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EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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II

(Non-legislative acts)

INTERNATIONAL AGREEMENTS

Information relating to the entry into force of the Agreement between the European Union and the People's Republic of China on the short-stay visa waiver for holders of diplomatic passports

The Agreement between the European Union and the People's Republic of China on the short-stay visa waiver for holders of diplomatic passports will enter into force on 1 January 2017, the procedure provided for in Article 10(1) of the Agreement having been completed on 18 November 2016.

Notice concerning the provisional application between the European Union and the Republic of Ecuador of the Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador

The European Union and the Republic of Ecuador have notified the completion of the procedures necessary for the provisional application of the Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador ⁽¹⁾, signed in Brussels on 11 November 2016. Consequently, the Protocol shall be provisionally applied, pursuant to Article 27(4) thereof, as from 1 January 2017 between the European Union and the Republic of Ecuador. As a result, and by virtue of Article 3 of the Council Decision (EU) 2016/2369 ⁽²⁾ on the signing and provisional application of the Protocol, the provisions of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part ⁽³⁾ shall be applied on a provisional basis by the European Union as provided for in Article 330(3) thereof, pending the completion of the procedures necessary for the conclusion of the said Protocol, with the exception of Article 2, Article 202(1) and Articles 291 and 292 of the Agreement.

⁽¹⁾ OJ L 356, 24.12.2016, p. 3.

⁽²⁾ OJ L 356, 24.12.2016, p. 1.

⁽³⁾ OJ L 354, 21.12.2012, p. 3.

DECISIONS

**COUNCIL DECISION (EU, Euratom) 2016/2392
of 19 December 2016
appointing a member of the Court of Auditors**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 286(2) thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a thereof,

Having regard to the proposal by the Republic of Estonia,

Having regard to the opinion of the European Parliament ⁽¹⁾,

Whereas:

- (1) The term of office of Ms Kersti KALJULAID expired on 6 May 2016.
- (2) A new appointment should therefore be made,

HAS ADOPTED THIS DECISION:

Article 1

Mr Juhan PARTS is hereby appointed member of the Court of Auditors for the period from 1 January 2017 to 31 December 2022.

Article 2

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 19 December 2016.

For the Council
The President
L. SÓLYMOS

⁽¹⁾ Opinion of 14 December 2016 (not yet published in the Official Journal).

COMMISSION DECISION (EU) 2016/2393**of 4 July 2016****on the State aid SA.33754 (2013/C) (ex 2013/NN) implemented by Spain for Real Madrid CF***(notified under document C(2016) 4080)***(Only the Spanish text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a),

Having called on interested parties to submit their comments pursuant to Article 108(2) of the Treaty ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) In October and November 2011, press reports and information sent by citizens drew the attention of the Commission to alleged State aid in favour of Real Madrid Club de Fútbol (hereinafter: 'Real Madrid'), granted in the form of an advantageous property transfer. On 20 December 2011, Spain was asked to comment on this information, to which it did on 23 December 2011 and 20 February 2012. Upon a further request of information by the Commission of 2 April 2012, Spain supplied additional information on 18 June 2012.
- (2) By letter dated 18 December 2013, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the aid. By letter dated 16 January 2014, Spain provided comments on that decision.
- (3) The Commission decision to initiate the procedure (the 'Opening Decision') was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measure.
- (4) The Commission received comments from interested parties. It forwarded them to Spain, which was given the opportunity to react. Spain's comments were received by the Commission by letter dated 17 November 2014. On 4 November 2015 and 14 March 2016, the Commission met with representatives of Real Madrid. On 6 November 2015, the Commission held a telephone conference with representatives of the City of Madrid. On 9 March 2016, Spain sent further information.
- (5) On 22 April 2015, the Commission sent Spain the land valuation study it had commissioned the independent land valuation office CEIAM Cabré Alegret (hereinafter: 'CEIAM') to prepare for possible comments. By letter dated 15 June 2015, Spain sent its observations on that study. By letter dated 9 July 2015, Real Madrid sent its observations on that study.

2. DETAILED DESCRIPTION OF THE CONTESTED MEASURE

- (6) On 29 July 2011, the Madrid City Council (*Ayuntamiento de Madrid*) and Real Madrid signed an agreement settling a legal dispute between them in relation to a 1991 agreement and a real estate property swap that had been the object of subsequent agreements between them in 1996 and 1998 (hereinafter: the '2011 settlement agreement' or 'the measure under consideration').

⁽¹⁾ OJ C 69, 7.3.2014, p. 108.

⁽²⁾ Cf. footnote 1.

- (7) On 20 December 1991 the Madrid City Council, the *Gerencia Municipal de Urbanismo* and Real Madrid concluded an agreement concerning the remodelling of Real Madrid's stadium, the Santiago Bernabéu (hereinafter: the '1991 agreement'). By that agreement, Real Madrid undertook to carry out the construction of an underground carpark. Real Madrid failed to comply with that obligation.
- (8) On 29 November 1996, Real Madrid and the regional government of Madrid (Comunidad de Madrid) entered into a land swap agreement (*convenio de permuta de suelo*) (hereinafter: the '1996 swap agreement'). By that agreement, Real Madrid agreed to transfer to the Community of Madrid and the Madrid City Council a plot of land of 30 000 square metres located in the 'Ciudad Deportiva' area. In exchange, the Madrid City Council undertook, for its part, to provide Real Madrid with some plots of publicly owned land as well as rights in other plots of public land. The plots of land and rights to be transferred by the Madrid City Council were to be identified at a later occasion. The parties set the value of the swap transaction at EUR 27 million.
- (9) On 29 May 1998, Real Madrid and the Madrid City Council concluded a new agreement with the aim to implement the swap that was envisaged by the 1996 swap agreement (hereinafter: the '1998 implementation agreement'). That agreement stipulated that one half of the Ciudad Deportiva plot of land (15 000 square metres) would be taken over by the Community of Madrid and the other 15 000 square metres by the Madrid City Council. Consequently, Real Madrid transferred those plots of land in the Ciudad Deportiva. In return, the Madrid City Council undertook to provide Real Madrid with land which would match its obligations towards the club, namely the transfer of plots of land worth approximately EUR 13 500 000. For this purpose plots located in the area Julian Camarillo Sur (plots 33 and 34) and plot B-32 in the Las Tablas area (plot B-32) were to be transferred to Real Madrid. Plot B-32 consists of an area of 70 815 square metres.
- (10) For the purpose of that swap, the technical services of the municipal administration of Madrid had estimated the value of plot B-32 in 1998 at EUR 595 194. That valuation was performed on the basis of legislation which lays down a methodology to determine the value of urban real property (*Real Decreto 1020/1993* ⁽³⁾). According to Spain, the technical services of the municipal administration of Madrid had taken into account in the valuation of plot B-32 in 1998 the level of and potential for development of the area. They had in particular had regard to the fact that only the urban planning had been concluded for the area but not yet its urban development and the fact that no building activity had started yet.
- (11) Later on, in 1998, the Madrid City Council transferred plots 33 and 34 to the club. Plot B-32 was not yet transferred because in 1998 the Madrid City Council did not yet hold legal ownership of that plot. On this point, the 1998 implementation agreement stipulated that the transfer should be effectuated seven days after the registration of the Madrid City Council as owner of plot B-32 in the Spanish Property Registry (*Registro de la Propiedad*). On 28 July 2000, the Madrid City Council acquired legal ownership of plot B-32. However, plot B-32 was only registered in the Property Registry as property of the Madrid City Council on 11 February 2003.
- (12) The transfer of plot B-32 did not ultimately take place. Under urban planning rules, plot B-32 is classified for basic sport use (*equipamiento básico deportivo*). That classification was initially contained in the Partial Plan (*plan parcial*) of the territory 'UZI 0.08 Las Tablas' of 28 July 1995. It was subsequently contained in the Land use plan of Madrid (*Plan General de Ordenación Urbana de Madrid*, hereinafter: 'PGOU'), which was approved on 17 April 1997 by the Madrid City Council and the Community of Madrid.
- (13) The parties to the 1998 implementation agreement were aware of the classification of plot B-32 for basic sport use but, according to Spain, they were of the opinion that the classification for sport would not exclude its transfer to private ownership and, since Real Madrid had intended to erect sport infrastructure on those premises, the Madrid City Council had assumed that plot B-32 could be transferred if the sport use classification of that plot of land was assured and respected by Real Madrid.
- (14) However, Article 64 of Law 9/2001 of July 17 of the Land of the Community of Madrid (*Ley 9/2001 del Suelo de la Comunidad de Madrid*, hereinafter: 'law 9/2001') established that all plots of land, facilities, constructions and

⁽³⁾ *Real Decreto 1020/1993, de 25 de junio, por el que se aprueban las Normas Técnicas de Valoración y el Cuadro Marco de Valores del Suelo y de las construcciones para determinar el valor catastral de los bienes inmuebles de naturaleza urbana, BOE de 22 de julio de 1993.*

buildings have to be used in accordance with their qualification, classification, or urban legal status. Article 7.7.2. a of the PGOU describes plots with the designation for sport use as plots of land in public ownership. Law 9/2001 had already entered into effect, when the Madrid City Council was registered as owner of plot B-32 in 2003 and was obliged to transfer the plot to Real Madrid. Law 9/2001 required a plot designated for basic sport use to be publicly owned. Any transfer to a private entity of such a plot would be excluded because the public nature of the plot (*bien de naturaleza demanial*) would make it inalienable. Therefore, the Madrid City Council considered that it was legally impossible to transfer plot B-32 to Real Madrid. It is for this reason that it did not transfer the plot as required by the 1998 implementation agreement in 2003.

