

The third plea, alleging breach of the principles of the protection of legitimate expectations and of legal certainty

Arguments of the parties

118 FCB contends that, in the decision at issue, the Commission infringed the principle of the protection of legitimate expectations in so far as it ordered the recovery of the aid in question. FCB, after all, should have been able to rely on a legitimate expectation as to the legality of the general tax regime in question, which that club, moreover, could not evade, in view, first, of the actions of the Spanish tax authorities, which, during the various inspections they carried out during the period in which the Commission conducted the procedure under Articles 107 and 108 TFEU, continued to apply to it the tax regime applicable to non-profit entities and, second, of the manifestly excessive length of that procedure, more than four years having elapsed between the receipt of the complaint and the opening of the formal investigation procedure and more than 30 additional months having been necessary for the adoption of the decision at issue. It is also appropriate to take into account the exceptional nature of that procedure, which was initiated only after the intervention of the European Ombudsman.

119 The Commission disputes that line of argument.

Findings of the Court

120 It should be borne in mind that it is in accordance with the settled case-law of the Court that, in view of the mandatory nature of the supervision of State aid by the Commission pursuant to Article 108 TFEU, undertakings to which aid has been granted may not, in principle, rely on a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article, and furthermore, an economic operator exercising due care should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, with the result that it is unlawful under Article 108(3) TFEU, the recipient of the aid cannot rely at that time on a legitimate expectation that its grant is lawful (judgments of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 98, and of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 145). This is true both in cases of individual grants of aid and aid granted under an aid scheme (judgment of 30 April 2020, *Nelson Antunes da Cunha*, C-627/18, EU:C:2020:321, paragraph 46).

121 Consequently, in the absence, in the present case, of notification of the measure at issue by the Kingdom of Spain under Article 108(3) TFEU, FCB can under no circumstance invoke an infringement of the principle of the protection of legitimate expectations.

122 In particular, without it being necessary to rule on the allegedly excessive duration of the procedure, it should be pointed out that, since that Member State has thus not allowed the Commission to assess that measure in the light of Article 107 TFEU, no indication as to its compliance with that provision can be inferred from the duration of that procedure.

123 Lastly, as regards the alleged infringement of the principle of legal certainty, it should be noted that, although FCB formally invokes the infringement of that principle in the heading of its third plea in law, it does not, however, put forward any separate argument capable of demonstrating such an infringement.

124 It follows that the third ground of appeal must be rejected as unfounded.

The fourth plea, alleging infringement of Article 107(1) TFEU, in that the Commission did not take into account the fact that the measure at issue was justified by the internal logic of the tax system

Arguments of the parties

125 FCB, supported by the Kingdom of Spain, argues that the existence of different tax regimes for non-profit entities and public limited companies is justified by the internal logic of the Spanish tax system. While the non-profit entities do not distribute their profits to their members, public limited companies seek, on the contrary, to ensure that such profits are distributed among their members. The existence of such a different tax regime is therefore also justified in the professional football sector. The Commission, however, in breach of its obligation to state reasons under Article 296 TFEU, does not explain why that would not be the case in that sector.

126 The Commission disputes that line of argument.

Findings of the Court

127 It should be noted that, contrary to what FCB assumes by the line of argument it develops in support of its fourth plea, the measure at issue, examined by the Commission, in its decision, in the light of Article 107 TFEU, consists not in the existence, in Spanish law, of different tax regimes for non-profit entities and for public limited companies, but in the narrowing, in the professional sports sector, of the scope *ratione personae* of the tax regime for non-profit entities, implying the existence, between professional football clubs, of a difference in treatment as regards access to that legal form and thus introducing a difference in the tax regime between those clubs, depending on whether they were obliged to convert into public limited companies or whether they could, by way of derogation, continue to operate as non-profit entities.

128 It follows that the fourth plea in law, in so far as it seeks to justify a measure which is not the measure which is the subject of the decision at issue, must be rejected as ineffective.