- (15) Moreover, in 2004 the Tribunal Superior de Justicia de Madrid ruled that the classification made by urban plans, like the PGOU, would prevent any private entity from holding the legal property of an area classified like plot B-32 ⁽⁴⁾. That judgment clarified the legal interpretation of the urban planning principles. As a consequence, plot B-32 was not transferred to Real Madrid.
- (16) By the 2011 settlement agreement, the Madrid City Council and Real Madrid acknowledged that there was a legal impossibility to transfer plot B-32 to Real Madrid (*‘Existe, aunque no una imposibilidad física, sí una imposibilidad jurídica de entregar la parcela’*). As a result, the Madrid City Council agreed to compensate Real Madrid for its failure to transfer plot B-32 under the 1998 agreement with an amount which represented the 2011 value of plot B-32. The technical services in charge of land valuation of the Madrid City Council valued plot B-32 in 2011 in a valuation report issued on 27 July 2011 at EUR 22 693 054,44. That valuation of plot B-32 used the same general criteria for determining the value of municipal assets, as those which had been applied in 1998, taking account of the same land classification and assuming the transferability of the plot.
- (17) The parties agreed that the compensation would be paid by replacing the transfer of plot B-32 with the transfer by the Madrid City Council of several other plots of land to Real Madrid. Those plots consisted of an estate located between the streets Rafael Salgado, Paseo de la Castellana and Concha Espina of 3 600 square metres; several pieces of the ‘Mercedes Arteaga, Jacinto Verdaguer’ areas in the neighbourhood of Carabanchel totalling 7 966 square metres; and an area of 3 035 square metres in the ‘Ciudad Aeroportuaria Parque de Valdebebas’. The technical services in charge of land valuation of the Madrid City Council valued those plots together at EUR 19 972 348,96.
- (18) The parties also agreed that Real Madrid owed the Madrid City Council an amount of EUR 2 812 735,03, as compensation for its failure to comply with its contractual obligation under the 1991 agreement to construct an underground carpark.
- (19) Under the 2011 settlement agreement, Real Madrid and the Madrid City Council agreed to offset their mutual debts. First, an amount of EUR 92 037,59 of property taxes, which Real Madrid had been paying since 2002 for plot B-32, was added to Real Madrid’s claim of EUR 22 693 054,44 for plot B-32. Then, the EUR 2 812 735,03 of outstanding debts under the 1991 agreement was deducted from Real Madrid’s claim, leading to a claim of Real Madrid against the Madrid City Council of EUR 19 972 357,00. That claim was offset against the value of EUR 19 972 348,96 of the estates compensating Real Madrid for the inability to transfer plot B-32. The result was a remaining net claim of EUR 8,04 for Real Madrid against the Madrid City Council.
- (20) Under a subsequent agreement concluded in September 2011 between the Madrid City Council and Real Madrid (hereinafter: the ‘2011 urban development agreement’), Real Madrid undertook to transfer the Mercedes Arteaga/Jacinto Verdaguer properties, which formed part of the real estate assets transferred to Real Madrid by the 2011 settlement agreement, back to the Madrid City Council, to transfer a shopping mall complex it owns to the Madrid City Council and to make a one off payment of EUR 6,6 million to the Madrid City Council. In return, the Madrid City Council undertook to transfer to Real Madrid an area of land of 5 216 square metres it owned in front of Real Madrid’s Bernabéu Stadium, on which Real Madrid intended to construct a shopping mall and a hotel. In the context of the latter transfer, the Council and the Community of Madrid amended the PGOU, reclassifying the area in front of that stadium to enable a more dense coverage by buildings and its commercial use. However, a recent judgment of the Tribunal Superior de Justicia de Madrid of 2 February 2015 ⁽⁵⁾ annulled that amendment to the PGOU.

⁽⁴⁾ Judgment of 6 October 2004 of the Tribunal Superior de Justicia de Madrid, Sala de lo Contencioso-Administrativo, Sección 2a.

⁽⁵⁾ Judgement No 77/2015, Sala de lo Contencioso-Administrativo, Sección Primera.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (21) In the opening decision, the Commission took the preliminary view that the compensation of Real Madrid by the Madrid City Council under the 2011 settlement agreement constituted State aid in favour of Real Madrid within the meaning of Article 107(1) of the Treaty.
- (22) In submissions to the Commission prior to the opening of the formal investigation procedure, Spain argued that, due to the legal impossibility of fulfilling its obligation under the 1998 implementation agreement to transfer plot B-32 to Real Madrid, the Madrid City Council was legally obliged to compensate Real Madrid with the 2011 value of the plot of land in question. This raised the question for the Commission whether it was indeed not possible to transfer the land to Real Madrid and what consequences Spanish civil law could impose on the impossibility on the part of one party of a contract to fulfil its contractual obligation.
- (23) In the opening decision, the Commission considered that the provisions of nullity of contracts in the Spanish Civil Code do not necessarily lead to an obligation to pay compensation for the party which is not able to fulfil its obligation.
- (24) The Commission furthermore considered that it was doubtful that the value of plot B-32 assumed in the 2011 settlement agreement reflected a market price. Although the Spanish authorities submitted valuation reports demonstrating the high value of allegedly comparable plots of land, designated e.g. for various uses, but not of a public nature, the comparability would be hampered because the areas referred to by Spain were transferable to private parties and thus marketable.
- (25) In the opening decision, the Commission expressed doubts as to the considerable increase of the alleged value of plot B-32 between 1998 and 2011. This plot of land, which at the time of its acquisition was valued at EUR 595 194, had allegedly increased in value to more than EUR 22 million, a 37-fold increase. The Commission asked the Spanish authorities why the Madrid City Council had not attempted to avoid a claim of more than EUR 22 million.
- (26) The Commission also expressed doubts as to whether the value of the properties which were transferred to Real Madrid by the further exchange of land around its Bernabéu Stadium, under the 2011 urban development agreement, was in line with their market value. Therefore the Commission considered that there could also be aid present in those transactions within the meaning of Article 107(1) of the Treaty.
- (27) The Commission also expressed doubts regarding the compatibility of any possible aid with the internal market. In the absence of specific guidelines on the application of the State aid rules to commercial sport activities, any assessment would have to be based directly under Article 107(3)(c) of the Treaty. According to that provision, aid may be considered compatible with the internal market if it facilitates, in the common interest, the development of certain economic activities or of certain economic areas. The Commission doubted that there was an objective of common interest which could justify selective support to a very strong actor in a highly competitive economic sector.
- (28) Accordingly, the Commission invited Spain and interested parties to provide relevant information on whether the transfer of plot B-32 to Real Madrid under the 1998 implementation agreement was indeed legally impossible for the Madrid City Council and on the possible consequences under Spanish law thereof. The Commission also invited comments on the value of the plots of land involved in the 2011 settlement agreement and the 2011 urban development agreement.

4. COMMENTS FROM SPAIN

4.1. Comments regarding the impossibility to transfer plot B-32

- (29) Spain confirmed that the transfer of plot B-32 was and is legally impossible. Spain argues that the legal situation regarding the transferability of the plot was at least unclear when the 1998 Agreement was concluded. The legal impossibility eventually became clear in 2004, with the judgment No 77/2015 of the Tribunal Superior de Justicia de Madrid mentioned in recital 20. Spain is of the opinion that that judgment concerned legislation already in force in 1998, when the 1998 implementation agreement between the Madrid City Council and Real Madrid was concluded. Spain therefore agrees that the transfer of plot B-32 was impossible *ab initio*. According to Spain, the consequence of that legal impossibility would be, in accordance with Article 1303 of the Civil Code, that the contracting parties return what they received mutually. In accordance with Article 1307 of the Civil Code, where the thing subject of the void contract cannot be returned, because it has been lost, the party must return the value of the thing at the time it has been lost. The objective would be to re-establish the situation as if the contract never existed.

- (30) Spain argues that a contract covering several objects and obligations should be considered void in its entirety except if one can assume that it would have been the will of the parties to maintain the rest of the contract. This depends on the hypothetical will of the parties. Spain is of the opinion that nothing seems to justify the assumption that the Madrid City Council and Real Madrid would have continued with the rest of the 1998 implementation agreement, had they known of the legal impossibility to transfer plot B-32 under that agreement.
- (31) In that context, Spain assumes that the 1998 Agreement is void in its entirety and concludes that Real Madrid and the Madrid City Council would also have to return the other pieces of land covered by the 1996 swap agreement and the 1998 implementation agreement. However, since those plots of land have been sold in the meantime and cannot be returned in kind, the Madrid City Council would have to return the values of those plots at the time they were sold. In other words, the Madrid City Council is obliged to pay Real Madrid the value of the 15 000 square metres of the land in 'Ciudad Deportiva' when it was sold which, according to Spain, amounted to EUR 53 578 623. Such an outcome would be much more beneficial for Real Madrid and much more onerous for the Madrid City Council than what was agreed to under the 2011 settlement agreement.
- (32) Spain furthermore refers to case-law that supports its view that the Madrid City Council would have to compensate Real Madrid for the non-fulfilment of its obligations under the 1998 implementation agreement. It refers to judgments which concern impossibility *ex post*, intentionally or by negligence caused by one of the parties. According to Spain, that case-law is based on the continuing validity of the contract and the non-fulfilment of it by one of the parties; the party which fulfils its part is entitled to the present value of what it did not receive because normally it should be in possession of it. That claim would exist independently from the intentions or the fault of the creditor. Spain refers to Article 1124 of the Civil Code, according to which a party may request compensation from its counterpart because of non-fulfilment of a valid bilateral contract, in case specific performance is no longer possible. Therefore, by the 2011 settlement agreement the Madrid City Council settled its existing legal obligations towards Real Madrid under the 1998 implementation agreement.
- (33) Concerning the possible change of the designated use of plot B-32 in the PGOU, Spain confirms that it is, in principle, within the powers of the Madrid City Council to propose to the Community of Madrid an amendment of the PGOU. However, Spain claims that such changes need to serve the general interest. It refers to a legal principle of maintenance of public domain land that forbids the sale of publicly owned land without the acquisition of new land of similar characteristics. The aim of avoiding a high compensation claim would not justify a change of the land zoning in the present case, since such a change would be arbitrary. Article 67(2) of law 9/2001 does not allow re-affectation of land designated for public use without compensatory measures in the same area.
- (34) Finally, Spain remarked that if Real Madrid would have obtained the ownership of the plot in 2011 no State aid would be present, so that the compensation it receives under the 2011 settlement agreement from Madrid City Council for its failure to transfer that plot of land cannot constitute State aid since that compensation is equal to the value of that plot of land in 2011.

4.2. Comments regarding the valuation of plot B-32

- (35) Regarding the valuation of the land, Spain explains that the valuation was made by the technical services of the municipality of Madrid on the basis of established criteria used for all the land in the ownership of the municipality. The experts employed by those services are bound by the principles of objectivity, professionalism and impartiality. Public administrations are required by law to establish land value in the first place by their own officials and services.
- (36) On the basis of a calculation model (*Módulo básico de repercusión de suelo*, hereinafter: 'MBR') a price per square metre is set for Madrid. The value of plot B-32 in 2011 was determined as follows:
- (a) Area: 70 815 square metres, of which 35 407 square metres allowed for construction;
 - (b) MBR according to the Order of the Ministry of Economy and Industry EHA/1213/2005: EUR 588 per square metre;
 - (c) Indexation coefficient: 1,09. The result of $35\,407 \times 588 \times 1,09$ is EUR 22 693 054,44.

- (37) Spain also refers to the report of the Ministry of Finance of 2011, where the value of plot B-32 was estimated at EUR 25 776 296. Spain stresses that it would be legally obliged to value for its inventory all plots of land it owns, irrespective of their legal nature of public or private domain.
- (38) Regarding the study prepared for the Commission by CEIAM, Spain criticises that study since it bases one of the scenarios of the valuation on the use of the plot for social housing. Such a use would not follow the assumption of highest and best use of the ground. Therefore the study arrived at a value that was 50 % below the value of a use for public services (*uso lucrativo de interés general, equipamiento singular*: education, cultural services and institutions, hospitals, churches) which represents the highest and best use of land devoted for public purposes. The value in the scenario of use for private purposes, like housing or offices, would be another 30 % higher.
- (39) On the basis of land use for public services, Spain proposes a calculation of the land value by the method of simple capitalisation. It starts from the expected sales price per building square metre which is based on comparable projects in 2011 in that part of Madrid. After deduction of the construction costs, determined according to a standard model applied by the municipality of Madrid, Spain arrives at a value of EUR 22 708 633,52. However, this valuation is made under the assumption that the land classification is for 'public use of various kinds' and Spain admits that the current classification of the land is not for 'public service use of various kinds' but for 'public sport use', and that a use for other activities than sport would require a change in the municipal land classification plan by a formal amendment of this plan.
- (40) Spain also proposes a comparison with another plot of land which is classified for hospital use. An independent valuation determined a value of EUR 900 per square metre of building surface for that plot.
- (41) Regarding the difference between the land valuation in 1998 and 2011, Spain explains that the substantial difference can be explained by the very early and basic urban development state of the land in 1998. At that point in time, only the planning was concluded. The land had still to be acquired by the Madrid City Council and be developed. Thus several years would have passed until it was possible to build something on the land. That situation had completely changed in 2011. In both cases the valuation followed the usual standards applied by the Madrid City Council for land valuation.

4.3. Comments regarding the value of the land around the Bernabéu stadium

- (42) Regarding the intended real estate arrangements under the 2011 urban development agreement, Spain considered that the judgment No 77/2015 of the Tribunal Superior de Justicia de Madrid of 2 February 2015 annulled the modification of the PGOU with regard to the land around the Bernabéu Stadium and prevents the entry into force of the 2011 urban development agreement.

5. COMMENTS FROM INTERESTED PARTIES

- (43) Following the publication of the opening decision, the Commission received observations from Real Madrid, the association *Ecologistas en Acción*, the *Asociación para la Defensa del Estado de Derecho*, and from the citizens who had informed the Commission about the real estate transaction under consideration.

5.1. Comments by Real Madrid

5.1.1. Comments regarding the consequences of the failure of the Madrid City Council to transfer plot B-32

- (44) Regarding the background of the 1998 implementation agreement, Real Madrid explains that the Madrid City Council had an interest in the Ciudad Deportiva, because it planned to develop that centrally located area, and Real Madrid needed to divest fixed assets to repay debts.

- (45) Real Madrid states that it had repeatedly requested the Madrid City Council to transfer plot B-32. Real Madrid agrees that the classification of the plot as for 'basic sport use' (*deportivo de carácter básico*) constitutes a legal obstacle for its sale to private parties. It considers, however, that the transfer of the plot could be made possible. The urban planning classification was neither inalterable nor beyond the control of the Madrid City Council. The Madrid City Council had the capacity to cancel the existing classification of the plot (*desafectación*) and assign a distinct classification to it. Such a step would have shifted the land from the 'public domain' into the 'private domain', with a view to enabling compliance with the contractual obligation to transfer the plot to Real Madrid.
- (46) In 1998, such a change to the existing classification could have been implemented without facing any specific statutory obstacles. However, the situation changed in 2001 as a result of the entry into force of law 9/2001. Article 67.2 of law 9/2001 provides that the decision to declassify land intended for public use (*desafecte el suelo de un destino público*) must be accompanied by compensatory measures with a view to maintain the quality and quantity of such public resources in the affected area ⁽⁶⁾. As a result, when the obligation to transfer plot B-32 fell due in 2003, the Madrid City Council could not have reclassified that plot without adopting measures to ensure that the quality and quantity of the basic sport installations at Las Tablas would not be affected.
- (47) In consequence, the Madrid City Council would have had to acquire land at Las Tablas that was similar in size to plot B-32 and classify it as for 'basic sport use'. To have done so would have been very expensive, since any available land in that area was classified, in 2011, as 'residential' or 'commercial'. Land with those classifications commanded a much higher market price than land classified as for 'basic sport use'. In fact, a study submitted by Real Madrid estimates the cost for the Madrid City Council for such compensatory measures to be between EUR 58 million and EUR 240 million, i.e. much more than the EUR 22 693 054,44 compensation agreed to under the 2011 settlement agreement ⁽⁷⁾.
- (48) Therefore, from a legal point of view, the Madrid City Council could have overcome the obstacles to contractual performance had it wanted to. In that regard, Real Madrid argues that, for a contractual obligation to be void under the Spanish private law doctrine of initial impossibility, the obstacles to performance must exist from the outset, be absolute, permanent and beyond the control of the parties.
- (49) For the same reason, the Madrid City Council could not have avoided its contractual obligation vis-à-vis the club to transfer plot B-32 by invoking the Spanish law doctrine of subsequent impossibility (*imposibilidad sobrevenida*). The Madrid City Council could only have avoided liability if the obstacles to performance were insuperable and wholly beyond its control.
- (50) For the Madrid City Council to have complied with its contractual obligation to transfer plot B-32 to Real Madrid in 2011 would have implied that Real Madrid would have obtained land with a market value of EUR 22 693 054,44. Therefore, the economic value of Real Madrid's right to require performance of the contract was identical to the market value of plot B-32 in 2011.
- (51) Real Madrid suggests that it would not have made any sense for it to accept a settlement that assigned a value to its contractual right to plot B-32 that was lower than the plot's current market value. Real Madrid would not have been willing to accept a settlement that valued its right to plot B-32 at the market value of that plot in 1998 or in 2003. Real Madrid would have brought court proceedings to protect the full value of its right to require performance of the 1998 implementation agreement.
- (52) The alternative to the 2011 settlement agreement would have been that Real Madrid would have insisted on its contractual rights. That could have been compensation for breach of contract if the breach is caused intentionally or by negligence on the basis of Article 1101 of the Civil Code. This would lead to a claim of compensation at the value the land has at the time of the judgment, which would be the value assumed in the 2011 settlement agreement. Real Madrid could also have terminated the contract pursuant to Article 1124 of the Civil Code, with the consequence of the right to restitution of what has already been performed according to Article 1123 of the Civil Code and a claim for damages.

⁽⁶⁾ 'Toda alteración de la ordenación establecida por un Plan de Ordenación Urbanística que [...], desafecte el suelo de un destino público [...], deberá contemplar las medidas compensatorias precisas para mantener la cantidad y calidad de las dotaciones previstas respecto del aprovechamiento urbanístico del suelo [...]'.

⁽⁷⁾ The Aguirre Newman Report, submitted by Real Madrid, pages 122-126.