The fifth plea, alleging infringement of Article 108 TFEU and Articles 21 to 23 of Regulation 2015/1589, in that the Commission ordered the recovery of existing aid and failed to comply with the procedure laid down for that type of aid

Arguments of the parties

129 FCB, supported by the Kingdom of Spain, submits that the Commission erred in not having found that the measure at issue constitutes ‘existing aid’ within the meaning of Article 1(b)(i) of Regulation 2015/1589, since the differentiated treatment of public limited companies and non-profit entities in the professional football sector, as regards the tax rate applicable to them, already existed at the time of the accession of the Kingdom of Spain to the European Economic Community on 1 January 1986. After all, the law on corporate tax in force at the time of accession, namely Ley 61/1978 del Impuesto sobre Sociedades (Law 61/1978 on corporate tax) of 27 December 1978 (*BOE* No 312, of 30 December 1978, p. 29429), already established different tax regimes for such companies and entities. Consequently, pursuant to Article 108 TFEU, the Commission could not order the recovery of the aid. In accordance with Articles 21

to 23 of that regulation, the Commission could, on the contrary, have found that the measure at issue constituted existing aid incompatible with the internal market and, where appropriate, examined the appropriate measures for abolishing that aid.

130 The Commission disputes that line of argument.

Findings of the Court

131 It should be recalled that, in accordance with Article 1(b)(i) of Regulation 2015/1589, 'existing aid' means all aid measures which existed prior to and are still applicable after the entry into force of the TFEU in the respective Member States.

132 Furthermore, according to Article 1(c) of that regulation, alterations to existing aid are to be considered as 'new aid' subject to the notification requirement of Article 108(3) TFEU. The first sentence of Article 4(1) of Regulation No 794/2004, as amended by Regulation 2015/2282), specifies, in that respect, that any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the internal market must be classified as an alteration to existing aid, for the purposes of Article 1(c) of Regulation 2015/1589.

133 In the present case, it is admittedly common ground that the reduced tax rate applicable to non-profit entities existed prior to the accession of the Kingdom of Spain to the European Economic Community on 1 January 1986.

134 However, as the Commission pointed out in recital 79 of the decision at issue, the alteration made by Law 10/1990 – after that accession – introduced a differentiation in the professional sports sector, by refusing professional football clubs in general the possibility of operating as a non-profit entity, while reserving that possibility, and the tax regime associated with it, to the four football clubs eligible for that derogation.

135 In so doing, Law 10/1990 introduced a tax differentiation within the same sector, which is not of a purely formal or administrative nature.

136 In particular, it must be held that that alteration is liable to have an effect on the assessment of the compatibility of the measure at issue under Article 107(3) TFEU since, by limiting the resulting advantageous tax treatment to certain professional football clubs only, it is such as to affect the ability of the Kingdom of Spain to rely on the compatibility of the aid scheme at issue with the objective of promoting sport, examined in recitals 85 and 86 of the decision at issue, as an objective of common interest, within the meaning of Article 107(3)(c) TFEU.

137 It follows that the fifth plea in law must be rejected as unfounded.

138 Since none of the pleas put forward in the action has been upheld, the action must therefore be dismissed.

Costs

139 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

140 According to Article 138(1) of those rules of procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

141 In the present case, since FCB has been unsuccessful and the Commission has applied to the General Court, but not to the Court of Justice, for an order that FCB pay the costs, FCB should be ordered to pay

the Commission's costs relating to the proceedings before the General Court, while the Commission must bear its own costs relating to the present appeal.

142 In accordance with Article 140(1) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, the Member States which have intervened in the proceedings are to bear their own costs. Consequently, the Kingdom of Spain, intervener in the action before the General Court and having participated in the proceedings before the Court of Justice, shall bear its own costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. Sets aside the judgment of the General Court of the European Union of 26 February 2019, *Fútbol Club Barcelona* v *Commission* (T-865/16, EU:T:2019:113) in so far as it upholds the second plea in law relied on at first instance, and annuls Commission Decision (EU) 2016/2391 of 4 July 2016 on the State aid SA.29769 (2013/C) (ex 2013/NN) implemented by Spain for certain football clubs;

2. Dismisses the action brought in Case T-865/16 by Fútbol Club Barcelona seeking annulment of Decision 2016/2391;

3. Orders Fútbol Club Barcelona to bear its own costs and to pay the costs incurred by the European Commission in the proceedings before the General Court of the European Union;

4. Orders the European Commission to bear its own costs incurred in the present appeal;

5. Orders the Kingdom of Spain to bear its own costs.

[Signatures]

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* Language of the case: Spanish.