- (53) Real Madrid underlines that the 2011 settlement agreement is more advantageous for the Madrid City Council than full restitution. Restitution would have entailed a return to the situation existing before the 1998 implementation agreement. In principle, the Madrid City Council would be compelled to return the 15 000 square metres it received at Ciudad Deportiva to Real Madrid and Real Madrid would have had to return to the Madrid City Council plots 33 and 34. However, to return the plots as such would not be feasible. The parties sold the land many years ago to third parties that acquired the land in good faith. In such cases, the parties must instead, according to Spanish law, return to the other party the current value of the land that is subject to restitution at the time the judgment is handed down.
- (54) Based on legal advice and on a land valuation report from the real estate consultancy Aguirre Newman (hereinafter 'the Aguirre Newman Report') it obtained in April 2014, Real Madrid explains how restitution of the contractual performances in 2011 would be dealt with under Spanish private law and what the financial consequences of restitution would be. According to Real Madrid, restitution would have triggered the following payments between the Madrid City Council and Real Madrid: the Madrid City Council would have had to pay Real Madrid the current value (in 2011) of the 15 000 square metres at Ciudad Deportiva, estimated by Aguirre Newman at EUR 65,346 million ⁽⁸⁾; Real Madrid would have had to pay the Madrid City Council the 2011 value of plots 33 and 34, estimated by Aguirre Newman at EUR 32,246 million ⁽⁹⁾. Accordingly, the net effect of restitution would be that the Madrid City Council should pay Real Madrid EUR 33,1 million, which figure is EUR 10,407 million more than what the club received under the 2011 settlement agreement. This means that Real Madrid essentially relinquished an additional EUR 10,407 million claim against the Madrid City Council by agreeing to the 2011 settlement agreement.
- (55) Real Madrid therefore argues that termination of the 1998 implementation agreement and full restitution under that contract and the 1996 swap agreement was a real and tangible risk for the Madrid City Council in 2011. By entering into the 2011 settlement agreement, the Madrid City Council was able to avoid that risk at a cost that was about EUR 10,407 million lower than what Real Madrid could have claimed had it terminated the 1998 implementation agreement and sought restitution.
- (56) Lastly, Real Madrid argues that it could have sought compensation for any damage caused as a result of the Madrid City Council's breach of contract. Article 1124 of the Civil Code and established case-law holds that termination and contractual damages are mutually compatible remedies. The purpose of such damages being to place the creditor in the same position as if the debtor had complied with its obligations under the contract.
- (57) If one were to assume the nullity of the 1998 implementation agreement, Real Madrid argues that the legal consequence of nullity of the contract would be, according to Article 1303 of the Civil Code, restitution of the parties' performances under the void contract. Article 1307 of the Civil Code provides that a thing which cannot be returned because it has been lost should be substituted for its value at the time of the loss, plus interest. A sale to a third party in good faith is equated to a loss ⁽¹⁰⁾, which means that the plots sold since the 1998 implementation agreement was concluded should, in principle, not be attributed their current value, but the value they had when they were sold to third parties.
- (58) That approach would lead to the following payments between Madrid City Council and Real Madrid: Madrid City Council should pay Real Madrid the proceeds from its sale in 2003 of the 15 000 square metres at Ciudad Deportiva of about EUR 53 million, plus interests from that date. Real Madrid should pay the Madrid City Council the proceeds from its sale in 1999 of plots 33 and 34, of about EUR 12,9 million, plus interest. Consequently, the net effect of such restitution in 2011, without interest, would have been that the Madrid City Council should pay Real Madrid EUR 40,1 million. That amount is about EUR 17,407 million more than the compensation paid to the club under the 2011 settlement agreement and about EUR 7 million more than what Madrid City Council would have to return to the club if the 1998 implementation agreement was terminated as a result of breach of contract by the Madrid City Council.

⁽⁸⁾ The Aguirre Newman Report, pages 113-117.

⁽⁹⁾ The Aguirre Newman Report, pages 106-112.

⁽¹⁰⁾ Supreme Court judgment dated 6 June 1997, appeal no. 1610/1993 ('que por su enajenación a terceros de buena fe la cosa vendida se hizo irrevindicable, no el de la sentencia que así lo declara habida cuenta que esta sentencia es declarativa, no constitutiva, y se limita a constatar una situación preexistente; de ahí que la obligación de restitución surja en el momento en que los vendedores enajenaron las cosas, careciendo de poder dispositivo sobre ellas').

5.1.2. Comments regarding the value of plot B-32

- (59) The land values supposed in 1998 were determined by experienced, expert officials of the Urban Development Department of the Madrid City Council (*Gerencia Municipal de Urbanismo*), using the valuation methodology laid down in Spanish law. According to those valuations, the plots to be transferred to the club had the same total value as the 15 000 square metres to be transferred to the Madrid City Council.

Table 1

Valuations in the 1998 implementation agreement

Madrid City Council		Real Madrid	
Land to be transferred to Real Madrid	Value (EUR)	Land to be transferred to Madrid City Council	Value (EUR)
Plot B-32	595 194	15 000 m ² at Ciudad Deportiva	13 522 772
Plots B-33 and B-34	12 927 578		
Total	13 522 772	Total	13 522 772

- (60) Accordingly, the valuations used by the Madrid City Council, in 1998, as the basis for the transfer of plots B-32, 33 and 34, did not indicate that it would overcompensate Real Madrid.
- (61) Real Madrid rejects the view that the valuations made by the technical experts of the Urban Development Department in accordance with national law are not 'independent'. It refers to the Commission Communication on State aid elements in sales of land and buildings by public authorities ⁽¹¹⁾ (the Land Sale Communication) which recognises that State valuation offices and public officers or employees are to be regarded as independent provided that undue influence on their findings is effectively excluded.
- (62) The valuation methodology used to assess the value of the plots in the 1998 Agreement is employed by public authorities all over Spain to objectively determine the value of land ⁽¹²⁾. The officials preparing valuation reports are experts in the field and are under personal duty to act in accordance with applicable law and procedures, and to uphold the principles of objectivity, neutrality and impartiality. The valuations they prepare are presumed fair and accurate, including when used in legal proceedings before a Spanish court. To deliberately adjust a valuation (up or down) to benefit a private party at the cost of the public administration would be unlawful under Spanish law.
- (63) For those reasons, Real Madrid considers that the valuations made in 1998 for the 1998 implementation agreement were independent expert valuations within the meaning of the Land Sale Communication.
- (64) In addition, the Aguirre Newman report estimates the 1998 market value of plot B-32 and the 15 000 square metres at Ciudad Deportiva. The results of the Aguirre Newman Report differ somewhat from the valuations agreed for the 1998 implementation agreement. However, the results support the view that Real Madrid was not overcompensated in 1998. In fact, the report indicates that the 1998 implementation agreement underestimated the 1998 value of the 15 000 square metres at Ciudad Deportiva and overestimated the value of plot B-32 as well as of plots 33 and 34.

⁽¹¹⁾ OJ C 209, 10.7.1997, p. 3.

⁽¹²⁾ Royal Decree 1020/1993 of 25 June containing the Technical Standards for Cadastral Valuation and the Standards Table for Land and Construction Values (*Real Decreto 1020/1993 por el que se aprueban las Normas Técnicas de Valoración y el Cuadro Marco de Valores del Suelo y de las construcciones para determinar el valor catastral de los bienes inmuebles de naturaleza urbana*). Article 114.1 of Act 33/2003 on the Assets of the Public Administrations (*Ley 33/2003, de 3 de noviembre, del Patrimonio de las Administraciones Públicas*) provides that valuations of public land, made for the purposes of said Act, may be carried out by (i) technical staff at the public body that manages the assets or rights to be transferred or that is interested in acquiring/renting them, (ii) technical staff at the Ministry of Finance and Public Administration, (iii) valuation companies registered on the Valuation Companies Register of the Bank of Spain (*Registro de Sociedades de Tasación del Banco de España*) and other valuation companies which have been duly authorised.

Table 2

Valuations in the 1998 implementation agreement compared to those in the Aguirre Newman Report

Madrid City Council				Real Madrid			
Land to be transferred to Real Madrid	Value (Aguirre Newman) (EUR)	Value (1998 agreement) (EUR)	Variation (Δ%)	Land to be transferred to Madrid City Council	Value (Aguirre Newman) (EUR)	Value (1998 agreement) (EUR)	Variation (Δ%)
Plot B-32	574 000	595 194	+ 3,69 %	15 000 m ² at Ciudad Deportiva	13 850 000	13 522 772	– 2,04 %
Plots B-33 and B-34	12 869 000	12 927 578	+ 0,46 %				
Total	13 443 000	13 522 772	+ 0,59 %	Total	13 850 000	13 522 772	– 2,04 %

- (65) Those elements would corroborate the view that the Madrid City Council acted like a private purchaser when entering into the 1996 land swap and the 1998 implementation agreement and did not transfer any benefit to Real Madrid. The subsequent sale of the Ciudad Deportiva for EUR 53 million would confirm that Real Madrid clearly was not overcompensated when it sold the Ciudad Deportiva. In addition, the sale of the land at Julián Camarillo Sur by Real Madrid to third parties in 1999 for a price that was nearly identical to the value assigned for the 1998 implementation agreement corroborates the accuracy of the valuations of Madrid City Council.
- (66) Regarding the land valuation for plot B-32 in 2011, Real Madrid considers that the valuation made by the technical services of the Madrid City Council's Urban Development Department also constitutes an independent valuation. Real Madrid has asked Aguirre Newman to also estimate the value of plot B-32 in 2011. The valuation made by the company, using established international valuation principles, indicates that the market value of plot B-32 in 2011 was EUR 22 690 000, i.e. almost exactly the same as the valuation made in the 2011 settlement agreement.
- (67) Moreover, Real Madrid draws attention to the fact that the value assigned to plot B-32 by the Real Estate Cadastre (*Catastro Inmobiliario*) in 2011 was even higher and arrived at an amount of EUR 25 776 296. The Real Estate Cadastre is a State entity attached to the Ministry of Finance and Public Administrations. It does not depend on the Madrid City Council or any other municipal authority or body in Madrid. Real Madrid finds it even reasonable to assume that the cadastral staff did not know about the negotiations between Real Madrid and the Madrid City Council that led to the 2011 settlement agreement. According to law, the cadastral value must not exceed the market value of the land in question and is based e.g. on information regarding actual market transactions. Consequently, the 2011 market value of plot B-32 should not have been lower than EUR 25 776 296.
- (68) Regarding the value increase since 1998, Real Madrid explains that in 1998 the area covered by plot B-32 was an unproductive piece of land located in an entirely undeveloped area. Although an urban development plan had been approved by the Madrid City Council in 1997, such approval is no guarantee of the actual development of the land, which requires significant investments from private investors willing to assume risk. The first building licenses in Las Tablas were not issued until 2001.
- (69) From that moment, significant construction had begun and it started to become clear that Las Tablas was likely to become a successful development. The relocation of the global head offices of Telefónica to Las Tablas was followed by other large companies. In 2011, the area was fully developed and had become a very popular residential and commercial area. That dramatic transformation of Las Tablas into a fully developed and built-up area, surrounded by expensive apartment blocks and the headquarters of multinational corporations, had a strong effect on the value of plot B-32.

- (70) Regarding the valuation of the land by the study provided to the Commission by CEIAM, Real Madrid observes that the result of that study is not a proper market value which an interested and willing buyer would be prepared to pay. Instead, the CEIAM study only determines an investment value, which according to Real Madrid constitutes the value of an asset to the owner or prospective owner for individual investment and operational objectives, and to arrive at that investment value the valuation method used by CEIAM (hereinafter the 'order ECO 805/2003') gives rise to a 'mortgage lending value'. A basic mortgage lending value principle is the 'prudence principle'. It reflects the fact that it is a particularly cautious estimate of an enduring, long-term value, whereas the 'market value' concept refers to the value in an arm's-length transaction between a willing buyer and a willing seller. The market value concept estimates the price that could be obtained for a property at the valuation date.
- (71) In contrast, the intended purpose of mortgage lending value would be to provide a long-term, sustainable value as a stable basis for judging the suitability of a property as a security for a mortgage which will continue through potential market fluctuations. According to Real Madrid the resulting value is likely to be below market value. Real Madrid finds it more suitable to use the static residual valuation method, which is based on estimates of the infrastructure and construction costs and the expected sales price of the units to be constructed.
- (72) Real Madrid refers to the various scenarios used by the CEIAM Report and in particular to the one which supposes the use for sport. Real Madrid is of the opinion that it is fraught with errors. In view of Real Madrid, the principal errors of the CEIAM Report when valuing plot B-32 as a sports installation are:
- (a) a failure to optimise the use of the land and the installations: CEIAM does not consider e.g. the revenue streams from the 25 % of the land the owner could, under existing regulations, have used for shops and parking spaces;
 - (b) an underestimation of existing sport infrastructure user demand: in 2011 Las Tablas was already an attractive and affluent area where many large corporations had or will have their head offices;
 - (c) CEIAM's calculation is based on a lower floor space built on the plot than allowed by the land classification (buildable area);
 - (d) CEIAM appraises the value under a scenario with a mere right to use the land (*'derecho de superficie'*), whereas a proper market value appraisal should be based on the transfer of full possession and title to the land.

5.1.3. *Comments regarding the land around the Bernabéu stadium*

- (73) Real Madrid explains that, as regards the amendment of the PGOU related to the area surrounding the Bernabéu Stadium and the Carabanchel district as agreed to in the 2011 urban development agreement, the envisaged amendment of the urban development plan provided for an increase in buildable area (*'edificabilidad'*) to allow the stadium to be enlarged and covered with a roof. To compensate for those developments, Spanish law provides that the owner shall transfer 10 % of the value of the increase in buildable area (*'aprovechamiento'*) to the public authority. In that case, it was planned that such compensation consisted in the transfer to the Madrid City Council of the plots at Mercedes Arteaga/Jacinto Verdaguier, which would be reclassified from 'residential' (*'residencial'*) to 'green area' and 'public installations' (*'equipamiento público'*).
- (74) However, the recent judgment No 77/2015 of the Tribunal Superior de Justicia de Madrid of 2 February 2015 annulled that amendment of 2011 to the PGOU. That judgment has become binding and prevents the entry into force of the 2011 urban development agreement. Real Madrid stresses that that agreement bears no relation whatsoever with the 2011 settlement agreement. So far, no land has been transferred between the Madrid City Council and Real Madrid under the 2011 urban development agreement. In fact, the respective plans of the parties have been cancelled.

5.2. **Comments from other interested parties**

- (75) *Ecologistas en acción* argue that even in 1998 plots which were classified for public services, like public sport use, could not be transferred to private parties. That prohibition would also apply to land which had not yet been acquired by the municipality, but which was included in the urban plans with such a classification. As such, law 9/2001 did not introduce any changes.

- (76) Like Real Madrid, *Ecologistas en acción* draw the Commission's attention to the judgement No 77/2015 of the Tribunal Superior de Justicia de Madrid of 2 February 2015, which annulled the modification of the PGOU with regard to the land around the Bernabéu stadium. The Tribunal Superior found that there was no general interest justifying the urban planning changes linked to the land around the stadium which is mentioned in paragraph 18 of the opening decision. The transaction between Real Madrid and the Madrid City Council was found by that court not to follow considerations of general public interests of the municipality but to be dictated only by the needs of the club in respect to its stadium modernisation project.
- (77) The Tribunal Superior de Justicia de Madrid underlined that urban planning decisions of the responsible authorities must serve objectively the general interest and not the interests of one or more land owners and not even the interests of the municipality itself.
- (78) The other interested parties did not contribute additional elements of fact or law.

6. ASSESSMENT OF THE AID

6.1. Preliminary observation on the 2011 urban development agreement

- (79) According to the information provided by Spain and Real Madrid, judgment No 77/2015 of the Tribunal Superior de Justicia de Madrid of 2 February 2015 annulled the modification of the PGOU with regard to the land surrounding Real Madrid's Bernabéu stadium. As a result of that judgment, the 2011 urban development agreement has been cancelled between the parties. Consequently, that agreement will no longer be implemented so that the Commission assessment of the 2011 urban development agreement has become without object.
- (80) The present Decision therefore only examines the 2011 settlement agreement under the State aid rules.

6.2. Existence of aid

- (81) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall be incompatible with the internal market, in so far as it affects trade between Member States.

6.2.1. Conditions for a finding of State aid

- (82) According to settled case-law, for a measure to be categorised as aid within the meaning of Article 107(1) of the Treaty, all the conditions set out in that provision must be fulfilled⁽¹³⁾. It is thus well-established that, for a measure to be categorised as State aid within the meaning of that provision, there must, first, be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on an undertaking and, fourth, it must distort or threaten to distort competition⁽¹⁴⁾.
- (83) As a preliminary matter, however, for the State aid rules to apply, the recipient of that alleged aid must be an 'undertaking' within the meaning of Article 107(1) of the Treaty. According to the case-law, an undertaking is any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed⁽¹⁵⁾. Having regard to the objectives of the European Union, sport is subject to European Union competition law in so far as it constitutes an economic activity⁽¹⁶⁾. In the present case, Real Madrid operates a professional football club for profit for which it receives revenues from ticket sales, marketing activities, broadcasting rights, merchandising, sponsorship, etc. Accordingly, Real Madrid should be considered an undertaking for the purposes of Article 107(1) of the Treaty.

⁽¹³⁾ See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 38 and the case-law cited therein.

⁽¹⁴⁾ See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 39 and the case-law cited therein.

⁽¹⁵⁾ Joined Cases C-180/98 to C-184/98 *Pavlov and Others* ECLI:EU:C:2000:428.

⁽¹⁶⁾ Case C-415/93 *Bosman* ECLI:EU:C:1995:463, paragraph 73, Case C-519/04 P *Meca-Medina and Majcen v Commission* ECLI:EU:C:2006:492, paragraph 22 and C-325/08 *Olympique Lyonnais* ECLI:EU:C:2010:143, paragraph 23.

- (84) As regards the other conditions for a finding of State aid, the 2011 settlement agreement was entered into by the Madrid City Council, which is a public authority, and results in the Madrid City Council compensating Real Madrid for its failure to comply with its contractual obligation to transfer a plot of land through the transfer of other plots of land worth EUR 19 972 348,96. Accordingly, the first condition for a finding of aid is met, since the 2011 settlement agreement is imputable to the Madrid City Council and results in the transfer of State resources in the form of a transfer of plots of land owned by the Madrid City Council to Real Madrid.
- (85) As regards the second condition for a finding of State aid, any aid granted to Real Madrid is liable to affect intra-Union trade, since Real Madrid derives revenues from the sale of tickets, marketing activities, merchandising, broadcasting rights and sponsorship not only within Spain, but from sources throughout the Union. Moreover, it competes economically with professional football clubs throughout the Union and in Spain for the aforementioned revenues, and in the acquisition of football players, so that any aid granted to it is liable to affect intra-EU trade and distort competition, since Real Madrid's financial position will be strengthened as compared to its competitors on the market for professional football as a result of that aid ⁽¹⁷⁾. Consequently, the second condition for a finding of State aid is also fulfilled in the present case.
- (86) As regards the third and final condition for a finding of State aid, the 2011 settlement agreement is selective since it was concluded with Real Madrid only. The only question that remains is whether that agreement confers an economic advantage on Real Madrid, which the Commission will examine in more detail below.

6.2.2. The market economy operator principle

- (87) For the purposes of Article 107(1) of the Treaty, an advantage is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention ⁽¹⁸⁾.
- (88) To determine whether Real Madrid obtained an economic advantage as a result of the 2011 settlement agreement, it is necessary to examine whether Real Madrid could have obtained the same advantage on the market as that which has been made available to it through State resources. According to the case-law, economic transactions carried out by a public body or a public undertaking do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions ⁽¹⁹⁾. To determine whether a particular transaction carried out by a public authority has been carried out in line with normal market conditions, it is necessary to compare the behaviour of that public authority with that of a similarly situated hypothetical 'market economy operator' operating under normal market conditions. If the 'market economy operator' would have entered into that transaction under similar terms, then the presence of an advantage may be excluded as regards that transaction ⁽²⁰⁾.
- (89) For this market economy operator principle (hereinafter: 'MEOP') to apply, the public authority must demonstrate that it behaved as a prudent market economy operator would have behaved in similar circumstances. Any prudent market economy operator would normally carry out its own *ex ante* assessment of the commercial rationale of entering into a particular agreement ⁽²¹⁾. Consequently, if a Member State argues that a particular transaction is in line with the MEOP, where there is doubt, it must provide evidence showing that the decision to carry out the transaction was taken, at the time, on the basis of sound economic evaluations comparable to those which, in similar circumstances, a rational private operator (with characteristics similar to those of the public body concerned) would have had carried out to determine the transaction's profitability or economic advantages. For this purpose, evaluations made after the transaction was entered into, based on a retrospective finding that it was actually economically rational, or on subsequent justifications of the course of action actually chosen, are irrelevant ⁽²²⁾.

⁽¹⁷⁾ Case C-172/03 *Heiser* ECLI:EU:C:2005:130, paragraph 55 Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others v Commission* ECLI:EU:C:2011:368, paragraph 136. See also Case C-156/98 *Germany v Commission* ECLI:EU:C:2000:467, paragraph 30, and the case-law cited.

⁽¹⁸⁾ Case C-342/96 *Spain v Commission* ECLI:EU:C:1999:210, paragraph 41.

⁽¹⁹⁾ Case C-39/94 *SFEI and Others* ECLI:EU:C:1996:285, paragraphs 60 and 61.

⁽²⁰⁾ Case C-73/11 P *Frucona Košice v Commission* ECLI:EU:C:2013:32, paragraph 71 and the case-law cited.

⁽²¹⁾ Case C-124/10 P *Commission v EDF* ECLI:EU:C:2012:318, paragraphs 84, 85 and 105; see, by way of analogy, Commission decision of 12 March 2014 in Case SA.36249 (2014/N-3): *Spain — Amendment of the Restructuring of CEISS through integration with Unicaja Banco*, recitals 59, 60; OJ C 141, 9.5.2014, p. 1.

⁽²²⁾ Case C-124/10 P *Commission v EDF* ECLI:EU:C:2012:318, paragraph 85.

- (90) The measure under consideration in the present case is an agreement between a public authority and an economic operator settling a legal dispute. On the basis of that agreement, Real Madrid agreed to waive its claim to seek legal redress for the Madrid City Council's inability to perform its obligations under the 1998 implementation agreement, in return for the payment of compensation by the Madrid City Council to Real Madrid.
- (91) According to Spain, due to the legal impossibility of fulfilling its obligation under the 1998 implementing agreement to transfer plot B-32 to Real Madrid, the Madrid City Council was obliged under Spanish law to compensate Real Madrid for its failure to perform that contract with the current value of the plot of land in question. It is for this reason that the Madrid City Council decided to enter into the 2011 settlement agreement whereby it assumed full legal liability for its failure to perform that obligation and compensated Real Madrid for that failure in the amount of EUR 22 693 054,44, that is, the value of plot B-32 in 2011 as estimated by the technical services in charge of land valuation of the Madrid City Council.
- (92) From the perspective of a market economy operator, whether the conclusion of such a settlement agreement is in line with market conditions depends on two factors: first, the probability that it will be held liable for its inability to perform its contractual obligations (the source of the legal dispute) and, second, the maximum extent of its financial exposure resulting from such a finding of liability. Both factors determine whether entering into a settlement agreement is in line with market conditions and under what terms, namely the amount of compensation offered to settle the legal dispute.
- (93) Applying those two factors to the present case, the Commission considers that a market economy operator in a similar situation to the Madrid City Council would not have entered into the 2011 settlement agreement. In the first place, considering the legal uncertainties in 2011 surrounding the question whether the Madrid City Council was liable to compensate Real Madrid for its failure to transfer plot B-32 under the 1998 implementation agreement, a market economy operator in the same situation as the Madrid City Council would have sought legal advice before entering into the 2011 settlement agreement, so as to establish the likelihood that it was indeed liable for that failure, which Madrid City Council did not do. In the second place, a market economy operator in a similar situation to Madrid City Council would not have accepted to pay Real Madrid compensation of EUR 22 693 054,44 under such an agreement, since that amount far exceeds the maximum extent of its legal liability for its failure to transfer plot B-32.

6.2.2.1. Liability of the Madrid City Council for failure to perform its contractual obligations

- (94) As regards the probability that Madrid City Council would have been found liable in legal proceedings, the Commission asked Spain to provide it with any legal advice the Madrid City Council sought before entering into the 2011 settlement agreement demonstrating that it was likely to be found liable for its failure to transfer plot B-32 under the 1998 implementation agreement, which Spain was unable to provide⁽²³⁾. In the absence of legal advice, the Commission considers that a hypothetical market economy operator in a similar situation would not have assumed full legal liability for its failure to perform a contractual obligation, as Madrid City Council did, considering the legal uncertainties surrounding the potential impossibility to perform that obligation, the legal consequences of that potential impossibility, and Madrid City Council's ability to remedy that legal impossibility through other means.
- (95) Firstly, it is unclear whether the Madrid City Council could legally assume the obligation to transfer plot B-32 at the time the 1998 implementation agreement was concluded. According to Spain and Real Madrid, the parties to the 1998 implementation agreement knew that the land was classified for basic sports use and assumed at the time that the agreement was concluded that land so classified could be transferred to a private party, so long as that party planned to use the plot for sport use. However, there are no indications that that assumption was correct at the time the 1998 implementation agreement was concluded.
- (96) With the adoption of law 9/2001, the parties should have certainly questioned that assumption since, according to that law, land in the public domain must remain in public ownership. The Commission notes in this regard that the Madrid City Council only became the registered owner of plot B-32 in 2003 and, according to the 1998 implementation agreement, the Madrid City Council was obliged to transfer that plot seven days after it became the registered owner thereof.

⁽²³⁾ Spain confirmed the absence of such external advice at a telephone conference on 6 November 2015 and in written information of 9 March 2016.

- (97) Moreover, following the judgment of the Tribunal Superior de Justicia de Madrid in 2004 ⁽²⁴⁾, it should have been clear to both parties that plots of land like plot B-32 could not be legally transferred to a private person or entity. Therefore, when the Madrid City Council agreed under the 2011 settlement agreement to assume full legal liability for its failure to transfer plot B-32 under the 1998 implementation agreement, it must have been abundantly clear to both parties that plot B-32 could not be legally transferred.
- (98) Secondly, the consequences of the legal impossibility for Madrid City Council to perform its obligation under the 1998 implementation agreement to transfer plot B-32 as regards any potential claim for compensation for Real Madrid were also unclear from a legal perspective when the 2011 settlement agreement was entered into. According to Spain, under the general rules of Spanish civil law, the legal impossibility to perform a contract would make that contract void under private law. In that case, it is unclear that the aggrieved party would have a claim for compensation or damages, since the contract no longer exists, as opposed to a claim for restitution of what has already been given in consideration of the contract. In that regard, Spain and Real Madrid argue that the legal impossibility for Madrid City Council to transfer plot B-32 entails the nullity of the entire 1998 implementation agreement and thus a return of all the plots of land involved in that agreement and the 1996 swap agreement or, where such return is impossible, their value when they were lost, i.e. sold.
- (99) However, it is unclear whether the fact that only one obligation under the 1998 implementation agreement could not be performed by one party to that agreement, entails the nullity of the entire agreement under Spanish civil law. Partial nullity is a complex issue under Spanish civil law and the Madrid City Council did not obtain any legal advice before entering into the 2011 settlement agreement.
- (100) In this regard, the Commission notes, first of all, that under the 1998 implementation agreement three separate plots valued at EUR 13 522 772 were to be transferred by the Madrid City Council to Real Madrid, of which plot B-32 was located in a different area and thus unconnected to the two other plots to be transferred (plots 33 and 34, which were located in the Julian Camarillo Sur area). Moreover, plot B-32 was valued at EUR 595 194, representing less than 5 % of the value of the entire 1998 implementation agreement.
- (101) The Commission notes, next, that the 1998 implementation agreement was entered into by the Madrid City Council to fulfil its obligation to compensate Real Madrid for its transfer of the Ciudad Deportiva to the City Council under the 1996 swap agreement. It is clear from the 1996 swap agreement that there was a distinct interest on the part of the Madrid City Council to acquire the Ciudad Deportiva, as confirmed by Real Madrid, and that the 1998 implementation agreement was concluded so that the Madrid City Council could fulfil its obligation under the 1996 swap agreement to transfer lands to Real Madrid of a certain value as compensation for the Ciudad Deportiva. There was therefore no distinct interest on the part of Real Madrid to include plot B-32 in the 1998 implementation agreement and, had the parties known of the legal impossibility to transfer that plot of land when the 1998 implementation agreement was concluded, that plot would likely have been replaced with another plot of land of similar value.
- (102) Thirdly, the 2011 settlement agreement itself demonstrates that the parties wanted to address the legal impossibility of transferring plot B-32 separate from the implementation of the entire 1998 implementation agreement and did not call into question the validity of the transfer of the other plots of land concerned by that agreement. Furthermore, in its submission of information of 18 June 2012 during the preliminary investigation of this case, Spain declared that the parties to the 2011 settlement agreement had an interest to keep in force the parts of the 1998 implementation agreement which did not concern plot B-32.
- (103) Fourthly, it was unclear at the time of the 2011 settlement agreement whether the Madrid City Council could have remedied the legal impossibility arising under the 1998 implementation agreement by changing the classification of the land under urban planning rules as being reserved for basic sport use. Real Madrid argued that such a change would be possible. Indeed, the Madrid City Council did offer such an amendment of the PGOU in the context of the 2011 urban development agreement.
- (104) However, Spain explained that the Madrid City Council could not make such a change on its own, but would have had to propose an amendment of the PGOU to the Community of Madrid. Furthermore, such a change

⁽²⁴⁾ Cf. footnote 4.

needs to serve the general interest. That view has since been confirmed by a 2015 judgment in which the Tribunal Superior de Justicia annulled the modification of the PGOU in relation to the land surrounding the Bernabéu Stadium which was the subject of the 2011 urban development agreement. However, since the 2011 urban development agreement was concluded shortly after the 2011 settlement agreement was concluded, that legal issue did not appear to be adequately settled at that time, so that there was legal uncertainty whether the Madrid City Council could have remedied the legal impossibility arising from the 1998 implementation agreement by changing the classification of plot B-32.

- (105) In light of the above, the Commission considers that a prudent market economy operator, faced with the same legal uncertainties, would have sought legal advice before entering into the 2011 settlement agreement and accepting full legal liability for its failure to transfer plot B-32 under the 1998 implementation agreement, which the Madrid City Council did not do.

6.2.2.2. The possible amount of compensation

- (106) As regards the amount of compensation the Madrid City Council agreed to pay Real Madrid to settle the legal dispute arising from the 1998 implementation agreement, the Commission considers that the EUR 22 693 054,44 value Madrid City Council agreed to for plot B-32 as a result of the 2011 settlement agreement far exceeds the maximum extent of its legal liability for its failure to transfer that plot to Real Madrid.
- (107) The value of plot B-32 in 2011 was established by the technical services of Madrid to be EUR 22 693 054,44, according to the same general criteria for determining the value of municipal assets which were already applied in 1998. Spain notes that that valuation has the character of a cadastral value, which is used as a reference base for e.g. taxation of land transfers or the internal value for the municipality, for accounting purposes. Spain and Real Madrid refer in that regard to the report of the Ministry of Finance of 2011, which estimated the cadastral value of plot B-32 at EUR 25 776 296. Spain stresses that it would be legally obliged to value for its inventory all plots of land it owns, irrespective of their legal nature of public or private domain. Real Madrid points to the valuation of EUR 22 690 000 made in the Aguirre Newman report, which was prepared after the adoption of the Opening Decision.
- (108) The Commission notes that all these valuations are based on the mistaken assumption that plot B-32 could have been transferred in 2011, which, as explained in recital 97 above, appears to be legally impossible. Assuming the Madrid City Council could not be held liable for that legal impossibility, for which it never solicited legal advice, it is at least arguable that the market value of the plot in its relationship with Real Madrid would be zero, since the land in question cannot be transferred.
- (109) Nevertheless, the Commission accepts that the purpose of concluding a settlement agreement is to buy legal certainty in return for compensation. Assuming the Madrid City Council could be held fully liable for the impossibility to transfer plot B-32 to Real Madrid, then its financial exposure for that liability cannot exceed the value of the plot at the time the 2011 settlement agreement was concluded.
- (110) Spain admits, in this regard, that the technical services of the Madrid City Council did not use the correct classification of plot B-32 (public sport use) when preparing their valuation in 2011, but considered that plot to fall into the category 'public service use of various kinds' when preparing that valuation. In addition, the cadastral value of EUR 25 776 296 referred to by Spain and Real Madrid was, inter alia, based on information regarding actual market transactions in the reference area, while the valuation of EUR 22 690 000 made in the Aguirre Newman report was based on the static residual value method, which is based on a scenario of a sale of the various units shortly after the construction of sport infrastructure on that land.
- (111) Since the classification of plot B-32 in 2011 was for sport use and Real Madrid had the intention to use plot B-32 for sport use, the Commission considers the correct parameter for the valuation of that plot is the long-term exploitation of the land for sport use. In that regard, the CEIAM study commissioned by the Commission starts, with regard to the envisaged sport use of plot B-32, from the assumption that an investor

acquires the land, constructs the infrastructure for various types of sport, and generates revenues by charging user fees. The scenario proposed by CEIAM appears to be reasonable because the long term exploitation of the sport infrastructures on plot B-32 by a single operator is the only realistic option under the land classification of that plot, which determines its use and excludes its further sale.

- (112) Under that assumption, the CEIAM study arrives at a valuation for plot B-32 in 2011 of EUR 4 275 000 ⁽²⁵⁾.
- (113) Spain criticises the fact that the CEIAM study bases one of the scenarios of the valuation on the use of the plot for social housing arriving at a value between EUR 12 245 000 and EUR 18 000 000, since that scenario would not assure highest and best use of the ground ⁽²⁶⁾. According to Spain, the CEIAM study arrived at a value that was 50 % below the value of a comparable plot for use for public services (*uso lucrativo de interés general*: education, cultural services and institutions, hospitals, churches) which would represent the highest and best use of land devoted for public purposes.
- (114) In response, the Commission notes that that alternative scenario under the CEIAM study was done for the purpose of comparison. The appropriate reference for the ultimate outcome of the study is the sport use scenario, since the Madrid City Council did not change the public service use classification of plot B-32, nor could it legally have changed that classification from sport use, for the reasons given in recital 104 above.
- (115) Real Madrid criticises the CEIAM study on several points ⁽²⁷⁾.
- (116) First, it criticises the valuation of the alternative, non-sport, scenarios, because they would be based on too many subjective and discretionary elements and, moreover, presuppose a use of plot B-32 that is not consistent with the profit-maximising behaviour of a hypothetical private property owner.
- (117) Second, regarding the valuation based on sport use, Real Madrid observes that the result of the study is not a proper market value. CEIAM would use a national valuation method (the 'order ECO 805/2003') which leads only to a 'mortgage lending value', which is a particularly cautious estimate of an enduring, long-term value and would tend to be lower than the 'market value' which refers to the value in an arm's-length transaction between a willing buyer and a willing seller. This market value should be determined on the basis of the static residual valuation method, as described in recital 110.
- (118) Third, Real Madrid criticises the CEIAM on several other grounds:
- (a) its failure to optimise the use of the land and the installations. CEIAM did not consider e.g. the revenue streams from the 25 % of the land which the owner could have used, under existing regulations, for shops and parking spaces;
 - (b) the fact that its assumptions do not fully exhaust the legally possible land use in terms of ground on which may be built (buildability);
 - (c) its underestimation of the existing demand in an attractive and affluent area. Real Madrid contests the estimate by CEIAM of 42,9 % of the population which practises sport and proposes 50 %, also referring to the possible demand by the many employees working in the area;
 - (d) the fact that the land value is appraised under a scenario with a mere right to use the land (*derecho de superficie*) and not on the transfer of full possession and title to the land.

- (119) These criticisms fail to convince.

⁽²⁵⁾ In the best and worst case scenario regarding the expected return on investment through revenues, the value would be EUR 6 350 000 and EUR 2 350 000, respectively.

⁽²⁶⁾ Comments of Spain of 15 June 2015 on the CEIAM study transmitted by the Commission on 22 April 2015.

⁽²⁷⁾ Submission by Real Madrid of 10 July 2015.

- (120) First, regarding the hypothetical alternative use scenarios, as explained in recital 114, they serve only for the purposes of comparison of various hypothetical types of land use, since the classification of the land has not and cannot be changed from sport use. This analysis demonstrates that the value of plot B-32 could at least approximate the value assumed by the Madrid City Council if it had a classification with more commercial potential. However, since the Madrid City Council did not change the classification of plot B-32, nor could legally have changed that classification from sport use, the appropriate reference for the ultimate outcome of the study is the sport use scenario.
- (121) Second, regarding the alleged valuation of the land on the basis of a 'mortgage lending value' or under the assumption of a mere land use right, the CEIAM study does not use these assumptions, as Real Madrid claims. On the contrary, as explained in Section 2.5 of the part of the study referring to the sport use scenario, the study defines the value on the basis of the investment value of the land which is its value to a current or potential owner. The CEIAM study explains in Section 2.3.2 that the application of the method described in Order ECO/805/2003, criticised by Real Madrid, has the objective to determine the market value of a plot ⁽²⁸⁾. Independently of the purposes for which Order ECO/805/2003 applies, it describes a method for determining the value of land which can produce income linked to a certain economic activity and has nothing to do with a mortgage value. For that purpose it applies generally accepted standards which do not depend on the reason for the valuation. That method depends on the existence of an investment project, since the value is determined by the net present value of long term future cash flows of the most likely investment project (in the case of plot B-32 building and operating sport infrastructure).
- (122) Unlike the static residual valuation method used in the Aguirre Newman report, supplied by Real Madrid, the CEIAM study bases its calculation not on the price which a sport infrastructure investor would make with the short term sale of the infrastructure, but with its commercial exploitation over the next decades. The method proposed by CEIAM is particularly appropriate for plot B-32, since no opportunity exists to sell the land with the infrastructure because the type of use and the public ownership of that land are determined for the long term. The static residual valuation method proposed by Real Madrid is not appropriate in a case of the intended operation of sport infrastructure against payment of user fees. That method can only be applied if the land and the infrastructure on it can be sold and only if this sale occurs immediately following the construction.
- (123) For the purposes of determining the current value of a plot in order to determine the value of a compensation claim depending on that value, it does not appear to be appropriate to assume or determine a hypothetical value based on characteristics which influence the value of the land but which actually are not fulfilled. If there were a claim for compensation against the Madrid City Council, the relevant value of plot B-32 is the value it has for the Madrid City Council, which could not benefit from a hypothetical value of the plot if it would be transferable.
- (124) Third, the CEIAM study contains a detailed and careful comparison with other sport installations of various characters and attractiveness for the estimation of the costs and revenues.
- (125) Regarding the alleged failure to consider revenue streams from other activities than sport and to fully exhaust the buildability of the land, the study provides in Section 1.6.4 a detailed hypothesis on the way in which the land could be used for several mixes of sport infrastructure. It also includes parking, shop and restaurant use and the expected revenues from user fees, elaborated in detail for the various infrastructures.
- (126) CEIAM explains in Section 1.6.5 of the study that it is aware that its estimates do not fully exhaust the legally possible land use in terms of ground on which may be built. Those percentages of land use are often set very high by urban planning to allow it to react to varying demands over the years until the expected use materialises. However, that would not be unusual in case of public use land, since it is common that those maximum percentages are not fully exhausted in those cases. The intensity of the land use would depend on the expected demand and on the type of sport activities or infrastructure offered. In this regard, CEIAM analysed 22 comparable sport complexes for the development of the scenario used by the study.
- (127) Regarding the percentage of sport users in the neighbourhood, which Real Madrid considers too low, the study used the existing official statistical data on sport activity of the inhabitants of the catchment area of sport installations on plot B-32 in Madrid, as reproduced in Section 3.2 of the study's information annex. The study also

⁽²⁸⁾ Cf. Article 24(2) of Orden ECO/805/2003, de 27 de marzo, sobre normas de valoración de bienes inmuebles y de determinados derechos para ciertas finalidades financieras, BOE núm. 85, de 9 de abril de 2003, p. 13678.

considers the possible demand by employees of the surrounding offices. In this regard, Real Madrid fails to provide figures based on market research in the neighbourhood to support its arguments that the percentage of sport users is too low, so that the Commission must accept the more prudent estimates provided by CEIAM.

- (128) Finally, regarding the fact that the land value is appraised under a scenario with a mere right to use the land (*derecho de superficie*) and not on the transfer of full possession and title to the land, the Commission refers to recital 111 above, in particular the observation that no opportunity exists to sell the land with the infrastructure because the type of use and the public ownership of that land are determined for the long term.
- (129) For all the foregoing reasons, the Commission considers that the criticisms expressed by Spain and by Real Madrid on the CEIAM study are unfounded. Real Madrid fails to show by how much the alleged shortcomings of the CEIAM report result in a material underestimation in value. Consequently, the value of plot B-32 in 2011 could not have been assumed to be higher than the EUR 4 275 000 value estimated by the CEIAM study, so that a prudent market economy operator in similar circumstances would not have entered into the 2011 settlement agreement by which the Madrid City Council agreed to compensate Real Madrid in the amount of EUR 22 693 054,44 to buy off an uncertain legal liability for its failure to fulfil its obligation to transfer plot B-32 under the 1998 implementation agreement.
- (130) In light of the uncertain probability that the Madrid City Council would have been found liable for its failure to transfer plot B-32 under the 1998 implementation agreement and the considerable disparity between the amount the Madrid City Council agreed to compensate Real Madrid under the 2011 settlement agreement (EUR 22 693 054,44) and the maximum extent of its legal liability (EUR 4 275 000), the Commission concludes that a prudent market economy operator, operating in circumstances similar to the Madrid City Council, would not have entered into the 2011 settlement agreement.
- (131) The Commission therefore concludes that the Madrid City Council, in concluding the 2011 settlement agreement with Real Madrid, did not behave as a market economy operator would have in comparable circumstances. Consequently, the 2011 settlement agreement should be considered to confer an economic advantage on Real Madrid amounting to the difference between the amount of the compensation and the maximum amount of its legal liability and therefore constitutes State aid within the meaning of Article 107(1) of the Treaty.
- (132) Finally, regarding Spain's claim that if the Madrid City Council had transferred plot B-32 to Real Madrid in 2011 instead, no aid would be present, the Commission considers that claim irrelevant for its conclusion that Real Madrid obtained an economic advantage under the 2011 settlement agreement. The Madrid City Council could only have transferred plot B-32 if it was legally entitled to do so. If that were the case, not only would there have been no need to enter into the 2011 settlement agreement, but Real Madrid would have obtained the actual plot of land to which it was entitled under the 1998 implementation agreement, so that there would have been no need to assess whether the compensation offered to Real Madrid in lieu of that plot of land corresponded to the value of that land. In other words, the Madrid City Council would have implemented the 1998 implementation agreement, which is not the subject-matter of the present decision.

6.3. Compatibility of the aid

- (133) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty ⁽²⁹⁾ and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty ⁽³⁰⁾. However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty ⁽³¹⁾.

⁽²⁹⁾ The exceptions provided for in Article 107(2) of the Treaty concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

⁽³⁰⁾ The exceptions provided for in Article 107(3) of the Treaty concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

⁽³¹⁾ Case T-68/03 *Olympiaki Aeroporja Ypiresies v Commission* ECLI:EU:T:2007:253, paragraph 34.

- (134) Neither Spain nor Real Madrid have claimed that any of the exceptions provided for in Article 107(2) and 107(3) of the Treaty apply in the present case.
- (135) The Commission notes in this regard that since the aid in question results in an income from which Real Madrid would not normally have benefited in the course of its business operations, the 2011 settlement agreement should be considered as granting operating aid to Real Madrid. As a general rule, such aid can normally not be considered compatible with the internal market under Article 107(3)(c) of the Treaty in that it does not facilitate the development of certain activities.
- (136) Consequently, the State aid granted to Real Madrid through the 2011 settlement agreement is incompatible with the internal market.

7. UNLAWFULNESS OF THE AID

- (137) According to Article 108(3) of the Treaty, Member States are obliged to inform the Commission of any plan to grant aid (notification obligation) and they may not put into effect any proposed aid measures until the Commission has taken a final position decision on the aid in question (standstill obligation).
- (138) The Commission notes that Spain did not notify the Commission of any plan to grant aid through the 2011 settlement agreement, nor did it respect the standstill obligation laid down in Article 108(3) of the Treaty. Therefore, in accordance with Article 1(f) of Council Regulation (EU) 2015/1589 ⁽³²⁾, the 2011 settlement agreement constitutes unlawful aid, put into effect in contravention of Article 108(3) of the Treaty.

8. RECOVERY

- (139) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ⁽³³⁾. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽³⁴⁾. In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽³⁵⁾.
- (140) Article 16(1) of Regulation (EU) 2015/1589 establishes an obligation on the Commission to order recovery of unlawful and incompatible aid. That provision also provides that the Member State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible. Article 16(2) of Regulation (EU) 2015/1589 establishes that the aid is to be recovered, including interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. Commission Regulation (EC) No 794/2004 ⁽³⁶⁾ elaborates the methods to be used for the calculation of recovery interest. Finally, Article 16(3) of Regulation (EU) 2015/1589 states, that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow for the immediate and effective execution of the Commission decision'.
- (141) No provision of Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered. Rather, it is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty ⁽³⁷⁾.

⁽³²⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽³³⁾ See Case C-70/72 *Commission v Germany* ECLI:EU:C:1973:87, paragraph 13.

⁽³⁴⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* ECLI:EU:C:1994:325, paragraph 75.

⁽³⁵⁾ See Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311, paragraphs 64-65.

⁽³⁶⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

⁽³⁷⁾ See Case C-441/06 *Commission v France* ECLI:EU:C:2007:616, paragraph 29 and the case-law cited.

- (142) Nevertheless, in the present case, the Commission deems the aid resulting from the 2011 settlement agreement which Spain must recover from Real Madrid to be equal to the difference between the value of plot B-32 as agreed to in the 2011 settlement agreement, being EUR 22 693 054,44, and the maximum extent of its legal liability under the 1998 implementation agreement, taking EUR 4 275 000 as the accurate market value of plot B-32 in 2011. Thus to remove the advantage granted to Real Madrid as a result of the 2011 settlement agreement, Spain must recover EUR 18 418 054,44 from that entity.

9. CONCLUSION

- (143) In conclusion, the Commission finds that Spain, by way of the 2011 settlement agreement concluded between Madrid City Council and Real Madrid, has unlawfully granted State aid to Real Madrid, in breach of Article 108(3) of the Treaty, which Spain is required to recover by virtue of Article 16 of Regulation (EU) 2015/1589 from Real Madrid,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 18 418 054,44, unlawfully granted on 29 July 2011 by the Kingdom of Spain in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Real Madrid Club de Fútbol is incompatible with the internal market.

Article 2

1. The Kingdom of Spain shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Commission Regulation (EC) No 271/2008 ⁽³⁸⁾ amending Regulation (EC) No 794/2004.
4. The Kingdom of Spain shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this decision.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. The Kingdom of Spain shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, the Kingdom of Spain shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.

⁽³⁸⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

2. The Kingdom of Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 4 July 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission

